THE REPORTS OF Edward Bulstrode

Of the Inner Temple, Esquire.

In Three PARTS.

OF DIVERS

RESOLUTIONS and JUDGMENTS

Given with great Advice and Mature Deliberation by the Grave, Reverend, and Learned Judges and Sages of the

LAW,

Of CASES and MATTERS in the LAW:

With the Reasons and Causes of their said Judgments,

Given in the

Court of Kings Bench,

In the time of the Reign of

KING JAMES I.

AND

KING CHARLES I.

Leges humanæ non aliunde sunt quam Regulæ, quibus Justitia edocetur; quia ubi nullus ordo, ibi sempiternus horror inhabitat, & confusio. Et sicut per Nervos compago corporis solidatur, Sic per Legem——quæ à ligando dicitur, corpus hujusmodi regni mysticum ligatur, & servatur in unum. Fortescue fo. 10, 11.

The Second Impression carefully Corrected; with the Addition of Thousands of References never before Printed.

LONDON,

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To the Right Honourable

Sir *BULSTRODE WHITLOCK* KNIGHT.

Right Honourable,

THERE is no desire more natural, than that of Knowledge; we attempt all ways to bring us to it; the desire of it being the end and aim of all Studies, in any Science whatsoever; and for the better guiding of our Knowledge aright, a learned Father, treating de Scientia, *observeth, the desirous of Knowledge to be fivefold, two of which only are commendable. A first sort are those that desire Knowledge,* eo fine tantum, ut sciant, & hæc est turpis curiositas. *A second sort are those that desire Knowledge,* eo fine tantum, ut sciantur ipsi, & hæc est turpis vanitas. *A third sort are those that desire Knowledge,* eo fine tantum, ut scientiam suam vendant, & hæc est turpis quæstus. *A fourth sort, are those that desire Knowledge,* eo fine tantum ut ædificent, aut ut cæteros instruant, & hæc est vera charitas. *The last sort, are those that desire Knowledge,* eo fine tantum, ut ædificentur ipsi, & hæc est vera prudentia. *It is well observed likewise by others, that Knowledge hath somewhat of the Serpent in it, and therefore where it enters into a man, it makes him swell, and this is* Scientia inflans, *being a curious kind of Knowledge, whereby a man is puffed up with Pride, and a self-conceit; and such was the Knowledge of King* Herod. *Acts* 12. *making an Oration to the People, and upon their Acclamation, that it was the voice of God, and not of man; he assuming that to himself (for which he ought to have given God the glory from whom all his Abilities came) the Text saies,* è vermibus consumptus est. *It was the*

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observation of King Solomon; *that he which increaseth Knowledg encreaseth Anxiety, but yet that Anxiety is mixed with much satisfaction, when the end of our Knowledge is to better, and instruct others; and when we shall worthily, and wisely imploy our labours, and industry in the Augmentation, and propagation of those things which are for the good of the Common-wealth. And this is* Scientia ædificans, *or* diffusa, *an extensive Knowledge, desirous to profit others, as well as our selves. And this is that Knowledge which is most fit, and requisite to be in a Professor of the Common Laws of this Land. The Knowledge of which Laws, are most agreeable for all persons, that live under the Government of them. The true understanding of them, being an excellent Defence for every Gentleman, in relation to his particular Estate; though he do not practise them, and a great preservative, to keep him from breaking them, since that* ignorantia juris non excusat: *Now for the better knowledge of the Laws of this Land, and as a readier way for the attainment thereof, are those Learned year Books, Grand Abridgments, and many Volumes of Reports now extant, for the use and benefit of the Professors of the Law; the knowledge whereof is not easily to be attained, it being* ars longa, sed vita brevis, & labilis memoria; *it is a study, that will take up a mans whole time, and all little enough, considering the vast Volumes, written of the Law, so that we of this profession, may truly say,* maxima pars eorum quæ scimus, est minima pars eorum quæ nescimus. Heraclites *speaking in commendation of the Laws, says,* Quod absq, legibus nullo pacto possit Civitas esse incolumis; sed absq; mœnibus possit: *and* Fortescue *saith,* Lex est sanctio sancta, jubens honesta, prohibens contraria, est regula Regni, quia regulat omnia in Regno. *It is the effect of Law, that man is to man as a God, and not as a Wolfe; and therefore* Aristotle *well observes;* Quod optimum animal homo, lege fruens, sed pessimum animal homo, lege devians. *Now the end, and aim at which all Laws should Level, is no other than this, That the People may live happily, the Instruments, and Sinews of all outward blessings, being good Laws. And truly, my Lord, the Laws of this Land have all the essential properties, to make them good, for they are certain in themselves, just in their Precepts, and Profitable in their execution; and without a certainty, a Law cannot be just.* Si enim incertam vocem det tuba,

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quis ſe parabit ad bellum? *So if the Law gives an uncertain ſound, who ſhall prepare himſelf to obey? It is an excellent Rule, That is the beſt Law, which gives leaſt liberty to the arbitrage of the Judge, (who is only to judge* ſecundum allegata & probata) *and he is the beſt Judge, that takes leaſt liberty herein to himſelf; and certainly ours Laws give the leaſt arbitrary power to the Judge; and are the moſt advantagious, for thoſe People, that live under them, of any Laws in the World: and yet I cannot but confeſs, that our Laws having continued for ſuch a long ſeries of time, may have received ſome kind of ruſt, which is fit ſhould be filed off, and ſomething fit to be taken away, that ſo our Laws may be reduced into a ſound, and ſolid Body, by the Reformation of ſome things: and ſuch a Work cannot but in future times be reputed an Heroick, and noble Work; and the Authors thereof, may be deſervedly rankt in the number of the Founders, and Reſtorers of our Laws. The advancement of which Laws, nothing does more import, than that the Authentique Writings of the Law be confined within moderate Bounds: and the Preſs not ſo free (without ſome publick allowance) as of late years it hath been. And truly, my Lord, I muſt confeſs, that the multiplicity of late Reports publiſhed, did much diſcourage me in going on with this Work, it being my fear to have any of my own Collections come forth in* publicum, *to the publick view, and cenſure of others, being conſcious of my own inabilities: but ſeeing it hath pleaſed God to bleſs me in my labours, in the way of my Profeſſion, and with many years obſervation, of the paſſages in the ſeveral Courts of Juſtice; I having been ſeveral times importuned by many of my Honourable good Friends, and in particular by your Lordſhip (whoſe very deſires to me, were always commands) to publiſh ſome of thoſe Collections, which I had ſo carefully, and laboriouſly collected, ſitting for many years together, at the Feet of thoſe learned Gamaliels, and grave Judges; (of which your learned Father was not the leaſt) in the Courts where I attended, (and principally in the then Court of Kings Bench.) I was at the laſt perſwaded, and reſolved with my ſelf (though with very much difficulty) to yeild thereunto; and faithfully to publiſh ſuch of my Collections, as I thought fitteſt, and moſt uſeful, with the ſeveral reaſons of the Reſolutions of thoſe learned Judges. And a principal reaſon, which did moſt of all induce me thereunto was this, that I having ſeriouſly viewed, and peruſed the multiplicity of Reports (of theſe*

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late times, more than before) since those Herculean *Labours, and many Volumes, of learned Reports, and Institutes, published by that Grave, and learned Chief Justice, Sir* Edward Coke, *who may well and truly be stiled the Father of the Law, (never any before him having done the like) and whose Memory will never be forgotten. I say when I had reviewed these late, and flying Reports, (most of them being* incerti temporis, *and of late time published) not by the Authors themselves, (who were well known to be profoundly Learned) nor yet by them, during their lives, fitted and prepared for the Press, but after their deaths, thus published by others; yet not known by whom, having not named themselves; and these Reports not without many gross mistakings in them, whereby they do rather cherish than extinguish Law Suits; whereas those Grave and Learned Men, whose Names they bear, did imploy their labours for the quieting and laying asleep all Controversies, and Questions in the Law, and for the cutting off and lessening Law Suits, which should be the principal aim and intention of all ingenuous professors of the Law, that we may not* consenescere litibus. *The due consideration of this, made me the more willing, now in my life time, (and so long as it shall please God to enable me) to publish the fittest and choisest Cases, out of those Reports, which I have with no small care, labour and pains collected together. And now if these my labours by the indulgency of your Lordships Favour be approved of, I shall then be encouraged to make a further progress herein under your Lordships shelter. For I could not settle my thoughts upon any other than your Lordship, for the patronizing these my* primitiæ laborum, *from whom I have received very many (though undeserved) Favours, which I can never sufficiently acknowledge. Neither can I ever forget the great Obligations, which in my younger years I have received from that Grave and Learned Judge Sir* Jame Whitlock *your Lordships Father; who was as a Father unto me, and to whose Learning, Worth, and Merit, I cannot attribute too much; he being not only Learned in the Civil and Common Laws, but universally Learned in all kinds of Knowledge; so that I may truly say he was* Antistes literarum & sapientiæ, & non solum doctus, sed natus sapiens: *many and great parts (which were wont to be incompatible in others) being eminently united in him.*

And

And now, my Lord, it is time for me to end (lest I should make the Porch too big for the House) and to beg your Lordships *pardon for sheltring these my weak Labours under your Patronage, hoping your Lordship will with a favourable Eye pass by the many Imperfections therein; some slips may unhappily pass my Pen, and many mistakes may casually happen in the Press during my absence, which I have been since as careful as I could to rectifie by an* Errata. *However I must humbly crave your* Lordships *pardon for what Oversights you may find herein, and do submit them to your* Lordships *and the Readers favourable Censure, beseeching your* Lordships *acceptance of this slender Work as an earnest of a greater, and as a tender of that great Respect and Service which is due to your* Lordship *from*

My Lord,

Your Lordships

most obedient Servant,

Edward Bulstrode.

Novemb. 8. 1656.

I have perused these Reports, and think fit they shall be printed for Publick Use.

J. GLYNN.

O L. St. JOHNS.

Novemb. 10. 1656.

I have perused divers Cases in these Reports, and I think that they are fit to be published.

MATTHEW HALE.

The

The NAMES *of the several* CASES *in this* BOOK *contained, and of the* TERMS *and* YEARS *in which they were Argued and Adjudged, with the Number of the* ROLLS *Entred.*

1 B*Arwick* against *Foster*, Debt, Hill.7 Jac.B.R.fo.1.
2 *Marsum* against *Hunter*, Ejectment, Hill.7 Jac.B.R.fo.2.entred Trin.7 Jac. B.R. Rot. 120.
3 *Proctor* against *Johnson*, Error, Hill.7 Jac.B.R.fo.2.
4 The Earl of *Shrewsbury* against the Earl of *Rutland*, Error, Hill.7 Jac. B.R. fo.4. entred Pasch.7 Jac.B.R.Rot.610.
5 *Franklin* against *Green*, Trespass, Hill.7 Jac.B.R.fo.11.
6 *Haverley* against *Laighton*, Error, Hill. 7 Jac. B.R.fo.12. entred Pasch. 6 Jac. B. R. Rot 601.
7 *Glittings* against *Cooper*, Ejectment, Hill.7 Jac.B.R.fo.13.
8 *Stroude* against *Roper*, Action on the Case for a Conspiracy, Hill.7 Jac. B.R. fo.16. entred Trin.7.Jac.B.R.Rot.568.
9 *Talby* against *Coke*, Action on the Case upon a Promise, Hill.7 Jac.B.R.fo.16. entred Mich. 7 Jac.B.R.Rot.540.
10 *Grimes* against *Peacock*, Trespass, Hill.7 Jac.B.R.17.
11 *Crews* against *Draper*, in a Prohibition, Pasch.8 Jac.B.R. fo.20.
12 *Odell* against *Tirrell*, Challenge of a Juror, Pasch.Jac.B.R.fo.21.
13 *Evers* and *Strickland*, Construction of Letters Patents, Pasch. 8 Jac. B. R. fo.21. entred Pasch.7 Jac.B.R.Rot.405.
14 *Smith* against *Skipwith*, Error, Pasch.8 Jac.B.R.fo.21. entred Hill. 7 Jac. B.R.Rot.653.
15 *Bartholmew* against *Savage*, in Debt, Pasch.8 Jac.fo.22.entred Hill.7 Jac.B.R.Rot.445.
16 The Lord *Rich* against *Frank*, in Debt, Pasch. 8 Jac.B.R. fo.22. entred Hill. 7 Jac.B.R. Rot.488.
17 *Stone* against *March*, Error, Trin.8 Jac.B.R.fo.24.
18 *Yate* against *Roules*, Trin.Jac.B.R.fo.25. entred Hill.7 Jac.B.R.Rot.517.
19 *Starkey* against *Pool*, Error, Trin.8 Jac.B.R.fo.26.entred Hill.7 Jac.B.R.Rot.496.
20 Sir *John Ratcliffe* against *Davis*, in a Trover and Conversion, Trin.8 Jac. B.R.fo.29. entred Hill.7 Jac.B.R.Rot.1217.
21 *Walter* against *Bould*, Error, Trin.8 Jac.B.R.fo.31.entred Trin.5 Jac.B.R.Rot.922.
22 *Hastings* against *Beamont*, Action upon the Case for words, Trin.8 Jac.B.R.fo.36.
23 *Fountain* against *Grymes*, Debt, Trin.8 Jac.B.R.fo.36.entred Mich.7 Jac.B.R.Rot.197.
24 *Barker* against ———Error, Trin.8 Jac.B.R.fo.37.
25 *Lynker* against *Stanwell*, Error, Trin.8 Jac. B.R.fo. 37. entred Trin. 7 Jac. B.R.Rot. 1617.
26 *Ascot* against *Hender* and *Molsworth*, Error, Trin 8 Jac.B.R.fo.37. entred Trin. 7 Jac.B. R.Rot.1113.
27 *Wolverton* against *Davis*, Action of the Case for a Promise, Trin.8 Jac.B.R.fol.38.entred Trin.7 Jac.B.R.Rot.1196.
28 *Dale* against *Copping*, Action on the Case for a promise, Trin.8 Jac.B.R.fo.39.
29 *Small* against *Hammon*, Action on the Case for words, Trin.8 Jac.B.R.fo.40.
30 *Cokaine* against *Goodlage*, Debt, Trin.8 Jac.B.R. fo.40. entred Pasch. 8 Jac. B.R. Rot. 204.

31 *Baker*

31. *Baker* againſt *Jacob*, Action on the Caſe for a promiſe, Mich. 8 Jac.B.R.fo.41.
32. *Eyliffe* againſt *Chopley*, Ejectment, Mich. 8 Jac.B.R.fo.42.
33 *Weſtley* againſt *Brown*, Debt, Mich. 8 Jac. B.R. fo.43.
34 *Luther* againſt *Sanders*, in a *Scire facias*, Mich. 8 Jac.B.R.43. entred Paſch. 8 Jac. B. R. Rot. 536.
35 *Stone* againſt *Bliſſe*, Debt, Mich. 8 Jac.B.R.fo. 43. entred Trin.6 Jac.B.R. Rot.1472.
36 *Gabbe* againſt *Moſſe*, Error, Mich. 8 Jac. B. R. fo.44. entred Trin.6 Jac.B.R. Rot.191.
37 *Smith* againſt *Jones*, Action on the Caſe for a promiſe, Mich. 8 Jac. *B.* R.fo.44.
38 *Lyskerrits* Caſe touching a *Venire facias*, Mich. 8 Jac.B.R.fo.46.
39 The Biſhop of *London* and *Baldwine* againſt *Drew*, Error, Mich. 8 Jac. B.R. fo.47. entred Hill. 7 Jac. B.R.Rot.502.
40 *Pollard* againſt *Caſy*, Treſpaſs, Mich. 8 Jac.B.R.fo.47.
41 *Pompier* againſt *Chamberlaine* in a *Replevin*, Mich. 8 Jac.B.R.fo.48. entred Hill. 7 Jac. B.R. Rot.197.
42 *Smith* againſt *Nuſam*, Debt, Mich.8 Jac.B.R. fo.48. entred Paſch. 3 Jac.B. R.Rot. 146.
43 *Hoblins* againſt *Kimble*, Error, Mich. 8 Jac. B. R. fo.49.entred Paſch. 3 Jac. B.R.Rot. 517.
44 *Mills* againſt——Error, Mich.8 Jac.B.R.fo.50.
45 *Brock* againſt *Beare*, Treſpaſs, Mich. 8 Jac. B. R. fo. 50. entred Hill. 7 Jac. B. R. Rot. 711.
46 *Hewet* againſt *Norberow*, Treſpaſs, Mich.8 Jac.B.R. fo.52.
47 The King againſt *Stafferton* and *Brown*, Information upon a *Quo Warranto*, Mich. 8 Jac. B.R.fo.54.
48 The Lord *Cavendiſh* againſt the Earl of *Shrewsbury*, Error, Mich. 8 Jac.B.R.fo.59.
49 *Wood* againſt *Ingerſole*, Ejectment, Mich. 8 Jac.B. R.fo.61. entred Paſch. 7 Jac. B.R. Rot. 155.
50 *Praunce* againſt *Tuckle*, Treſpaſs, Mich. 8 Jac. B. R. fo. 64. entred 8 Jac. B.R.Rot. 138.
51 *Simpſon* againſt *Clay*, Treſpaſs, Mich. 8 Jac.B.R.fo.64. entred Paſch. 8 Jac. B.R. Rot. 27.
52 *Burgeſſe* againſt *Standiſh*, Error, Mich.8 Jac.B.R fo.65.entred Paſch. 8 Jac. B. R. Rot. 640.
53 *Tittleby* againſt *Adams*, Error, Mich. 8 Jac. B.R. fo. 65.
54 *Neale* againſt *Sheffill*, Debt, Mich. 8 Jac. B.R. fo. 66. entred Trin. 8 Jac. B. R. Rot. 742.
55 *Limney* againſt *Hemmurſe*, Error, Mich.8 Jac.B.R.Rot.fo.67.entred Paſch. 8 Jac.B.R.Rot. 206.
56 *Denton* againſt *Stock*, Error, Mich. 8 Jac.B.R. fo.67.
57 *Flewellin* and others againſt *Rave* in a Trover and Converſion, Mich. 8 Jac. B. R. fo. 68.
58 *Rowland Egerton* againſt *Morgan* and *Robinſon*, in an Appeal, Mich.8 Jac.B.R. fo.69.
59 The King againſt *Morgan*, in an Indictment, Mich. 8 Jac.B.R.fo 84. and fo.89. his Pardon allowed.
60 *Walterton* and his Wife againſt *Day*, an Action upon the Caſe for a promiſe, Mich. 8 Jac. B.R.fo.89. entred Trin. 7 Jac.B.R. Rot.1596.
61 *Goldney* againſt *Curtiſe*, in an Action of Covenant, Mich. 8 Jac. B.R.fo.90. entred Hill. 7 Jac. B.R. Rot.864.
62 Doctor *Lyrey* againſt Sir *Richard Lovelas* as touching an Uſurpation, Mich. 8 Jac.BR. fo.91.
63 *Brickendell* againſt ——Action on the Caſe upon a Promiſe, Mich. 8 Jac. B. R. fo. 91.
64 *Moore* againſt *Brown*, Ejectment, Mich. 8 Jac. B. R. fo. 92.
65 *Penruddock* and *Lanxsfords* Caſe, Indictment, Mich. 8 Jac. B. R. fo. 93.
66 *Davis* againſt *Hales*, touching the manner of pleading, Mich. 8 Jac. B. R. fo. 93.
67 *Douglas* and others againſt *Kendall*, An Action of Treſpaſs, Mich. 8 Jac. B. R. fo. 93. entred Mich. 7 Jac. B. R. Rot. 356.
68 The King and Sir *William Fitz-williams* againſt *Ives*, Indictment againſt a Purveyor, Hill. 8 Jac. B. R. fo. 96.

69 *Turpine* againſt *Forreyner* and others, in an Action of Treſpaſs, Hill. 8 Jac. B. R. fo.99.
70 *Hawes* againſt *Loader*, Debt, Hill. 8 Jac. B. R. fo. 101.
71 *Syliard* againſt ———Replevin, Hill. 8 Jac. B.R. fo.101.
72 *Barton* againſt *Sadock*, in an Action of Account, Hill. 8 Jac. B. R. fo.103. entred Paſch. 7 Jac. B. R. Rot. 416.
73 *Hampton* againſt *Courtney*, Error, Hill. 8 Jac. B.R. fo.107.
74 The King againſt *Lemman*, an Indictment, Paſch. 9 Jac. B.R. fo. 109.
75 *Tabbe* againſt *Matthew*, Words, Paſch. 9 Jac. B. R. fo. 109.
76 *Scot* againſt *Scot*, Debt, Paſch. 9 Jac. B.R. fo.110.
77 *Baker* againſt *Dickinſon*, in a Prohibition, Paſch. 9 Jac. B. R. fo. 110.
78 *Maynard* and his Wife againſt *Towe*, an Action of Treſpaſs, Paſch. 9 Jac. B.R. fo.110.
79 *Shepheard* againſt *Woolſie*, an Action upon the Caſe for a promiſe, Paſch. 9 Jac. B.R. fo. 111. entred Paſch. 7 Jac. B. R. Rot. 100.
80 *Stowe* againſt *Holland*, Words, Paſch. 9 Jac. B. R. fo. 112. entred Hill. 8 Jac. B. R. Rot. ——
81 *Golley* againſt *Bacon*, a Promiſe, Paſch. 9 Jac. B.R. fo.112.
82 *Newman* againſt *Edmunds*, in Ejectment, Paſch. 9 Jac. B.R. fo. 113.
83 *Hughes* againſt *Keymiſh*, in a ſpecial Action upon the Caſe for ſtopping of lights, Paſch. 9 Jac. B.R. fo. 115. entred Trin. 7 Jac. B.R. Rot. 1490.
84 *Newall* againſt *Barnard*, an Action on the Caſe for ſtopping of lights, Paſch. 9 Jac. B.R. fo. 116. entred Paſch. 10 Jac. B.R. Rot. 597.
85 *Mirrill* againſt *Nichols*, in an Action of Treſpaſs, Paſch. 9 Jac. B. R. fo. 117.
86 *Plat* againſt *Sleepe*, Ejectment, Paſch. 9 Jac. B.R. fo. 118.
87 The Preſident, Fellows, and Scholars of St. *John's* Colledge in *Oxford*, againſt the Lord *Norris*, Ejectment, Paſch. 9 Jac. *B.* R. fo. 119.
88 Sir *John Poultney* againſt *Maſſe*, in a Trover and Converſion, Paſch 9 Jac. B.R. fo. 120.
89 *Thorner* againſt *Field*, an Action upon the Caſe for a promiſe, Paſch. 9 Jac. B. R. fo. 120.
90 *Viccaridge* againſt *Gelſe*, in an Appeal, Paſch. 9 Jac. B.R. fo. 121.
91 *Hall* againſt *King*, Ejectment, Paſch. 9 Jac. B.R. fo. 122.
92 *Sallows* againſt *Gurling*, Debt, Paſch. 9 Jac. B.R. fo. 123.
93 The King againſt *Lorkin*, an Indictment, Paſch. 9 Jac. B.R. fo. 124.
94 *Collins* againſt *Roe*, a Promiſe, Paſch. 9 Jac. B.R. fo. 124. entred Hill. 8 Jac. B. R. Rot. 109.
95 *Stubbs* againſt *Flower*, Error, Paſch. 9 Jac. B.R. fo. 125. entred Trin. 7 Jac. B. R. Rot. 963.
96 *Hooker* againſt *Robinſon*, Error, Paſch. 9 Jac. B. R. fo. 125.
97 *Fuller* againſt *Righteous*, Error, Paſch. 9 Jac. B. R. fo. 129. entred Mich. 8 Jac. B. R. Rot. 641.
98 *Procter* againſt *Clifton*, Error, Paſch. 9 Jac. B. R. fo. 126. entred Paſch. 8 Jac. B.R. Rot. 627.
99 *Orde* againſt *Moreton*, Error, Paſch. 9 Jac. B. R. fo. 129. entred Mich. 7 Jac. B. R. Rot. 539.
100 *Francis Holts* Caſe, Indictment, Paſch. 9 Jac. B.R. fo. 133.
101 *Tirlot* againſt *Morris*, or *Morriſon*, an Action of the Caſe for Words, Trin. 9 Jac. B.R. fo. 134. entred Paſch. 9 Jac. B.R. Rot. 285. or 286.
102 *Bowles* againſt *Poore*, Error, Trin. 9 Jac. B.R. fo. 135. entred Mich. 8 Jac. B.R. Rot. 348.
103 *Waſtnape* againſt *Tayler*, Treſpaſs, Trin. 9 Jac. B. R. fo. 138. entred Hill. 8 Jac. B.R. Rot. 1337. 2. pa.
104 *Simpſon* againſt *Brook*, Words, Trin. 9 Jac. B. R. fo. 139. entred Hill. 8 Jac. B.R. Rot. 702.
105 *Shordiſh* againſt *Faldoe*, Covenant, Trin. 9 Jac. B.R. fo. 138. entred Hill. 8 Jac. B. R. fo. 248.
106 *Tourney* againſt *Adey*, Debt, Trin. 9 Jac. B.R. fo. 140.
107 *Bradley* againſt *Banks*, Appeal, Trin. 9 Jac. B. R. fo. 141. entred Mich. 8 Jac. B. R. Rot. 407.
108 *Baſepoole* againſt *Freeman*, Error, Trin. 9 Jac. B.R. fo. 144. entred Trin. 8 Jac. B. R. Rot. 1222.
109 *Scriven* againſt *Wright*, Trin. 9 Jac. B. R. fo. 145.

110 *Foſter* againſt *Hill*, Treſpaſs, Trin. 9 Jac. B. R. fo. 146. entred Hill. 8 Jac. B. R. Rot. 1199.
111 *King* and *Long* againſt *Lorking*, Words, Trin. 9 Jac. B. R. fo. 147.
112 *Beresford* againſt *Preſſe*, Words, Trin. 9 Jac. B. R. fo. 147.
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A N

HILLARY TERM,

SEPTIMO

JACOBI,

IN THE

KINGS BENCH.

R. *Barwick* Plaintiff, against *J. Foster* Defendant.

RIchard Barwick made a Lease of Land unto John Foster for ten years, rendring 50 l. Rent. Payable yearly by equal portions at two Feasts in the year: That is to say, At the Feast of the Annuntiation, and Saint Michael the Archangel, or within the said Term. The Term expires. And for the Arrerages of Rent, for the two last years, the Plaintiff brough his Action of Debt after the last ten days, counting of the Arrerages to be behind, at the Feast of Saint Michael last past; which was the last Feast, and the last day of the Term, *Et adhuc existit à retro*: And upon the general Issue pleaded, A Verdict was found for the Plaintiff. The Defendant by his Counsel moved in Arrest of Judgment, for that the Plaintiff counted for so much Rent due for two years at S. Michaelmas, last past. Whereas no Rent was due until ten days after. As appears in the Declaration by the words of Reservation, (for the last half years rent.) *Williams Justice*; the Plaintiff is in this case without remedy for any part of his rent, by reason of the falsity in his Action. For if a man brings his action for one thing to which he hath right: and for another thing also, to which he hath no right, his Writ shall abate for all, as appears by 9. H 7. fo 3 by Fineux. So in this case the Plaintiff bringing his Action for rent payable within ten days, which are out of the Term, and so no rent by force of the Reservation, nor yet a rent within the word (yearly) and therefore the whole Writ ought to abate, & this last rent, being reserved, and payable out of the Term, is no rent. Croke Justice to the contrary, although the lease be ended at Michaelmas, yet the duty, as to the rent remains, by reason of the contract between them: and the ten days are only a liberty given to the Lessee for his benefit. The which he cannot use to defeat the Lessor of all his Rent, & in an Action of debt brought for the arrerages of such a Rent, where ten days time of payment are given, he is to say in his declaration pro duobus annis finitis at Michaelmas, and not finitis after the ten days, and where the rent is reserved payable at Michaelmas, or within ten days after during the Term, he may demand the rent at Michaelmas, and the Lessee shall not have the liberty of ten days for the last payment. Yelverton Justice and Flemming Chief Justice agreed herein clearly, and that for this reason, because, that this election, is an agreement made between the parties at the time of the Lease made, & when in such a case that happens so that no Election can be made, by this agreement between the parties is gone,

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A N

HILLARY TERM,

SEPTIMO

JACOBI,

IN THE

KINGS BENCH.

R. Barwick Plaintiff, against *J. Foster* Defendant.

RIchard Barwick made a Lease of Land unto John Foster for ten years, rendring 50 l. Rent. Payable yearly by equal portions at two Feasts in the year: That is to say, At the Feast of the Annuntiation, and Saint Michael the Archangel, or within the said Term. The Term expires. And for the Arrerages of Rent, for the two last years, the Plaintiff brough his Action of Debt after the last ten days, counting of the Arrerages to be behind, at the Feast of Saint Michael last past; which was the last Feast, and the last day of the Term, *Et adhuc existit à retro*: And upon the general Issue pleaded, A Verdict was found for the Plaintiff. The Defendant by his Counsel moved in Arrest of Judgment, for that the Plaintiff counted for so much Rent due for two years at S. Michaelmas, last past. Whereas no Rent was due until ten days after. As appears in the Declaration by the words of Reservation, (for the last half years rent.) *Williams Justice*; the Plaintiff is in this case without remedy for any part of his rent, by reason of the falsity in his Action. For if a man brings his action for one thing to which he hath right: and for another thing also, to which he hath no right, his Writ shall abate for all, as appears by 9. H 7. fo 3. by Fineux. So in this case the Plaintiff bringing his Action for rent payable within ten days, which are out of the Term, and so no rent by force of the Reservation, nor yet a rent within the word (yearly) and therefore the whole Writ ought to abate, & this last rent, being reserved, and payable out of the Term, is no rent. Croke Justice to the contrary, although the lease be ended at Michaelmas, yet the duty, as to the rent remains, by reason of the contract between them: and the ten days are only a liberty given to the Lessee for his benefit. The which he cannot use to defeat the Lessor of all his Rent, & in an Action of debt brought for the arrerages of such a Rent, where ten days time of payment are given, he is to say in his declaration pro duobus annis finitis at Michaelmas, and not finitis after the ten days, and where the rent is reserved payable at Michaelmas, or within ten days after during the Term, he may demand the rent at Michaelmas, and the Lessee shall not have the liberty of ten days for the last payment. Yelverton Justice and Flemming Chief Justice agreed herein clearly, and that for this reason, because, that this election, is an agreement made between the parties at the time of the Lease made, & when in such a case that happens so that no Election can be made, by this agreement between the parties is gone,

In an Action of Debt for rent.
Yel. 167.
2 Cro. 227
233.
2 Brown. 220
1 Brownl. 105

Where the Writ shall abate and where not.

and determined, and when the term flows out, no election can then be for the ten days after the Term ended, for that by this Determination of the term, the Lessors remedy by way of distress, is good, and therefore the contract shall be also determined, and this shall be vested in the Lessor presently after Michaelmas, as a proper duty, & so his action well brought, according to the agreement betwæn the parties grounded upon the contract, and by no intendment it can be otherwise construed. For that according to the express agreement made betwæn the parties, the rent reserved ought to be paid during the Term. This case was ended by agreement between the parties, after they perceived which way the Court enclined in their opinions, the better opinion of the Court being clear for the Plaintif.

This case ended by agreement.

Thomas Marsum Plaintif, against *Stephen Hunter* Defendant.

In an Ejectione firm. entred, Trinit. 7. Jac. B. R. Rot. 120.
1 Brown. 220.
Yel. 189.
2 Cro. 253
2 Brown. 209.
Common extinct by unity of possession.
Mo. 667.
Noy 156.

A Copiholder prescribes to have common of Pasture in the wast of the Lord, afterwards he doth purchase the Inheritance in fee, and hath a Confirmation made unto him by the Lord, of the House, and Land, and (to the which he had his Common) *Habendum* to him and his Heirs *cum pertinentiis*. The question was, whether the Common passed or not, or should be extinct by the unity of possession. It was argued at the Bar, that the Common should be gon, for this reason. That if that thing to which it is appendant be gon, the thing appendant by this is also gon, according to the Books of 5. E. 4 fo. 8. The case of Garter King of the Heralds, and 19. E. 3 Fitz. tit. Assise. Placito. 83. where an Assise was brought by a feme, and it was found by Verdict, that the Father of the Woman gave the Land unto the Defendant with his Daughter the Plaintiff in Frankmarriage when they were *infra annos nubiles* both the one, and the other: afterwards at their full age, the Husband sueth a Divorce, and that at his suit, they were divorced, and that after the divorce he kept the possession of the whole, and did put out the woman, for the which she brought her Assise. And for that the cause of the gift, and the form of it was determined and taken away by the divorce at the suit of the Husband, it was adjudged that the Woman, being Plaintiff should recover the whole. For that the Frankmarriage destroyed by the divorce, the title of the Husband is also gon. And so in this case, the Copyhold being destroyed, the Common also depending on this shall be likewise gon. Flemming chief Justice, the sole point in this case rests upon the prescription, for in this case, he ought to say in pleading *Talis est consuetudo*; but after the purchase he cannot say so, for the purchase doth extinguish the prescription, and the Common being by prescription which is gon, the Common also is gon. And in this agreed Yelverton Justice, Williams Justice. A Coppholder may intitle himself by pleading a *usit atam fuit*: but when he himself, by his own act hath determined his estate, by this he hath lost his Common. Yelverton and Croke Justices, did agree with him in this, for that the belonging here in this case is unto a customary estate, and not unto a Freehold; and these words here *cum pertinentiis* will not serve his turn; but if in the grant there had been these words (s) with all Commons before used, this had been then good and sufficient for him, and would have carried the Common, but not otherwise, as here in this case it is, being without this clause, of all Commons before used. It was therefore ruled against him, by all the Judges; that he should not by this new grant, have the Common of Pasture to him, and to his Heires: and by the rule of the Court Judgment was given against the Plaintiff, that he should not by this grant have the Common of Pasture to him and his Heires.

Ro. 18.
Judgment for the Defendant.

In a Writ of Error to reverse a Judgment in the C.B. in debt upon a bond.
2 Cro. 233
Yel. 175.
2 Brown. 212.
Cro. Eliz. 809.

Proctor Plaintiff, against *Johnson* Defendant.

Two Jointenants for years of a Will, the one of them grants his estate, & dyes, the other supposing that all came to him by survivorship, and as he took the Law to be, Grants, bargains & sells the same to Johnson, by the name, and words of *Molendinum suum* generally, and all his Estate, Right, Title and interest

rest in this, and doth also covenant by the same Indenture, to save and keep harmless, the vendee, from all former Acts done by him, or Disturbances, and did also further bind himself in a Bond to perform all the former Articles, Grants Covenants, and agreements in the same indenture between them contained. The Vendee being evicted out of part, brought his action of Debt upon the Bond in the C.B. and there it was adjudged for Johnson the Plaintiff, that the Action well lyeth. For the reversing of which Judgment Procter brought his Writ of Error in the Kings Bench, the Writ of Error was brought, for Error in point of Judgment, without shewing of any particular Error but assigned the error generally, that Judgment was there given for the Plaintiff, whereas the same should have been given for the Defendant. And at the day assigned for the opening and arguing of the errors, the Council for the Plaint. being absent, Hitcham being of Council with the Defendant would have opened the point, and shewed the particular error pretended by the Plaintiff; but the Judges would not suffer him, but said, that if the Plaintiff would not come with his Council, and open the errors unto the Court, they would then proceed & affirm the Judgment. Afterwards Yelverton at the Bar, argued for the Plaintiff in the Writ of error, that the Judg. given was Erroneous and ought to be reversed, for that the Bond was not forfeited. For that by his grant, nothing more passed, than what he had rightfully in him to pass, the words of the grant are *molendinum suum*, and all his estate in the same, the which general word *molendinum* is afterwards bounded and restrained by these subsequent words, (and all his estate) neither had he any intent, to pass away more, than he had in him to pass, and all the words in the grant do pass *uno flatu*; and to be construed the one by the other. Joyntenants as to the possession of the thing in joynture are seised by entierties of the whole, and of every part thereof, equally, but in right, only of a moity; and by a grant of the whole, by one of them there doth only pass a moity, and by the Covenant the first part is qualified by the later, according unto Nokes Case, Coke 4. p. 1. fo. 80, 81. that a Covenant precedent in Law shall be qualified by a Covenant in Deed subsequent. Sir Robert Hitchin argued on the contrary, for the Defendant in the Writ of Error, and prayed affirmance of the former Judgment, for that the oligation was clearly forfeited, and that for two reasons. First, because of the general grant, he having generally granted the Mill, by these words, *molendium suum*, by which words, all the Mill doth pass, whereas he could not rightly pass any more, than a Moity thereof, neither doth any more pass in right, but a Moity, but in respect of his possession in the whole and of the generalty of his grant, the which is to be taken strongest against the Grantor, and for that he hath also bound himself by his obligation to make good and perform this Grant, and in this he hath failed, and therefore being bound by his obligation to perform the premises in the whole, wherein he hath failed, and therefore his Obligation is forfeited for the whole. Secondly the Obligation is forfeited for the whole, by reason of the express agreement betwen them, for if a man that hath not a term in point of right, will yet Covenant by his Indenture that another shall have the said Term, and afterwards binds himself by Bond to perform all former Articles, Covenants and Agreements betwen them, and cannot perform this, for he cannot grant that which he hath not in him for to grant but by reason of his Covenant and Agreement, and his Bond to perform the same, his Obligation therefore is to be forfeited. Williams Justice: there is a passing in Right, and a passing in Possession, and these are two several and distinct things: for where there are two Joyntenants, they are seised per my, & per tout: if one of them by deed indented, bargains and sells *totum statum suum*, and the other dies before inrolment, there passeth but a Moity, in this case, *ex vi termini* the Obligation is forfeited, by the general words in the first part of the Indenture, if the same be not remedied, and qualified by the subsequent words of the Covenant, wherein the difference will be this, where in the beginning, there are things, or Rights in Law, to be passed, and where in deed, the first may be afterwards explained, by words subsequent, but not the other, as the word *dedi* implies a general Warranty, but *dedi pro me & hæredibus meis*, is a special Warranty with

this limitation. Croke Justice; two Joyntenants be, the one grants all, which he hath by survivorship (as he takes the Law,) all passeth, for that his misjudging, or his mistaking of the Law, cannot alter his first Grant, these words, all his Estate cannot prejudice, nor any ways diminish his first Grant, when as he before takes upon him to pass the whole, and so his Obligation forfeited: if these words had been in the Covenant to perform as much as in him was, there the first general words, by the words subsequent, might be very well qualified, but here, by this general Grant, and peremtory Covenant to perform this with a Bond by him entred to perform the same, and herein failing, by this his Obligation is forfeited, and therefore the former Judgement was well given, and to be affirmed. Yelverton Justice, the Judgment to be affirmed, his imagination cannot qualifie his Grant, the difference will be this, If a man grants a Manor which he hath not, he shall not be bound by this Grant, but by his express Covenant to perform this Grant, he shall be bound by this, in this case his Bond is forfeited. Fenner Justice, to the contrary, the Grant here hath reference to that thing which may pass, and to no more, and the Covenant hath reference unto the Grant, and therefore nothing passeth, neither by the Grant, nor yet by the Covenant, but that, which he might well pass. For if there be two Coparceners of a Manor, the one Enfeoffs the other of the whole, there yet passeth but a moity, notwithstanding the Feoffment was made of the whole: so in this case here, he grants *molendinum suum*, that is as much as to say, so much of it as he could well pass by his Grant, and in which he hath right, and the Covenant and Bond shall extend no further, and so no forfeiture, and therefore the Judgement given is erroneous and to be reversed. Flemming Chief Justice, as to the Covenant, which is, that he should continue in, freed, and discharged of all Incumbrances, by any one, and not, that he should have, and enjoy, all his Estate which he had in the Mill: but the Covenant is, that he would save him harmless: the Law, by any construction will not extend further, or beyond a limitation, by express Covenant, meeting with the same, as where Lessee for years grants his term, and Covenants that he shall injoy the same, notwithstanding any thing done by him, this is an express Covenant, in this principal case, there is a grant of the whole, a Covenant to enjoy, and a Bond for performance, the which by his not enjoying of the whole is forfeited, the Judgment well given, and to be affirmed. Croke, Williams, Yelverton Justices, & Flemming Chief Justice clear of opinon, that the Obligation was forfeited, and the first judgment well given, the difference between this case, and Nokes Case, Coke 4. pa. fo. 80. & 81. is in the manner of the performance of the Original agreement, in this case, the whole Mill, by the recital, and by their agreement was conveyed, and the mony paid accordingly for the whole, and but a moity passed, and he never enjoyed but the moity; and herein this case differs from Nokes Case, here in this case the agreement was, to pass the whole Mill, and bound by Bond to perform this agreement and hath failed herein, and so the Bond forfeited, and as to the other Covenants, touching the Incumbrances, as to this there is no difference between this case & Nokes Case, but in this case the breach is not laid, in the not performance of the Covenants, but the breach is here laid in the not performance of the Original agreement between them, and the Bond for the performance of this agreement (being not performed) is therefore forfeited, and the Plaintiff in the C.B. had good cause of Action, and so the Judgment there well given, and to be accordingly, by four Judges against one, and by the Rule of the Court the Judgment was affirmed.

Judgment affirmed.

The Case in a Writ of Error to reverse a judgment in an assise in the C.B. entred, pasch. 7. Jac. B.R. Rot. 610. 8 Co. 55. 2 Brown. 229.

The Earl of *Shrewsbury* Plaintiff against the Earl of *Rutland* Defendant.

Queen Elizabeth being seised of the Manor and Park of Clypston alias Clepston- 10. Eliz. did grant by Letters Patents, *Officium custodis parci sui de* Clypston to Thomas Markham for his life, and did further grant unto him, *Herbagium, & pannagium* of the same Park for his life upon the death or Demise of Queen Eliz. the

the Mannor with the reversion of the same Park, did descend and come unto King James, who 1. Jac. reciting Markhams Patent of the custody of the Park of Clypston by a new Patent, grants unto the Earl of Rutland for his life in reversion, *Officium custodis parci sui de Clypston alias Clepston*, to begin upon the death, surrender, or forfeiture of the Estate of Markham, and did thereby further grant unto him for life, *Herbagium, & pannagium parci prædicti. Habendum adeo plene, & integre*, as Markham had the same; afterwards King James grants the reversion of this in fee, both of the Mannor and Park unto the Lord Mountjoy, who granted the same in fee unto the Earl of Shrewsbury, 4. Jac. Markham died, after whose death Thomas Thorne entred into the Park as servant to the Earl of Rutland, and by his Command, and upon a Reentry the Earl of Rutland brought this Assise in the C. B. and had Judgment there given and recovered, and for reversing of this Judgment, the Earl of Shrewsbury brought his Writ of Error in B.R. and divers Errors assigned to reverse the same Judgment, all which several Errors were argued by the Judges. Croke Justice, the Judgment given in the C. B. is Erroneous, and to be reversed. The Errours in the Judgment are 3. The 1. Error, That after the Verdict, and before Judgment, the Plaintiff in the Assise did enter into the Park, and did there hunt and kill a Stag, and did take a shoulder of it for his fee, & that therefore his Writ ought to abate; this is no Error nor any cause sufficient to hinder Judgment, neither did the Court erre herein in giving of their Judgment, and that for this reason, wherein this difference is to be observed between that which doth abate a Writ in Facto, and that by Plea, and where the same doth abate a Writ in facto, and that without any Plea, and therefore if a thing happens in facto, between the Verdict and the Judgment, as death, which *Omnia solvit*, Judgment given in such a case, with, or against any of the Parties, such a Judgment thus given is meerly *Vacuum*, and this without any other Plea, and such a thing shall abate a Writ in facto without any plea. But if a Feme sole brings an Assise, and after Verdict, and before Judgment, she takes a Husband, this is no cause for to hinder Judgment, for this cannot be avoided but by plea, and the partie hath no time to plead this between the Verdict and Judgment, and after Judgment the time is past for to plead it. So in this case, this entrie being a matter in facto, to abate the Writ, ought to be pleaded, but not between the Verdict and Judgment, for after Verdict the partie hath no day in Court to plead it, and after Judgment such a matter in facto cannot be alledged for error; but before, or not at all, admitting of this difference, this entrie in manner as it was, (if he might have pleaded it) would not have abated the Writ, for here he did enter into the Park, and did there kill a Stag, and took one shoulder of it for his fee, in this case by his entrie he was a trespasser, and this did not abate his Writ; but if he had entred, *ad custodiendum*, by such an entrie he had abated his Writ, for that by this he claims a propertie, and he doth not here enter as an Officer, but as a wrong doer, and therefore this his entrie shall not abate his Writ. The 2. Error, being the great Question in this case, this makes me *hærere et hæsitare*, and this was upon the principal challenge disallowed, this is *novus casus*, and never before came in question, this is a principal challenge, to say, that between the Sheriff who returns the Pannel, and one of the Defendants, there was an action of Trespass then depending. I rely not upon the principal challenge alledged to be, for that the Sheriff was *quondam* servant to the Earl of Rutland, this is no principal challenge, for this is executed and past, but otherwise, if he were his servant at this time, and did weare his cloath, that in this case, the challenge, taken and disallowed by the Court, is a principal challenge, and this appears to be so by the Book of 11. H. fo. 26. where the case was this in an Assise, that the Coroner, who returned the Pannel, had an action of debt then depending against one of the parties, this is here held to be no principal challenge, otherwise it is in trespass, or battery, for that a suit may be concerning *meum, & tuum*, and their friendship by this not infringed, it is there said if he be Plaintiff in an action of Debt, this is no Principal Challenge, otherwise it is *via versa* if he be Defendant, and this is our case directly, for here the Sheriff

Termin. Pasch 8 Jac. B. R. les jndges argued 1. Error.

Note the difference.

Error.

Sheriff was Defendant, and therefore this is a good principal challenge in 21. E. 4. fo. 12. this rule is there taken, that in every case where apparent malice doth appear to be in the one, or in the other, come in slaunder, this is a Principal Challenge: If an Action of battery, at the time of the return of the Pannel, be hanging, by, or against the Sheriff, and one of the Parties, this is a principal challenge, and so it is of an Action of Slander, for these are angry Actions. *Et lex est recta & à Deo ordinata, directa ratione, & lex plus laudatur quando ratione probatur.* In this case, the Jury being returned by such a Minister as was not to return the same, nor to execute the same, for this cause the return is not good, and by consequence the Judgment given upon this Verdict is not good, but erroneous, and
3 Error. so to be reversed. The 3. Error, That Judgment was given for the Plantiff, whereas the same ought to have been given for the Defendant. This error resteth upon the validity of both the Patents, for *ex debili fundamento fallit opus*, both the Patents here are good, and the Earl of Rutland in his Assise might have made himself a good Title, as to the exception taken to Markhams Patent, that is to say, *recitando* the grant of Queen Elizabeth by Patent to Markham, in the next place it is said, *Et ulterius concessit* to him, *Herbagium & pannagium parci prædict.* and did not say, *per easdem literas patentes*, this grant notwithstanding was good; for *ex præcedentibus, & consequentibus* le grant appears to be good, and to make the same good, for there was therein a word Copulative, and relative, therefore this omission is not material, for by a necessary consequence, it shall have relation to the first Patent. As to the exception to the Patent granted to the Earl of Rutland *recitando* the grant to the King to the Earl of Rutland *per literas patentes (hic in curia prolatas)* for so he must say, grants to him *officium parci sui, &c. & ulterius* grants to him *Herbagium & pannagium parci prædicti*, and doth not say, *quam cito vacare contigerit*, this omission is not material, for that *parci prædicti* shall have such a Relation, and Construction, as if the Grant had been, *modo, & forma prædicta*, and then without all doubt the same had been very good, and this shall be here supplied, for that *Literæ patentes Regis non erunt vacuæ*, if by any reasonable construction the same may be made good, and this is a Rule to be observed in the construction of Letters Patents, and this is but a captious exception, and in such cases, *Curiosa, & captiosa interpretatio, in lege reprobatur*, here the Patent is good, the Verdict, as it is found, sufficient, and that which is by them omitted, shall be well supplied by reasonable intendment, for the *post mortem, &c.* is not material when the King rehearsing the first grant by Patent, and afterwards Grants the same thing by Patent to another, not saying therein *post mortem*, the Patent yet is good, and shall take this effect, *quando vacuerit*, for that the King is not in this case deceived in his Grant, and so to conclude the Patent is good, the Verdict sufficient, and this is no sufficient error to reverse the first Judgment; but the Court refusing to admit of a Principal Challenge, this is erroneous, and for this error the
1. Judgment ought to be reversed. VVilliams Justice, First, as to the Grant made unto Markham, and the Omission in the same, the Patent is good by Relation to the first, and this is according to the common form of pleading, and this appears to be so by the Commentaries in the case of Mynes, and so it is in Greyndons Case there, and this is a sure form of pleading, and there is sufficient matter here found by the Jury to supply all this, and no other intendment can be in this case, for when the Kings Grant cannot be construed unto a double intent, the same is then to be construed according to the intent and meaning of the King, and if to a double intent, then the same shall be void: and in this case the Jury may finde *Concessit*, or *non concessit*, this Grant to Markham is good, and he hath in both an estate for life. Secondly, the Grant made to the Earl of Rutland is good, and if it hath not been therein expressed to begin *post mortem*
2. *Markham*, yet the same had been good, for that by a Legal construction it should be so intended by Law, after the recital of Markhams Estate at the time of the second Grant, and the King is not here deceived in his Grant where the same cannot be by any Construction construed to enure, to a double intent, or upon a false suggestion of the Party, neither of these are in this case, and therefore the

Grant

Grant is good, there being a convenient certainty therein contained. Thirdly, as to the error assigned, being the refusal by the Court to allow of a principal challenge, the same being that at the time of the returning of the Pannel, there then was a Suit depending by one of the Parties against the Sheriff, this is no principal Challenge, but where there is Kindred, Alliance continuing, or malice appearing between the Sheriff and one of the Parties, this will be a principal challenge; but otherwise it is, where this is only by way of intendment, as in this case here, and therefore this is no principal challenge. Fourthly, As to the Entry by the Plaintiff in the Assise, into the Park, and there hunting and killing of a Stag, and taking a shoulder of the Stag for his fee, and this done by him after the Verdict and before Judgment, this entry doth not abate his Writ; and herein this difference, is, where abateable, and where abated, as where death is pleaded, there the Writ is abated *in facto*, and this may be pleaded at any time when the party pleaseth: so it is if a Feme Sole be Plaintiff, and take a Husband, or if a Plaintiff in an Assise be made Judge of Assise, hanging the same, this doth abate the same *in facto*. Fifthly, as to the matter of variance, being the Park of Clypston *alias* Clepston, for this the Judgment is erroneous, for it cannot be intended to be all one, without averment, as the case is, 12. Assise fo. 33. Pla. 2. A Manor called Anstie, in the Demand called Anestie, this not good without an Averment, and so is the Book case in Hillary Term 42. E. 3. fo. 3. Pla. 12. a *Scire facias* upon a Fine of Tenements in Esgrave, and the Fine was of Tenements in Depgrave, and the Writ abated, because no averment, and so is Cooks Case, Coke 5. Rep. fo. 46. A Formedon brought of the Manor de Iffield in the County Sussex, the Tenant Pleads in Bar a common recovery against the Donee in Tayl of the said Manor, the parties at issue upon no such record pleaded, and the Record was Iffield there it was amended, otherwise without an averment it would have been Erroneous, and so in this case here without an averment, it shall not be intended to be one and the same, and this being a material variance, and for this cause, there being no averment, the Judgment is erroneous. Sixthly, as to the Seisin and Disseisin, there is no Disseisin in the case, for without a Seisin there can be no Disseisin, for there was no Seisin of the Panage, and therefore the Judgment Erroneous; it is alledged that he put in two Horses to take Seisin of the Herbage and Pannage, the which could not take any Seisin of the Pawnage. For as Lyndwood in his third Book, and in the Chapter *De decimis* fo. 101. B. defineth, saith that *Pannagium est pastus porcorum, in nemoribus, & in silvis, ut puta de glandibus, & aliis fructibus arborum, silvestrium, quarum fructus, aliter non solent colligi.* Mr. Skene in his Book *de verborum significatione* defines this to be a duty given to the King for the Pasturage of his Swine in his Forrest, and *Pannagium*, is also money taken for the Pawnage or the Pawnage it self, as appears by the Stat. of Charter de Foresta cap. 90. *unusquisque liber homo, &c.* and by Crompton in his Jurisdiction of Courts fo. 165. where he saith, that Pawnage is properly a certain sum of money which is taken in the time of Pawnage for the feeding of his own Hogs in his proper Wood, through the Kings wood, if there be no other way, and by Manwood in his Forest Laws fo. 90. saith that Pawnage is the agistment of the mast of the trees, or the profit that is made of the same. And if he had in this case turned in his Hogs, this had been a good Seisin of both, both of the Herbage, and also of the Pawnage, for that they would both eat and grase, and a Seisin to maintain an Assise, ought to be of such a thing as is a sufficient Seisin in its proper nature, and if he be disturbed in the means to come unto this, this very disturbance is a Disseisin, and so far these two last Causes, the Judgment is Erroneous, and to be reversed. Croke Justice, as touching the last point, the Seisin and Disseisin agree in omnibus with Williams Justice, that the Judgment in this is Erroneous and to be reversed. Yelverton Justice, As to the first Error, the Entrie of the Plaintiff after Verdict, and before Judgment, this is no Error, and in this agrees with Croke and Williams, and whereas it was said at the Bar, that after verdict the parties have no day in Court, to plead this, and to be therefore aided by a Writ

of

of Error, this is not so, for they have a day in Court, and may well plead this before Judgment, or at the day adjourned, for to hear the Judgment of the Court, but not to assign this for error after Judgment, this being only matter Dilatory, so that he had day to have pleaded this after Adjournment, but not after Judgment; but admit he might plead this, yet this is no execution of his
2. Office, for he ought to have alledged a lawful exercising of his Office, and this is not so, for he alledgeth a killing, by which a forfeiture follows, and that which is done is a Tortious Act. As to the second point touching the challenge disallowed, this is no principal challenge, the Actions depending between the parties: the difference herein will be in the nature of the Actions; also the challenge is not good, if the Test of the writ of trespass hanging, were not before the other action brought, as in our case, before the assise in this principal case, this was no principal challenge, though the Test of the trespass were before the Assise, for the trespass here was for a trespass done in one Town, and the Assise of Lands in another, and so diverse. A difference there will likewise be where the challenge is principal, and where the same is for favour; where it is a principal challenge, and not proved, as consanguinity, this is not good, for that in every principal challenge, the matter alledged without proof is not good, otherwise it is in a challenge for favour; for their demands shall be of the Jurors which are to try the favour, whether he be indifferent for this cause, or for any other, this is sufficient. Also in any principal challenge Issue shall be taken upon the matter alledged, but never so, where the challenge is for favour, for there the Triors shall say, whether favourable or not: Every Principal Challenge ought to be either confessed by the Party, tried by the Triors, or judged by the Judges, the two former do fail in this case, the Judges are therefore to determine this, this is no principal challenge, which was by the Court disallowed, and so no Error to reverse the Judgment. As to the third Error, that Judgment was given for the Plaintiff, where the same ought to have been given for the Defendant, which resteth upon the validity of the Patents, the Patents in this case are both good: As touching Recitals, in Letters Patents, this is to be observed, where the same is material, and where not; if the King grants lands in lease, which came unto him from a person attainted, this is good without any recital, as if he grants by Letters Patents, Lands of an Abbe, after the dissolution; but as touching the General learning of Recitals, in Letters Patents, see for this Coke 1. pars. Alton Woods Case, if in the Kings Grant there is a misrecital in the date of the Patent, yet the Patent is good, but otherwise it is, if it be in the name where a recital is of that which is not requisite, and this is false, this shall not make the grant void; if in Letters Patents, the recital is issuable, and it is found false, this shall make the grant void, o-
1 Co. 51. therwise it is if the same be not issuable, there it is no wayes material, whether it be found true or false, this is a sure Ground for construction of Letters Patents. If the King grants an Office for life, and reciting this Grant, Grants the same to another to begin presently, this Grant is void; but if after the Recital he grants this unto another, without saying any more, there by a Legal construction he shall have it after the life of the other; if after such a recital he Grants this to another by the name of a Reversion, this is a void Grant, for that the King then had no reversion in him to Grant, but if the Grant be in the life of the
4. particular Tenant, *habendum post mortem*, this Grant is good. Fourthly, as to the Omission insisted upon the not saying *per easdem literas patentes*, this Grant is good notwithstanding, and in this agrees with Croke Justice. As to the fifth Error touching the variance, Clipston, and Clepston, the Judgment is good, not-
5. withstanding this, and this no such a variance as shall make the Judgment Erroneous, for the same is all one, *idem sonant*, and the same is all one, as Boson and Bozon *quatuordecem, & quatuordecim*, the same is all one; and so in this case it shall be intended to be all one and the same thing, and this is no such
6 material variance as to make the Judgment erroneous. Sixthly, as to the Seisin, and the disseisin, there can be no Disseisin without a good Seisin, in this case, the putting in of the two Horses to depasture, is a good Seisin both of the Herbage

bage and also of the Pannage, and so notwithstanding any of the Errors insisted upon, the Judgment is no ways Erroneous, but *in omnibus* the same is to be affirmed. Fenner Justice, 1. As to the first Error being the entry after Verdict, and before Judgment; this cannot be pleaded after Verdict, *à fortiori* the same is not to be assigned for Error after Judgment; the difference before taken is good, where by that which happens, the Writ is abated, and where abatable, as in case of death, for that *mors omnia solvit*; as this case is, this cannot be assigned for Error. 2. As to the Plaint, this is not sufficient, there being therein no allegation made, where the Park is, and this ought to have been certainly alledged, and in this the Judgment is erroneous. 3. The manner of the pleading is not good, by reason of the Omission of prædict. for the Park, thereby to shew in what place it is, all this ought to have been alledged in certain; the difference therefore will be between a Plea in Bar, and a Replication or Entitling a Plea in Bar, if good to a common intent it is sufficient, otherwise it is, where by way of intitling, for this ought to be certainly set down in pleading. Also there is a Seisin and a Disseisin allowed, but there is no entry mentioned to be made by him, the which ought to have been done, for when a man is to have an Office after the death of another, who dieth before his entry, the same is not so in him vested, as that he may have an Assise for the same, the which he cannot maintain, before an actual entry by him made. 5. As to the taking of Seisin with the Horses, this is a good Seisin, both of the Herbage, and also of the Pannage, but the plaintiff hath well entitled himself to have this Assise. 6. As to the refusal of the challenge by the Court, makes the Judgment erroneous, be the challenge a principal challenge or not: for the Court, when this challenge is offered to to them, they ought to have adjudged the same a principal challenge, or not, and then according to the form, an inquiry ought to be, whether the party challenged be indifferent, or not: in this case the Sheriff was no fit person to return the Pannel, the Judgment in this case is erroneous, and so to be reversed. Flemming chief Justice. First, As to the entry after Verdict and before Judgment, this was no abatement of his Writ, for that an entry to abate a Writ, ought to be an entry into the thing demanded, or else it shall not abate the Writ, and this entry ought to be with an intent to have the thing demanded, and that every entry will not abate the Demandants Writ, appeareth fully in the Assise of fresh force in Plowdens Commentaries fo. 92. the Parson of Honey-Lanes case, where the entry was into the Cellar, hanging the Assise, but this entry was to view the antiquity of the Cellar, and so did not abate the Writ, and there fo. 93. in a Formedon hanging before the Justices, the Tenants in abatement of the Writ that the Demandant had entred, after the last continuance, and upon the evidence, it appeared, that there were many upon the ground cutting down of Wood, and the demandant came upon the Land, and admonished them, at their perils to do no more than they could do by Law, and this was there adjudged to be no entry to abate his writ; in this case, it is to be considered, whether his entry was in the thing demanded, or not, and that with an intent to have the same; here is no such entry in this case, to any such purpose the entry here, being a tortious entry, and not in execution of his office, in this case, he entred into the Park, and this was not the thing in demand, but the office, if in an Assise of Land, the Recognitors in the Assise pray the Demandant to come upon the Land, to direct them in the view thereof, and he comes so accordingly, and to shew them his evidence for the Land, this was held no entry to abate his Writ, as appeareth in 26. the Book of Assises. Secondly, As to the second point being the time of pleading of this entry to abate the Writ, this entry being after Verdict, and before Judgment, as to this, if the matter alledged for to abate the Writ ought of necessity to be pleaded, as here in this case it ought, he hath surceast his time, the same being past, and that by his own default, he cannot therefore now assign the same for Error, to reverse the Judgment; and as to the entry and pleading of the same, where the same ought to be, and where not, see for this, the Book in

Mich. 40. E. 3. fo. 42. Pl. 25. Thirdly, As to the matter of variance, the Assise is of Lands in Clipston, *alias* Clepston, this ought to have reference to have the Town, and as to the Objection, that the Title is *de libero tenemento in Clipston*, et le plaint est *de libero tenemento*, but saith not in Clipston, this is good, and no error, for the Land shall be intended to be in the same County where the action is brought, and the Town ought not in pleading to be twice alledged in Assise, for that the Town is not here in controversie, but *liberum tenementum*. As to the variance, Clipston in the premises, and afterwards Clepston, this hath some probability of variance, but is no Error, for it shall not be intended, but that the same was, one, and the same place, but one is to be put in view, and the *vocatum* here is merly void, and p[illegible]ect. is sufficient, and so the same is called in common speech.

4 Fourthly, As to the title, the Grant made first to Markham for life, *et ulterius*, grants Herbagium, & Pannagium, this shall be intended *per easdem literas patentes*; as to this a Declaration, it is true, ought to have certainty in it, but the same, not to be so, as to every intent, but if the same be certain to a Common intent, this is sufficient, for if in an *Ejectione firmæ*, the Declaration is, that such a one, dimisit generally, this is good, for the Law presumes, that he hath a Title to make the Lease. Fifthly, As to the challenge taken and refused, this

5 was no principal challenge in 3. E. 4. fo. 12. in a real Action, a Juror was there challenged, for that his Son had married with the Daughter of the Plaintiff, this was there held to be no principal challenge, for that this did touch the parties, but ought to conclude, and so favourable, as so this is to be tried, challenge for cause of Actions; an Action brought for every debate, will not be the cause of a principal challenge, unless it be in such Actions, in which there is either Malice, Grief, or Revenge, in such cases, this will be a principal challenge, but not otherwise; or if an Action be brought, in which the good name, and fame of the party is touched, this will be a principal challenge, but in this case now in question, this is no principal challenge. Sixthly,

6 As to the Seisin and Disseisin of the Herbage and Pannage is sufficiently alledged, by the putting in of two Horses; also the Seisin doth not rest only in eating or not eating, but the same is sufficient to make a claim by the entrie, and it is no strange thing for a Horse to eat Acrons; and admitting that they were chased out presently, before they could eat a mouthful, yet this is a Disseisin clearly, & if they were put in on purpose, to make a claim, and to take Seisin, it is not material whether they did eat or not, but the intent will make this a sufficient Seisin of both the Herbage and pannage also. Seventhly, As to the recitals, they are good,

7 but if Markham were dead, at the time of the recital, then the patent had been void, if there be a lease made by crown, in this case upon a second grant a recital is necessary, but not so in the case of a common person, if in case after a recital, & before the second patent taken, the first patentee surrenders, if the king be not certified of this, before the taking of the second patent, notwithstanding the surrender this second patent is void, for the King in this case is deceived in his grant, & so was it adjuded, 2 Eliz. in one Filpots case, where the thing granted by the King was extinguished by an Attainder, and the patentee said that the same was in being, and did inform the King, and therefore the patent was adjudged void, the King being deceived in his grant. *Concessio Regis* ought to contain certainty, and therefore if the King grants unto one which hath Lands in divers Counties that he shall not be made Sheriff, by these general words, the grant is not good, for the uncertainty of it, but if the grant be that he shall not be Sheriff of any particular County, this Grant is good, having sufficient certainty in it, for in the King grants certainty is requisite, certainty in the estate granted, and this not to be urged or wrested against the intent of the grant, as appears by the case in 18. H. 8. Br. cases fo. 1. Plac. 5. The King grants Lands to I. S. *et hæredibus suis masculis*, this Title to be

1 In. 27. a void grant, because the King is deceived in his grant, for that this sounds in Fe-
1 Co. 43. simple, whereas the King intended an Estate Tail; also express limitation by the King in his Grant, or be it implyed by Law, this shall make the grant good, in this case here the King doth alledge sufficient certainty in the beginning of the grant,

grant, for he hath recited that Markham, the first Grantee was then living, and so this is to have a Legal construction: and the Law saith that the second Patentee, cannot have the fruit of his grant, before the death of Markham, the first Patentee, so that here the Law makes a sufficint certainty, and there is no difference where the Law doth express this, and where the party, and so the Judgment, notwithstanding any thing objected to the contrary, was well given *in omnibus*, & no ways erroneous, but ought to be affirmed. Note that at another time Serjeant Nicols moved the Judges to have their resolutions in this case, and further said, that in the entring of Judgments, the course is, that if the Judgment be affirmed, the entry then is, *quod affirmetur in omnibus*, but if the same be to be reversed, the entry then is to be *ob errores illos*, and to assign which they were; according to this is the Book 1 Eliz. Dyer. fo. 168. Pla. 17. where in the end of the case, it is there said, Note the course in Banco Reg. that if any of the Errors assigned, are held for no error, they are then made void by a mark in the Roll, which is a Crosse, and *Man* Secundary, did then inform the Court, that this was their usual course to mark this in the Judgment, with a Crosse, or Line, which is assigned for Error. and is none; and the Serjeant informing the Court, said, that if in this case the Errors insisted upon, were singled out each by it self, and their opinions, as touching these Errors, in every one of the said Errors, there where three against two for the affirmance of the Judgment. Upon this the Judges then answered, and said unto him, that it was never seen, that any one at the Bar for the reversing, or affirming of any Judgment, after their Arguments, have used to single out the Opinions of the Judges in the several Points, and to reherse their several Opinions thus unto them, when they prayed to have their Resolutions in the case, this they ought not to do, but only after their Arguments to demand their Resolutions, and to attend the hearing of the same, without making any mention of their several Opinions in their Arguments. But in this case, the Court being doubtful which way the Judgment should be given, they all of them maintaining their several Opinions; and in almuch as at the Bar, they desired to have their resolutions, Flemming chief Justice, the Court being full, did move them to deliver their several Opinions, whether the Judgment should be reversed, or affirmed in general. Croke, VVilliams, and Fenner Justices, for the several errors by them insisted upon, the Judgment is erroneous and ought to be reversed. Yelverton Justice and Flemming chief Justice, the Judgment is not erroneous for any of the Errors Assigned, but the same ought to be affirmed throughout, and so there being three against two for the reversal of the Judgment, therefore by the Rule of the Court, Judgment was given, that the former Judgment should be reversed, and the reversal was accordingly pronounced, *quod nota bene*, for that as to every Error singled out by it self, there were three Judges against two, for the affirming of the first Judgment, and overruling of every Error singled out, but yet upon the whole matter, as before, the Judgment was reversed.

This was Termin. Trinit. 8 Jac. B.R. Judgment reversed.

Judgment reversed.

Franklin Plaintiff, against *Green* Defendant.

THe Corporation of Butchers in London was confirmed 3. Jac. by the which they had power and Authority to them given, to make By-laws, and Ordinances, they did afterwards ordain, that no Butcher, or person being a Stranger, should sell any Veal within the City of London, unless they did dress the Kidnies of their Veals in such a manner as the Kidnies of sheep were dressed, and that if they did otherwise, to forfeit for every time six pence, and if refused to pay the same, then to forfeit the Veal: the servant of the Plaintiff coming with a Veal to sell, and not performing of the Ordinance, the Defendant in behalf of the Corporation, took the Veal for his refusal to pay the forfeiture, and for this the Plaintiff brought his Action of Trespass, and demands the Judgment of the Court, the Defendant pleads in Bar, that he took the same as forfeited by their Ordinance, but doth not shew the Ordinance in certain. Harris for the Defendant

In an Action of Trespass.

By-Laws by the Corporation of Butchers in London.

dant, that the pleading is good without shewing of the Ordinance in certain, being by way of Bar; and a certainty to a common intent, being by way of Bar is good. Stephens to the contrary, the Ordinance ought to be shewed specially in pleading, for that the same lieth properly in their own knowledge, also this Ordinance is not of any force to bind Foreiners, neither can they distrain by vertue of this, because that they themselves are parties, and the other had no notice of this. Williams Justice, of a private Ordinance made by the Butchers in their Corporation, a Stranger is not bound to take notice thereof, otherwise it is of an Act of Parliament; in this agrees Yelverton Justice, and the Court as, also that this By-Law was not good to bind Strangers, but the same had been good, if made for to suppress Fraud, or any other general inconvenience, used by a Foreiner, as corruption or the like, in the sale of their Meat, and then they ought to take notice of the same, but not here as this case is, and so Judgment was given in this case for the Plaintiff.

Judgment for the Plaintiff.

Haverley Plaintiff, against *Laighton* Defendant.

In a Writ of Error to reverse a Judgment in the C.B. in an action of the case upon a promise, Entred Pasch. 6. Jac. B.R. Rot. 601.

Where notice is to be given, and where not.

HAverley did assume, and promise unto I. S. that if he did borrow of one Powell, 100 l. that he would repay this to him upon the same day, and on the same conditions that they between them should agree upon: I. S. borrowed the money, and agreed the same to be repaid at a day certain, before the day I. S. dies, and makes Laighton his Executor, the day passeth, the money not paid, Powell brings his Action against Laighton and recovers, and Laighton as Executor of I. S. brings his Action of the Case upon a promise against Haverley, and had Judgment to recover against him in the C. B upon which Judgment, Haverley brought his Writ of Error in B. R. and assigns for Error, that no notice was alledged to be given unto him before the day, what agreement was made between them, and without notice thereof given, he was not bound by his promise, to perform the said agreement. Against the giving of notice, it was urged, that where the first Act to be done, ariseth on the part of the Plaintiff, and this is secret and unknown to the Defendant, in this case notice ought to be given, but otherwise it is, where both parties are with this acquainted; no notice is to be given, where it is in case of an Obligation between the parties, and so in case of an express Assumpsit: if a man be bound to pay I. S. 100. l. when he comes to Rome, he ought to take notice of this at his peril. Williams Justice, in this case notice ought to have been given to the Defendant of the agreement, and day of payment, for want of which, the Declaration was bad, and defective, and so for this Omission, the Judgment erroneous, the difference will be where the thing is executed, and where the same is executory, where executed, there no notice to be given, but otherwise where the same is executory, and so is the case in 4. H. 7. what Cloth you shall deliver to I. S. I will see you paid for it, Ruled, that here notice ought to be given what Cloth was delivered to I. S. in this principal case, it was impossible for the party to take notice of the quantity of the sum borrowed, and of their secret agreements, and therefore for want of notice the Declaration was nought, and the Judgment erroneous, and the Plaintiff in this principal case, could not have an Action upon the case for the promise, without giving of notice, for that notice here is the ground of the Action, and the not giving of notice, goes in bar of the Action, and without an Action brought he could not recover, and for this cause the Judgment was erroneous, and to be reversed. Croke and Yelverton Justices, agreed with Williams Justice in this, and with this difference where it rests in the equal knowledge of the parties, and where not; where in their equal knowledge, there no notice ought to be given, but otherwise if *è contra*, if the same be not in their equal knowledge, there notice is to be given, and so it ought to have been given in this principal case. Flemming chief Justice to the contrary, as to the giving of notice, this difference is to be observed, where a penalty is to be reco-

recovered, there notice is requisite to be given, but where damages are only to be recovered, there no notice is to be given, as in a Bond, where notice is part of the Action. In an Action of the case upon a promise, he is only to recover damages, and the party hath sufficient notice given him by the Declaration against him, if notice here had been given to him, he should then have paid the principal, with the damages also, but here there was no notice given, the party is not for want of notice, discharged of his promise, for he shall pay the principal, but not the damages, for in this case, the notice is no part of the promise, but a consequent, and the Judgment in Law upon it, and no penalty but damages to be recovered: the notice is a conveniency in Law, but by the not doing of this, the party shall not lose the benefit of the promise made, but shall recover his damages, if no notice be given before the day, but after the day, he may say that so much mony is paid, and so to demand this upon the promise, and if he deny to pay this, he may well have his Action upon the promise, and recover the principal, but not his damages, and so the Declaration was good, and the Judgment well given, and not erroneous, but ought to be affirmed. Yelverton and Croke Justices, *mutata opinione* agree with Flemming chief Justice, that the Declaration was good, though no notice given, and the Plaintiff to recover the principal, but not damages, and so three Judges against Williams, that judgment was well given, and not erroneous, but to be affirmed, and accordingly by the Rule of the Court Judgment was affirmed.

Judgment affirmed.

Richard Gittings Plaintiff against *Richard Cooper* Defendant.

An Ejectione firme, a special Verdict upon the Custom of a Copyhold Mannor. 2 Brown. 217.

IN an Action of Trespass and Ejectment upon not guilty pleaded, the Jury gave a special Verdict, and did find to this effect, that Humfery Packington was seised as Lord of the Mannor of Chepley-corner in the County of D. in which Mannor, there are divers Copyholders of inheritance; they find further, that within the said Mannor there was this custom, that if any Copiholder of the said Mannor, do commit any felony, that he shall forfeit to the Lord his Copyhold estate, and that the Lord upon presentment of this by the Homage, may enter and seise the same; the Jury find further, that one Hunt who was a Copyhold Tenant of the same Mannor had killed one Silvester Taylor, and that the same Felony was presented by the Homage at the next Court: they further find, that Hunt was afterwards indicted for the same Felony, and was thereof acquitted; thy find that after his acquittal, the Lord did enter and seise the Copyhold Estate for a forfeiture, and made a Lease thereof to Gittings the Plaintiff to try the Title, who by vertue of his Lease did enter, upon whom Cooper the Defendant as servant unto Hunt, and by his command did re-enter, upon which re-entry Gittings the Plaintiff brought his Ejectione firme, all which matter appeared in the special Verdict. VWalter for the Plaintiff moved two points considerable in this case, upon the special Verdict. 1. Whether this custom be good or not. 1
2. Admitting the custom good, whether the acquittal of Hunt the Copyholder shall avoid the seisin of the Lord for the forfeiture. 2
3. This custom is a good custom, for a reasonable commencement, in a condition, makes this to be good, and so in a Custom, and this custom here doth tend to restrain a great mischief, and therefore it is a good Custom; it is also a good Custom, for that it hath a resonable intendment, and a reasonable commencement, and such customs which have a reasonable commencement are good customs in Law; a reasonable intendment may be made of this custom here, for that the Lord with the assent of his Tenants may grant his Copyhold Estates upon such Conditions, purposely to prevent the committing of such offences. Also the place it self, and the nature of the place is many times the cause of the beginning, and the ground of Customs, as appeareth by the Book of 12. H. 8. fo. 5. where it is said that such offences are Felony, as the same have been accustomed and used so to be, for that in many places, some offences are Felony, the which 3

are

are not so elsewhere, as in the Isle Man, therefore if one take a Horse or an Ox, this is there no Felony, for that he cannot hide them, but if he take a Capon or a Pig, this is there Felony, and for this he shall be hanged. And so by the custom of London, the wife in the absence of her Husband, a Merchant, may sue, and be sued, and so in Kent, the custom of Gavelkind, being this, the Father to the Bough, and the Son to the Plough, these customs have their Commencements and grounds from the nature of the place; this Custom here is also good, & that for this reason, because the same is annexed unto an estate beginning by Custom; and as touching Customs in the general, it is to be observed, that these three Customs are not good, but utterly void. First, A Custom which is directly against Justice. Secondly, If it be a Custom against the Common wealth, this is not good. And Thirdly, a Custom which is in prejudice of a third person, these three Customs are void in Law; but the custom here found in our case, is none of these, and therefore good. As to the Objection made, that this Custom should not be good. 1. There is no certain time when this presentment shall be made, and so this may be examined twenty years after, which is very inconvenient, and therefore void. To this it may be answered, that there is no incertainty in this, for that the Lord may cause this to be done presently, or when he will, at any time afterwards, for when a man hath cause to enter for a Forfeiture, he is not bound to enter presently, but he may enter when he pleaseth. It may also be said that this Custom is not good, because, if the examination of this may be twenty years after, he may then examin this after his death, and so by this a great inconvenience may follow, to examin an offence after the death of the party. The answer is, that this is no inconvenience, for this is only in case of a forfeiture, which may be examined after the death of the party; but if it were in case of an Attainder, where by this the Blood is to be corrupted, there otherwise it is. 3. This is no good Custom, for that this is against the nature of a Court Baron for to enquire of Felony. To this it may be answered, that here is no inquiry of Felony, nor yet of any thing to call the life of the party in question, but only a particular information for to intitle the Lord to the forfeiture. As to the Second Point, admitting the Custom, whether the acquittal of the Tenant shall conclude the Lord, that he cannot now seise the Copihold Estate for the forfeiture, the Lord may enter notwithstanding the acquittal, for that the acquittal shall not in this case prevent the Custom. Stevens for the Defendant, that the Custom is noot good, nor reasonable: and therefore in Littleton in his Chapter of Villenage, fo.46. and Cokes Littleton fo. 139, 140. & pla. 209. if the Lord of a Manor claims by custom to have a sum of mony, by way of fine of every Tenant which marrieth his Daughter without the Licence of the Lord, this is a void Custom, the same being against the Freedom of a free man that is not bound thereunto by his Particular Tenure; besides a Custom ought to have a coherence with Reason, or it shall not be good, but this Custom here is very unreasonable, by reason of the generality of it, the same being (for any Felony) for unvoluntary maihm, and petty larceny is Felony, but not to cause a forfeiture of any Lands. Note by the Rule of the Court, this Custom was adjudged cleerly to be a good Custom, but as to the residue of the Points in this case the Court delivered no opinion, but as to these *Curia advisare vult*, in this case the parties by their mutual assent submitted themselves unto Williams Justice to end this matter between them without any further Argument, quod Nota.

1 2 3 Objections against the Custom.

Object. 1. *Resp.*

Object. 2.

Resp.

Object. 3. *Resp.*

2. Point.

Th Custom adjudged good.

Sir Robert Stroud Plaintiff, against *Henry Roper*, and others Defendants.

An Action upon the case in nature of a conspiracy entred, Trin. 7. Jac.B. R. Rot.568.

ROper and the other Defendants preferred their Petitions against the Plaintiff unto Vicount Byndon, in which Petition, they did accuse the Plaintiff being then a Justice of Peace, with oppression, & other misdemeanors, for that he having sent unto them his Warrant, for a Tax by them to be made and rated, for provision

sion for the Kings house, and that they accordingly having made a general Tax, and returned the same unto him, and that he seeing therein some of his friends to be Taxed (as he conceived) beyond their ability, and contrary to his Warrant, caused a new Tax to be made, the which to pay, they refused. The Plaintiff returns their refusal, and procures a Messenger to be sent unto them, from the Green-cloth, and they demanding of the Tax, some of them paid upon threats, and some refuse, & upon their refusal they were by him committed to Prison, afterwards they preferred another Petition against the Plaintiff, to the same effect as the other was, unto the Clerks of the Green-cloth, and another Petition to the Lord Chancellor, with divers Articles against him, the which by their oath they did aver to be true, and this so done, to the intent to disgrace the Plaintiff unto these honourable personages, and so to cause him to be removed, and put out of the Commission of the Peace, and afterwards by the Lord Chancellor he was put out of the Commission of the Peace, and the Plaintiff supposing this to be done, upon their false complaint, brought against them an Action upon the Case in the nature of a conspiracy, and this against them all: To this Declaration the Defendants demur in Law. The chief Point in the case being, whether the Plaintiff may joyn the several conspiracies in one Action upon the Case, this was as to the manner of Action. It was urged for the Defendants, that the Plaintiff could not joyn them all in one and the same Action, and for this the Book case of 21. H 7. fo. 39. was cited, where it is held by the Justices, that if one hold two Acres of one, by several services, and dieth without heir, the Lord cannot have one writ of Escheat for both Acres, but ought to have two Writs. So as it was urged, if two men slander one, he cannot at the common Law have one action against them both, but several Actions, but otherwise it is in the Spiritual Court, where one Libel may be against several persons. As to the matter of the Action, it was urged, that the same was not good, for that the Plaintiff sheweth in his Declaration, that in the time of Queen Elizabeth he was made a Justice of the Peace, and that afterwards, in the time of King James, *Constitutus fuit* a Justice of the Peace, but he doth not shew *quomodo*, as he ought to have done, and so this shewing is not good, and the Declaration herein is insufficient; for it appears by the Book of 20. H. 7. fo. 8. that no Justice of Peace can be made, but by the Letters Patents of the King. Yelverton Justice. They are not here several conspiracies, for that all of the Defendants are charged with one and the same thing, and therefore one Action upon the Case may be well brought against them all. Williams Justice, If the conspiracies be all of them of one and the same nature, all of the Defendants may then be well joyned in one and the same Action. Fenner Justice, the Action is well brought against all the Defendants. Croke Justice, *Fama & fides sunt tanquam anima, fides, & fama, & oculus, non patiuntur Ludum*, the Plaintiff as a Justice of peace, could not enforce the Defendants to make a Tax, but he might perswade them so to do. By the exhibiting a Bill for Forgery against a Noble man, although he fails in his proof of this, this is no cause for an Action to be brought against him: advised the Plaintiff to relinquish his suit, for that *Latrantes caniculos cum contemptu præterire sapientis est.* Yelverton Justice, the Plaintiff shewing that he was *constitutus*, made a Justice of peace, and doth not shew by whom, nor yet how he was so made, this is not good; but if he had said generally that he was a Justice of the peace, this had been good enough. Flemming Chief Justice agreed in this, that he ought to have shewed by whom, and how he was made a Justice of the peace; and for this cause, the opinion of the Court was, that the Action was not well brought, but no Judgment was given in this case, for that the parties by their mutual consent referred the same unto Flemming chief Justice, to be by him ended in an arbitrary way.

A Demurrer to the Declaration

This Case ended by a mutual reference to the chief Justice.

Talbye

Talbye Plaintiff, against *Cooke* Defendant.

An action of the case upon a promise to pay money upon an accompt, entred Mich. 7. Jac. B.R. Rot. 540.

Yel. 171. Cro Ja. 234.

IN an Action upon the Case for a promise to pay money, the Plaintiff sets forth in his Declaration, that there was an accompt betwen the Plaintiff and the Defendant, and that upon the said accompt the Defendant was found to be in arrear unto the Plaintiff in the sum of six pounds, the which he promised to pay unto the Plaintiff at a time past, and for the not paying thereof, the Plaintiff brought his Action upon the Case against the Defendant, upon his promise. The Defendant by his plea saith and confesseth it to be true, that long time before there was such an accompt had between them, as in the Plaint is alledged, and that upon the same accompt he was found in arrerages unto the Plaintiff, in the said sum of six pounds, for the payment whereof he entred into a Bond unto the Plaintiff, and then concludes his plea with a Travers, *absq; hoc*, that there was any other accompt between them after this time. Upon which plea the Plaintiff demurs in Law, and for cause it was alledged, that the Travers so taken was not good, for that the accompt is not in this case traversable, but the same is to be given in evidence: in this case there are two things to be considered. 1. The consideration, and 2. the Assumpsit, the which promise is only issuable, and the sole point in this case to be traversed, but not the consideration: and to warrant this, Tatams case in 27. H. 8. fo. 24. and 25. was cited. On the other side, it was urged that the Travers is good, and well taken, and that for this reason, and with this difference, where the convepance to the Action is material, and where not, where the same is not material, but is alledged only for to encrease damages, there the convepance to the Action is well traversable, but not otherwise, and in this case, if there were no accompt, then no promise to perform, and so the travers well taken. Williams Justice, In an action upon the case brought for slanderous words spoken three weeks ago, the Defendant by plea saith, that true it is he did speak such words two years ago, and traverseth *absq; hoc*, that at any time after he spake the words, and this is a good traverse. Yelverton Justice, In an action upon the case for a promise, there the consideration is not traversable, but the promise on the day is not material, but the matter is; the difference will be this, when a sufficient satisfaction is by plea alledged to be made, and when not, and also when the satisfaction alledged, is in a thing of the same nature, and when not, but in a thing meerly collateral, there such a travers is not good. In an Assumpsit, grounded upon a good consideration, in this case he is not to travers the consideration generally, but the promise, and in this principal case, the Defendant doth not travers the consideration, but by his plea, he confesseth the Action, with full satisfaction made of the sum demanded, and afterwards to take the Travers, and to say *absq; hoc*, that any time after this he did accompt with the Plaintiff, he could not have taken a better travers: for if he had pleaded in this case Non assumpsit, the averment of the accompt against him would have disproved this. The Court all agreed in this, that the travers in this case taken by the Defendant in the conclusion of his plea, being *absq; hoc*, that there was another accompt made between them, after this time of his entring into the Bond for payment of the money demanded, this was a good travers, and well taken: and therefore by the Rule of the Court, Judgment was given for the Defendant, that the travers was good, *& quod querens Nil capiat per breve.*

Judgment for the Defendant.

A Prohibition.

A Chappel of ease taxed by the Mother Church for reparations thereof.

THat in the County of Dorset, there was a Mother Church, and also a Chappel of Ease within the said Parish, that they of the Mother Church, did rate,

rate, and tare them of the Chappel of ease, towards reparations of the Mother Church, for the which, upon their refusal to pay the same, being sued in the Spiritual Court, they prayed a Prohibition, and for cause alledged, that they themselves have used, time out of mind, to repair the Chappel at their own proper cost, without having of any contribution at all from them of the Mother Church, and that they have also been exempted from all charges and reparations of the Mother Church, and yet for their refusal to pay this Tax, they were libelled against in the Spiritual Court, and a Sentence there passed against them, and they therefore prayed a Prohibition. By the opinion of the whole Court, a Prohibition lieth not in this case, in regard, that this prescription is meerly Spiritual, and therefore a Prohibition denied *per Curiam.*

A prescription spiritual.

Prohibition denied per curiam.

In an Action of Debt upon a Bond.

IN an Action of Debt upon an Obligation, the Case was this, that I. S. on our Lady day in March did lend unto T. N. sixty pounds for one year, and to have six pound interest for the same year, for the which, he was bound by a penal Bond, condicioned to pay sixty six pound on such a day, which, was at the end of the year, sixty pound for the principal, and 6. l. for the interest, afterwards, and before the end of the year, that is to say, the first day of March, the Obligor paid the 6. l. for the interest to the Obligee, and afterwards did not pay the principal at the day: upon this the Obligee brought an Action of Debt against the Obligor, and he to avoid his Obligation and payment of the mony, pleads the Statute of Usury, of 13 Eliz. cap. 8. for supposed taking of above ten pound in the hundred, because he took his use mony within the year. It was resolved by the whole Court, that this his taking of the use mony within the year shall not avoid the Obligation, and that this taking is no usury within the Statute. Williams Justice, where the first Contract is not usurious, this shall never be made usury within the Statute, by matter *ex post facto*, as if one Contract with another to borrow 100 l. for a year, and to give him 10 l. for interest at the end of the year, if he pays the interest within the year, this is not usury within the Statute, to avoid the Obligation, or to give a forfeiture of the mony within the Statute, because that this Contract was not usurious at the beginning, which was agreed by the whole Court, and Judgment given for the Plaintiff.

Debt upon a Bond, the Defendant pleaded the Stat. of 13 El. cap. 8. of usury for taking the interest within the year, entred Trin. 7 Jac. B.R. Rot. 991. Yel. 30. Cr. Ja. 25. 67. Mo. 644. Noy. 41. 1 Ro.Rep. 510.

Judgment for the Plaintiff.

Sir *Thomas Grymes* Plaintiff, against *Peacock* Defendant.

IN an Action of Trespass, for the taking of Turf and Stones, in the waste of the Plaintiff, being Lord of the Manor, the Defendant justifies by a *usitatum fuit*, that it had been there used time out of mind, that every Tenant for years, of an ancient Tenement, within the said Manor, used to have common of Turbary, and of Lymestones on the waste of the said Manor, and that the Tenement and Close he now hath, is an ancient Tenement, and the same granted unto him with all Commons appurtenant to the said Messuage and Close, accepted, or reputed, as part, parcel, or member of the same, and so justifies the taking, the Jury found the whole matter specially. That the Abbot of Fountains was heretofore seised of the said Manor, that there was such a prescription for Common in the waste of the Manor as belonging to every ancient Tenement, that upon the dissolution of Abbies, the Possessions and Reversions of the Abbey came to the Crown. That 32 H. 8. the King granted the Monastery, the Possessions, and Reversions, with the Manor unto Sir John Gresham, and that afterwards the same came unto Sir Thomas Grymes the Plaintiff, and that the Tenement

An Action of Trespass for taking of Turf and Stones. 2 Brown. 222.

and Close, unto which the Common is claimed came by grant unto the Defendant, upon which special Verdict, the question was, when the Lord of a Manor is seised of a Waste, and a Tenant of an ancient Tenement, prescribes to have common in the waste of the Lord, afterwards the Tenement is severed from the Manor, and the Inheritance of the Manor, and of the Tenement, being in the hands of one Lord who grants away the Tenement and Close for a Term unto the Defendant, with all Commons appurtenant to the said Messuage, and Close, whether this Common that was before belonging to this ancient Tenement, shall pass to the Grantee of this Tenement here or not. Yelverton for the Plaintiff, that the Common in this case did not pass unto
1 the Defendant: two things in this case are to be considered. 1. If any Common be created by this grant, or not? No Common is hereby created, 9 H. 6. fo. 35. If a man grants Common to one, and doth not shew where, or out of what Land he shall have it, the grant is void: so it is in this case, it being not expressed where this grantee should have his Common, and so the
2 grant void, 9 H. 6. fo. 36. a man grants Common of Pasture to another *ubicunq; averia* of the Grantor *ierint*, the Grantee ought to shew in what place the Cattel of the Grantor did go, or else he shall have no Common. 2. Whether these words in the Grant, appurtenant to the House, or Tenement, shall create a Common? they shall not, unless the Common were appendant before, 7 E. 3. Fitz. tit. Ass. Pla. 134. a man grants Land to another with all Commons appurtenant to the same, this Common (by Herle there) doth not pass, if it were not appendant before: A difference there is betwæn a Grant of a Rent, and a grant of Common: if a man grants a Rent to another, here his person is chargable with it, but otherwise in a grant of a Common, for that this is Local. Then it is to be examined, whether there be any thing in this case, to make it appear that this Common is appurtenant to the Tenement, & to be taken out of the Waste of the Lord being Local: As to this, there are two sorts of appurtenants, the one in right, which goes with the inheritance; unity of possession destroys the Common, for that a man cannot have Common in his own Land, the unity of possession destroys this; for the inheritance, in the waste, and in the Tenement, being in one and the same Person, no Common can then be had, and then his Lessee cannot prescribe to have Common. 2. There is common appurtenant in occupation, the Lessee here cannot have such a Common, for the prescription here is grounded upon a feeble foundation: for whereas it is here said, that every Lessee of the said House and Close, time out of mind have used to have Common in the Waste, this is no such *usitatum*, to have such a clear right to have Common without interruption, for here every new Lease and Contract is an interruption, also such a usage ought to be perpetual, which cannot be so here. Williams Justice, A Termor shall have no more than his Lessor doth contract with him for to have, and this is a new thing for a Termor to make such a prescription, 6. E. 6. Dyer. Pla. 70, 71. Ishams case, to make good the prescription there, he ought to shew, that the Park was *Antiquum Parcum*, and because that was omitted, the prescription was not good, in this case the Termor cannot say, that he was *Antiquus firmarius*. If a Copiholder doth purchase the Inheritance of his Copihold, & afterwards grants this with all Commons belonging to the same, the Common which was used with the same, when it was a Copyhold doth not pass unto this Grantee. Croke Justice, Yelverton, and Fenner Justices, and Flemming Chief Justice, that in the last case, the Common that was before used with the Copihold, did pass to the Grantee. Fleming chief Justice, in the principal case, the Termor cannot have the Common by prescription, because there is a certain Commencement, and a certain Determination of his Estate, these words in the Grant, with all Commons belonging to the House, and usually occupied, and enjoyed with the same, with an averrement, that such a Termor had enjoyed the Common with the House, and so pleads the Grant unto him, as in this case here, (leaving out the *usitatum*) this had been good and would have carried the Common, for if a man makes a Lease of a Farm

A difference between a grant of a rent and of a common.

Two sorts of common appurtenant. 1. In right.

2. Common appurtenant in occupation.

Ante 2.

to

to another, with these words in his lease, that he shall have Common in his waste; if afterwards he grants this Farm by lease to another, with all Commons usually occupied therewith, the Common in the Waste doth pass, and so should it have been in this principal case (if it had not been laid to be with a usitat. fuit, which is no good, nor formal pleading in Law. Yet a prescription may be good in some case, although the form of the same be altered. As if a Copiholder prescribes to have Common in the soil of I.S. he ought in this case to prescribe in the name of the Lord: but if he prescribes to have Common in the Waste of the Lord, there his prescription is to be with a usitatum fuit. Croke Justice: A Copiholder may have common in the Waste of the Lord, if in this case the Lord confirms his estate in fee with all commons usually occupied with the same, this creates a fee in him in the Copihold, and a fee also in the common, for in this case benigne construction ought to be made, ut res magis valeat quam pereat. Afterwards in Hillary Term 8. Jac. B. R. this case was argued again by the Judges, and adjudged for the Plaintiff against the Defendant. Williams Justice, This prescription as it is here laid, is very absurd, that such a Termor for years should prescribe, notwithstanding such a Tenement be an antient Tenement; the beginning of this common was by grant, and by the permission of the Lord, and this for the advancement of his Tenant, and not by prescription, and no remedy he hath for this, but only in the Court of the Chancery by way of equity, and this hath been to him denied, for he hath been in Chancery, and thence dismissed, and therefore no remedy here. If a Copiholder have common, and then the alteration coming (to wit) the unity of possession, this extinguisheth the common. If a man having two Mannors, of Da. and of Sa. and Copiholders of both Mannors, the Copiholders of Da. have used to have common in the Mannor of Sa. and so è contra, afterwards the Lord sells away both the Mannors, the Copiholders of the Mannor of Da. die, and others admitted, they claim the common which the other Copiholders had, their claim is not good, as it hath been resolved, for that the common was extinct by the alteration. Flemming chief Justice, as to those words in the Grant, reputed, or used as part, or parcel of this, this shall not extend to common, that the same was parcel, it being not so but by permission, but if the conveyance had been by averment special, that he should have the same Tenement with such commons and profits as had been before used by the Farmers formerly enjoying the same, this had been good; this cause is very conscionable and full of equity, but not well pleaded here with a usitatum fuit. Croke Justice, the pleading here with a usitatum fuit is not good, but idle and very absurd. In alieno, non in proprio solo, a man may prescribe. A Termor may prescribe, but it is to be in such a manner, not in his own name, but in the name of his Lord, that he had for himself, and for his Farmers, but not otherwise. Yelverton Justice, this prescription, as it is laid in the principal case here it is not good. Fenner Justice, the Farmer here cannot have common, the prescription, as it is laid, is not good: if a Lord of a Mannor hath a Waste, and he grants unto others that they shall have common in this Waste, yet the Lord himself also shall have common there, but he hath this in respect of his interest, for if he have no common, he can grant no common. Flemming chief Justice, if it had been here laid, with all commons, profits, used, occupied, and enjoyed with the Tenement, by the Farmers, this had been good, but not as the same is here laid. The grant here by it self without a usitat. fuit, will not aid him, and couple both together, the Grant here with a usitatum fuit, as it is here, this is all one in effect, and shall no ways aid him, for here the usitatum est is annexed unto the estate of the Termor, which cannot be good, and the same usitatum unto the lands as it ought to be, to make the Grant good. All the Court agreed clearly, that this prescription as it is laid here with a usitatum fuit is not good for to intitle the Defendant to have common, and so to make his justification good, and so by the Rule of the Court, Judgment was given for the Plaintiff against the Defendant.

Common claimed by a Termor with a Usitatum fuit, not good.

Difference where a Copiholder claims common in the soil of another, and where in the Waste of the Lord. 4 Co. 31. b.

Hillary Term 8. Jac. B R. adjudged *pro quer.*

Unity of possession extinguisheth a Common.

6 Co. 60. a.

Judgment given for the Plaintiff.

Crews Plaintiff, against *Draper* Defendant.

DRaper had divers creditors, all of them, but one, being the Plaintiff, did give him two, or three years for payment, and the other creditor, (being the

In a Prohibition to the Court of requests.

Plaintiff would not agree unto this) but would have his money presently, or would commence his action for recovery of the same, and for stay of his proceedings at the common Law, Draper petitioned against him in the Court of requests, and prayed the Court to order him to yield and stand to the time of payment limited by the other creditors, at which time he offered to put in good security for to pay them all. The Court of requests called him before them, and moved to yield thereunto, the which he refused to do, but said that if he would presently give him good security to pay him in some reasonable time which he should give him, with this he would be satisfied, otherwise he would forbear him no longer: Draper to do this refused, but prayed an injunction from the Court, for to compel him to stand to the time limited by the other creditors, the which was granted by the Court, and upon this Crewes the Plaintiff moved for a Prohibition to stay the proceedings in the Court of Requests, against the granting of this Prohibition was objected the priority of suit in the Court of Requests. Yelverton Justice, this priority of suit there makes nothing in the case, as to the granting of a Prohibition, for when the propriety of suit, is here in B.R. another Court, as the court of Requests cannot grant an Injunction, to stay the proceedings here, but when the Court of Requests hath the priority of Action, then this Court upon cause shewed, may well grant an Injunction to stay, and prohibit their proceedings in that Court. Flemming chief Justice agreed in this with Yelverton. Flemming, this creditor may have some cause to be harder with Draper than the other Creditors, and he may well have, and pursue his remedy at the common Law for his money, and if Draper refuses to give security to pay the money, according to the request and offer of the other, but procures an Injunction, a Prohibition shall then be granted, by the Rule of the Court to stay the proceedings in the Court of Requests, and the matter shall be tried here; and if notwithstanding this, the Court will there proceed and grant an Injunction, this Court will stay their proceedings, and by our directions here the party shall not obey their Injunction, and an Attachment shall also be granted by this Court, against the Suitor there. Man. Secundar. There have been divers Prohibitions granted here in the like cases, and by the Rule of the Court a Prohibition was granted.

The difference where prioritie of suit is in BR. and where in the Court of Requests.

A prohibition granted per Curiam.

An information for usury upon the statute 13 Eliz. cap. 8.

An information upon the Statute of the 13. of Eliz. 2. cap. 8. for Usury. The case was, the contract was, that he to whom the money was lent, should give such a sum for the Loan of the money, and by this agreement the sum he received ten days after the Loan was more than 10. l. per annum for 100. l. this was adjudged by the whole Court to be an usurious contract ab initio.

For the reparations of a Church, what Land to be charged, and how, and what persons.

As touching the Reparations of a Church, and who were lyable thereunto, this being a question coming in debate before the Judges: it was resolved by the whole Court; that for, and towards the Reparation of a Church, the land of all, as well of Foreiners there inhabiting, as of all others, is liable thereunto, and this is so by the general custom of the place, and this is to be raised, by a rate imposed, according to the value of the land, and that in the nature of a fifteen, and this is not meerly in the realty. Williams, and Yelverton Justices, and Flemming chief Justices, Not the land, but the person of him who occupieth the Land is to be charged. Yelverton Justice, A man is chargeable for reparations of a Church, by reason of the land, and for the Ornaments in the Church, by reason of his coming to Church. Williams Justice, and Flemming chief Justice, If the party have land there, he is chargeable for both, whether he come to Church, or not, for that he may come to the Church if he please.

Odill Plaintiff, against *Tyrrell* Defendant.

A challenge of a Juror for giving of his Verdict beforehand.

Upon a trial at the Bar by a Northamtonshire jury, between Odill Plaintiff, and Tyrrel Defendant, a juror was challenged, for that he said unto one of the parties, provide you to pay, for if I am sworn, I will give my verdict against you, and that this is true, the partie to whom the words were spoken, did offer to depose the same, (if he may be suffered to swear, and whether he should be suffered in this case to swear, to prove this,) he being one of the parties, was the question. Fenner Justice. He may well be sworn in this case, to prove the challenge good, and by the Court he was allowed to be sworn to make good the cause of his

his challenge, which being proved by his Oath, the Triors found him for this cause not to be indifferent, and therefore he was withdrawn. Another juror was challenged in this case, for that he had bought land of one of the parties in the suit, (s) of the Lessor, and that the Lessor did owe to this juror 10 l. notwithstanding this challenge, the Triors found him to be indifferent, otherwise it had been per Curiam, if the juror had owed mony to one of the parties.

What challenge allowable and what not.

Where the Husband and wife are to joyn in an Action, and where not. It was held by the Court, that if a disseisin be made upon the Husband and wife, in the lands of the Wife, in an Action brought for to recover the land again: in this Action the Husband and wife are to joyn, but in an Action of Trespass they may sever. If a man promise to give 100 l. to the wife of I.S. they ought per Curiam, to joyn in an Action for recovery of this. Fleming chief Justice, if a lease be made by Husband and wife, of the land of the wife, rendring rent, in an Action for rent behind, they are both of them to joyn. Yelverton Justice, in the last case they need not to joyn, & so is Markhams opinion in 7 E. 4. fo. 7, 6. that in such a case where the Hus. alone brings the Action for rent behind, it was never questioned, but that this Action, by the Hus. alone, was well brought, but where the same hath been brought in both their names, it hath been questioned, whether this were good, or not.

Where the Husband and Wife ought to joyn in an action to be brought, and where not.

The Lord *Evers* case, and *Strickland*, entred Pasch. 7. *Jac. B. R.* Rot. 405.

A Conveyance was made to Rodolf Evers Knight, Lord Evers, and for to avoid this conveyance, it was alledged, that at the time when this conveyance was so made, he was not cognitus & reputatus per nomen militis, that he was not then a Knight, and whether this shall make void the conveyance, or not, was the question. In this case was cited at the Bar, Mich. 27 E. 3. fo. 85. Fitz. tit. Grants. pla. 67. Where an Abbot, by, and with the assent of his covent, did grant a common in his land, and this Grant was by the name of Richard Abbot, whereas his name was Robert Abbot, this Grant was there held to be good, notwithstanding this misnaming of his Christian-name, by the opinion of the Court, and Perkins in the chapter of Grants, fo. 8. pla. 36. where it is said, that the name of the Grantor is not put in any deed, to any other intent, but only to make a certainty in his Grantor, and in the Grantee. In the principal case, the Judges did all of them clearly agree, that the conveyance so made unto Ralf Evers Knight, Lord Evers, is a good conveyance, and that the plea in Bar to make void the same, is no good plea: for that where a thing is so granted unto one, by such a name, as that he cannot be intended to be another person, this is good, without any Christian-name expressed, & as the case here is, there is but one Lord Evers, and therefore this is certain enough, for that the same doth well constare de persona, & therefore the other addition here of Knight (though false) notwithstanding this, yet this falsitie shall not take away the description of the true person, to whom the conveyance was made, but that he ought to have the same, being here sufficiently expressed by the name of Lord Evers, and therefore, by the opinion of the whole Court, the plea in Bar here is not good, but the conveyance is good, and sufficient to carry the land conveyed unto the Lord Evers, though he were then no Knight, and this was the judgment of the whole Court.

Construction upon a Conveyance. 2 Cr. 240.

Smith Plaintiff, against *Skipwith* Defendant, entred Pasch. 7. *Jac. B. R.* Rot. 653.

IN a Writ of Error to reverse a judgment given in the C.B. in an Action of debt, the Error assigned was, for that no Warrant of Atturney was entred in the suit in such a Term. Williams Justice, it is a crafty course to assign for Error, that there was no Warrant of Atturney entred in a Term certain, this Error assigned is a clear Error, and for this cause, the judgment given is erroneous, and to be reversed, because there was no Warrant of Atturney, and so the Rule of the Court was quod judicium revocetur, but in as much as this was not entred of Record, and for that the entrie of the Warrant of Atturney in another Term was good; a Certiorari was prayed, to inform the Court of all the proceedings, in regard that the judgment for reversal was not entred of Record and the Certiorari prayed only to inform the Court, whether any Warrant of Attorney were entred, or not, and when. Williams Justice, if the appa-

2 Cr. 277. Error that no Warrant of Atturney was entred in such a Term, for this Error judgment reversed.

rance

Before this entred of Record, a Certiorare was prayed and granted *per curiam.*

rance were in this Term, and judgment entred without any warrant of Atturny, the warrant of Atturny may be entred in the next Term following, and this is clearly good. The Judges then said unto the Plaintiff, in the Writ of error, this was your fault and neglect, that the judgment for the reversal was not entred of Record, for if the same had been entred, then this motion had been prevented, but for this omission, a Certiorare was granted by the Rule of the Court.

Anne Bartholomew Administratrix of *Thomas Bartholomew* Plaintiff, against *Savage* Defendant, entred Hill. 7 *Jac. B.R. Rot.* 445.

In an Action of Debt upon a Bond.

IN an action of debt upon a Bond, the case was this, there being an old lease in being, the condition of the Bond was, that Savage the Defendant upon the assignment and giving up of the old lease, should make a new lease for the like term unto the Lessee. In an Action of Debt brought upon the Bond, against Savage, for not performing on his part according to the Condition of the Bond, the Defendant pleads the old lease, and the assignment of this made, &c. but saith nothing at all of the new lease to be made by him, according to the condition of the Bond, the Court agreed this plea to be a good plea, and therefore the Rule of the Court was quod judicium intretur pro querente.

The Lord *Rich* Plaintiff against *Frank*, as Administrator of *Thomas Frank* Defendant entred Hill. 7 *Jac. B.R. Rot* 488.

Judgment *pro quer.*
1 Brown. 56.
2 Cro. 238.
2 Brown. 202.
Plow. 116.

IN an action of debt for Rent behind, against the Defendant, as Administrator of the goods of Thomas Frank his Father, to whom the lease was made, by the Lord Rich, rendring rent. Thomas Frank the Lessee died, Frank the Defendant his Son takes letters of Administration, and for rent incurred in his time the Lord Rich the lessor brought an action of debt; in the debet & detinet, and whether this Action were well brought, being not in the detinet tantum (as was urged it should have been) was the question; Williams Justice. An administrator suffers Rent to be behind in his own time, whether an action of Debt brought for this Rent, ought to be brought in the debet & detinet, or in the detinet tantum; this is the sole matter of substance in this case; the Defendant is here to be charged, in respect of his possession, and not otherwise, but as an Administrator, this action is here well brought in the debet & detinet. Coke 5. pa. fo. 31 in Hargraves case, it was so adjudged in this Court, unto which judgment credit is to be given, till the Record of the Reversal may be seen, and the reasons for which the same judgment was so reversed, & in 7 E. 6. Dyer pla. 82. an action of Debt brought against the Executors of Potter in the debet & detinet, for rent behind, in his own time, and the same there held to be well brought. If the rent be behind in his own time, he shall be chargeable to pay this, de bonis propriis. It is to be observed, that whensoever a man brings an action against one, as Executor or Administrator, this ought to be always brought in the detinet tantum, but this case here now in question, doth vary from all the other cases, for that he is not here charged only as Administrator, but in respect of his possession, and in this respect, he shall be charged de bonis propriis, and for this reason was it so adjudged in Hargraves case in this Court, Mich. 41. and 42. Eliz. And so the action here in this principal case is well brought in the debet, & detinet. Crok Justice accordant, the action here is well brought, and the difference will be this, where he is only charged, as Administrator, or Executor, there the action ought for to be in the detinet tant. but where he is charged, partim, as Administrator, & partim of the occupation of the Land, there the action ought to be brought in the debet & detinet, and he cannot waive the Term, but he may at the first refuse the occupation of the same, and then the charge in the judgment, is de bonis testatoris, so that he may well waive the occupation of the Land, but if he once agrees unto this, by taking of the profits, then he shall be charged, in respect of this his occupation, and in this case, the charge shall

For rent in his time brought in the *debet, & detinet.* Difference where the Defendant is charged only as Administrator, or as Executor, there to be in the *detinet tantum*, and where *partim* as Administrator and *partim* in respect of his occupation of the land, there to be in the *debet & detinet.*

shall be against him, *de bonis testatoris*, if he hath sufficient to make satisfaction, but if not, then *de bonis propriis*, and so in this principal case here the Action is well brought. Flemming chief Justice. The Action here is well brought, and this agreeth with the first Judgment given in Hargraves case. If the intestate dies but one month before the Rent day comes, and his Administrator enters, and occupieth the Land, he shall here be chargable with all the Rent, notwithstanding that he takes nothing of the profits, and the Action to be brought for this, shall be in the *debet & detinet*, this is a case very worthy of good advice, and deliberate consideration. If Lessee for years, rendring yearly 10 l. Rent, dies, if his Executor or Administrator hath not received any more of the profits of the Land than is sufficient for to pay the Rent, in this case, in an Action brought against him, he may well plead against all the world, that he hath no more in his hands, than will serve for to pay his Rent, and this is a good plea, the which Rent being thus reserved, ought in the first place to be paid before all other debts, but he may, if he will, wave the occupation of the Land, and then the same shall be extended for the residue of the Rent, if he have not assets in his hands. Yelverton, at the Bar, this Action is not well brought, in the *debet & detinet*, but the same ought to have been in the *detinet tantum*, for where in an Action of Debt brought against Executors, they are of necessity to be named Executors, there the Writ ought to be in the *detinet tantum*, but where there is no such necessity for to name them Executors, there it is well in the *debet & detinet*. In the principal case here they cannot declare, but upon the Lease made to the Testator, and therefore it ought to have been in the *detinet tantum*. Flemming chief Justice, The ground before is well taken, that where of necessity he is to be named Executor, in an Action brought against him, there the same ought to be brought in the *detinet tantum*, but herein the difference to be observed, will be, where it is in a meer personal thing, which hath his end by the suit, there if in such a case, he is of necessity to be named Executor, there it is true, that the Writ ought to be brought against him, in the *detinet tantum*, but if the same suit be in the realty, and for a real suit, there it is otherwise, and the Writ shall be brought in the *debet & detinet*. And in this Principal case, he hath the occupation of the Land, by reason of which, he is charged with the Rent, which is in the realtie, and so the Writ well brought in the *debet & detinet*, 21 H. 6. fo. 24. Brook tit. Waiver Pla. 9. An Executor of a Term may waive it, and then he shall be discharged of the Rent, and shall not be chargeable for any arrears, *de bonis propriis*, but if he once occupies the Land, he shall be then chargeable, *de bonis testatoris* (if he have any in his hands) and if not, then *de bonis suis propriis*, for an Executor is an assignee in Law of the interest of the Term. Williams Justice, the Writ is here well brought against the Defendant in the *debet & detinet*, and there is no Book against this, but 10 H. 7. fo. 5. where the case was, an Action of Debt brought against one as Executor, and counts that a Lease was made of Lands to the Testator rendring Rent, and for rent behind after the death of the Testator, the Action was brought in the *detinet tantum*. Keble there demands Judgment of the Writ, for that it ought to have been in the *debet & detinet*, is as much as the arrerages were supposed to be behind in the time of the Executor. Fineux there to the contrary, here in this principal case, the Action is well brought in the *debet & detinet*, and Hargraves case was so adjudged in point, but the same was afterwards reversed upon another matter, and for other Reasons. Croke and Fenner Justices, the Action here is well brought in the *debet & detinet*. The Court all agreed in this, and therefore the Rule of the Court was *quod judicium inveretur pro querente*.

Note the difference where the suit is in the personaltie, and for that which is ended by the suit, and where in the realtie.

21 H. 5. fo. 24. Brook tit. Waiver, place 9.

10 H. 7. fo. 5.

Judgment entred for the Plaintiff.

Stacy

Stone Plaint. against *March* Defendant.

In a Writ of Error for to reverse a judgment in the C.B. in a Writ of right, Error because at full age he prosecuted by his prochein amy, and not by his Atturney. What to be assigned for Error, and what not. 2 Cr. 580.

IN a Writ of Error, to reverse a Judgment given in the C. B. in a Writ of Right, and assigns for Error, that the Plaintiff in the Writ of Right, did appear by his prochein amy, and that afterwards he came to his full age, and did prosecute his Suit, and recovered per prochein amy, being of full age, whereas he ought to have appeared in proper person, by Baily, or by Atturney. It was urged by the Counsel at the Bar, that this ought not to be assigned for Error after Judgment given; in 19 the Book of Assises, Pla. 8. it appears, what may be assigned for Error after Judgment, and what not, if it be not such a matter, as being pleaded, would have abated the Action in *facto*, this is not to be assigned for Error after Judgment; in 5 H. 7. fo. 3. in an Action of Trespass, Error was assigned to reverse the Judgment, because that after issue joyned, and before Verdict, the Atturney of the Defendant died at such a place, by the opinion of the Court, this was held to be no Error, for that the Writ did not abate by the death of the Atturney of the Defendant, neither by this is the issue waived or discontinued, for that he may appear by another Atturney, or in his proper person, and the continuance is not between the Atturneys, but between the parties, and so the continuance is not taken by the Atturney, but by the parties. Also a man shall not plead a collateral Error to reverse a Judgment, unless that such a matter (if pleaded before) would have abated the Action in *facto*. Also a man shall not assign for Error, any thing which is contrary to the Record, as an entrie, hanging the suit, nor yet any thing which is contrary to the duty of a Judge, as that he gave Judgment for the Plaintiff, whereas he ought to have given Judgment for the Defendant. Williams Justice, as to the Error assigned, in this case, the Demandant hath the best, and more certain knowledge of his own age, than any other, and when he comes unto his full age then at his peril he ought to enform the Court of his being of full age, and so to have had an Atturney in the place of his prochein amy to prosecute the suit for him, and this omission here makes the proceedings to be erroneous, and this may very well be assigned for Error after Judgment, notwithstanding it did not go, or operate in abatement of the Writ in *facto*, and yet may be at any time alledged for Error, and the Court here cannot have any certain knowledge of his age, without information to them given of the same. Fenner, & Croke Justices, and Flemming chief Justice, without some information given to the Court of his age, the proceedings in Court are Legal, and not Erroneous: and if in such a case the Judgment had been given against him, who in such a manner had made his appearance, and afterwards he would plead this for Error to reverse the Judgment, he cannot by this way avoid the Judgment as Erroneous, and if it be so in such a case, by the same reason, it shall be so where the Judgment is given for him, which appears and prosecutes in such a manner as before, and so this Judgment not reversible without great advice, this being in a Writ of right. Yelverton Justice, the party himself ought to have given notice unto the Court, of his coming to his full age, for as well as he might have knowledge of his non-age, he may as well have knowledge of the time of his full age, but whether this omission in not making of his full age known to the Court, shall make the Judgment to be Erroneous, of this he will be better advised. Flemming chief Justice, If a Feme sole be Demandant, in a Writ of Right, and during the Trial, and before Judgment, She takes a Husband and afterwards Judgment is given for her, as for a Feme sole, without saying any thing of her Husband, the Judgment thus given, is not Erroneous. Yelverton Justice, if in the principal case, this Error assigned should make the Judgment Erroneous, this may be now well assigned for Error, notwithstanding it would not have abated the Writ in *facto*. Fenner Justice, if one appear per prochein amy, being within age, and afterwards, after verdict, and before Judgment, he comes to his full age, and then Judgment is given, this

this shall have relation to the time of the Verdict given, and so the same judgment not Erroneous. Afterwards Termin. Mich. 8. Jac. B.R. this case was debated again and argued by Harris Ser. that the Judgment given was not Erroneous neither was this matter assignable for Error after judgment given, for asmuch as it is but matter of Grace and Favor, but not of Right, the admittance of the Plaintiff being within age, per prochein amy, & per son gardian, and the matter of prochein amy is not issuable, and it rests in the power of the Court, to have a care, for the benefit of the Issue within age, this is not assignable for Error, the Rule of the Law, being, that a man shall never assign that for Error, of the which, he could not have advantage by way of Plea, neither shall a man have any advantage by way of Error, for an Error en fait, where before he might have had benefit of it by way of answer, as appears by the case of Mich. 36. E. 3. Fitz. tit. error pla. 82. where the case is this, en Dette, where an Exigent is awarded, where no *Capias pluries* issued, the Defendant came in upon the Exigent, and pleaded, and upon his plea was condemned, he shall have no advantage of this, by way of Error, because he hath admitted the proces good by his pleading to it, otherwise it is, if the original had bæn bad, for that this cannot be amended, and therefore in such a case, after pleading he may have advantage by way of Error, or by his alledging of this matter before Judgment. An Infant cannot make an Atturney, and therefore he cannot appear by Atturney, and this may at all times after be assigned for Error. Again, this is not Assignable for Error, for that here is a Verdict given and past, and the matter now assigned for Error, is no more but that the Plea is discontinued, and the Verdict aids all this, and that by the Stat. 32 H. 8. cap. 30. of Jeofails, and therefore the Judgment not Erroneous, and prays affirmance of the same. First, because this is not assignable for Error, for that he might have had his plea unto it, and the same is not such a matter in Fact, as would have abated the proceedings in facto. Secondly, this is not assignable for Error, being a thing done against the Office of a Judge, as a Judge. Thirdly, If Error, and assignable, yet the same is but in the nature of a Discontinuance, and so will not hurt after a Verdict, the same being aided by the Stat. of 32 H. 8. cap. 3. of Jeofayls, and so in the giving of this Judgment the Court did not Erre, and the same therefore ought to be affirmed. Flemming chief Justice, and Williams Justice, this is not assignable for Error, for that the Court is not to determin, or to take notice when the Plaintiff there came to his full age, but this ought to have bæn pleaded, and if not pleaded then there is now no time to plead it, and by this Laches, the benefit of this is now lost for ever, also this Writ of Right is a spædy Writ, and so ought to have a spædy end, afterwards Trin. Term. 9 Jac. B. R. Williams Justice, it hath bæn the opinion of the whole Court before, that the Court ought not to take notice when the Plaintiff came to his full age, and the Defendant there hath now surceased his time, this might have been pleaded before Judgment, but not now assignable for Error, and therefore by the Rule of the Court *nullo contradicente*, the Judgment was affirmed, *quod nota*.

Termin. Mich. 8 Jac. B. R. this case argued again.

Admittance prochein amy is matter of grace, not of right. Prochein amy not issuable.

The Rule of Law, not to assign that for Error, of which he could not have any advantage by way of Plea.

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3.

Trin. Term. 9 Jac. B. R. Judgment affirmed per curiam.

Yate Plaintiff, against *Roules* Defendant.

A Writ of Error to reverse a judgment in the C. B. in an action of Covenant entred. Hil. 7. Jac. B.R. Rot. 517. Yel. 177. 2 Brow. 207. 2 Ro. Abr. 22.

IN a Writ of Error to reverse a Judgment given in the C.B. in Action of Covenant there brought by Roules and others Plaintiffs against Yate, upon Covenants between them made in writing, in the which there was wanting the ordinary words of Covenant, the words of the Covenant being these, that is to say, *Conventum, & aggreatum est* bettwæn the parties in *forma sequenti*. That Yate and his Wife to levy a fine unto Roules, and Roules to make a lease to Yate and his Wife, the Error assigned, and insisted upon, because the Plaintiffs did joyn in the Action of Covenant, whereas they ought not to have joyned, the question being, whether in this case, the Covenant were joynt or single. Flemming chief Justice, *conventum, & aggreatum est* between the parties, this is a joynt Covenant, and they all ought,

Question whether the Covenant be joynt, or single.

as here they have done to bring their Action of Covenant joyntly, and so is it adjudged in Slingsbies case, Coke 5. pa. fo. 18. 19. there the words are *convenisset, promisisset, & concessisset ad, &c. cum dictis, &c. & ad &c. cum quolibet & qualibet eorum quod, &c.* and it was there adjudged, that they all ought to joyn, and the Judgment there was reversed, because they did not all of them joyn, the Covenant being joynt, but where their Interests are several, there they may well have several Actions, otherwise not, where the same is joynt, as in this case. Williams Justice; the Covenant here in this Case is a joynt Covenant, and therefore all the parties interested are to joyn in the Action of Covenant, and in their so doing, they did well, and so the Judgment was well given for them, and not Erroneous, and therefore the same ought to be affirmed, and this appears to be so by Mathewsons case, Coke 5 pa. fo. 22. 23. where the words of the Covenant were *Coveniunt separatim, &c. ad performationem omnium & singulorum conventionum, & quilibet mercator separatim obligat seipsum, &* there resolved, that although the Merchants joyn in Covenant (s) *conveniunt separatim*: this word (*separatim*) makes the same to be several Covenants, and not a joynt Covenant; but in the principal case here, there is not the word (*separatim*) but *conventum & aggreatum est* between the parties, and this makes the Covenant to be joynt. Yelverton, Croke, and Fenner Justices, the Covenant in this case is a joynt Covenant, and that they all of them ought to joyn in the Action of Covenant, and they have well done in their so doing, and therefore the Judgment was well given for the Plaintiffs in the C. B. and so to be affirmed. Flemming chief Justice, where there is matter precedent, and apt words to draw several considerations, as in Mathewsons case before, there several Actions of Covenant are to be brought, but otherwise it is where no such matter appears, as in this principal case, and therefore the Covenant here being joynt, the Plaintiffs ought to joyn in the Action of Covenant, and so the Judgment well given for them, and to be affirmed. Fenner Justice, if a man be bound to three, *solvendum*, to one of them, this is joynt, and they ought all of them to joyn in the Action, and so in the principal case here, and so by the Rule of the Court, *affirmatur judicium* for the Defendant in the Writ of Error.

Coveniunt separatim makes the Covenant to be several.

Judgment affirmed per Curiam pro defendente in Error.

Starkey Plaintiff, against *Pool* Defendant.

A Writ of Error to reverse a judgment at Chester in a Quare Impedit entred. Mil. 7. Jac. B. R. Rot. 496.

IN a Writ of Error to reverse a Judgment given at Chester in a Quare Impedit, where the case was this, that Sir Cotton being seised of an Advowson in Fee simple, the Church being full, he grants *præsentationem* to one. *Quandocunq; & quomodocunq; ecclesia vacare contigerit, pro unica vice tantum,* and in this grant there is this clause (s) *Ac insuper voluit & concessit,* that this Grant shall remain in his force, *quousque clericum habilem, & idoneum,* by his presentment shall be admitted, instituted, and induced, and afterwards he grants away the Inheritance of the Advowson in fee simple, the Church becomes void, the Patron presents, the Church becomes void the second time, the Patron presents Pool, and upon a disturbance by Starkey, the Presentee of the Grantee a Quare Impedit brought, and Judgment given for the Plaintiff, and to reverse this Judgment, a Writ of Error brought, wherein the question was whether this grantee not presenting upon the first avoidance, hath not by this his Laches surceased his time, and so lost the benefit of his Grant to present again. Walter, that the Judgment is well given, and to be affirmed. This case consists of two parts. First, What doth pass by this Grant. Secondly, Whether the Clause in the Grant, (*Ac insuper voluit, &c.*) shall enlarge the Grant, or not. First, as touching the Grant of the presentation, *quandocunque & quomodo-*

quomodocunq; ecclesia vacare contigerit, pro unica vice tantum, whether by this grant and the words in the same the Grantee hath a liberty to present when he will, whether he shall be compelled to take the next presentment, when the Church shall first happen to be void after the Grant made, by this Grant he ought to take the next turn when the Church falls first void, and that for this reason. In all cases where the limitation is uncertain, as in this case here it is, there by the Judgment of Law, there ought to be the soonest and speediest Execution of the same as may be, and so it shall be in this case, the Grantee taking the next Presentment, at the first and next avoidance, this may fitly be resembled to the Bish. of Bathes case, Coke 6. par. fo. 34. 35. for where a thing is left to the construction, and consideration of the Law, the Law delights in the effecting and executing of this, in as short and speedy a time as may be. As if a man make a Lease for twenty one years, & no time is limited when the same shall begin, there by the Judgment of Law it shall begin presently, for that every estate ought to take effect as soon as may be; and as touching the Execution of Estates, where the time is left to the operation of Law, the Law respects no time, but the soonest. 2. As to the clause (*Ac insuper voluit*) this clause shall not inlarge the Grant, neither by the intent of the Grantor, nor yet by the Law; not by the intent of the Grantor, for that this clause, by the intent of the Grantor, was only put in to manifest thus much, that the Grant should stand in force until the Clerk of the Grantee presented, be admitted instituted & inducted, & for no other intent whatsoever, & to be in force until the Grantee have presented, & further to manifest, that he ought not to present to the next avoidance, unless that he lawfully might so do. In this case, no assignee shall present, but the Grant shall be good only unto himself, and by his death, the Grant (if not effected) shall be determined. And if the Grant had been, that the presentment should be by him, or by his assigns when he will, there such a grant made, with these general words, shall be void, otherwise, no Laps or usurpation would bar him, the which is against the very nature of an Advowson, for whosoever hath an Advowson, ought to have it, with all that by the Law belongs unto it, and this is to be prejudiced by laps, by him suffered, or by usurpation, and therefore such a general Grant would be void, the same being against the proper nature of an Advowson. Also if a man that hath an Advowson, grants to another one avoidance, but saith nothing of the next, or when he shall have it, by this Grant he hath an interest passed unto him, and all interests ought to be reduced unto a certainty, and that as soon as may be, by the intendment and construction of Law; and further, as to the clause of the Grant, that it shall be in force, until his Clerk be admitted, instituted, and inducted *& quandocunq; & quomodocunque Ecclesia vacare contigerit*, these are but words of Circumlocution, and not of Substance, they are Adverbs, that do supply the diversity of means, and times when the Church shall be void, as first, by death; secondly, by Deprivation; thirdly, by Cession; fourthly, by Resignation, so that the presentment of the Grantee hath reference unto four times, and therefore if a Church be full, and the next avoidance is granted, after the vacancie of the Church by Deprivation of the Incumbent, and after the Incumbent dies, the Grantee shall not present by force of the Grant, for that his time limited, is not as yet come; also those words in the Grant are not of any force, or effect, to give any Election unto the Grantee, to present when he will, but he ought to take the next turn or none, and herein there will be a difference, where the presentment is knit unto one Church, and where unto divers; where unto one Church, as in this case, there no Election, but otherwise where it is to one of divers Churches. Also these three mischiefs would follow, if this Grantee should present, when he will. First, the true Patron could not then certainly know when to present. Secondly, the true Patron should be then disabled, for to make any new grant, by reason of the incertainty of time, when the first Grantee will present; and Thirdly, the Ordinary cannot then tell when to make an enquiry *de jure patronatus*; & if this should be so, the Church might then for ever remain Litigious, for that the Jury cannot make any inquiry *de jure patronatus*, the case in Fitz. Nat. bre. fo. 144. R. where the King is to have *annum*,

A Church may be void by four ways.

Note the difference where the presentment is to one Church, and where to divers.

Three mischiefs would ensue if the Grantee should present when he would.

diem & vastum by his prerogative, the Law hath so confined him, as that he ought to take the benefit of this, presently when it falls, or else he shall lose the same, & if the Law be so in the Kings case, *a fortiori* it shall be so, in the case of a common person, and therefore here in this case, he ought for to present at the next avoidance, or not at all. G. Croke argued on the contrary, in this case the Grantee may present and take his turn when he will, and no mischief at all herein: and it is the Office of a Judge, to make the deed to stand according to the words of it, (if the same may be agreeable to the Rules of Law) if the Grant here had been of the next avoidance, there he ought of necessity to take the next, but here it is not the next, but *quandocunq; & quomodocunq; Ecclesia vacare contigerit, pro unica vice tantum*, and therefore he may take the same presentment when he will, for it is not here said in the Grant, *quando primo vacare contigerit*, but *quandocunq; vacare contigerit*, and the Grantee here is to have the same in as ample and large manner, and liberty, as the Grantor himself had the same, and a difference there will be between Interests and Authorities, and Interest in Land, and therefore if a man grants to another one Crop of his Medow *quandocunq;* he will have the same, this is a good grant, and he may take the same when he will; and so in the principal case here he may take his turn when he will, and no mischief hereby unto any one. Flemming chief Justice, in this case, if it were not in respect that it is in a Writ of Error, it were not worthy of an argument being so clear a case; by this Grant, the Grantee hath an Interest, and not an Authority, and if a man have an Interest, if the same be not vested in him, he cannot grant this over to an other: and cleerly in this case, the Grantee ought to take his presentment by force of the Grant at the next avoidance of the Church. Note that Termin. Mich. 8. Jac. B.R. this cause was moved again and argued by the Judges. Yelverton Justice in this case the Grantee ought of necessity to present at the next avoidance which happens, or not at all. Flemming chief Justice accords that he ought to take the first presentment which happens, and he hath no election to take any other turn but only the first, when the Church became first void, and by his not then presenting, he by his own Laches, and neglect, hath lost the benefit of his Grant, and so the Judgment well given against him, and not Erroneous. Williams Justice of the same opinion, that the Grantee here ought to take the first presentment at the first voydance of the Church, and if it were in the case of the King he could not do otherwise, but in such a case, he ought to take the first which falls void, or none. Croke Justice accordant, that of necessity he ought to take his presentment upon the first avoidance, which happens after the Grant and not any other, nor in any other manner, by force of this Grant made unto him. Flemming chief Justice agrees with Williams Justice, that if it were in the Kings case, he ought to take the next turn which happens, the whole Court accordant in this, that in this case the Grantee ought to take the next turn when it falls, and not to present at any other time when he will, and the words in the Grant, *quandocunq; Ecclesia vacare contigerit*, give him no election or liberty for to present when he will. Williams Justice, the Grantor here Grants *donationem, & præsentationem quandocunq;, & quomodocunq; ecclesia vacare contigerit, pro unica vice tantum*, yet he ought here to take the next presentation, and no other, all which the whole Court agreed cleerly. Flemming chief Justice, as to the latter words of the Grant, that if the Grantee do present, and be disturbed, per eigne Title, or Grants, then this Grant shall remain in force to be taken the next avoidance, but not otherwise: The whole Court agreed in this. Williams Justice, the subsequent words in the Grant, are but only an explanation of the words precedent, and these relate unto the next avoidance, and this is of necessity to be taken, unless it be in the case put of a disturbance; the whole Court accordant in this, *nullo contradicente* that the Grantee ought to take the first which happens to be void, or none, and so the Judgment well given, and by the Rule of the Court, Judgment was affirmed.

Difference between Interests and Authorities and interests in Land.

Termin. Mic. 8. Jac. B.R. the Judges argued this case.

2 Cr. 54.

Judgment affirmed per Curiam.

Sir

Sir John Ratcliff Plaintiff, against *Davis* Defendant.

An Action on the Case, for a Trover and conversion entred. Hil. 7. Jac. B. R. Rot. 1217. 2 Cr. 244. Yel. 178. Noy. 137.

AN Action upon the case for a Trover and conversion was brought by Sir John Ratcliffe against Davis, upon not guilty pleaded, the Jury found a special Verdict, and upon the special Verdict, the case was this, that Sir John Ratcliffe did pawn a Hatband set with Jewels, unto one Whitlock a Goldsmith in Cheapside for 20 l. and no day certain set down for the redeeming of the same again, by payment of the mony; afterwards Whitlock lying on his death bed, in the presence of Davis his neighbour, commanded his wife for to fetch the Hatband, and then delivered the same to the said Davis, wishing him to keep the same safely till the twenty pound were paid, and then to re-deliver the same to the owner, and afterwards makes his Wife his Executrix, and dies. Sir John Ratcliff tenders the twenty pound to the Wife the Executrix, who refuseth to receive the same, after which tender made and refusal, Sir John came unto Davis, and demands his Hatband, he having first tendered the mony to the Executrix, which he borrowed of the Testator, upon the same; Davis refused to deliver it to him, and upon this his refusal Sir John Ratcliff brought his Action upon the case of Trover and conversion. It was moved for Sir John Ratcliff the Plaintiff, that by this tender of the mony to the Wife, and her refusal of the same, this is yet a good redemption in Law of the Pawn, and upon refusal to deliver this by the Bailee, the Action brought against him by the Plaintiff is maintainable: on the part of the Defendant, it was alledged, that he which had the Hatband as a Pawn, had an interest in it, and that this was in Whitlocke the Goldsmith, upon a certain condition, to be redeemed, but that after the death of Whitlock, this is not then to be redeemed, for that the time is past after his death. VWilliams Justice, he may have a Detinue against the one, or the other, for this Hatband, and the denyal to deliver the same, is a conversion in Law, by the Book of 31 E. 3. Executors may redeem a pledge, and this shall be Assets in their hands; and if he which ought for to redeem a Pledge, offers the mony, which is refused, by this tender there is a devesting of the thing pledged, into his hands again, and he may afterwards well maintain an Action for detaining of the same. Yelverton at the Bar for the Defendant, a Pledge cannot be redeemed by any one, but by him which pledged the same, and where there is no time limited for the redeeming of it, he hath only during the life of the party to whom it was pledged for to redeem the same, and he cannot redeem the same after his death, and if this be ajudged otherwise, in this case it will be the first Judgment that ever was given in this Point, and where there is no time limited for to redeem this, there the Law shall set down the time, and then the extreamest, and longest time shall be, during the life of both the parties. As to the Tender unto the Widow, whether this be a good Tender, and a good Redemption, the Pledge being in the hands of a third person, 13 R. 2. fo. 13. Brook tit. Pledges Pla. 31. if a man gage his goods, and afterwards is attainted of felony, yet the King shall not have the goods gaged without paying of the sum for which they were gaged, 20 H. 7. fo. 1. and by Frowik chief Justice in case of a pledge, he to whom the goods are pledged, hath a property in them, for the time they are pledged. VWilliams Justice, a man pawns goods, after he is outlawed during this his oultawry he cannot redeem them, and morgaged goods, if they be not redeemed, they shall not be forfeited by outlawry, and if mony be tendred to redeem, and a refusal be to deliver them, this hath been adjudged to be a conversion, and so in this Principall case, the Tender and refusal makes a conversion, and gives the Plaintiff here a good cause of Action, and the Action by him well brought. Croke Justice, the Action here is well brought by the Plaintiff, if one do pawn, or Morgage goods, and a time certain is limited for the redeeming of them, there the death of any of the parties, shall not be prejudicial, the one way or the other, but

13 R. 2. fo. 13. Brook tit. Pledges pla. 31. 20 H. 7. fo. 1.

but where there is no time limited, there he which pawns the goods hath during his life, to redeem them, and in this case the death of him, to whom the goods were pawned, shall not hinder the Redemption, but if the party which pawned the goods dies before the goods redeemed, no other person may then redæm the goods for him, for this should be a very mischievous case, to compel him to keep the goods thus pawned, for such an infinite time, when as he hath paid sufficiently for them; also a lawful tender doth amount unto a good payment, and a refusal for to deliver them afterwards, is a clear conversion, and in this case here was a good tender, and a refusal, and so a good conversion, and the Action by the Plaintiff well brought. Yelverton Justice, of the same opinion, he which pawns goods, and no time appointed for the redemption, he hath liberty during his life, to tender and redeem them, and the death of the party to whom, shall not hinder the redemption, but if the party himself, which pawned the goods dies before redemption, his Executor cannot redeem, and so the time of redemption is not determined by the death of him to whom the goods were pawned, but by the death of him which pawned the goods; the time of the redemption is determined by this delivery of the Hatband unto Davis, no manner of interest is hereby passed unto him, but notwithstanding all this, the Interest remains still in the Wife the Executrix, and Davis hath only the custody of the same, and the Tender and payment to redeem the same, ought to be made to the Wife the Executrix, she may demand the Debt if she Will, and the other the Pledge, and so the Action here is well brought. Fenner Justice accords in opinion, as to the time of Redemption and liberty to demand the Debt, the Tender here is sufficient, and if the other refuseth to receive the same, he may have the benefit to redæm his Pledge by way of Action, if the same be detained from him after the Tender, but the other hath no remedy for the mony after a Tender, and a refusal of the same; in this case there was a good Tender to a right person, and a refusal of the same, and then a good demand made of the Hatband, and refusal to deliver the same (which refusal makes a good conversion, and so the Plaintiff hath just cause of Action, and the Action is well brought. Fleming chief Justice, there is no great doubt in this case,
1. first, it is to be considered, *quid operatur*, by the pawning of this Hatband, or of any other goods; as to this, he to whom goods are pledged, hath a special property in them until the mony be paid, and he which pawns the goods hath the general property in them; he to whom they were pawned hath a property to detain them until the mony be paid, but without all question, the general property
2. remains in him which pawned the goods, and he is not to lose this his property by the death of the other, but that he may well redeem the same. In the next place, it is to be considered, to whom the mony is to be paid, to redeem the pledge, as to this, the same is to be paid unto the Executor, who is privy to the Contract,
3. and upon a Tender and Refusal, an Action well lieth, otherwise he may refuse perpetually, and in such a case, if a man takes goods as a Pledge, which are *bona peritura*, at his own proper peril, be it, if he cannot re-deliver them again upon the Tender and payment of the mony borrowed of him, he which pledges goods generally, hath during his life time to redæm the same. As to the Action here brought against a third person, admitting that the goods pledged, were not delivered over to any other, and the tender is made to the Wife the Executrix, and she refuseth the same, an Action of the Case for a Trover and conversion lieth upon this re-fusal to deliver the goods after such a Tender, and the possession here of the Hatband, being in a third person, will not alter the Case, for that he hath neither sale, bargain, nor gift made to him of the same, but he hath only a bare delivery thereof, and this only for the safer custody of the same, and to no other intent or purpose whatsoever: but in the same nature, as he himself (who delivered the same over) had it, and this delivery over by him, to Davis, was in *articulo mortis*, and here this remains still a pawn in him to whom the same was pledged; but if he had there said thus unto him, take you those goods which are pawned unto me, give you the mony to my Wife my Executrix, and you shall have the same again of him which owes

the

then Pawn, and pawned the same to me, if this especial matter had been thus found, then it would have been otherwise, and the Tender should then have been to such a Bailey, and such a Tender then to the Executor would not have been good, but it is not so in this principal Case here, and therefore the Tender here was well made, and the refusal, a Conversion, the Debt here is not transferred over unto the Bailey, but only the bare possession of the Pawn delivered to him, and in respect of the possession only, the title in the thing pledged, but this only safely to keep, and therefore the Tender here made to the Wife the Executrix, was well made, and as the same ought to be, and so the Tender well made, and sufficient, and as to that which hath been said, that if he paid the mony to the Wife the Executrix, that he ought to make his claim to the third person, this is not requisite to be done, for that no property was at any time out of the first person to whom the Pawn was made, but when he had made his Tender, and afterwards comes again to him, who had the possession delivered to him, as he ought to do, and tells him, that he had made Tender of the mony which was refused, and prays delivery of the pledge, and he refuseth to deliver the same, this refusal is a Conversion, but yet notwithstanding the refusal of the Executrix to receive the mony, being tendred, the Debt still remains a Debt, and for the which an Action of Debt well lieth, though the mony were refused upon Tender, and the same is not lost, no more than in case of an Obligation, but he ought still to be ever ready to pay the same, and so upon the whole matter, the Action is here well brought by the Plaintiff, and by the Rule of the Court, Judgment was entred for the Plaintiff.

Judgment by the Court for the Plaintiff.

John Walter Plaintiff, against *Edward Bould* Defendant.

A Writ of Error to reverse a judgment C. B. in an action of trespass and ejectment entred. Tr. 5. Jac. B. R. Rot. 922.

IN a Writ of Error to reverse a Judgment given in the Common Bench, in an Ejectione firmæ brought there by Bould against Walter, and upon the general Issue pleaded by the Defendant, the Jury found a special Verdict, the effect of which Verdict was that John Bourcher, Lord Barnes being in debt to King Hen. 8. in 500 l. and seised in fee of the Manor of Haughton, to which the Advowson of the Church of Haughton was appendant 12 Aprilis 5 H. 8. suffers a Common recovery of the said Manor, and this was to the use of himself in fee, and after the Recoverors in performance of certain Covenants contained in certain Indentures of Covenant, dated the 22. of April. 23 H. 8. and made between the said Lord Barnes of the one party, and James Burcher his Son of the other party, by Feoffment bearing date 4 Maij. 24 H. 8. did grant the said Manor to the said James Bourcher, and others, and to their heirs, to the use of the said John for his life, the remainder to the use of the said James, and the heirs of his body issuing, the Reversion to the said Lord Barnes and his heirs for ever: afterwards John Bourcher, Lord Barnes by his Will in writing dated in March. 24 H. 8. deviseth *in hæc verba* as followeth, I humbly intreat the Kings Majesty after the death of the Lady my Wife to accept of the Manor of Haughton and Doxey for the five hundred pound which I do owe his Grace, paying for the premises to my Executors, over and above the said 500 l. so much mony as it shall please his Highness towards the performance of this my last Will, and afterwards 19 Martij 24. H. 8. he died, and 12 Martij. 27 H. 8. the Lady Barnes died, afterwards James Boucher (the Church being then full of one Webbe) 20 Martij 35 H. 8. grants *primam & proximam advocationem al Littleton, & Littleton*, and 20. Februarij 36 H. 8. he grants *primam & proximam advocationem*, to Edward Bould and Philip Bould, and the 20. of February 38 H. 8. dies, having Issue Ralph Bourcher, and afterwards 1 E. 6. the King by his Writ reciting the said Will, commands the Sheriff of the County of Stafford to enquire of the decease of the Lord Barnes, and of Dame Barnes his Wife, and what persons have intruded, and to seise the said

said Mannors into the Kings hands, which Writ was executed accordingly, and then Webbe, the Incumbent, dies, after whose death, Littleton and Littleton present Brett, who was instituted and inducted. Ralf Bourcher the issue in tayl, 14 July 6, E. 6. grants *primam & proximam advocationem* to Edward Bould and Philip Bould the 16. of October 1. and 2 Mar. Ralph Bourcher sues his ouster le maine. Brett demiseth the Rectory *cum pertinentiis* to Humphrey Walter pr 80. ans. Ralph Bourcher 20 Jan. 3. El. and the Ordinary 18 Ja. 4. El. confirms the Lease, afterwards Edward Bould dies, after Brett the Incumbent dies, and Philip Bould the Survivor by force of the second grant of James Bourcher presents Nowel who was instituted and inducted, and 31 Maij. 19 Eliz. dies, and Philip Bould presents Falkoner by reason of the Grant of Ralph Bourcher, who was instituted and inducted. Humphry Walter 9 January 40 Eliz. 2. grants all his estate in the Lease of 80 years to John Walter and Edward Bould as servants unto Falkoner, takes the Tithe Corn, set out by the owners, and John Walter brought the Action, *& si, &c.* and upon this special Verdict, after divers Arguments in the C. B. Judgment was given for the Defendant against Walter, and for to reverse this Judgment, Walter brought his Writ of Error in B. R. Yelverton at the Bar argued for the Plaintiff in the Writ of Error, that the Judgment given in the C. B. is Erroneous, and so to be reversed. The first Error assigned, was in the entry of the Judgment in the C. B. for the entry of the Judgment upon the Roll is, *quod judicium datum fuit die Jovis proxim. post Octa. Sancti Hillar.* and this was the Essoine day, being the day before the Term begins, and so not a day in Court, on which day a Judgment could not be given, there being not there, on that day any Court for to give a Judgment, and so the Judgment then given for this cause is Erroneous. The second Error assigned, was the matter in Law, in which 3 Points are considerable, which were all of them argued in the C. B. The first Point was, when Tenant in Tail grants the next avoidance and dies before the Church becomes void, whether this Grant be determined by his death or not; that it is not, and that for 2. Reasons, First, that this is parcel of the thing intailed, the which may expect a confirmation to be made, and so by this to be made absolutely good; for when Tenant in Tail makes any grant of the thing it self intailed, this grant is not void by his death, for that the same may be made good, the same is only voidable; otherwise it is of a thing granted out of an entailed thing, as of a Rent granted out of Land intailed, this grant is void by the death of the Grantor Tenant in Tail, and the same can never after be made good, and this Advowson here is parcel of the thing intailed, to wit, of the Manor, and the next avoidance is parcel of the Advowson, and so parcel of the thing intailed, and therefore the grant of this by Tenant in Tail is not absolutely void by his death. If Tenant in Tail of a Rent Service, grants this for life, or in Fee, and dyes, the Grant not determined by his death, but determinable only, but if the grant had been here determined by his death, yet in as much as the Jury have found the grant, and that Littleton the Grantee presented Brett, who was admitted, instituted, and inducted upon this presentment, this being a presentment upon a Grant, which was intended to be a lawful presentment, and the Grantee doth not claim any other Title, but present only by force of this Grant, admission and induction is had accordingly, this is no usurpation, for that his presentment doth not operate otherwise than according to his claim, the interest shall be vested in the party according as his claim is. If an Infant purchaseth Land, his Father enters, and claims to hold this as his Gardian, by cause of Nurture, he shall not be adjudged a Disseisor, for by his claim he did not intend to do any wrong, and he shall not be in otherwise than as his claim is. If the King presents to a Church in the right of his Ward, whereas the Ward had no right at all, this shall be taken to be in the right of the Ward, and not by this to make him a usurper, or wrong doer; and so in the principal case here, when the grantee presents here by force of his grant, he shall not be said to present as an usurper, this being against his express claim; and herein the difference will be, where a man doth a thing by force of

Errors assigned. Because judgment was given upon the Essoyn day.

Note the difference where the grant of Testator in tail is void by death, and where but voidable.

Note the difference where the grant is of part of the thing which is intailed, and where not.

Note, the difference where a man acts by force of a void grant, and where voidable.

of a Grant which was void *ab initio*, and when by force of a Grant, the which was good at the first, but afterwards void by matter subsequent, or *ex post facto*; where the Grant is void at the beginning, there a claim by reason of this, will not qualifie the wrong done, but here in this case Littleton presents by force of a Grant which was good at the first, and therefore by this he shall be no usurper, and so the Issue in Tail is not put out of his Patronage, but that he may well confirm the Lease made by Bret unto Walter, and so by this confirmation, the same made a good Lease. The Second Point being *quid operatur*, by this second Grant of the next avoidance unto Bould, and Bould, wherein the question considerable is, when Tenant in Tail grants the next avoidance unto Bould, and dies, and the Issue in Tail afterwads grants the next avoidance of the same Church unto the former Grantee, whether this be not a surrender of the first Grant, as to this, admitting that the first grant was not determined by the death of Tenant in Tail by the taking of the second Grant, the first is by this surrendred, and extinct, for where two present Interests come together under one and the same Title, the first shall be extinct, and determined, as if Lessee for years takes a second Lease, by this the first Lease is surrendred, and extinct, so in this principal Case, if the grant to Bould by the father Tenant in Tail be good, the acceptance of a second Grant by him, from the Issue in Tail, this is a making void of the first Grant. As to the Third Point, which is the great question in this Case, *quid operatur* by the Seisure, by force of the Commission out of the Exchequer, whether this Seisure by the Commission out of Exchequer, being grounded upon a void Will, shall gain any thing to the King, as to this, the King may well take by this Will. The Objection against this is, That the King can take nothing unless the same be recorded, he can take nothing but by matter of Record; As to this it may be Answered, that here the Will is found upon Record, and therefore this is good, and here the Office is only an Office of Instruction, for all the Title of the King appears here in the Commission out of the Court of Exchequer, the same being for to make enquiry of the things devised, and the King may well take by the devise, as appears by the Judgment in the Court of Wards from the time of E. 6. till this day, for upon this very Will now in question, which was made in the time of E. 6. and a seisure was then made by Commission of the Lands devised, and they could never be had out of the Kings hands, and by Stamfords Prærogativa Regis, fo. 79. if a Title appears for the King by Office, or by any other matter of Record, the Officers may seise for the King, when they perceiving his title, and then upon this seisure, the possession of the Land being transferred to the King, then by this the party is put out of possession, and then the Issue in Tail grants the next avoidance when the possession is out of him, this Grant is void; and although the hands of the King were afterwards amoved, yet the Grant shall not be made good by Relation. If a Disseisee be of a Manor to which an Advowson is appendant, Grants the next avoidance and after enters into the Manor, this shall not make the Grant good; so if a Disseisor Enfeoffs A. and B. and makes Livery unto A. A. grants a Rent-Charge, and dies. B. disclaims, this shall vest the Land in the Heir of A. *ab initio* by the Relation, but yet it shall not Relate to make the Grant of the Rent-Charge good, no more shall the Grant of Issue in Tail, made during the possession in the King be made good by Relation, after the Kings possession is amoved by an ouster le main, and so this Judgment here given is Erroneous, and to be reversed. Winch, the Judgment was well given, and to be affirmed. First, Where Tenant in Tail of an Advowson, grants the next Avoidance, and dies, whether this Grant by his death, is determined by the Common Law, the same Grant is void by his death, but now, since the Statute of 32 H. 8. cap. 36. if a Fine be levied of an Advowson, or of other things which lie in Grant by Tenant in Tail, this is not void by the death of Tenant in Tail, but that after Proclamation, the Issue shall be bound by force of the Statute, for by this Statute of 32 H. 8. cap.

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3.

Object.

Resp.

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Stat. 32 H. 8. cap. 36.

36. Tenant in Tail is enabled to alien, the which he was restrained to do before, by the Common Law, for by the Common Law, a Grant made by Tenant in Tail, of things which do lie in Grant, the same is void by his death, unless it be in the case of a fine by him levied; here in this Case, Tenant in tail grants the next avoidance to Littleton, and afterwards grants the next avoidance to Bould, and dies, the Issue in Tail grants the next avoidance unto Bould, Littleton presents Bret, he by this is a usurper, for the Grant was not by fine, and so void by the death of Tenant in Tail, the Grantor, and so by this usurpation the right of estate, is now made a right remediless, for the Tenant in Tail came to this by purchase, and no presentment was had by him, and the six months being past, the Issue in tail hath no remedy to recover the presentment, and Patronage, and so Littleton hath gained the Patronage for ever, and then the Confirmation made by the Issue in Tail of the Lease made by Bret, the Presentee of the Usurper, is void, for that he had nothing in the Patronage, and so when Bret dies, his Lease is void and determined, and then the Lease of Falkoner in the end of the Case will be good. As to that which was alledged, that Littleton should be no usurper, because that he presented by force of the Grant made unto him, to this the Answer may be, that the Presentation is after death of Tenant in Tail who made the Grant, and then he could not present, in right of the Grant made unto him by the Tenant in Tail, for he was then dead, and by his death, the Grant was void, and determined, and he doth not present in the right of the Issue in Tail, and therefore of necessity he must be a Usurper when he presents by force of a void Grant, for he cannot qualifie his own wrong by his Claim. As to the Second Point, Whether the Seisure, by force of the Commission for the King without any title, by a false Office, shall prejudice him, which is in possession, that it shall not, and therefore the difference will be this, if an Office be found by the Escheator, *virtute brevis*, an Entry by this is given to the King, and this shall bind the party until the same be avoided. But otherwise it is, if the Escheator find an Office *ex officio*, *virtute officii*, and without any Writ, and this is false, this shall put no man out of his possession, neither doth the King by this gain any interest at all; as appears, Coke 5. pa. fo. 53. in Pages Case. Thirdly, As to the Error assigned, being the Entry of the Judgment upon the Essoin day, being no Judicial day, and so not good, but Erroneous, as to this, the Judgment was well given, and so not Erroneous, for a Judgment may well be given on any day within the four days, proclamation being made according to the Stat. of 32 H. 8. cap. 36. touching fines, ought to be made after the fourth day, for where these proclamations are made, all Pleas are to cease, which is intended to be after the fourth day, but the four first days are days of grace, but yet the Term begins the first day of these four days, and therefore in 2 R. 3. fo. 15. in a Writ of right, the Tenant comes with his Champion the first day, ready for Battail, the Court ought to admit of this, as if it had been after the fourth day and to give Judgment upon this, as if the same had been on the fourth day or after, so here in this Case, the Judgment being given in this *ejectione firmæ*, upon the Essoin day, is well given, and to be affirmed. Yelverton al Barre, that the Judgment is Erroneous, and to be reversed, agrees that in an Assise, the adjournment ought to be to a special day, but here it is upon a Judicial Writ, and therefore in this the Judgment ought to be given *sedente curia*, as in the Case of a Proclamation upon a fine, the Pleas are to cease, therefore the Court is to be sitting; and as to the Case of Ley gager, it is not material on what day this is. Williams Justice, if a Stranger usurp upon the possession of the King, and his Incumbent makes a Lease, this Lease is good till it be avoided. Flemming chief Justice, if the issue in Tail, during the possession in the King, Grants the next avoidance in Tail, the issue hath Livery by an ouster le maine, and then confirms the Lease made by Bret the Incumbent of Littleton, the Grantee of Tenant in Tail, and afterwards Bould the Grantee of the issue in Tail presents, this doth put the issue in Tail out of possession of the Estate, and yet his Confirmation before doth strengthen the Lease made

Object. Resp.

2. Note the difference where an Office is found by the Escheator *virtute brevis*, and where *ex officio* without any Writ.

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made by Bret. Williams Justice, In this case, *quacunque via data*, there is a Usurpation upon the King. George Crooke, that the Judgment is erroneous, and to be reversed, and that in respect of the time when the judgment was given, the same being out of the Term, and so the Judgment erroneous, and this to be so appears by the Stat. of 32 H. 8. cap. 21. which orders the Returns of Trinity Term, and the beginning of the same Term perpetually, as to the keeping of Essoyns, Profers, Returns, Appearances, and to begin the Munday next after Trinity Sunday, whensoever it shall happen to fall, and that the full Term of Trinity Term shall yearly for ever begin, and take his commencement the Friday next after Corpus Christi day. Williams Justice, the King hath no remedy; if a Usurpation be made upon him after six months past, he hath no remedy, neither by Writ of Right, nor yet by a *Quare Impedit*. If an Advowson be appurtenant to a Manor by the Grant of the Manor *cum pertinentiis*, the Advowson passeth, but by the grant of an Acre of Land parcel of the Manor, *cum pertinentiis*, the Advowson doth not pass. Flemming chief Justice, If Tenant in Tail be of a Manor, to which an Advowson is appendant, the Church being full, and he grants *proximam advocationem*, and then dies, by his death, this grant is merly void, and in this the Court agreed. And so without any further Argument this Case was adjourned, for the Court further to advise upon, and afterwards an end was made between the parties by agreement.

Stat. 32 H. 8. cap. 21 for Trinity Term.

This case ended by agreement between the parties.

Note, That at another time, the question before the Judges was, whether a Judgment given on the Essoin day, be good, or not. Williams Justice, a Judgment may be well given on the Essoin day, and so it was held in a case which was in this Court. Hill. 6 Jac. B. R. Rott. 1341. and Buckly was one of the Parties; also a man may plead any Plea on the Essoin day, and the difference will be between Returns, and the Test of Writs. A Return may be on the Essoin day; a Writ shall not abate, if the Return be, *quarto die post*. In an Assise between the parties not demandable before *quarto die post*, as appears in 12 H. 4 fo. 24 pla. 10. The question may be, to what day a Judgment given in full Term shall have relation, whether to the Essoin day, or to the day in full Term. Flemming chief Justice, If it be not in a Writ of Right, no man is demandable before *quarto die post*; by intendment of Law, all the Judges ought to be there ready in Court the first day, and so they used to do in ancient time, and so the Case of Inspection of an Enfant taken in Court by Croke Justice on the Essoin day, was adjudged good, the which was one Poynes Case, who was by him suspected, and the Judgment upon the suspection by him given upon the Essoin day, was ruled by us all to be a Judgment well given, and this proves that a Judgment given in full Term, shall have Relation to the first day, that is, to the Essoin day; by our affirmance of the said Judgment, upon the inspection, which could not be good, if it related not to this time, and therefore he held such a Judgment given upon the Essoin day, to be a good Judgment, and well given, and that the Judgment shall relate to the first day; the Defendant is not demandable before the *quarto die post*, but he may appear if he will, the first day, and Judgment shall be then given, but no Judgment shall be given upon his default, before the *quarto die post*. It hath been the general opinion of all the Lawyers, and Practisers in the Town, that a Judgment cannot be given upon the Essoin day, nor yet to have Relation to the first day, being given in the full Term, but he would have them all to know, that in this, they are all of them in an Error, and as to the Relation of a Judgment given in full Term unto the first day, the Essoin day, which is the Essential day of the Term, and the other days are but days of grace, and to prove this, there is a notable case in 22 E. 4. Fitz. tit. Jour. pla. 39. where it is said, where a Judgment is given upon a default in any Record, *quarto die* is the day, and this is the day of Grace, before which day, no default was to be recorded, and so is the entry, *obtulit se quarto die*, but where Judgment is given upon appearance, there the entrance is *ad quam quidem diem*, and there the Judgment hath relation to the first day, and is a Judg-

Whether a Judgment given on the Essoin day be good or not. 2 Cr. 243.

Difference between returns and the Test of writs.

To what day a judgment in full term shall relate.

Poynes Case. 2 Cr. 230.

Adjudgment given upon the Essoyn day well given.

ment given by appearance. Croke Justice, If a man be bound to appear the first day of the Term in Court, he may appear the first day of the Essoyn, and then have his appearance recorded, and this is good, and this case was agreed for good Law, by the whole Court, and so the Court did all agree in this clearly, *nullo contradicente*; that Judgment may be well given on the Essoin day, and that a Judgment given in the full Term, shall have relation to the first day of the Term, *quod nota.*

Hastings Plaintiff, against *Beamount* Defendant.

Hastings Plain. against *Beamount* Defend. in an action upon the case for words.

IN an Action upon the Case for slanderous words spoken by the Defendant of the Plaintiff, being then a Justice of the Peace, the words were these, you, meaning the Plaintiff, out of malice and spleen, have perverted Justice, and have wrested the Law many times for to serve your own turn, Upon not guilty pleaded, the Jury found for the Plaintiff, the Defendant moved in Arrest of Judgment, that the words will not bear an Action, for that it shall be intended the words were spoken, before he was a Justice of Peace, and so not Actionable. Williams Justice, if these words will not bear an Action, none will, they are clearly scandalous, and that in a very high degree, and so actionable; it is here laid in the Declaration, that the Plaintiff, Hastings, of whom the words were spoken, was a Justice of the Peace, and that then, *ad tunc*, the Defendant did speak the words of him, upon which the Action was brought. The whole Court was clear of opinion that the words are clearly actionable, and shall be intended to be spoken of him, when he was a Justice of Peace, and so then, he was a person able to pervert Justice, and not to be intended, as the Counsel of the Defendant would have it, that the words were spoken before he was a Justice of the Peace, the Declaration it self being otherwise, and therefore by the Rule of the Court Judgment was entred for the Plaintiff.

2 Cr. 56, 58, 90.

Judgment given for the Plaintiff.

Fountain Plaintiff against *Grymes* Defendant.

Fountain Pl. against *Grymes* Defen. entred Mich. 7 Jac. B. R. Rot. 197.
2 Cr. 252.
Stat. 37 H. 8. cap. 9. & 13. El. 2. cap. 8. against a Jury.

FOuntain Plaintiff against Grymes Defendant, in an Action of Debt upon a Bond for 100 l. the Defendant in avoidance of this, pleads the Statute of usury, and upon the Statute of 37 H. 8. cap. 9. and of 13 Eliz. cap. 8. against usury, the case was this. The Defendant comes to the Plaintiff to borrow mony, there was communication between them of borrowing, and lending, 100 l. the Plaintiff refused to lend him any mony upon Interest, but said he should have a 100 l. if he would enter into a Bond, conditioned for the payment of 20 l. a year unto him, by way of an Annuity, and this payment so to continue for three lives without any provision, or mention at all made for the repayment unto him of the 100 l. principal mony. The question was, whether this case be within the Statute of usury, to make this Bond void or not. It was objected, that such a communication, and the lending of 100 l. thereupon was within the Statute made against Usury, and against Corrupt, and Usurious Contracts and agreements, notwithstanding there was no certain agreement, to have any repayment made of the principal 100 l. to him again, and though the same were never paid, yet the same should be within the Statute, for that this was only a trick, and a shift, to avoid and defeat the Statute, the which by this means is not to be defeated, and it shall be said to be Usury, and within the Statute, by reason of the one parties coming to borrow mony, and upon the others offering to lend mony upon this corrupt communication, this is therefore a corrupt Annuity contracted, and agreed to be yearly paid, for this 100 l. upon this corrupt communication, and agreement to borrow, and lend 100 l. in this manner, and this is within the Statute, though the 100 l. were never paid again, and so, (as it was urged) it hath

been

been adjudged here in this Court before. But by Williams, Yelverton, and Fenner Judges, this is no corruption nor usury within the Statute of Usury, the same being only a contract bargain, and agreement, for a yearly Annuity for a certain time, and for a sum of mony; but otherwise it would have been, if there had been any provision made for the repayment of the said 100 l. unto him within any certain time, and in the mean time the yearly payment of the 20 l. Annuity to continue, this had been clearly a usurious agreement, and lending within the Statute. But this case is not so, and therefore not within the Statute, and the action being brought by the Plaintiff upon the Bond, against the Defendant, for not paying of the said Annuity, is well brought, and so by the Rule of the Court, Judgment was entred for the Plaintiff.

Judgment for the Plaint.

Barker Plaintiff, against ——— Defendant.

IN a Writ of Error to reverse a Judgment given in the C. B. for to reverse the Judgment, this was alledged for Error, that at the time of the Judgment given, the party against whom Judgment was given, was then an Infant, and within age, and so the Judgment given against him was Erroneous, *& hoc paratus est verificare, prout curia vult*, it was urged, that this was no cause to reverse the Judgment, for that by this their plea, the matter is put into the notice, and Judgment of the Court, of which the Court can take no Conusans; and by the Book of 24 E. 3 where it is Adjudged, that the Court is not to take inspection of the age, but where the party is of full age, and not where he is within age. And as to the Allegation, that he was within age at the time of the Judgment given, *& hoc paratus est verificare, prout curia vult*, and to this the other pleads in *Nullo est erratum* by the Court, this is a good Plea, for it lieth not in the breast of the Court to know whether he be within age; but if he had concluded, *& hoc paratus est verificare* only, this had been good and traversable, and to be tryed by the Country, so by the Rule of the Court Judgment was affirmed.

Barker Plaint. against ——— in a Writ of Error for to reverse a judgment given in the C. B.

Judgment affirmed by the Rule of the Court.

Lynker Plaintiff, against *Stanwel* Defendant.

IN a Writ of Error to reverse a Judgment given in the C. B. in an Action upon the case for words, the words were these, spoken by the Defendant there of the Plaintiff. Thief, Murderer, Bloodsucker, Villein, Rogue, and Banckrupt; upon not guilty pleaded, a Verdict was found for the Plaintiff, and damages given. Judgment upon this given for the Plaintiff, and a Writ of Error brought for to reverse this Judgment; the Error assigned, and insisted upon, was this, for that there were divers words spoken, some of which were actionable, and some of them not, and the Jury have given entire damages for all the words in general, and therefore not good, and so the Judgment given according to this Verdict, is Erroneous, and so to be reversed; the whole Court agreed in this, that some of the words are Actionable, and some of them not so, and that the damages given by the Jury in general, shall be said to be given for the words which are Actionable, and not for the other words, and so the Judgment well given, and so by the Rule of the Court, Judgment was affirmed.

A Writ of Error to reverse a judgment in the C B. in an action upon the case for words entred Trin. 7 Jac. B. B. Rot. 1617.

Judgment affirmed per curiam.

Ascot Plaintiff, against *Hender* and *Molsworth* Defendants.

A Writ of Error to reverse a judgment in the C. B. in Wast entred, Trin. 7 Jac. B.R. Rot. 1113.

IN a Writ of Error to reverse a Judgment given in the C. B. in an Action of Wast, where the Plaintiff in the Action of Wast did assigne the Wast to be done

done in a Parlour, a Hall, Kitchin, and a Smiths Shop, upon the pleading of no Wast made, the Jury found for the Plaintiff, that the Wast was done in these places assigned in the Inquisition, and also in a Dovehouse, not named, nor assigned by the party Plaintiff in the Inquisition, and did give damages for the whole, and the Judgment given accordingly, and so in this Erroneous, and this assigned for Error to reverse the Judgment, and the Book of 2 H. 6. was cited where in an Action of Trespass the Plaintiff counts of damages done him, to the value of 10 l. the Jury found for the Plaintiff, and gave 15 l. damages, and Judgment given accordingly for the 15 l. it is there said, that he shall have no more by his recovery than he found himself to be grieved for, so in this case here in finding of the Jury, and Judgment given to recover damages for the wast done, in a place not assigned by the Plaintiff, the Judgment for this cause is herein Erroneous, and therefore they having exceeded their Authority, and the directions given them by the inquisition, as touching the finding by the Waste, and the Jury having found the Wast done in the places by the Plaintiff assigned, and in another place also not assigned, and they giving of damages for all, and the Judgment so given accordingly, this is Erroneous, and so to be reversed. The Court clear of opinion, that this finding by the Jury, and judgment given for damages in the Wast done in the Dovehouse, and the same not assigned by the Plaintiff, as to this part the Court clear of opinion, that the judgment is Erroneous, and so by the Rule of the Court, as to this part, the judgment was reversed.

The Jury give damage for Wast done in places assigned, and also for Wast done in a place not assigned by the Plaintiff in this Erroneous.

Judgment reversed by the Rule of the Court, for that part where the Wast was not assigned.

Wolverton and his Wife Plaintiff, against *Davis* Defendant.

Wolverton and his Wife Plaintiff against *Davis* Defendant, in an action upon the Case for a promise, entred Trin. 7 Jac. B. R. Rot. 1196.

IN an Action upon the Case for a Promise, and the Case appeared to be this: The Defendant in consideration of a 100 l. to be paid unto him by the Plaintiff, did assume and promise to enfeoff him of certain Lands, upon request made by him, the 100 l. is paid accordingly by the Plaintiff to the Defendant, and a request made by him to the Defendant to enfeoff him of the Lands according to his promise, but he refused to make the Feoffment, and upon this the Plaintiff brings his Action upon the Case for breach of promise. The Defendants pleads that he had enfeoffed him of the Land, before the Action brought, and that the Plaintiff had accepted thereof in full satisfaction, and discharge of all, and yet contrary to his own acceptance he hath brought this Action, and so he demands the judgment of the Court, by his Counsel, whether this his acceptance of the Feoffment did not go in full discharge of all. Williams Justice, the acceptance is in full discharge of the damages which he was only for to recover in this Action, and if a wrong be done to another, as by taking of his Horse, after the delivery of his Horse again to him, and acceptance of him by the party, from whom the Horse was taken, notwithstanding this taking of his Horse again in this manner, yet an action for the wrongful taking away of his Horse, doth remain unto him. Yelverton Justice, if in this Case he performes not his promise, he can for this recover nothing but damages, and if afterwards he enfeoffs him in consideration of the damages, and he accepteth thereof, this now is in full discharge of the damages, this being so done, performed, and accepted of by their mutual agreement, here in this case, the Plaintiff by the not performance of the promise by the Defendant, in making of the Feoffment upon request, hath his Election, either to bring his Action, for to recover his damages, for breach of Promise, or else for to accept of the Feoffment in discharge of the damages, the which he hath here accepted of, and this in all likelihood, a better bargain for him, than the damages would have been, for he ought not to have both the Land and damages also; and it is here laid in the Bar, that he had accepted of the Feoffment in discharge of the damages, and this the party Plaintiff

Post. 88. 89.

tiff could not deny, and therefore if one doth promise to assure unto another certain Land, at Michaelmas next coming, and at the time he doth not make an assurance according to his promise, for this breach of promise the party may well have his Action, and recover damages, but if afterwards upon conference had between themselves, it is agreed that if the assurance be made, he will take no benefit by way of Action for the first breach, if the assurance be made according to this subsequent agreement, this is good, and the other cannot have any Action for the first breach, the same being discharged by the subsequent performance, by the latter agreement, and so it shall be here in this principal case; but where it is in a Case of Debt, upon an Obligation, there ought to be such a Discharge, as may amount unto a full discharge of the Action it self, or else it shall not be good; but where it is not in Debt, as in this principal Case, there a good and sufficient discharge may be of the Action, by such agreement as is here set forth in this Case, the Action being only for to recover damages for the breach of a promise. Flemming chief Justice, If in this principal case the Plaintiff had not accepted of this Feoffment, by the subsequent agreement in full discharge of all, of the Action accrued unto him, and of the damages for the breach of promise, the same had not then been discharged by the sole and bare acceptance of the Feoffment, after the breach, but this acceptance, as it is in this Case, shall not only be a qualification of the damages, but as the case here is, the same subsequent acceptance of the Feoffment, is a good discharge of the damages. Croke Justice, by this acceptance of the Feoffment, by the Plaint. from the Defendant, the Action for the recovery of damages is clearly discharged. Williams Justice, where a promise is made to Husband and Wife, the Husband alone may very well discharge the same, and that by word, as it hath been adjudged. Fenner Justice, this acceptance of the Feoffment by the Plaintiff is a clear discharge of the damages, and so by the Rule of the Court Judgment was given for the Defendant, that this acceptance of the Feoffment shall operate and enure as a full and plenary satisfaction, and discharge of all the damages which were to have been recovered, in and by the said Action, and therefore the judgment of the Court was *quod querens Nil capiat per Billam*

Judgment by the Court for the Defendant, *quod querens nil capiat per Billam.*

Dale Plaintiff, against *Copping* Defendant.

IN an Action upon the Case for a promise, the Case was this, the Defendant did promise to pay such a sum of mony to the Plaintiff for a Cure, in consideration that he would cure him of the Falling-sickness, he promised to give him so much, and says in fact that accordingly, he had cured him, and for not payment of the mony, according to his promise the Plaintiff brought his Action. The Defendant pleads this in Bar, that at the time of the promise made, he was within age, and so demands Judgment of the Court, whether the Plaintiff shall have this Action against him. Williams Justice, clearly the Action well lieth against the Defendant, and this non-age by him alledged at the time of the promise made, is not material, for that this shall be taken as a contract, and that to be for a thing in the nature of necessity to be done for him, and the same as necessary as if it had been a promise by him made for his Meat, Drink, or Apparel, and in all such cases his promise is good, and shall bind him, although he were within age at the time of his promise by him made for such necessaries, and his nonage not at all material, and so in this case, here his promise shall as well bind him, as in the other cases, the reason of the Law being the same, and this Cure being of as great necessity for him, as any of the other, and so the Court clear of opinion that the Action was well brought by the Plaintiff, but they would not overrule the same, but left it to the Plaintiff to demur in Law unto this plea of the Defendant. Williams Justice, there is no Book case in this, the Court declared their Opinions, that the Plea in Bar of the Defendant was not good, but no judgment was given in this case for the Plaintiff, because there was no demurrer by him to the Plea, the parties

Dale Plaintiff against *Copping* Defendant An action upon the case for a promise against an Infant to pay mony for curing him of the falling sickness, this shall bind him.

The opinion of the Court for the Plaintiff ended by agreement.

parties perceiving the opinion of the Court, the same was ended between them by agreement.

Smale Plaintiff, against *Hammon* Defendant.

Smale Plaintiff against *Hammon* Defend. An action up on the Case for words.

IN an Action upon the Case for slanderous words spoken by the Defendant of the Plaintiff, the words were these, Thou wert for sworn, and I can prove thee forsworn when I will, upon not guilty pleaded, a Verdict for the Plaintiff, and damages moved in arrest of judgment, that the words are not actionable. Williams Justice, this Rule is to be observed, as touching words which are Actionable, that is to say, where the words spoken do tend to the infamy, discredit, or disgrace of the party, there the words shall be actionable, and this Rule was affirmed by the Court, and in this principal Case the words are actionable, and judgment given for the Plaintiff, *per curiam.*

Judgment given for the Plaintiff.

An action upon the Case for Words.

An action upon the case for words, Thou wert in the Goal for robbing such a one the high-way.

IN an Action upon the case brought for slanderous words spoken by the Defendant of the Plaintiff, upon not guilty pleaded, a Verdict was found for the Plaintiff, The words were these, spoken of the Plaintiff, and to himself. Thou wert in the Goal for robbing of such a one in the high-way. It was moved in arrest of Judgment that these words are not actionable. Williams Justice, these words are scandalous, and so clearly actionable. Yelverton Justice, *è contra*, that they are not actionable, and to this purpose there was this case in the C. B. in an Action upon the Case for words, the words were, Thou were arraigned for felony, for stealing of a Horse, (and by Verdict, he was acquitted) it was there adjudged that these words were not actionable. Williams Justice, there was this Case in this Court for Words, being Thou wert in the Goal for stealing of a Pan, it was adjudged here in this Court, that the Action well lay, for these words. Croke Justice agreed herein. Fenner Justice, if one saith of another, thou art as very a Thief as any is in Warwick Goal, none being then there in prison, these words are not actionable, but otherwise it had been, if a Felon had been there in prison at that time, and so hath it been here ruled. Note, that in the principal Case, the Court differing in opinion, gave directions to have a search made for presidents in this Case.

An Action upon the Case for Words.

Action upon the case for words, being a beggarly Gentman and a Bankrupt spoke of a Grasier. Judgment given for the Plaintiff.

IN an Action upon the Case for words, for calling of the Plaintiff a Beggarly Gentleman, and a Bankrupt, and said he used the Trade of a Grasier, and hath gained his wealth by this means. Ruled by the Court, that these words are scandalous, and well Actionable, and this Rule was observed by the Court, that where one is called a Bankrupt, if he were of no Trade, he could not then be a Bankrupt, and then by consequence, such words spoken of him, or to him, are not Actionable; but here in this case it is laid that he did use the Trade of buying and selling as a Grasier, and therefore the words are Actionable, and the Action by the Plaintiff well brought, and therefore by the Rule of the Court, Judgment was given for the Plaintiff, and Mich. 8 Jac. B.R. the like Judgment given by the Court for the like words.

Cokain Plaintiff, against *Goodlage* Defendant.

Cokain Plain. against *Goodlage* Defendant in an action of debt upon Apprentices Bond entred. Pas. 8. Jac. B.R. Rot. 204. Hob. 217. 91.

IN an Action of Debt upon an Obligation, upon an Apprentises Bond, the Case was this, Goodlage did bind his Son as an Apprentice with Cokain, and did enter into a Bond, conditioned that his Son should make and render to

Cokain

Cokain his Master a good and just account *de omnibus bonis, monetis & mercenariis*, without the imbezeling, or making any away, & that if he did imbezel any thing upon due proof made of this, he would pay the same to him within three months after demand, upon due proof made thereof; upon this Bond the Plaintiff brought his Action, the Defendant pleaded, that his Prentice had imbezeled nothing, and that no proof was made against him, for any thing, nor any notice to him given of this, nor any demand made. The doubt in this Case was, touching the manner of the proof, and what proof this should be. Flemming chief Justice, before the payment here to be made, there ought to preceed an accompt, and upon this accompt, Arrerages to be found, and in this accompt the proof ought to be made, and he cannot be found to be in Arrerages, but by proof made, and where there is a certain time limited for payment of the mony after proof made, there the proof ought to preceed the payment, so here in this principal Case he ought to make his proof before, and to give notice of this to the Defendant, before his Action brought, the which he ought not here to have brought before the three months ended, according to the condition of the Bond, and so the Action not well brought, being before his time. Williams Justice, and the whole Court agreed in this clearly, *& quod querens nil capiat per Billam.*

1 Ro. 2, 222, 261.
3 Bul. 55.
Mo. 345, 888
2 Ro. 595.
2 Cr. 381.

Judgment Quod querens Nil capiat per Billam.

Baker Plaintiff, against *Jacob* Defendant.

IN an Action upon the Case for a promise of forbearance, the Case was this, The Defendant in consideration that the Plaintiff would forbear him, *pro aliquo parvo tempore, videlicet*, for a fortnight, or there abouts, he did assume and promise then to pay him, and for not performance of his promise, the Plaintiff brought his Action, and shews in his Declaration, that he had forborn him two years, and yet he hath not paid him: Upon Non assumpsit pleaded, a Verdict was given for the Plaintiff. It was moved for the Defendant in arrest of judgment, that the Declaration is not good, because there is no good consideration laid in the same, to maintain the Action, the consideration laid, being, that in consideration that he would forbear him, *pro parvo tempore*, this time of the forbearance being the consideration, and ground of the Action, is altogether uncertain, and so void, and no good consideration; in consideration that he would forbear him, *pro aliquo parvo tempore*, this hath been adjudged to be no good consideration in Law for to ground an Action upon. Yelverton Justice, the Videlicet here hath well explained the matter, *pro aliquo parvo tempore*, Videlicet, or Anglice, for some small time, that is to say, for a fortnight; if he had said, forbear a while, and names one day, this had been good, here it appears, that he had forborn him two years, *per satium*, of two weeks, *& duorum annorum.* Flemming chief Justice, forbear a little time, that is to say, a fortnight, and the Plaintiff says the truth of his Case, that he hath forborn him this time, and more (that is to say, two years) this is sufficient, and a good consideration and certain enough. Yelverton Justice, if it had been in consideration, that you will forbear me a small time, and I will pay you, and the Plaintiff shews in his Declaration, that he had forborn him a fortnight, this had not been good clearly, because that no certain consideration is here laid, for the incertainty of the time of forbearance, and the same being without any words of explanation; but if it had been, as it is here with a Videlicet, for such a time certain, this had been good clearly: another exception was taken because the Action was brought against an Executor, and it is not averred in the Declaration that he hath Assets, and therefore for this omission, the Declaration is not good. The whole Court disallowed of this exception, for that, as the Court agreed, it is not requisite for the Plaintiff to shew this in his Declaration, for that this ought not to be averred by him, and so the opinion of the whole Coure clearly was, that the Declaration was good, and the consideration well, and certainly laid, and by the rule of the Court, judgment was given for the Plaintiff.

An action upon the Case for a promise grounded on a consideration of forbearance, Pro aliquo parvo tempore (s) a fortnight
1 Cr. 19.
2 Cr. 250, 397, 505, 683.
3 Cr. 241.
2 Mo. 853 4.
2 Sid. 45, 38, 396, 369.
The Verdict in right hath well explained the matter and made the consideration to be certain.
Co. 91, 92.
Hob. 216. 18.

Sid. 369.

Judgment for the Plaintiff by the Court.

Eyliff Plaintiff against *Chopley* Defendant.

In Trespass & ejectment Case of a devise by a Copiholder to his two Sons. 2 Cr. 259. Yel. 183. 1 Brownl. 147.

IN an Action of Trespass and Ejectment, The Case was this, a Copiholder deviseth his Copihold Land to J. and R. his two Sons, and to the Heirs of their two Bodies begotten, and Wills, that each of them shall enter at their several ages of twenty one years, and that his Executors shall take the profits of the Land, until they come to their several ages of twenty one years, J. comes to his full age, enters and seals an Ejectment Lease. The question was, whether the Executors shall hold the Land until R. also comes to his full age, and what Estate this shall be in them. It was urged that they were not to enter, until they had severally attained to their several ages of 21 years. Williams Justice, First, this is clearly a joint Estate in them, and you cannot make this to be several, for this should be repugnant to the Premises; they have here a joynt estate for their Lives, and several inheritances, and it may be, the Will cannot be performed before the full age of both of them. Yelverton Justice, if Lands be given unto two, provided that one of them shall not take any of the profits, this is a void Proviso, and repugnant. Flemming chief Justice, Marshal the beginning of the Will, with the latter part of it, as the devise to his two Sons, and wills, that his Executors shall take the profits of the Land, until they shall accomplish their several ages of twenty one years, and that afterwards they shall have the Land joyntly, and to the Heirs of their two Bodies, this is a clear and plain Case, that both of them ought to be of full age, before they ought to have the Land. Fenner Justice, if a man gives Land unto one, in the beginning of his Will, and in the latter part of the same Will, he gives the Land to another, this is a good devise to the last man. Williams Justice denied this, but it shall be altogether void, for the uncertainty which of them was to have it. Flemming chief Justice, you cannot here in this Case, by any intendment destroy the devise made to the Executors, and the Sons are not to have the Land to them devised, until their several ages of 21 years, and this is a plain Case. Williams Justice, the Sons here by this will, have the Land in Joynture, and there is no way for to frustrate, and destroy the devise made to the Executors, but they by this Will, are to hold the Land until the full age of 21 years of both the Sons. Yelverton Justice, this Will shall be construed *distributive posito*, that one of them be two years old, and the other ten. Fenner Justice, they are Joyntenants still. Croke Justice, they are as distinct persons, when they shall come to their several ages, they shall then have this Land, and this is the true meaning of the Will. Williams Justice, there is some repugnancy in this Will, the devise is to his two Sons, and to the Heirs of their bodies, and that his Executors shall take the Profits, until they come to their several ages of 21 years, they are not to have the same till they come to their several ages of 21 years. Yelverton Justice, if Copihold land doth descend unto one, he may well make a lease before admittance, and the possession of a Termor for years, is the possession of him in the Remainder, and he in the Remainder may make a Lease before his admittance, and the admittance of his Termor shall be good enough to this purpose for him in the remainder. Fenner Justice, agreed with him in this, and that there may be a *possessio fratris* of a Copyhold Estate upon a discent before admittance, as appears, Coke 4. pa. fo. 23. 6. in Clarke and Pennisethers Case, and a Copiholder may have an Action of Trespass, and may take the profits of the Copihold Lands upon a discent to him before admittance, the Court agreed in this, and that in this principal Case, the two Sons of the Copiholder cannot have the profits of the Lands to them devised, until they do both of them come to their ages of 21. years, but the Executors are by the Will to have the same in the mean time, to perform the Will, and so the opinion and Judgment of the Court was against the Lessee of the first Son, coming to his full age.

Coke 4. pa. fo. 23. 6. in Clark and Pennisethers Case.

Judgment by the Court against the Plaintiff.

Westly

Westley Plaintiff, against *Brown* Defendant.

IN an Action of Debt, The Case was this, A. was Bail for Brown, in Debt, at the Suit of Westley, the money not paid, A. the Bail is taken in Execution for the Debt, the Principal, Brown obscures himself: upon a motion for the Bail, by the Rule of the Court, it was ordered that the Marshals man should take Brown the principal Debtor, (he absenting of himself in Stratford for A. the Bail, who was before taken in Execution, and the Marshal's man accordingly did take Brown the Principal,) but he said, that the Plaintiff, some three hours before, was with Brown the principal Debtor, and did then give him notice of the Rule of the Court, and did then advise him to absent himself, and that if he would so do, the money should be then levied upon the Bail, who was taken, and in execution for the same, but yet the Marshal's man did take him, and afterwards the Plaintiff did write to the Marshal's man for to let the said Brown the Defendant and the principal, *ire ad Largum*, and that he would secure him, and charge the Bail with the Debt, all this was averred, and made good by Oath to the Court. Williams Justice, this execution against the Bail, when he hath taken the Defendant the principal Debtor, this now is no such execution against the Bail, as shall any ways hurt him, but he is to be discharged, and by the whole Court clearly, the Plaintiff can have no remedy against the Bail, when he hath once taken the principal in execution, but the Bail ought to be discharged; and in this principal Case there appears to be a practice between the Plaintiff and the principal Debtor, to charge the Bail with the Debt, and to free and discharge the Principal, and this upon examination appearing fully to the Court, by Oath therefore by the Rule of the Court, the Bail was discharged, and the Principal to remain in execution for satisfaction of the Debt.

Westly Plaint. against Brown and a Bail. Bail discharged, where the Principal is taken in execution.

The Plaint. by practice with the principal would charge the Bail and free the Principal.

The Bail discharged by the Court.

Luther Plaintiff, against *Sanders* Defendant.

THe Case was this, In a *scire facias ad audiendum errores*, brought by the Plaintiff as Heir, a Diminution was pleaded, and afterwards averred by way of Plea, that the Father of the party was then in life, and living at York; it was moved, that this matter was not to be pleaded after Diminution. The whole Court clear of opinion, that this may at any time be pleaded, and that this is a good Plea, and the life may very well be averred to be in any place, where he will, and by the Rule of the Court, an indifferent County was named for the Trial of this; and in Dower, or appeal, the life of the Husband, or of the party killed may well be averred in any place, by the opinion of the whole Court.

A scire facias ad audiendum Errores entred Pasch. 8 Jac. B.R. Rot. 536.

A Plea after Diminution alledged.

Stone Plaintiff, against *Bliss* Defendant.

IN an Action of Debt upon a Bond. The Condition was this, that if the Defendant did pay unto the Plaintiff all such Legacies, and Gifts, the which he had given him, and when he should come to his full age, that then the Obligation should be void. In an Action of Debt brought against the Defendant upon this Bond, he pleads to the same in this manner, That he hath paid *omnia talia legata qualia ad tale tempus* generally, and without shewing in particular and in certain the time when, nor yet what the Legacies were, all which ought to have been shewed certainly, and therefore the plea is not good, but void for this incertainty. Williams Justice, he ought to have shewed this in certain in his Plea, what he had paid, and also the time of payment when this was, and also the time when he came to his full age, and this ought to have been shewed by him, specially in his Plea, according to the condition

Debt upon an Obligation entred. Trin. 8 Jac B. R. Rot. 1472.

A general plea of full performance void for incertainty for not shewing what was paid nor the time when. per curiam.

dition of the Obligation, and when this was so paid by him, and this was the clear Opinion of the whole Court.

Gable Plaintiff against *Moss* Defendant.

A Writ of Error to reverse a judgment in the C. B. in an action upon the Case for a promise entred Trin. 6 Jac. B. R. Rot. 191.

1 Where notice is to given

2 Where not.

IN a Writ of Error for to reverse a Judgment given in the C. B. in an Action upon the Case for a promise, where the case was this, the Defendant there did promise to pay such a sum of mony unto the Plaintiff when he should return from London, the Plaintiff there did shew, that he came from London, and the mony was not paid unto him, upon this the Plaintiff there brought his Action upon the Case for breach of Promise, and upon Non Assumpsit pleaded, a Verdict was found for the Plaintiff, and Judgment for him given, to reverse which Judgment a Writ of Error was brought. The Error assigned was, that the Declaration was not good. First, because there was no special request of payment laid in the Declaration as it ought to have been. Secondly, because there was no notice laid to be given to the Defendant in the Action of the Plaintiffs return from London, when the same was, that being the time of payment, which the Defendant could not know of without notice to him given of the same. Williams Justice, in this Case notice ought to have been given by the Plaintiff in the Action, of the time when he returned from London, for the Defendant there could not, neither ought he to take notice thereof himself without particular notice to him given of the same. Yelverton Justice, notice in this Case ought to be given of his return from London to the Defendant, who by his promise was then to pay him the mony, and herein the difference will be this, when it rests upon a matter to be done between the parties themselves, there notice is to be given of this unto the party, who is to make the payment, upon an Act to be done by the other to whom the payment is to be made, otherwise, where it is to be done by a Stranger, for there he hath assumed upon himself, to take notice, and so there at his peril, he ought so to do, and so it hath been formerly adjudged upon this difference, and so in this Case, the Act to be done before payment of the mony, being to be done by the party himself, to whom the mony is by promise to be paid, he is himself to give notice of the time of the performance of this Act by him, to the party that is to pay the mony, before he is to pay the same, and there being no notice of this laid in the Declaration, as the same ought to have been, for this cause the Declaration is not good, and this is a good Error, and so consequently the Judgment for this Cause is Erroneous, and to be reversed. Tota Curia clear of opinion, that this is a good Error, for that notice ought to have been given of the time of his return from London, and this ought to have been laid in the Declaration, and so for this omission, the Declaration is not good, and the Judgment for this Cause Erroneous, and for this Error the Judgment was reversed by the Rule of the whole Court.

Note the difference where the act is to be done by the party to whom the payment is to be made, and where by a stranger, as to the giving of notice.

Judgment reversed per Curiam.

Smith Plaintiff, against *Jones* Defendant.

An action upon the Case upon a promise. Yel. 184. 2 Cr. 257. Owen. 133.

IN an Action upon the Case for a promise, the Case was this, A man doth devise unto his Son seven pound, makes his Will, and his Wife Executrix, and dieth, afterwards she takes another Husband. So that by this, all the goods came to the hands of the Husband, the Wife dies, the Husband afterwards makes his promise, In consideration that he had the goods, being more than will satisfie the Debts, and Legacies, if the Plaintiff being the Son, and Legatee, would forbear to sue him, for such a time certain, In consideration of this, He did assume and promise to pay unto him the said seven pound. The Plaintiff shews, that accordingly he did forbear to sue him, but yet the Defendant hath not paid him the seven pound according to his promise, to his damage, &c. and for this cause the Action brought. The Defendant for plea saith, that his Wife was dead before his promise made to the Plaintiff, and therefore he ought not to be bound by his promise

mise made to the Plaintiff, to pay him this seven pound. To this Plea the Plaintiff demurred in Law. Yelverton for the Plaintiff; If a man takes to Wife an Executor, all the Debts being paid, and he hath goods in his hands to pay Legacies, the Wife dies, whether the surviving Husband may be sued for these goods, in the Ecclesiastical Court by the Legatees, for their several Legacies. It is held that they may be very well sued there by the Legatees, and that this is a usual course. Flemming chief Justice denied this, for that the next of Kin to the Wife, may have Letters of Administration granted him of these goods, in the hands of the Husband. This promise here made by the Defendant, to pay the Legacie, was made after the death of the Wife, and therefore no good promise, wanting a good consideration, for if he be not chargable with the payment of this by Law, (as he is not) he shall not be made liable to pay this, by reason of his promise made to pay it, this his promise being void in Law. Yelverton, if the Defendant be chargable in the Ecclesiastical Court for these goods, then he may be well sued upon this his promise, but if he be not questionable there for them, then is his promise void in Law, and he not chargable therewith. Flemming chief Justice, If the Defendant had been questioned for these Goods in the Ecclesiastical Court, this had been a good plea there for him to have said, that he would deliver the Goods, to him which had the next and best right to have them, and this would have been a good Bar unto the Action there commenced against him for these Goods. The Court clear of opinion, that if the Defendant could not be sued for this Legacy, the promise by him made to pay the same, is not good. Yelverton, the Husband may well be sued for these Goods in the Spiritual Court, and therefore his promise to pay this Legacy is good, and he shall be chargable therewith. Flemming chief Justice, It is true, that he may be there sued for these Goods, but it is as true that he hath a good answer to plead there in Bar, which is this, that he is ready to restore them unto the Administrator, and this will be a good plea, in regard, they came unto him by his Wife. The Court were all clear of opinion in this Case against the Plaintiff, and therefore by the Rule of the Court, Judgment was given for the Defendant, *Quod querens Nill capiat per billam.*

Judgment for the Defendant. Quod querens Nil capiat per Billam.

Note, that in case of bayling of a Prisoner, the constant Rule observable in the Kings Bench is this, that where the return of the Sheriff is to be at a day to come, as at *octavis Michael. proximè sequent.* And the Prisoner is bailed (being baylable) before the day of the Return, the Bayl then to be taken ought to be in a sum of mony, and not to be body for body. The reason of this is, for that, before the Return, he is not present in Court. But if the Prisoner be bailed after the day of the Return, and when he is present in Court, the Bail is then to be *de die in diem*, and in this case the Bail is to be taken, body for body, because the Prisoner is Present in Court, and this was agreed by the Court, to be the constant Rule, and course of the Court, Man secundary did affirm, the constant Rule of the Court so to be.

Note the difference where the Bail is to be in a sum of mony, and where the same is to be body for body.

Lyskerrits

Lyskerrits Case.

Lyskerrits Case, as touching the awarding of a venire facias where the same is to be of the Town, and where of the Parish.

As touching the awarding of a *venire facias*, the Case was this, the Major and Burgesses of Lyskerrit did claime, *pro se, tenentibus, & firmariis suis* to have a Water-course, &c. An Action upon the Case was brought, for the stopping of this Water-course, upon Tryal, the *venire facias* was De Lyskerrit Town, and not *De Parochia*. This exception was moved in Arrest of the Judgment. The Court were of opinion, that the Trial was good, and the *venire facias* well awarded. Williams Justice, A House was demised in Abbington, in the Burrough of Abbington, the *venire facias* was of the Burrough of Abbington, this was here adjudged to be well awarded, and was afterwards affirmed in a Writ of Error. Curia. The *venire facias* ought to be awarded, from that place which hath the best notice, and cognisance of the matter in question, and so is the Book of 10 E. 4. fo. 10. And therefore, if there be two places, which have equal notice of the matter in question, there the *venire facias* shall be of both places, and so it was adjudged in Godfrey's Case this Term, in this Court, where one having a Manor in Hampshire, prescribes to have Common in Wiltshire, here in a Trial for this Common, the *venire facias* is to be awarded of both, Trin. 40 Eliz. Rot. 243.

Land demised in Abbington, in the Burrough of Abbington, the venire facias of the Burrough well awarded.
1 Cr. 866.

10 E. 4. fo. 10.

Godfries Case, Mich. 8 Jac. B. R. the venire facias to be awarded from the place having best notice of the fact.

A Case between *Morley* Plaintiff, and *Lapham* Defendant, Was cited, the Case being in Debt for not performance of Covenants. The Case was this, Morley did demise to Lapham by Indenture, *omnes terras suas jacent. & existen. in parochia Maxfield voca't* Hamshire Parke Habendum for one and twenty years; the Lessee Covenants, that he will not cut any Trees there growing, *super terris demissis*, above one Cord of Wood, without the assent of the Lessor. In debt for breach of Covenant, the Breach was assigned in this, that the Defendant had cut down twenty Oaks, exceeding the quantity of a Cord of Wood; upon the Trial, the *venire facias* was awarded De Mayfield, a Verdict for the Plaintiff, this Exception moved in Arrest of Judgment, that the *venire facias* was ill awarded, the same being De Mayfield, whereas (as it was urged) the same ought to have been De parochia de Mayfield. Judgment was given for the Plaintiff, and the samed affirmed in a Writ of Error, and held by the whole Court, that the *venire facias* was well awarded. In the Principal Case was also cited a Case, wherein Bedel was Plaintiff against Stanborrough Defendant, Pasch. 38 Eliz. 2 Rott. 481. In an Ejectione firmæ, the Plaintiff counted upon a Lease made at Denham, of a House and 40 Acres of Land, in parochia De Denham, the *venire facias* was awarded De Denham, a Verdict passed for the Plaintiff. It was moved in Arrest of Judgment, that that the *venire facias* was misawarded, because it was not awarded, De parochia de Denham. Judgment was given for the Plaintiff, and this affirmed in a Writ of Error, the misadwarding of the *venire facias*, being only assigned for Error, and Judgment affirmed by the Court, that the *venire facias* was well awarded. In the principal Case here the *venire facias* to be well awarded, and Judgment was given for the Plaintiff.

Morley Plaintiff against *Lapham* Defendant. Trinit. 40 Eliz. Rot. 243. B. R. are in Exchequer, The venire facias de Maxfield well awarded adjudged, and affirmed in a Writ of Error.
6 Co. 77. b.
1 Browl. 189.
Yel. 186, 182.

Bedel Plaintiff against *Stanborough* Defendant, Pasch. 38 Eliz. B. R. Rot. 481.
1 Cr. 538.
Mo. 709.
Judgment in B. R. Venire facias De Denham & non de parochia de Denham well awarded, adjudged, and affirmed in a Writ of Error.
Judgment for the Plaintiff.

The

The Bishop of *London*, and *Baldwine* Plaintiff, against *Drew* Defendant.

A Writ of Error to reverse a Judgment given in *Communi banco*, in a *Quare Impedit*, the Case was this, The Bishop of London, at Fullam, did grant the next Avoidance to a Church of his presentation in the County of Wigorn; upon an Issue taken, *quod non concessit*, this was tried in Comitatu Wigorn. Judg. for the Plaintiff, and a Writ of Error brought, and for Error assigned, that this was mistryal, against this the Book of 43 E. 3. fo. 1. was cited to prove that the tryal ought to be where the Land is, and so was it cited to be adjuged in a case between Heale, and Spratt, concerning the Church of Newton-Jefferies where the Grant was made in London, of the next avoidance of a Church in the County of Devon, and there in that Case it was adjudged, that the Tryal ought to be where the Land is. Fenner Justice, a grant is made here in London, of Land in Comitatu Wigorn, *Non concessit* is pleaded; and Issue taken upon this, this may be well tried in either place, either where the Grant was made, or where the Land lieth. Yelverton Justice made some doubt whether the Trial were good, in Worcestershire where the Church was. Williams, Fenner, and Croke Justices, clearly of opinion, that this Trial in *Comitatu Wigorn*, where the Church was, was good, and the Issue well tried, and Judgment was afterwards given accordingly for the affirmance of the former Judgment. Yelverton Justice agreeing with the Court herein.

Entred Hill. 7 Jac. B. R. Rot. 502.

Error upon a supposed mistrial.

43 E. 3. fo. 1. the tryal to be where the Land is, Heal and Sprats Case, and accordingly for the Church of Newton Jefferies.

Judgment affirmed per Curiam.

Pollard Plaintiff, against *Casy* Defendant.

IN an Action of Trespass, for stopping of a way, upon not guilty pleaded, a Verdict was given for the Plaintiff in arrest of Judgment, two Exceptions were taken at the Declaration, that the same was not good. The first Exception was, that the Plaintiff claims to have a way, from his House to a Mill, and so back again, from the Mill, to his House, and that the Plaintiff claims an Inheritance in the House, and therefore he ought to have had an Assise of Nusans, and not an Action of Trespass, and for this was cited the Book of Mich. 2 H. 4. fo. 11. and of Hillar. 8 Eliz. Dyer. fo. 248. Pla. 80. The Court in this case was Clear of opinion, that the Declaration was good, and that the Plaintiff might have either an Action of Trespass, upon the Case, or an Assise of Nusans, which he pleased, and either way good. The Second Exception was this, every way ought to be, either appendant or in gross and so to be laid, and it is not here in this Declaration alledged by the Plaintiff, that this way was appertaining to the House. The Court were clear of opinion, that this ought to be so expressed in the Declaration, for that the Plaintiff here in this Action is only for to recover Damages, and that for the Trespass done, but in an Assise of Nusans, otherwise it is, for there the thing it self is to be recovered. In this principal Case he ought not to alledge in his Declaration, that this way was appendant to the House, for it is laid to be from the House unto such a place, and from the same place, back again to the House, and so the Declaration is good. And therefore the Rule of the Court was, *Quod intretur juditium pro querente.*

Yel. 159.

Trepass for stopping of a way.

Where Trespass, and where an Assise of Nusans lieth. Mich. 2 H. 4. fo. 11. Hillar. 8 Eliz: Dyer fo. 248. pla. 80.

Judgment given for the Plaintiff.

Pompier

Pompier Plaintiff against *Chamberlain* Defendant.

Entred Hil. 7. Jac. B. R. Rot. 197.
A Replevin the Defendant Travers. Replication bad for want of a Travers.

1 Sid. 227.

Judgment given for the avowant against the Plaintiff.

IN a Replevin, the Defendant avows the taking, and justifies for that the place where the taking was, was called Ree-meadow, parcel of the Manor of Dam, being the Freehold of one Chamberlain, and that he, as his servant, did take the Cattel there damage Feasant, and so justifies his Servant unto Chamberlain, and in his right. The Plaintiff replies, and for Plea saith, that long time before Chamberlain was seised of this, that one I. S. a Stranger was seised, and so conveys a Title to himself under him, but takes no Travers, as to the Freehold alleadged to be in Chamberlain. The Court clear of opinion that the Plaintiff ought to have made answer to the Freehold of Chamberlain by way of Traverse. Williams Justice, he ought to have said that long time before Chamberlain was seised, that I. S. was seised, and to have concluded with a Travers, *absque hoc*, that the same was the Freehold of Chamberlain *tempore captionis*, and this had been good; but the Replication being without this Traverse, is not good, and so Judgment was given by the Court for the Advowant, against the Plaintiff.

Smith Plaintiff, against *Nusam* Defendant.

Entred Pasc. 8 Jac. B. R. Rot. 146.
En debt for Rent.
Yel. 189.
1 Brownl. 108.

Where the Law will supply words defective in a reservation of Rent.
13 H. 4. Brooks tit. apporcionment pla. 20.

Judgment for the Defendant *Quod querens Nil capiat per Billam.*

IN an Action of Debt brought for Rent, the Case was this, George Smith Father of the Plaintiff, made a Lease for years, reserving twenty Marks Rent at two Feasts, solvendum the said twenty Marks G. S. *& hæredibus suis ad terminos prædictos*, and doth not say, *per æquales portiones*, afterwards the Father dies and the Plaintiff his Heir brought his Action of Debt for the whole twenty Marks, pretending the same to be all paid at each Feast, twenty Marks, and declares that this Rent did grow due, and payable to him, *ut hæres*. To this Declaration the Defendant demurred in Law, because the Action was brought by the Plaintiff for the whole twenty Marks as due at one Feast, whereas but a moity thereof was then due, and the Declaration ought to have been for no more than for a moity of the said twenty Marks. Yelverton Justice *& curia*, when twenty Marks Rent is reserved to be paid at two several Feasts in the year, the Law, by construction, will make this Rent to be several, in the time of the payment thereof, as appears by the book of 13 H. 4. Br. tit. apporcionment pla. 20. whereas Rent *est reserve solvendum al feasts de Mich. & Pasc.* this shall be taken by intendement of Law, to be *æquis procionibus*, and the Law by necessary construction shall supply this, which was thus defective in the words of the reservation: the Plaintiff here intitles himself to this Rent as Heir, but makes no Title at all to himself in his Declaration; he only saith therein, that he is Son and Heir of George Smith the Lessor his Father, but it is not alledged in the Declaration, that this Action was brought by him, as Heir, as he ought to have done, and so for this defect, the Declaration is vitious. Williams Justice, he ought to have shewed in his Declaration, how he came to the Reversion; thereby to intitle himself to have an Action for this Rent. The Court was clear of opinion that the Plaintiff had very much failed in this his Declaration, and therefore by the Rule of the Court, Judgment was given for the Defendant, *Quod querens Nil capiat per Billam.*

Hoblins

Hoblins Plaintiff, against *Kimble* Defendant.

Entred Pasch. 3 Jac. B. R. Rot. 517. Error to reverse a judgment in the C. B. in an action of Detinue, because the judgment was for greater damages than the Plaintiff counted for.

If a Writ of Error to reverse a Judgment given in the Court *De Communi Banco* in an Action of Detinue there brought, in which Action, the Plaintiff there counted to his damages of 100 l. the Jury found the damages to be 150 l. and so the Jury found more damages than the Plaintiff himself had counted upon in his Declaration; the Plaintiff in the Court of Common Pleas, had Judgment there given him for to recover 150 l. according as the Jury found; upon this Judgment, a Writ of Error brought, and this only insisted upon, and assigned for Error, that the Judgment was there given by the Court, according to the finding of the Jury, being for greater damages than the Plaintiff there himself did declare for, and so for this cause the Judgment was Erroneous, and that the Plaintiff ought to recover no greater damages than he himself declares for, though the Jury finde more; many Books were cited to this purpose as 9 Eliz. Dyer 58. 20 E. 6. fo. 7. in an Action of Trespass, the Plaintiff counts to his damage of 10. marks, the Jury found the damages to 10. l. the Plaintiff prayed to have his damages of 10 l. according as the Jury had found, there the Court made answer, that he should have his Judgment for 10. marks according to his Count in his Declaration, for it is there said, that they may abridge damages, but not encrease them, and with this agrees the Book of 42 E. 3. fo. 7. where in an Action of Trespass the Plaintiff declares *ad damnum* 40. l. and the Jury do find the Damages to 42. l. the Plaintiff shall recover but 40. l. according to his Count, 2 H. 6. fo. 7. the Plaintiff shall recover damages according to his Count only, and not as the Jury finds, though they find greater damages, 8 H. 6. fo. 4. and 5. to this purpose, 42 E. 3. fo. 7. In an Action of Trespass, the Jury found for the Plaintiff, and damages 42. l. the judgment of the Court was, that he should have but 40. l. for that his Count was but to his damage of 40. l. 13 H. 7. fo. 16. 17. In an Action of Trespass, the Plaintiff counts to his damage of 20. marks, the Jury found damage to 22. marks. It is there held, that this is a good finding of the Jury for 20. marks only, 34 E. 3 Fitz. tit. Damage Pla. 7. the Jury find the Wast, to the Damage of 40. l. where the Plaintiff declared but to his Damage of 10. l. the damages here were trebled because the Statute is, that in this case he shall recover treble damages by the Statute of Glocester cap. 50. but in other actions, as Fitz. there observes, that the Plaint. shall recover no greater damages than he counts for, although the Jury do find greater damages for him. 2 H. 6. fo. 7 Fitz. tit. damage pla. 16. In an action of Trespass, the Plaintiff counts to his Damage of 20 l. the Jury find for him, and his damages to 30. l. he shall recover damages according to his Count, and not according to the finding of the Jury, for that the Plaintiff himself did best know, what he was by the Trespass damnified, and the Jury may lessen, but not enlarge the same, 17 E. 2 Fitz. tit Damage pla. 13. In an Action of Debt upon an Obligation, the Jury finds greater damages than the Plaintiff counts upon, the Plaintiff shall only recover the damages as he hath counted upon, and according to this are the Books of 43 E. 3. E. 3 Fitz. tit. Damages pla. 73. 44 E. 3. fo. 12. and 29 E. 3. fo. 49 Fitz. tit. Damage pla. 133. In the principal case here it was held by the Court, that where the Plaint. doth declare to no certain damage, there he shall recover such damages as the Jury find; but where the Plaint. declares of a certain damage, and the Jury do find greater damages, there the Plaintiff ought to have no greater damage than according to his Count, and not as the Jury finds, they finding greater damages than the Plaintiff declared upon; and in this action the Plaintiff declaring to his damage of 100. l. and the Jury finding for the Plaintiff, and damages 150. l. and he having his judgment for 150. l. according to the finding of the Jury, and in more than he Counted upon, and so for this cause being the only Error insisted upon, the Court were all clear of opinion, that the Judgment so given in the C. B. was Erroneous, and therefore by the Rule of the Court the judgment was reversed.

42 E. 3. fo. 7.

2 H. 6. fo. 7. Fitz. tit. Damage pla. 16. 8 H. 6. fo. 4. 5. 42 E. 3. fo. 7.

13 H. 7. fo. 16. & 17.

34 E. 3 Fitz. tit. Damage pla. 7.

2. H. 6. fo. Fitz. tit. Damages pla. 16.

17 E. 2. Fitz. tit Damage pla. 13.

43 E. 3 Fitz. tit. Damage pla. 73. 44 E. 3. fo. 4. 12. 29. E. 3. fo. 49 Fitz. tit. damage pla. 133.

Judgment reversed per Cur.

Mills Plaintiff——

Mills Plaintiff.

In Error, first, to reverse a judgment in the C. B.

IN an Action of Trespass against three Defendants, the first pleads generally *Non culp.* to the whole: the second pleads, as to part, *Non culp.* and the third, as to another part pleads *Non culp.* Issues joyned against them all at the Trial; the Jury found the first Defendant guilty of the whole, and the other Defendants guilty of the several parcels, and did assess entire damages for the Plaintiff, and Judgment given for the Plaintiff accordingly in the C. B. and a writ of Error brought to reverse the Judgment, and this only assigned for Error, *quia Juratores se male gesserunt, in veredicto dando Curiæ,* this is a clear Error, and for this Error, Judgment was reversed *per Curiam,* and a new Trial to be had.

Judgment reversed per Curiam.

Brock Plaintiff, against *Beare* Defendant.

Brock Plaintiff against Beare Defendant Hil. 7 Jac. B. R. Rot. 711.

Stat. 31 Eliz. cap. 7. made against Cottages.

IN an Action of Trespass, upon not guilty pleaded, the Jury found a special Verdict, and upon the special Verdict, the case was this; A Copiholder of Inheritance, did surrender this, to the use of one for life, and afterwards to the use of another, and his Heirs. The Tenant for life of the Copihold, doth build a Mansion-house, and dies, after his death, the Copihold Tenant of Inheritance, pretending that four Acres of Land, of Freehold, were not laid to this House, (according to the Statute of 31 Eliz. cap. 7. made against Cottages erected) pulls this House down. The Jury finds that by the Custom, no Copihold Tenant of Inheritance, may pull down any dwelling Houses; but if he do, the same shall be a forfeiture, and that this pulling down of the House was contrary to the Custom. Brock the Plaintiff being the Lord of the Manor, and pretending this to be a forfeiture, brings his Action against the Defendant the Copiholder, alledging that the Defendant *prostravit, & voluntarie diruit —— messuagium prædictum.* The Court clear of opinion, that the Copiholder could not pull down this House, his colour for so doing, being only, because that four Acres of Freehold Land were not laid to the same. The Custom found to be, that the Lord in such a Case, may well enter for a forfeiture *& tenentem expellere,* the Defendant here, because he had the Fee, and Inheritance, as a Customary Tenant, pretended that he might well pull down the House. Fenner Justice, if a Tenant builds a House, and this is not covered, he may well pull this down again, for that before the covering of it, it is not a House, but when the House is covered, he cannot then pull it down, but it shall be Wast: the Jury have found this pulling down of the House, to be a forfeiture, by the custom, the usage, and custom makes a Copihold. Yelverton Justice, the place where this House was built, was ancient Copihold Land; if Lessee for life builds a House upon this Land, and afterwards pulls it down again, this is Wast, and this is a forfeiture in the principal Case. Williams Justice, Lessee for life is, with a condition, that he shall not do Wast, he builds a House, and pulls the same down again, this is done but of late time, and therefore he cannot enter for this condition, yet this pulling down is Wast, and he shall be punished for his Wast. Fenner Justice al contrary in this, for he may well enter for his condition. Williams Justice clearly, he cannot enter for this condition, for that this condition is annexed unto the Land, and not unto the House, which was built, but of late time, and since the condition; but whether this pulling down of the House by the Copiholder of Inheritance, be a forfeiture of his Copihold Estate, this is somwhat doubtful, in regard that this House was so built, and erected but of late time. Fenner, & Yelverton Justice clear of opinion that this pulling down of the House is a forfeiture, for that the place where the House was built, was ancient Copihold land. Fen. Justice; Lessee for Life is, upon condition that he shall do no Wast, the Lessee commits Wast, the Lessor enters for the condition broken, he shall not have an Action of Wast, for Wast done before his Entry. Afterwards Termin. Hillar. 8 Jac. B. R. This Case was moved again, and John Moore argued for Brock the Plaintiff.

Termin. Hill. 8 Jac. B. R.

Two

Two matters arise upon this special Verdict. First, Whether a Copiholder, may by Law justifie this erection of a Cottage, and Secondly, if he shall be dispensed withal for this, by Statute Law, whether then by the Common Law, this pulling down shall be a forfeiture, if not, then whether it shall be a forfeiture, by the Custom, as the same is found by the Jury. First, it is to be examined here, what Estate a Copiholder, or a Customary Tenant hath, he hath only a bare Estate, as a Tenant at will, and this is not to be denied; a Tenant at will, ought not to deal, or meddle with the Land, he is not bound to do, and perform such things upon the Land, as Tenant for years is to do, and this appears by Littleton, that he shall not be punished in wast, for permissive wast, 8 E.4 fo.6. & 7. and by the Common Law, Tenant at Will cannot cut down any Under-wood, and voluntary wast by him shall be a forfeiture, and so if he alien, or make a Feoffment, or a Lease for years, as appears in Murrel and Smiths case, Coke 4. pa. fo.24 and Taverner, and Cromwels case, Croke 4. pa. 27. if a Copiholder cut down Trees, this shall be a forfeiture, and by 9 H.4 Fitz. tit. Wast pla. 59. that a Tenant by Copy of Court Roll ought not to do wast, nor to cut Trees to sell, but only for to repair his House; he hath here an Inheritance by the Custom, but when he doth that which is Contrary to the Custom, he shall then be in no better a condition, than a bare Tenant at Will, if Lessee for years build a House, and afterwards pulls it down again, this will be wast: so here in this case, the pulling down of the House by Bear the Copiholder, is a forfeitur by the Statute of 31 Eliz. cap. 7. no Cottage erected is to be suffered, unless that four Acres of Freehold Land be laid unto it, this Statute was made to restrain Lords of great Wasts, from building of Cottages, without laying of four Acres of Freehold Land to the same, this Statute to be extended to none, but to those which have a Freehold of Inheritance, and not to be extended unto such a Copiholder: but admitting this to be within the Statute, hath the Copiholder then power and Authority by this Statute (as this case is) to pull the House down again? he hath not. Yelverton Justice, this Case needs no help of any custom, for by the Common Law, this is a clear forfeiture. If the custom be, that a Copiholder may pull down Houses, such a custom is not good; if the custom be, for a Copiholder to cut down Trees, in this, for the warranting of such a Custom, the difference will be this, if he be a Copiholder of Inheritance, then such a custom for to cut down Trees, by such a Copiholder, will be a good custom, but otherwise it is, if he be but a Copiholder for life, there such a custom to cut down Trees, is not good. As to the Statute of 31 Eliz. cap. 7. against the erecting of Cottages, this Statute extends to every Freeholder, to any one which builds a new House, or converts old Houses unto Cottages, this Statute meant to meet with them all, and such a Copiholder, as in this Principal Case, is within the danger of this Statute. Croke Justice, agrees in this, and that a Copiholder cannot prescribe to do any thing, that may any ways trench to the disinheritance of the Lord; a Copiholder of Inheritance, by custom, may cut down Trees, but not another Copiholder. Fenner Justice, a Copiholder is not within the Statute of 31 Eliz. cap. 7. and if the Lord lays Freehold Land to his messuage, this is no parcel of it, and so not within the Statute, and there is no such power in a Copiholder to do as the Statute doth require to be done, and I was present with the Lord Popham, when at an Assises he did adjudge according to this upon an evidence before him, that a Copiholder was not within the Statute of 31 Eliz. cap. 7. for erecting of Cottages, and this I conceive to be very clear, that a Copiholder is not within that statute. But as to the other point, I hold it, in some clearness, also that when the Copiholder, in this principal case, had erected such a house or Cottage, he cannot pull the same down again, but it will be a forfeitur. Flemm. chief Justice, the matter here was, that the Woman who did erect this house, or Cottage was a Copihold Tenant for life, and did not lay four Acres of Freehold Land to it. As to the chief point in question, being, whether a Copiholder may pull down houses edified, and erected for habitation, it is found by the special verdict, that by the custom of the Manor, a Copiholder shall not do any wast, and it is very clear,

8 E. 4. fo. 6. & 7.

Muriel and Smiths Case. Coke. 4. fo. 24.

Taverners and Cromwell Case Coke 4. pa. fo. 27. a.

9 H. 4. Fitz. tit. wast pla. 59.

31 El. 2. cap. 7.

Po. 158.

31 El. 2. cap. 7.

31 El. 2. cap. 7.

clear, that if a Copiholder do pull down Houses when they are built, this shall be adjudged to be Wast; and it is as clear, that this shall not be aided, by alledging that the same was newly built, for this is not material, for when the House is once builded, the same is then annexed unto the Freehold. The second matter here considerable is, touching the Statute of 31 Eliz. cap. 7. whether a Copiholder be within this Statute or not, if a Copiholder of 20 Acres of Land, to him and his Heirs by the custom of the Manor, erects a House, or if a Copiholder be, who hath but three Acres of Land of Inheritance, by the custom, and having no House, erects a House. I think (and that in some clearness) that a Coppyholder is not, nor yet ever was taken to be within the meaning and intention of the same; the Statute is general, That no persons shall erect——and unless he lay four Acres of his Freehold Land to it, this is to be understood (if he be a Freeholder) and doth erect a House, and not lay four Acres of Freehold Land to it, he shall then be in danger of that Law. But a Copiholder is not within that Law, if he build a House for the Habitation of others; the Statute restrains none, which do build a House for their own dwelling, but for to prevent, and to meet with, the great greedinesse of Landlords, was this Stat. made, the which Statute intends such a one, who hath good power to build, and also to pull down, as he pleaseth, and when he pleaseth, which a Copiholder hath not, nor yet a Termor for years, and therefore they are not within the same Statute; if the Custom of a Copihold manor be that if a Copiholder do commit Wast, that this shall be a forfeiture, this custom shall be taken strict, and shall not be extended to permissive Wast. In this principal Case, the pulling down of this House by the Copiholder, is a clear forfeiture of his Copihold estate. Yelverton Justice, the Statute is general, No persons shall erect——but yet there is no question, if a man do erect a House for his own habitation, this he may very well do, and this is out of the Statute, for the Statute is this, that he shall not build a House for the habitation of another, without laying of four Acres of Freehold Land to it, otherwise he shall be in danger of the Law. But if a Copiholder erects divers Cottages upon the Land, within the Manor, or if a Freeholder erects a Cottage, and dwels in the same himself, this is not within the danger of the Statute. Flemming chief Justice, If a Copiholder having twelve Acres of Land, erects a House, and allots to it, two Acres, this is not within the Statute. A Copiholder erects a Cottage, and lays Freehold Land, part of his own Freehold Land to it, yet this is not within the Statute, notwithstanding that it is not Copihold Land, but Freehold Land, that is laid to it. This matter was afterwards moved again, & *Curia* unement accord, that this Statute intends Cottages erected for the habitation of others, that is to say, for Strangers, and so by this means to draw many together, for the prevention of which mischief, that might thereby ensue, was this Statute made. Williams Justice, and Curia accord. in this, that a Copiholder, is not within this Statute of 31 Eliz. cap. 7. for erecting of Cottages, and the Court also agreed in this, that the pulling down of this House, (so erected by the Copiholder) by him is a clear forfeiture of his Copihold estate, and so *per curiam*, Judgment was given for the Plaintiff and the Rule of Court entred accordingly, *quod intretur judicium pro querente.*

31 Eliz. cap. 7.

Stat. 31 Eliz. cap. 7.

Judgment per Curiam pro Querente.

Hewet Plaintiff against *Norberow* Defendant.

A Trespass for the taking of a Cow, the Defendant doth justifie as Bayliff of the Court Baron.
Yel. 194.
Cro. Ja. 255.

IN an Action of Trespass, for taking of a Cow, the Defendant justifies, as Bayliff of the Kings Manor of Dunstable, and upon the justification, the case appeared to be this, That at the Court Baron, there held, the Plaintiff being a Suitor, was attached to come to the Court, but came not, afterwards he was distrained, *per bona & catalla*, & yet came not, whereupon the Defendant as Bailiff of the Manor, caused the distress to be praised and sold. The question was, whether by this his Non-appearance after that he was distrained *per bona & Catalla,*

Catalla, the distress so taken be forfeited, or not, and whether this distress so taken for the Cause, so as aforesaid, may by the Bayliff be sold, or not, for the sale of the distress, the Book of 18 E. 4. fo. 21. was cited, where the Sheriff returns that he had distrained the party by certain Chattels *ad valentiam* xx.d. the which were forfeited. Williams Justice, the Bayliff may sell the distress taken; if he come not in at the time appointed, the distress by which he was attached, shall be forfeited, and may be sold. Fenner, and Yelverton Justices al contrary, the Distress is not forfeited, nor can be sold by the Bayliff, but upon this his not appearing, there shall issue forth against him, a distress infinite, First, an Attachment to be, and if he appears not upon this, then a *Distringas, per bona & catalla*, to issue out. Williams Justice, by his not appearing, the distress taken is forfeited. Fenner, Yelverton Justices, clearly the distress by this is not forfeited, but a distress infinite shall be awarded, but no Cattel shall be attached, but only such, in the which the party attached hath a property, but in case of another distress, otherwise is not, being there material whether he hath any property, or not, in the Cattel distrained, and the reason of the difference is this, for that when goods are attached, for the not appearing of the party, the goods are to be forfeited, and this is the reason for that one by his not appearing, shall not forfeit the goods of another man, but otherwise it is in case of another distress taken, for there the distress so taken, shall be only in *Custodia Legis*, until satisfaction be made to the party which hath distrained the same. This Case was afterwards moved again, and the only question insisted upon was, whether the Bayliff may sell a distress by him taken, for a default, in not appearing at a Court Baron, or not, the Bailiff here in this case kept the distress so by him taken twenty days, and afterwards sold the same, and so justifies the taking and sale thereof. Where a distress shall be sold, and where not, these Books were cited, as 3 H. 7. fo. 4. 6. It was there moved, that if the Lord of a Manor having a Leet, and a distress be there taken for the Lord, whether it may be sold, or not; there by Fairefax he may well sell the distress, for that this is the Court of the King, notwithstanding it was in the hands of a common person, and so is 11 H. 7. fo. 14. a & 21 H. 7. fo. 40. 6. whether in this principal Case, the Bayliff may sell the distress being taken in the Court Baron of the King. It was urged, that this was not mearly a Court Baron, but a Court of Record, and it was *Curia domini regis manerii sui de Dunstable*, by the Book of 9 E. 4. 2. if Cattel are distrained, they are to be put in a common pound, that so the owner may come to give them meat, and if they there die, this shall be at the loss and peril of the owner; but if they be *bona peritura* which are taken by way of distress, if they come to perish, and to be good for nothing, this shall be at the peril of him that distrained them at his loss, and therefore for this cause, in such a Case, such a distress may well be sold, rather than to be suffered to perish. See the Statute of Magna Charta cap. 8 Rastal Debt to the King fo. 101. and the Statute of Marlebridge cap. 10 Rastal tit. Distresses fo. 107. pla. 1. Curia. but there is no Statute made as touching Distresses to be taken in Court Baron. Williams Justice, he was here distrained, *per bona & Catalla*, and this is to be intended, that he had one day given him for to appear, and for his not appearing, being distrained the distress is forfeited, as in an Attachment, where attached, by his Lands and Tenements, *per omnes terras & tenementa*, the distress was first, he was also distrained, and did not appear at the day, & therefore pleaded, that the distress was taken, *& legitimo modo appreciare fecit & adtunc & ibidem vendidit*, the goods were well taken, for his not appearing, the distress forfeited, and the sale of the distress good, and the Defendant may very well justifie the sale. All the other Judges clearly against him in this, that the distress was not forfeited, and the sale made by the Bayliff not good, but he ought safely to have kept the distress, and not to have sold the same, and so *per Curiam* the justification of the Defendant (as Bayliff of the Court) to sell the Distress is not good, and so by the Rule of the Court, Judgment was entred for the Plaintiff.

18 E. 4. fo. 21.

Note the difference.

3 H. 7. fo. 4. 6.

11 H. 7. fo. 14. a. 21 H. 7. fo. 40. 6.

9 E. 4. fo. 26.

Statutes, Magna Charta cap. 8 Rastal Debt to the King. fo. 101, pla. 1. & Marlebridge cap. 80. Rastal. tit. Distresses fo. 107. pla. 10.

Judgment pro Querente that the justification to sell the distress was not good.

Dominus

Dominus Rex Plaintiff, against *Stafferton* and *Brown* Defendants.

An Information upon a Quo warranto for claiming liberties. 2 Cr. 259. Yel. 190.

AN Information upon a *Quo warranto* by what Warrant they claimed to have certain Liberties. Brown, one of the Defendants disclaims in all the Liberties, and so a Judgment entred against him for the King upon his disclaimer; the Defendant Stafferton disclaims likewise in all, but only, in one, and that was to have, and hold a Court Baron, and for maintenance of this, by his plea he shews, that Sir Henry Nevill was seised of an Ancient Manor, of which Manor, the Manor of Newnam and others are parcel, and conveys to himself, from Sir Henry Nevil an admittance to the Manor of Newnam in 4 Eliz. and so likewise of two others (s) of Lakes, and Ayleworth, these by the name of so many Acres, and shews that a Messuage, and seven Acres of Customary Land, used to be Demised, were to him conveyed by Sir Henry Nevil *Tenendum secundum consuetudinem manerii.* The sole and only question in this Case, upon this *Quo warranto* was, whether Stafferton, by his Plea hath so well intitled himself to the Manor of Newnam, as that he may justifie the keeping of a Court Baron. Against this *Quo Warranto*, it was argued, that where there is a Manor, there of Common Right, as incident thereunto is a Court Baron, and this appears to be so by the Book of 13 E. 4. fo. 18. Even as a Court of Pipowders is incident to a Fair, and with this agrees the Book of 19 H. 8 Br. Cases fo. 2. pla. 7 B. tit. Incidents. Pla. 34. here in this Principal Case, the *Quo Warranto* is *Quare clamat tenere Curiam Baroniam*, In Tr. 17 E. 2 Brit. tit. Quo Warranto Pla. 4. Quo Warranto, he claims to hold a Court of his Tenants within his Manor It is there held, that it is sufficient for him, to shew that he there hath a Manor without saying any more, and there it is said, that he need not to make any further or other answer thereunto, so he might well have pleaded here, that he had a Manor without saying any more. Kellaway fo. 138. In Itinere en temps roy. E. 3 pla. 3. en Gernesey, un Quo Warranto issuist pur, &c. he claims to have a Court of his Tenants, it is here said, that the Common Law, gives him a Court of his Tenants, and therefore he ought not to make any claim to it, for that this lieth not in point of Franches, so here in this principal Case, the Court Baron, lyeth not in point of Franches; but admitting that he ought to make a title unto this Manor, he hath here made a good, and a sufficient Title; one Manor may well be parcel of another, and one Manor may be held of another, as appeareth by the Book of 32 H. 6. fo. 9. All that is here desired, is but to hold a Court Baron: as to the manner of his Title here made, he intitles himself to this Manor of Newnam, by this manner of conveyance by the name of a Messuage, and of seven Acres of Land Customary, used to be demised, *tenendum secundum consuetudinem manerii.* In Hill. 4 E. 3. fo. 124. pla. 25. where the conveyance to a Manor is pleaded to be by the name of two Messuages, and of two Carews of Land, and by 6 E. 3. fo. 243. and 9 E. 3. A Fine pleaded of a Manor by the name of 8 l. Land; and there it also appeareth, that a Manor may well pass, by the name of 8 l. land or of a Messuage. Also a Manor may be known by the name of Priory, or Chauntery, and by the same name it may pass, as appeareth by the Book of 17 E. 3. fo. 8. where a Feoffment made of a Manor, by the name of Knights fee, and this is there held to be good, this having usually carried the name of Knights fee, and the same may well pass by this name, either by fine, or by Feoffment; here in this principal Case, the manner was *cognitum, & vocatum*, by the name of seven yard Land, as well, as by the name of Manor, and so in this manner, the same passed, and so here is a good interest set forth by the Defendant that this was time out of mind demised by Copy, and this is sufficient for him to keep a Court Baron as incident thereunto. Yelverton al contrary, and prayed that

13 E. 4. fo. 18. 6.

19 H. 8 Br. Cases fo. 2. pla. 7 Br. tit. Incidents pla. 34.

Trin. 17 E. 2. Br. tit. Quo warranto pla. 4.

Kelloway fo. 138. in Itinere E. 3. pla. 3. in a Quo warranto, he claims a Court of his Tenants.

32 H. 6. fo. 9.

Hill. 4 E. 3. fo. 124. pal. 25.

6 E. 3. fo. 243. 9 E. 3. Manor by the name of 8. l. Land.

17 E. 3. fo. 8. a Manor by the name of Knights fee.

that the Defendant may be ousted from keeping of this Court Baron. It is here said in this principal case, that Sir Henry Nevil was seised of the Manor of, &c. of which the Manor of, &c. Newnam and others are parcel, and that in 40 Eliz. he was admitted unto this, and so unto the two others, by the name of so many Acres; but as to the Manor of Newnam, there is no plea at all made by him: As to the case cited in 17 E. 2 Br. tit. *Quo warranto* Pla. 4. *Quo warranto* he held a Court of his Tenants in his Manor, there he pleaded that he had a Manor, and this was sufficient; here he intitles himself unto seven yard Lands, and 20 s. Rent, & *eo warranto* claims to hold a Court Baron, this is no good plea, for it is impossible for a Copihold Manor to be a Manor, for that he cannot have any Freeholder, and one cannot have a Manor, if he be not capable to have an Escheat, and therefore a Copihold Manor cannot be a Manor: Also it is here alledged, that this is only a Manor in reputation, and that this may pass in this manner by a conveyance, and that one Manor may be parcel of another, and one Manor may be held of another; this Principal case here is out of the Reason given in Kelloway, before cited, the King is the Original of all Franchises, and a *Quo warranto* is the Kings Writ; a Tenant at will hath not Title to keep such a Court, being but a Customary Tenant himself, of a Manor, the King here ought to be answered in chief; and it is to be observed for a Rule, that none can plead in chief, with the King, but he which hath a Freehold, and here the Defendant which hath only an Estate at will, and so cannot hold a Court Baron, because he is not capable of an Escheat. Croke Justice, the plea here of the Defendant is not good, the same being in it self repugnant, for that it is impossible for one Manor to have two Court Barons; they are two Manors here, but that is so, *diversis respectibus, non simpliciter, & absolute*, this here is a great usurpation upon the Prerogative of the King, for one to use a Manor, and keep a Court Baron, and that without having of any good Title; Tenant at will of a Manor, may grant a Copihold Estate, but not keep a Court Baron, he hath made no good Rule here; and so he ought to be debarred from holding of a Court Baron. Williams Justice, it is to be considered, whether a *Quo warranto* lieth against one to shew; by what Title he keepeth a Court Baron, or not. As to this, In the beginning, all these liberties were in the Crown, and as it is said in Kelloway fo. 138. the King is the Original of all Franchises, and the *Quo warranto* is called the Kings Writ, and that a *Quo warranto* lieth of a Court Baron, this appears by old *Natura brevium* fo. 160. the sole and only Authority, for this, where it is said that this Writ of *Quo warranto* lies for the King, in case where a man Usurps certain Franchises, upon the King, as for to have Wake, or Stray, March, or Ferrie, or a Court Baron, or any such like, without any good Title, and against the will of the King, if he hath good Title, to hold this, he must make this to appear: This Court Baron is incident, to every Manor, but as to this, it is to be understood to be of a Manor in *Facto*, and in truth, but not to be, as in this principal Case, a Manor only in intendment, and a nominal Manor. A Man cannot have a Court Baron without a Manor, for that this Court is incident to a Manor, and cannot be severed from it, as appeareth by the Book of 19 H. 8 Br. Case, fo. 2 Pla. 7. Br. tit. Incidents Pla. 34. a Court Baron is incident to a Manor, and a Court of Pipowders to a Fair, and the Lord of the Manor cannot grant away his Courts to another, and if he grant away the Manor, or Fair, he cannot reserve such Courts unto himself, for that they are incident to the Manor, 8 H. 7. fo. 4. Br. tit. Incidents pla. 16. there by Bryan to every Manor there is incident a Court Baron; and by Vavisor, there are certain things that are incident to the principal, as Fealtie to Homage, Homage to Escuage, a Court of Pipowders to a Fair, and a Court Baron to a Manor, and by the Grant of the principal, these things do pass without being named, 12 Eliz. Dyer pla. 288. The King by his Letters Patents doth lease the Manor of Rock unto Orme for years, except all the Courts, and Perquisites, afterwards the King grants the reversion to a Stranger, with the Perquisites, and Courts, the Grantee makes another Lease to begin

19 H. 8. Bro. Cases fo. 2. pla. 7 Bro. tit. Incidents pla. 34.

8 H. 7. 4. Br. tit. Incidens pla. 16.

12 Elyz Dyer fo. 288. pla. 54.

being after the first Lease ended, except Courts & perquisites, it is there held, that this exception is good, in a lease of the King, contrary in the Lease of the grantee, the same being repugnant to the Lease of the Manor. 34 H. 6. fol. 49. every Manor hath a Court Baron as incident to the same of common Right. Fitz. tit. Court pla. 1. Also to a Manor there is requisite to be Demesnes and services; here in this case he ought to make a good title to the Manor, Otherwise he cannot justifie the keeping of a Court Baron. If a man have 100. Acres of Land, and these passed unto him, by the name of a Manor, this is good, but yet this shall not be in him as a Manor. A Copiholder, cannot grant a Copihold, this is impossible; here in this case in question, he hath only the name of a Manor, but not the effect of it. In a *Quo warranto*, a Customary Court, is not in question, but at the common Law, one Manor may be held of another, this is clear, and when the same escheats, the other is extinguished, and the new remains, and this appears by Sir Henry Nevils case Cooke 11. pag. fol. 17. Where it is Resolved that there may be such a Customary Manor, held by Copy, and that such a customary Lord may keep Courts and grant Copies; And that such a customary Manor may pass by surrender and admittance. But in this principal case, there is no Book, nor any Authority in the Law, to warrant the Defendant, to keep a Court by reason of this Copihold Manor, which he hath, he having made no Title unto himself, unto the Manor, and so he is not any ways enabled to hold and keep a Court Baron, and so his plea to this *Quo warranto* by way of Justification, is not good, nor to be allowed of as sufficient. Yelverton Justice. Usurpation del Lete, and Court Baron in this *Quo warranto* is examinable. It is to be considered, whether here be any good Bar and Title made against the King in this *Quo warranto*. It is very clear, that neither the Bar, nor Title here made is good, but that by the Judgment upon this *Quo warranto*, he ought to be ousted of this Court Baron. A man cannot make a Manor at this day, as appears by 5 H. 7. fol. 38 Br. tit. Comprise pla. 34. That a Manor cannot be, but by ancient continuance, for a Manor cannot be made at this day: A man which hath not a Court, cannot enable another to keep a Court, and there cannot be a Manor without a Court. Perkins chap. Reservations fol. 127. pla. 670. as touching the commencement of a Manor, a Court Baron is incident to a Manor, and is not to be severed from it, unless it be in the case of the King, but not by a common person, this is not possible to be done; by the same name as land comes, by the same name the land may well pass again, but this cannot make this to be a Manor; one Manor may be parcel of another for a time, but not perpetually; one may be Lord of another, and there is no question to be made, but this which escheats, doth continue to be a Manor still; the quantity of land by which the same is passed, is not material. That a *Quo warranto* well lieth in this case, to know why he keeps a Court Baron, without any Title made to enable him so to do, and this is very clear, and not to be questioned; the reason of this is, for that this is a jurisdiction, the which he cannot have nor maintain, without a Manor; the question here is, whether he may maintain and justifie his keeping of a Court Baron, by his having of the Copihold Manor held of another Manor, and clearly he cannot: and as touching his Title here made, it is very clear, that here he hath made no good Title to justifie his keeping of this Court Baron against the King, and therefore by Judgment of the Court upon this *Quo warranto*, he ought to be ousted from keeping of this Court Baron ——— Flemming chief Justice. The first point here considerable is, whether a *Quo warranto* lieth for the keeping of a Court Baron in a Mannor, or not. A Court Baron is incident inseparably to a Manor, without any grant to him made by the King, to keep the same, and this is not claimed out of the Crown, but is to be used and held of necessity, *de necessitate*, and no Jurisdiction by this drawn, or derived out of the Crown by this, these Courts are to be held to avoid inconveniency, and this is to be so, without any special grant of the King. Manors cannot be at this day created, unless it be by way of derivation, as being derived out of the ancient Manor, which descends unto Coparceners, in this case upon partition had

34 H. 6. fo. 49. Fit. tit. Court pla. 10.

Coke 11. pa. fo. 17 18. 5. Henry Nevils Case.

5 H. 7. fo. 38. Br. tit. comprise pla. 34.

Perkins chap. obsetvations fo. 127. pla. 670.

had of such a Manor between them, the same shall now be in them as several Manors, as appears in 26 H. 8. fo. 4. where it is agreed in the end of the Case of Common, that if a Manor descend, to two or more Coparceners, and they make partition, so that every one of them hath part of the Demean, and part of the Services, and so each of them hath a Manor, and Br. tit. Manor pla. 1. in abridging of that Case, concludes——*& ideo videtur*, that each of them may keep a Court, so that here, necessity and inconvenience causeth them to have several Courts, but Br. makes this a quere, whether they shall hold several Courts, in as much as it was agreed for Law in the Star-chamber, that it is not a Manor, unless where there be two Freeholders at the least, and in Br. tit. Cause pla. 35. it appears that in the Register fo. 11. the Parol was removed out of the Court Baron, for that there were there but four Sutors, and therefore it is the said quere, what number is sufficient, when there are no more. If the creation of the Manor did not come from the King, the Court Baron is incident unto it; the Court of Pipowders, and Fairs do come, and are derived originally out of the Crown. A Manor may be, and not derived out of the Crown, and therefore *ex consequente*, neither the Court Baron, which is incident to such a Manor, but a Court Leet is not incident to a Manor, but he which hath a Manor, may also have a Court Leet to be by him held within his Manor, but this ought for to be by a special grant from the King, and not otherwise, and then he may punish Offenders, the which he cannot do in his Court Baron; he cannot be ousted of his Court Baron, unless he be ousted of his Manor, for if he have a Manor, he ought to have such a Court Baron, for this is as an incident, and follows the Manor, as a necessary subsequent and adjunct unto the Manor, and therefore if he have the one (s) the Manor, he shall also have the other (s) the Court Baron. There is no doubt to be made, but that a *Quo warranto* well lieth, for to shew how, and by what Right and Title he keeps a Court Baron; but it is to be well considered of, to whom the Writ of Right of the King shall be directed, being *quod dominus remitti debet, curiam suam Baronam*; his Plea here is, that three other Manors are within the great Manor of, &c. and usually demised by Copy of Court Roll: a Manor before the Statute may be very well derived out of another Manor, but he ought to have said here, that such a Manor had been used time out of mind, to be granted by Copy, and also, that time out of mind, such Grantees, or Donees, had used also to hold such Court Barons, and also to grant Copies of Court Rolls to others, and so he ought to have prescribed in all this, time out of mind, and then this would have been good, and much better, than here it is, the Plea being here too short; the other way had been a sure way, and that without all question, but as the Plea here is, the same is too short, and doubtful; there may be a Copiholder of a Manor whether a Grant by Copy, made by such a Copiholder, be good or not. Williams Justice, clerement, such a grant is not good. Flemming chief Justice, such a grant is clearly good, if he prescribes in this, that so it hath been used time out of mind, but not otherwise, and this appears Coke 11. pa. fo. 17. and 18. on Sir Henry Nevils Case, where it is clearly resolved by the whole Court, that there may be a customary Manor, and held by Copy, and that such a customary Lord may hold Courts, and grant Copies, and that such a customary Manor may pass by surrender and admittance, and that fines shall be paid upon admittance, as well upon alienation, as upon discent; and there may be also a customary Lord, Mesne, and a customary Tenant, as well in case, where the mesnalty is a Tenancy at will, according to the Custom of the Manor, as there is a Tenancy at Will, at the Common Law of a Manor, and also if such a customary Manor be forfeited, the Lord shall have the Customs and Services as appertaining unto the same, and it is there said that the Manor of Aylesham, in the County of Norfolk is held by Copy. Hubberd Le Attorney le Roy, the question is not here, whether he may derive this from the King, but whether he may give this to himself or not. Williams

26 H. 8. fo. 4. Br. tit. Manor pla. 1.

Br. tit cause pla. 35. and Register fo. 11.

Coke 11. pa. fo. 17, 18. Sir Henry Nevils Case.

Justice, the Sutors are the Judges in a Court Baron. Flem. chief Justice, he may have here Sutors (s) those which pay their Rents unto him. Williams Justice, it is here considerable, whether he may draw the Kings Subjects to a Court, conveyed to him here, and by himself; the Writ of Right in a Court Baron, shall go, and be directed unto the Lord Paramount. Flemming chief Justice agreed in this. Fenner Justice, you have no Manor here, and therefore you cannot have such a Court Baron, as is only incident unto a Manor: you cannot here hold Plea in a Writ of Right, nor do Justice: Curia all accorded in this clearly, against this Court Baron, and his keeping of it, having made to himself no good Title thereunto by his pleading, and that therefore he ought by the judgment of the Court, upon this *Quo warranto* brought against him, to be ousted of the Court Baron by him kept (but of nothing else, that was passed unto him) afterwards by the Rule of the Court, Judgment was given for the King in this *Quo warranto*, that the same lieth well against the Defendant Stafferton, for claiming to hold a Court Baron, and that he hath made no good Title to himself, by his pleading to this *Quo warranto* to enable him to hold this Court Baron, and therefore Judgment was given against him for the King, to oust him, for keeping of this his Court Baron, which Judgment was entred accordingly.

Judgment given for the King in the Quo warranto against Stafferton, for keeping of a Court Baron.

Error upon removing of a Record.

Error upon removing of a Record. The Record to be removed, was taken before 8. and being removed, it appeared to be taken before 9.

This question was moved, upon the removing of a Record by the Bishop of Durham, upon a Writ of Error to certifie the same, whether the Record, as certified, was well removed, or not, the same was certified to be taken before eight, and being removed, it appeared to be taken before nine: the Principal Case was, a Record taken before eight, this was to be removed up into this Court, and upon the certifying of it, it appeared, that the Record certified, and removed, was taken before nine, whereas the Record to be removed was taken before eight, and so the Record certified, and removed, was not the Record, which was to have been certified, and this matter was assigned for Error. Yelverton at the Bar argued, that this was Erroneous, for that this cannot be taken to be the same Record, for the Record, proceedings and judgment to be certified, was taken before eight, and this which is removed, makes mention of a Record taken before nine, and therefore it neither is, nor yet can be the same Record. John Moore argued to the contrary, upon this Reason, that the greater number contains the lesser, but not on the contrary. Flemming chief Justice, the Record certified to be taken before eight, and being removed, it appears the same to be taken before nine, and so not the same. Yelverton Justice, all the proceedings at Durham, are by Commission, and there may be two several Commissions, the one before eight, and the other before nine. Williams Justice, If there be here any Error at all, there is sufficient warrant for us to proceed to examine the Errors, the Record being here before us: as to the Earl of Leicesters Case in Plowdens Comment. fo. 392, 393. in Case of an Inditement, the Judgment was there reversed by a Writ of Error. In this case the Record being now before us, and Erroneous, a Writ of Error ought to be *De Recordo, quod coram vobis residet.* The Commission directed to nine, the Writ of Error makes mention but of 8. the Recital is, that the Judgment was before 9. and certified to be before 8. this is Erroneous. Flem. chief Justice, the Writ is here directed to certain persons, by their names,

Hob. 179.

names, and they are to certifie such a Record, and their names, or else they are to certifie that there is no such Record; if they certifie part, but not all, may we proceed upon this, and take this now for the same Record, this is doubtful, but it is better for them, and the surer way, the Record being now certified, and here before us, to have a Writ of Error *de recordo quod coram vobis residet.* The whole Court agreed clearly in this. Williams Justice, we may also proceed here very well upon this Error, upon the Record that is now before us, in this manner, as well, as if the Record had been well removed. All the Judges agreed in this clearly, that the Record was now here in Court, and therefore the Rule of the Court was, that they should begin again *de novo*, in a Writ of Error *de recordo quod coram vobis residet*; *quod nota.*

A Writ of Error, de recordo quod coram vobis residet.

The Lord *Candish* Plaintiff against the Earl of *Shrewsbury* Defendant.

In a Writ of Error to reverse a Judgment given in *Communi Banco* in an Action of Debt conditioned pur payment del mony, plead performance generally; the Plaintiff pleads *Non solvit*, issue joyned upon this and tried, and Verdict, and Judgment was there given for the Plaintiff, and to reverse this Judgment, a Writ of Error brought, and for Error assigned, that there was a mistrial, for that the *venire facias* was not well awarded, wherein the Case appeared to be this, that by the condition of the Bond, the Mony was to be paid at the South Porch door of the Parish-Church of Hauck-Hucknol, the *venire facias* was De vicineto de Hauck-Hucknol, whereas, (as it was objected) the same ought to have been De parochia de Hauck-Hucknol, and this was assigned for Error, wherein the question was, whether the *venire* ought to be, De Hauck-Hucknol, or De parochia de Hauck-Hucknol. Yelverton Justice, the *venire* shall never come of an Adjective. In this case it was urged, that the Parish was never in question, but the Porch only. Yelverton at the Bar, there is no president for to warrant this exception here against the Trial. Yelverton Justice, the like exception was never taken. It was Objected, that here was no Town, nor yet Parish named in the Record, nor in the Condition, and therefore this was a mis-trial. Yelverton Justice demanded, whether Hauck-Hucknol were a Town or not. Answer was made that it was a Town. Crew Serjeant, that this was a mis-trial, and so the Judgment Erroneous: In his Declaration, he ought to express a place certain, from whence the venire to come; if it shall be here intended to be within the Parish, then the *venire facias* ought to have been de parochia, Hil. 7 Jac. Bragg against Carter in Debt, it was laid to be apud parochiam de magno Bursted, no Town named, the *venire facias* was de magno Bursted, and held good. Hutton Serjeant, If the condition was to be paid at his Mansion House, of the Manor of Dale, this extent is sufficient to make a good issue, and it shall be intended to be a Town. Flemming chief Justice, where the payment is to be made at his Mansion House of the Manor of Dale, there if the *venire facias* be de Manerio, this is good; but if it be Dale, it may be questioned whether this would be good or not, he thought it would not be good, here in this Case, the payment is to be at the South Porch of the Parish Church of Hauck-Hucknol, and the *venire facias* ought to be of a place certain; if it had been de Parochia de Dale, this had been good, for that no Parish Church can be without a Parish; if the *venire facias* had been De parochia, and no Town named before, this had been good, but if it had been of a Town where none named before, and not de Parochia, this had not been good. Yelverton Justice, where he alledges Hauck-Hucknol, this ought to be intended to be a Town, there is here no Town by name alledged but the Parish Church of Hauck-Hucknol. Croke Justice, if the *venire facias* here had been of the Town, the same had not been good, but being here De vicineto de Hauck-Hucknol, this is good. Williams Justice, a Parish is a place from whence a *venire facias* may well be awarded, but it is not so, of a City, or a Forrest, a Parish is a place more general; Parochia is thus defined

In a Writ of Error to reverse a judgment given in the C. B. in Debt, Error that there was a mis-trial.

Objected.

Hill. 7 Jac. Bragg against Carter.

to be a place in which, *populus alicujus Ecclesiæ* are residing, if a payment of money be to be made in the Temple Church, the *venire facias* ought not here to be of the Church, but *De Parochia de St. Dunstans*. In this principal case Yelverton and Croke Justices held the Trial good, and the *venire facias* De Vicineto Hauck Hucknol was well awarded. Flemming chief Justice, Williams, and Fenner Justices held the contrary, and afterwards at another time this matter was moved again, and George Coke argued, that the *venire facias* was well awarded. It shall not be here intended, that the Parish extends it self further than the Town of which the Parish hath its name. In Throgmorton and Tracyes case in Pl.Com. fo. 149. where the Abbot of the Monastery of Tewxbury, apud Tewxbury prædictum made a Lease, it is there ruled, that Tewxbury was the Town, and apud Tewxbury prædict. this is to be in *villa prædicta*. In this Principal Case, Hauck-Hucknol shall be intended to be a Town, and this so is named, the *venire facias* is well awarded: the Town and Parish here is all one. Thomas Crew, the *venire facias* in this case was not well awarded, as to the pleading here, the payment is to be made at Hauck-Hucknol, videlicet, *in Australi porticu Ecclesiæ parochialis de Hauck-Hucknol*, the *venire facias* was of the Town. As to Cases of Intendments, where it is to be intended the Town, then the *venire facias* to be of the Town, if it be of the Parish, then the *venire facias* to be of the Parish, and if of the Castle, the *venire facias* shall be of the Castle, Hil. 7 Jac. B. R. Rott. 1312. Bragg Plaintiff against Carter in Dette; no Town there named but London, this president is to prove, that where the question was *De magno Bursted*, and not *De parochia*, the opinion of the Court then was, that where it is named to be in the Parish, there the *venire facias* is to be *De parochia*, or it is not good, but otherwise it is, where it is to be done at the City of Dale, or at his Mansion House in Dam, there the *venire facias* is to be of the Town. Yelverton Justice, of what place should the *venire facias* here have been? Croke Justice, payment of money is to be made at the Market Cross in the Town of Dam: the *venire facias* here shall be De Dam. Walter, the *venire facias* is here well awarded, and shall be good, and this being now tried, is to be assigned for Error, the Law will intend this Trial now to be, where it ought duly to be, and 31 Eliz. B. R. Benridges Case adjudged here accordingly, where the case was in an Action of Debt, for Rent, that was reversed upon a Lease, the Issue was tried where the Action was brought, it was alledged in this case, that this was a mis-trial, but it was adjudged, that this was well tried, being a thing transitory. Yelverton Justice, here is a good Issue well tried, and the *venire facias* well awarded, and this follows the words of the Condition, payment pleaded, and this denied, hereupon they are at Issue, and this well tried. I never did see any *venire facias* to be awarded *De Vicineto villæ de Dam*, but *de Dam*. If the *venire facias* here should have been *De Parochia*, of what Parish should this be, a Parish cannot be in a Town, but a Town may well be in a Parish: this *venire facias* here is well awarded, and so no Error in the Judgment, but the same ought to be affirmed. Fenner Justice, it is to be here intended, that there is some other place, than the Parish; when he saith here, Hauck-Hucknol this shall be intended to be the Parish, and the *venire facias* to have been here of the Parish, but where the Town is first named, there the *venire facias* ought to be of the Town; but as it is here in this Case, where the reference is to no other place but unto the Parish, as in this Case it is, there the *venire, &c.* ought to have been awarded, *De Parochia*, and not of the Town, and so the same was misawarded, and this being now assigned for Error in the Judgment, the same is Erroneous, and for this Error to be reversed. Williams Justice, it is the soundest and best pleading for to lay the Town first. If money be to be paid in the Temple Hall, or Church, this in pleading is to be laid, to be *apud parochiam sancti Dunstani*, videlicet, at the Stone in the Temple Church, and this is so usually done: a Parish may be of a place and a of Town, *est locus sed non villa*. In Cornwal, there are twenty Towns in one Parish, and it is not to be doubted, but that a *venire facias* may be awarded of a Castle, *venire facias De vicineto Castri de B.* and this was

Hil. 7 Jac. B.R. Rot. 1312. Bragg Plaintiff against Carter Defendant.

31 Eliz. B. R. Benridges case adjudged.

was adjudged here to be good in 41 Eliz. and so where a thing is laid to be done at the Manor of Dale, the *venire facias* is not to be here awarded de Dam, but *de manerio de Dam*; where there is a Parish and a Town named, there the *venire facias* shall be of the Town, but if no Town be named, there it shall be of the Parish; the Parish is very uncertain, if a Parish be named, the other may say, that there are divers Towns within this Parish, as Sam and Dam; if one pleads in avoidance of an outlary that it was in Dam, *absque hoc*, that it was in the Parish of Dam, the *venire facias* is here to be *De Parochia*. If a payment of mony be to be made at the Church door of St. Dunstans, a *venire facias* cannot be awarded from hence, but from the place where it was made; in this principal case the *venire facias* was misawarded, and so a mistrial, and the Judgment for this cause Erroneous, and to be reversed. Croke Justice, that the *venire facias* in this case was well awarded, and the Issue well tried, and the Judgment to be affirmed; and the difference will be, when the Parish is named by way of distinction, or separation, there the *venire facias* shall be of the Parish, but not otherwise. *Parochia* originally is where many Houses are set together, but where the Parish is named by way of Denotation, or Explanation, where the place lieth, where the mony is to be paid, there the *venire facias* is to be awarded of the Town, as here in this case, the Parish is named only by way of Explanation, where the place of payment alledged to be, the same being to be made at the South Porch door of the Parish Church of Hauck-Hucknol; the *venire facias* here is well awarded of the Town, and so no mistrial, but the Judgment to be affirmed. Flemming chief Justice: this is a great and a very difficult case, and very worthy of a conference with all the rest of the Judges for the certain setling of this doubt; this is a very good argumentable case on both sides, the *venire facias* is to be awarded in such manner, as by the course of Law the same ought to be; a *venire facias* awarded of a Forrest cannot be good, in asmuch as this is a place only for wild Beasts; within a ville, or Parish, are most Trials, if no Town appear, then the *venire facias* is to be *De parochia*, but where a Town is named, there the *venire facias* shall be awarded of the Town. At another time afterwards (g) Termin. Hill. 8. Jac. B. R. the Court being divided in opinion, Flemming chief Justice, being moved to deliver his opinion in this case said, that —— he had moved the Judges at Serjeants Inn for their opinions in this case, and that the better opinion of them there was, that the *venire facias* was well awarded, and that he himself was also of the same opinion, that the *venire facias* was well awarded, and the Judgment well given and not Erroneous, and so by the Rule of the Court, three Judges against two, Judgment was affirmed for the Defendant in the writ of Error.

41 Eliz. B.

Termin Hillar. 8 Jac. B. R.

Judgment affirmed by the Court.

Wood Plaintiff, against *Ingersole* Defendant.

IN an Action of Trespass and ejectment upon the construction of a Will, a special Verdict being found, upon which, the Case was this, a man having three Sons, and being seised of Lands in three Counties in Fee simple, makes his Will, and thereby deviseth one parcel of his Land in one County to his Eldest Son, another parcel in another County, to his Second Son, and another parcel in the third County, to his third and Youngest Son, and by his said Will expresseth further, that his Will is, that if any of his Sons do die, that then the one of them to be Heir unto the other, afterwards the Father dies, the Eldest Son dies, having Issue a Son, the question was, who should now have this Land, which the Eldest Son had, upon his Death, whether his Son, being his Heir, or his two Brothers, being the Uncles. Yelverton Justice, the question

An action of Trespass and ejectment entred Pasch. 7 Jac. B. R. Rot. 155. 2 Cr. 260.

question here only is, for that parcel of Land which was devised to the Eldest Son, and for no more. Harris at the Bar argued, that the issue of the Eldest Son should have the Land, and not the Uncles. In Hamleton, and Hamletons Case, which was Mich. 29 and 30 Eliz. in C. B. where the like Devise was made to three Men, there it was held they should be Joyntenants. In Wildes Case Coke 6. pa. fo. 16. 17. where it appears, that in case of a Will, one word in several, shall make several Estates, to several respects, as where a Devise is made to one, and to his Children, if he hath no Children, at the time of the Devise, that then this is an Estate Tail in him, for that the intent of the Devisor here is manifest and certain, that his Children should take, and the words shall be taken as words of limitation, but if he had Children at the time, there this should be a Joynt-estate for Life and no more, 19 H. 8. fo. 9. b. that the intent of every last Will, shall be taken according to the intent and meaning of the Testator, where the same appears not by express words, as a Devise made of Land to one imperpetuum, or to sell, give, or do with it at his pleasure, this shall be in him a Fee simple, for so was his intent, and so is 7 E. 6. Br. Cases fo. 94. pla. 432. and 7 E. 6. Br. Cases fo. 94. pla. 431. If a Man hath three Sons and deviseth his Land in this manner (s) one part to his first Son, another part to his second Son in Tail, and another part to his third Son in Tail, and that none of them shall sell any part, but that each shall be Heir to the other, if one of the Sons dies without Issue, his part shall not revert to the Eldest Son, but shall remain to the other; and for that the words (that each shall be Heir to the other) implies a remainder, being in the case of a Will, which is to be intended to be according to the intent of the Devisor. 2 Eliz. Dyer pla. 170. Frenchams Case, devised Land to his Wife for life, the remainder to C. F. and to the Heirs Males of his body, *& si contingat illum obire sine hærede de corpore*, then to H. and his Heirs Males in Fee simple, the remainder to the next Heir Males of kin; adjudged that the *si contingat* doth not alter the Tail, because the intent of the Devisor is apparent in the principal case; it is repugnant that the Brother should have this Land, living the Issue of the Eldest Son; this principal case, is in case of a Will, and upon construction to be made thereof, the words here are, that if any of the Sons die, that the one shall be Heir to the other, and how this may be, is the matter considerable; the word heir, shall not here make any Inheritance, the Eldest Son here hath the Inheritance, and he hath an Estate for Life, in his part in possession, and a Fee simple in reversion in the other parts. Williams Justice, what Estate is here devised, this limitation here is meerly void, it doth not appear by this Will, what the Devisor meant, it being altogether uncertain, and so void in Law; a Reason of this, may be made upon the Statute of 34 H. 8. cap. 5. a Devise is to be made to some person, or persons; and to this purpose is the case in 14 Eliz. Dyer fo. 303. pla. 49. where a limitation by Will to a Son in ventre sa mere is not good. Coke 5. pa. fo. 68. Cheneys Case, a man hath two Sons, named John, and deviseth Land to John his Son, this is a meer void Devise, for the incertainty of it; *tota curia* except Flemming chief Justice agreed with him, for this being in the Case of a Will, the Law will make this good. Flemming cheif Justice, as to this Devise here when one of the Sons dies, the reversion is in his Heir; as to the words in the Will, That if one dies, that the one shall be Heir to the other, this is but an Estate for life; here are three Sons, Devisees in this case, it is to be considered what Estate they have by this Will, they have no such Estate with a remainder over, as to make any disposition thereof. If a Lease be made to Husband and Wife, the remainder for forty one years to the survivor of them, neither of them here can say certainly, which of them shall have this Lease for forty one years in remainder, it being uncertain which of them shall survive the other; here in this Principal Case, the Eldest Son being Heir, may well have an Action of Waste, for Waste done; as to the latter words in this Will, (that

Hamleton, &c. Hamletons case Mich. 29. and 30 Eliz in C. B. 1 Cr. 163.

Coke 6. pa. fo. 16. 17. Wildes Case.

19 H. 8. fo. 9. b. old Reports.

7 E. Br. cases fo. 94. pla. 432. and 431.

2 Eliz. Dyer pla. 107. Frenchams case.

14 Eliz. Dyer fo. 303. pla. 49. Coke 5. pa. fo. 68. Cheneyes case.

(that the one shall be Heir to the other) these words are not meerly void, and idle, for they may have some thing by this Will, but no Estate of Inheritance, in as much as these are words only of Limitation of an Estate precedent, which of them here shall first die, the others to succeed him, but not for the Inheritance, but if he have Issue, the Issue is to have the same; here is an interest passed, but not such a one as is grantable by one, nor is the same in the other, but is in *nubibus*. Yelverton Justice, this a strange Case, by the death of the devisor a Fee simple is descended unto the Eldest Son, in his part, to him devised, and also the reversions of the other parts in Fee simple; he hath Issue a Son, and dies, shall this now go from him? it shall not; an Estate in Fee simple, descends here unto him executed, either both of them, which survive, or neither of them, shall have this in remainder; we ought here to make such a construction, and to gather the meaning of the Testator, out of the words of the Will it self, and in this case here, the Heir of the eldest Son shall have this Land, rather than any of the other Brothers. Croke Justice of the same opinion, that in this case clearly, the Issue of the Eldest Son shall have this Land, and not the two surviving Sons; by the Rules of Law, if there be any repugnancy, and incertainty in a Devise, there this devise shall be void, and here in this Will there is a plain repugnancy, and therefore the Devise in this case shall be void; it appears by the case in 19 H.8. Old Reports fo. 8. 6. when the intent of the Testator in his Will doth not agree with the Rules of Law, there this intent shall be void; as if a Man Devise Land to A. in Fee, and if he dies without Heir, that B. shall have the Land, this Devise is void to B. for that one Fee simple cannot depend upon another, by the Rule of Law, in 27 H. 8. fo. 27. it is there clearly agreed, that if Land be Devised to a Man, and to his Heirs Males, the Devisee hath an Estate Tail without other words, for that the Law is favourable to all Devises, and will construe them according to the intent of the Devisor, and for this Reason the Devisee here shall have an Estate tail, (otherwise it is in case of a Grant.) If a man deviseth Lands to his Son, and to his Heirs Males, and if he dies without Issue, that his second Son shall have the Land, this shall no ways enlarge the Estate, but that his Heir Male shall have it, as before it was limited, here it is not certain, what Issue shall have it, and therefore the Limitation is void, as idle, and that for want of a sufficient Declaration of his intent, for if the youngest Son happen first to die, who shall have this Land? by this limitation here, it doth not appear, and therefore the limitation is void and idle, and the Issue of the eldest Son shall have the Land after the death of his Father. Flemming chief Justice, if the Will may stand good to any intent, such construction ought to be made to uphold the Will, if it may be. This Case was afterwards moved again, and Hill and Bakers Case cited, which was 37 Eliz. B. R. Rott. 382. where the Devise was, as in this Principal Case, and the eldest Son there died first, after his Father, having Issue a Son, as in the Principal Case here, and the better opinion of the Court there was, that the Issue of the eldest Son should have the Land, and so in this Case now here in question, the opinion of the Court was, that the Issue of the eldest Son should have the Land upon the death of his Father, and not the two surviving Uncles: and it was further agreed, that the Reversion of the Inheritance is in the Son of the eldest Brother, and that the others have only Estates for their lives, by the Scope, Meaning, and Construction of this Will, and so the Opinion of the Court was for the Issue of the elder Son, being Defendant against the Plaintiff, who claimed under the Title of the surviving Uncles, and by Fenner, Williams, Croke, and Yelverton Judges, the Will is good to the Eldest Son, and that his Issue shall have the Land: and that the subsequent Clause in the Will, after the particular devises, (s) (that the one shall be Heir to the other) is Repugnant in it self, to the other part of the Will, and so the same Clause is meerly void in Law, and therefore Judgment was given by the Court for the Issue of the Eldest Son, against the two surviving Sons, and that

19 H. 8. Old. reports fo. 8. 6.

27 H. 8. fo. 27. Old reports.

37 Eliz. B. R.

Hill against Baker Defendant. Rott. 382.

Judgment for the Defendant, quod Querens nil capiat per billam.

that by four Judges against Flemming chief Justice, who seemed somewhat to doubt of it, the judgment thereupon entred by the Rule of the Court *quod Querens nil capiat per Billam.*

Praunce Plaintiff, against *Tuckle* Defendant.

Praunce Plaint. against Tuckle Defendant. Pasc 3 Jac. B. R. Rott. 138. in Trespass.

IN an Action of Trespas, the Plaintiff declares that the Defendant did enter and brake his Close, Chase, and drive his Cattle to his Damags of, &c. The Defendant pleads and justifies *quoad Intrationem & effugationem*, but pleads nothing as to the breaking, a Verdict given for the Defendant. George Croke for the Defendant, the justification is good, and so prayed Judgment for the Defendant, according to the Verdict given for him. Yelverton at the Bar prayed judgment for the Plaintiff, for that the justification here is not good, for that he hath not answered all the matter laid to his charge; he ought here to have answered to the breaking, as well as to the entrie, and therefore the justification is not good, and prayed judgment for the Plaintiff. Williams Justice, the Defendant here ought to answer and make his justification in the same Manner as the Plaintiff hath declared against him, and to have pleaded unto, or made his justification, *quoad intrationem & fractionem*, as well as *effugationem*, and the Plaintiff is of necessity to declare so, or else his Declaration had not been good. Fenner and Yelverton Justices agreed with him, that the justification is not good. (Croke Justice doubted of it) and the Court agreed. Croke Justice except that the justification here is not good, without answering to the beaking, and chasing, and according to this resolution, Judgment by the Rule of the Court was entred for the Plaintiff.

Judgment entred for the Plaintiff.

Simpson Plaintiff against *Claye* Defendant.

Simpson Plaintiff against Claye Defendant, Pasch. 8 Jac. B. R. Rott. 27. in Trespass.

IN an Action of Trespass, for beating, wounding, and imprisoning of the Plaintiff, the Defendant pleads not guilty, as to part (s) as to the beating, and wounding, and as to the other Part (s) imprisoning, the Defendant justifies, that what was done by him, was then so done as a Constable, and in the execution of his office, and so justified, the Jury found the justification good: but find nothing of the other matter, to which not guilty was pleaded, and yet they assesse Damages to the Plaintiff, for the wounding, for which they did not find the Defendant guilty, and so the Jury gave damages for that which was not found by them, which was void, there being no ground for them to give these Damages, and so by the Rule of the Court, this giving of damages for the wounding, which was not found, is Erroneous, and the Judgment of the Court was therefore for the Defendant, *quod Querens nil capiat per billam.*

Judgment for the Defendant, quod Querens nil capiat per billam.

Burgess

Burgess Plaintiff against *Standish* Defendant.

IN a Writ of Error to reverse a Judgment given in C. B. in an Action of debt there brought for Rent of 20 s. and upon *Nil debet* pleaded; verdict and Judgment was there given for the Plaintiff; for the reversing of which Judgment, a Writ of Error was brought, and the Error assigned was, For that the Declaration was not good, the Action being in debt for 20 s. Rent, and doth not shew in his Declaration, how this Rent did grow to be due, as he ought to have done; and so for this omission in the Declaration (being so materially to be alledged) the Declaration was not good, and the Judgment there given for the Plaintiff, in this cause Erroneous; and to be reversed. *Curia*, all agree, this omission in the Declaration to be a clear Errour, to vitiate the Declaration, and so the Judgment for this cause Erroneous: and by the Rule of the Court, the Judgment was reversed.

Burgess Plain. against Standish Defen. Pasch. 8 Jac. B.R. Rot. 640. in Debt for 20 s. Rent

Judgment reversed per curiam.

Titleby Plaintiff, against *Adams* Defendant.

IN a Writ of Error for to reverse a Judgment given in an inferiour Court at Bristol; In an Action of debt: Judgment was there given for the Plaintiff against the Defendant, being a Surety, and the Judgment was, *Tam de debito Prædicto, quam de* 20 s. *costs*. Upon this Judgment a Writ of Error brought; the first Error assigned was, for that the Judgment was given against the Surety, whereas there was no Judgment given against the principal. 2. Error, that no Judgment being given against the principal, the Judgment against the Surety, *tam pro debito, quam de* 20 s. costs, is Erroneous. 3. Error. For that Judgment was, *Quod sit in misericordia*, whereas it did not appear, that there was any appearance to warrant the Judgment, *Quod sit in misericordia*. George Croke for the Plaintiff, for these Errors prayed the reversal of the Judgment. Yelverton, that the Judgment was well given, and not Erroneous, for that all is here aided, and made good, being laid to be according to the custom there used in Bristol, and the proceedings there, warranted by the custom: by the which custom where the party sued, being there summoned, appeared not, he was by the custom there, to be attached *per bona*, so that there was no Discontinuance here, as it was objected; for that no day was given unto him by any Rule, and so there being no appearance, there could be no Discontinuance. 2. As to the Error assigned, for that the Judgment was given for the costs; this is grounded likewise upon the custom, which warranted this to be good; for this is laid to be *Secundum consuetudinem*, and this is parcel of the Judgment for the costs. As to the Third Error in the Judgment, *Quod sit in misericordia*, as to this, the same is likewise warranted by the custom. Fenner Justice, If he pleads not the custom, he shall not be aided by the Custom. *Curia*, all agreed, that the Judgment given for the costs, was good; and that in this case, *Secundum consuetudinem*, being pleaded, this shall aid all defects. Fenner Justice, Bristol follows London, *& easdem habet libertates*, as London had. If a man sells his goods by fraud, these goods are not to be attached by the custom; and so likewise it is, if by fraud he doth convey: No custom is here alledged for the Judgment to be *Quod sit in misericordia*. Yelverton Justice. How could the Judgment be against him? *Quod sit in misericordia*, against him who never was any party to the Action. Fenner Justice; The first Judgment is alledged to be *Secundum consuetudinem*; and so ought also the second Judgment to be. *Curia*, the whole Court agreed clearly in this, that this judgment being *Quod sit in misericordia*, whereas he never appeared; this is a clear and an incurable Error: and so for this Error only, the Judgment is Erroneous, and so by the Rule of the Court, for this Error alone, the Judgment was reversed.

A Writ of Error.

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Judgment reversed by the Rule of the Court.

Neal Plaintiff, against *Sheffill* Defendant.

Neale Plaintiff against *Sheffill* Defendant: An Action of Debt upon an Obligation entred. Tr. 8. Jac. B. R. Rot. 742. 2 Cr. 254. Yel. 192. 1 Brownl. 109.

IN an Action of Debt upon an Obligation. Upon Oyer demanded of the Bond and of the condition it appeared to be this; that if the Defendant should pay such a Sum of mony, unto the Plaintiff on the birth day of the first child of the Obligee, that then the Obligation should be void; the Plaintiff to intitle himself to have the Action, sets forth in his Declaration, that the Child was Born, the mony not paid; and for this cause the Action was brought: the Defendant pleads in Bar, that after the Bond entred into, and before the Birth of the Child, the Plaintiff accepted of the Defendant (one load of Lyme) in full satisfaction of the said debt, and in full discharge *dicti scripti obligationis*: And upon this plea, the Plaintiff demurred in Law: and the Defendant joyned in the Demurrer: and whether this Plea, as the same is pleaded, be good, in Law, or not, was the question. Upon which Plea, the only point insisted upon, was, whether this acceptance of the said Load of Lime, before the birth of the Child, by the Plaintiff, of the Defendant, in satisfaction of the Debt, be a good and a sufficient discharge of the debt, in Law, or not: It was argued for the Defendant, That this acceptance of the Load of Lime, before the Birth of the Child, should be a good discharge of the Debt, and to this purpose was cited the Book of 37 H. 6. fol. 26.

37 H. 6. fol. 26.

In an Action of Debt for payment of mony at a day to come; and before the time he accepts of some other thing in full satisfaction of the Debt: this shall bar him of his Action (be it either by payments, acquittance, or by acceptance of that, which amounts to as much, as a payment,) being an acceptance in full satisfaction; this will be good, as appears, by Coke 5. pa. fol. 117. a. in Pinnels Case. And by 4 H. 8. Dyer. fol. 1. where the condition of a Bond is collateral, there the acceptance of another thing in satisfaction, is no good bar, but contrary it is, where the condition is to pay mony. Yelverton at the Bar, that this acceptance of the Load of Lime, before the Child Born, is no discharge of the Debt, or any satisfaction at all for the same, for that the same was done, after the Bond entred into, and before the Birth of the Child; and so the same done before any debt did grow due; for that no debt here grows due until the birth of the Child. Fenner Justice. This acceptance could be no satisfaction, because that no debt was due at this time. Yelverton Justice. In case of a Bond for to pay mony, at a time to come, the same is a debt, and a duty presently, but not demandable till the day, or the time here of the birth of the Child; the same is a duty presently, but the time of payment may be deferred; but notwithstanding this, the same remains a debt, and a duty presently: as if one be bound by bond, conditioned for to pay mony when I. S. should come from beyond Sea: This is a debt and duty presently: but the payment thereof only deferred for a time, and that by the express words of the Condition; but this doth not alter the Debt, it still continues to be a debt, and a duty presently, upon his entring into the Bond; Here in this Case, the Defendant pleads the acceptance of this Load of Lime, for to be in *plenam satisfactionem dicti scripti Obligationis*. This cannot be a discharge of an Obligation by words, but by writing: he might well have pleaded this acceptance of the Load of Lime, by the Plaintiff in full satisfaction and discharge of the sum of Mony, mentioned, and contained in the Condition of the Bond; and this had been good: but then he ought to have pleaded it so; and that this was accepted of by the Plaintiff in full satisfaction, and discharge of the Sum of Mony, in the Condition of the Bond, mentioned to be paid; but not to have pleaded, as it is done in this Case, viz. that the acceptance of this Load of Lime, was in discharge *Dicti scripti Obligationis*, which is too short, and no good pleading; and so for this cause the Plea in Bar is not good; and the Plaintiff had good cause to Demur in Law unto it: and so the Demurrer good, and the Plaintiff hath good cause to Recover his Debt. Croke Justice, of the same opinion; The Plea here in Bar is not good: It is very clear, that

Coke 5. a. fol. 117. a. Pinnels case. 4 H. 8. Dyer. fol. 1.

Yel. 214. Mo. 469, 852.

that this is a debt and a duty presently, though not to be paid till a certain time to come. And this appears to be so by Littleton in his Chapter of Releases fo. 118. Pla. 512. and 513. and Coke. 8. pag. fol. 153. and in Edward Althams case, it is debitum presently. And may well before the time of payment be discharged by a release. Fenner Justice: the plea hereof the Defendant is not good, for that it is no debt till the Child be Born. Williams Justice; the binding by the obligation here makes a debt and duty presently. And the payment mentioned, to be made in the condition of the Bond, this is not performed here by matter in fact, by payment of the mony, but by the acceptance of a Load of Lime pleaded to be in satisfaction and discharge *dicti scripti obligationis*, this is not good, but if he had pleaded, that this had been delivered, and accepted of by the Plaintiff in full satisfaction and discharge of the sum of mony mentioned to be paid in the condition of the Bond, this had been then a good plea in Bar, but not as it is here pleaded. Curia all agree with him herein that this plea in Bar, as it is here pleaded, is not good to Bar the Plaintiff of his action, and therefore by the Rule of the Court judgment was entred for the Plaintiff.

Littleton Ch. Releases fol. 118. pla. 512. and 513. and Coke 8. p. fol. 153. Althams Case.

Judgment by the Rule of the Court given for the Plaintiff.

Limbey Plaintiff against *Hemmurse* Defendant.

IN a Writ of Error to reverse a Judgment given in the Court of Marshalsie in an action of debt, there brought upon an *Indebitatus assumpsit*. The Error assigned for to reverse the Judgment there given, was this, because that the Plaintiff there in his Declaration, did not shew the cause, how this debt to the Plaintiff ded grow due, as he ought to have done. Curia, this is a clear Error. For he ought to have shewed in his Declaration, the cause of the debt, and how it did grow due unto him, and for this omission, the Declaration is not good, and so the Judgment there given Erroneous, and for this only Error, by the Rule of the Court the Judgment was reversed.

Limbey Plaint. against Hemmurse Defend. A Writ of Error entred. Pasch. 8. Jac. B. R. Rott. 206. Judgment reversed by Cur.

Denton Plaintiff against *Stocke* Defendant.

IN a Writ of Error, to reverse a Judgment given in an inferior Court, in an Action of Debt upon a Bond, conditioned for payment of mony, which by the condition of the Bond was to be paid, at a day to come, *in porticu Capellæ de Middleton*; upon payment pleaded by the Defendant, issue was joyned upon *Non solvit*, and the *venire facias* was awarded De Middleton. Verdict and Judgment was given for the Plaintiff, and a Writ of Error brought for to reverse this Judgment. The Error assigned was that this was —— a mis-trial, for that the *venire facias* was not well awarded. Curia clear of opinion, that this was no mis-trial, but that the *venire facias* here awarded De Midleton was well awarded, that the verdict and judgment was well given for the Plaintiff, and therefore by the Rule of the Court *Nullo Contradicente* the Judgment was affirmed.

Denton Plaint. against Stocke Defendant in a Writ of Error. The Venire facias de Middleton well awarded. Judgment affirmed by the Rule of the Court.

Note upon the Statute of 2 E. 6. Chap. 13. made for setting out of Tithes. In a prohibition to stay proceedings by a Parson, in a suit, in the spiritual Court brought by him against one of his Parish, for hindering of him in his way, in the carriage of his Tithes. Curia all agreed in this, that if a Parson hath his usual way stopped, that so he cannot come to take away his Tithes being set out for him, he may well sue for this in the spiritual Court, and there have his remedy. But if the question be whether the Parson be of right to have a way, (s) one way,

Stat. 2 E. 6. Cap. 13. for setting out of Tithes. In a prohibition upon a suit in the spiritual Court for the stopping of his way.

way, or an other, this is tryable by the Common Law, and not in the spiritual Court; but if the Parson have a certain way granted to him, and set out by the Common Law, if he be at any time disturbed, and hindered by any of his Parishioners, or by any other in the use of this his way, he may then in such a Case well sue in the spiritual Court for his remedy. And the words of the Statute of 2 E. 6. Chap. 13. are, that if any Parson be disturbed, stopped, or hindered, in the carrying away of his Tithes, so that the Tithe comes to be lost, hurt, or impaired, in this case he may sue in the spiritual Court for his remedy, and upon due proof there made thereof, he shall recover double value of the Tithe so taken, or lost, besides his costs and charges of suit. But because in this principal case, the Parson sued in the spiritual Court, for the right of his way, whether he was to have that way or not, which belonged properly to the Common Law, and not triable there in the spiritual Court, and for this cause, the Court granted a Prohibition to stay their further proceedings in the spiritual Court. Poph. 108.

Prohibition granted per Cur. to stay proceedings in the Spiritual Court.

Flewellin and others Plaintiff against *Rave.*

Flewellin Pla. again Rave. An action on the case Sur Trover and Conversion, grounded on a disceit.

IN an action upon the case sur Trover and Conversion, grounded upon a disceit, the case appeared to be this. That where there was A. B. and C. A. was indebted unto C. in such a sum of money. And B. in such a sum was indebted unto A. It was agreed between A. B. and C. that B. in discharge of his debt unto A. should discharge the debt of A. unto C. in paying and delivering unto him certain commodities which he then had in his hands, and possession, being properly the goods and commodities of A. and which B. by and with the consent of A. did assume, promise, and undertake, to deliver them unto C. in discharge of the debt of A. unto him, and C. was contented to accept thereof. According to this agreement made between them, B. did not according to his promise, and undertaking discharge the debt of A. unto C. by delivery of the goods unto him, but contrariwise, did convert them unto his own use after the death of A. and for this C. brought his action upon the case for a Trover and Conversion, grounded upon this disceit. And whether this lieth or not is the question. Curia, the whole Court agreed clearly in this: that the action is well maintainable; for if a man bail goods to one, for to bail them over to another; if he to whom this Bailment was thus made, to bail them over, contrary to the trust in him reposed, doth not deliver them over, as he was to have done, but doth convert them to his own use, he hath by this deceit, made himself liable to an action, both of the first bailour, and also of the party to whom they were to have been bailed over, and either of them may well have his action against him for this. And notwithstanding the third person here to whom the goods ought to have been bailed, had never the possession of them, yet this Conversion and non-fesance of that which he ought to have done, is a wrong, and very prejudicial to C. the third person. And for this wrong and prejudice, he may have his action upon the case, as well as the first bailour. (But both of them shall not have their actions.) But he that first begins his action, shall go on with the same. Curia the whole Court also agreed clearly in this —— that this not bailing over, and delivery of the goods by B. the first bailee unto C. in satisfaction of the debt of A. and according to the agreement made between A. and B. that this doth clearly amount in Law to make a Conversion. And that by this, he hath made himself subject, and liable to an action, to be brought by the party to whom he should have delivered the goods. Williams Justice, if a man delivers a Deed to one, to deliver the same over to another, and he doth not deliver the same over accordingly, the party here to whom the deed was to have been delivered, may well have his action for this not delivery of the deed unto him, and with this agrees the Case in 28 H. 8. Dyer. fol. 20. and 21. pla. 125. and 228.

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in the Grocers case of London by Mountague: there, if a man deliver mony to bail this over, if the bailee doth not perform the condition, he is by this a debtor of the mony, or accomptable, at the pleasure of the bailor. And there pla. 128. in every receipt, two things are included, (s) either the receipt is to the use of the bailour, or to the use of a stranger, or his own use. If the same be to the use of a stranger, then he is his debtor, because that the property is not in the bailee. Curia, the whole Court agreed in this, that the action brought by C. the Plaintiff, against the Defendant, being the first bailee, for not bailing of the goods unto him according to the agreement, was well brought, and that here was a good conversion in Law, and so by the Rule of the Court Judgment was given for the Plaintiff.

Judgment given for the Plaintiff by the Rule of the Court.

In an action upon the case brought for slanderous words the case was this. The Defendant spake these words to the Plaintiff himself. (s) Thou art a perjured fellow, thou hadst 10 l. to take a false oath, and therefore thou art a forsworn fellow. Whether these words are actionable, was the question. Yelverton Justice, that they are not actionable, for he may take the mony and not take the oath. Williams Justice, those words are scandalous, being a great scandal to his name, credit, and reputation, and a blemish, and discredit unto him, and therefore actionable. Fenner Justice, that the words are actionable; if one saith of another, thou didst assault me on the high-way to rob me, these words are scandalous, and actionable. So here in this case the words are actionable.

In an action of the Case for words.

Rowland Egerton Plaintiff against *Edward Morgan* and others Defendants.

IN an Appeal brought for the death of his Brother, killed by Morgan. In which Appeal, the Plaintiff declared against the said Edward Morgan, against Morgan his Brother, and against one William Robinson, but for that they were not to be found (as by the Return of the Sheriff appeared,) he proceeded only against Edward Morgan. Henry Yelverton at the Bar excepted against the Writ, *quod minus sufficiens in lege existit*, to enforce the Defendant to answer the same, and so Demurred in Law to the Writ. The Court gave day for the argument, saying that when they gave their Judgment upon this Appeal, the same Judgment should have Relation unto this day, and that the day by them given for the argument of this Appeal, is but only a day of grace. Afterwards Yelverton beginning to argue, said that he would speak for Morgan, and therein he would also help the others in the Appeal. For if the Appeal be not good against Morgan, but shall abate, the same shall be then also abated against the others. The Writ here is *minus sufficiens* to enforce the Defendant to answer, and therefore he pleaded over to the Felony. The Writ as it is now in Court, is not sufficient; *In favorem vitæ* which the Law hath of a man, it so provides that the Writ of Appeal ought to be most exact, and more exactly pleaded, than any other action, and if the same be once abated, it shall not be afterwards revived. It appears by Stamford lib. 2. fol. 82. that an Appeal shall abate for false Latin, or for default of form, and to this purpose is the case in 13 E. 3. Fitz. tit. Corone pla. 121. Where in the Writ of Appeal, the word (*Habeas*) was left out, and for this omission the Writ was abated without any amendment. By all which it appears, how favourable the Law is to the life of a man. In the Appeal was shewed the Weapon, with which the party was killed; In what part of the Body the Wound was, the Longitude and Latitude of the Wound. It was prayed that the appearance of Morgan might be as well upon the Indictment as upon the Appeal. The Recorder of London prayed, that they might proceed upon the

Egerton Pla. against Morgan in Appeal.

Stamford lib. 2 fol. 82.

13 E. 3. Fitz. tit. Corone Pla. 121.

the Indictment notwithstanding the Appeal was hanging. Exceptions being taken to abate the Appeal, but because they had not the Exceptions ready to deliver into Court, the Court did much dislike of it, for that a plea pleaded in abatement of a Writ, ought to be shewed presently, and therefore the Exceptions were shewed. Man Secundary informed the Court, that if they shewed not their Exceptions presently, the plea did then amount to no more than to a not guilty. The plea here is, that the Writ is *minus sufficiens* to cause the Defendant to answer. They ought to shew wherein: George Croke for the Defendant, this ought to be done with this difference, if it be matter in Law, there he needs say no more, but *minus sufficiens*, but if it be matter in fact that is alledged, there he ought to shew what the same is. The whole Court did agree this difference to be good Law. The prisoner was bailed, and the —— bail was taken Body for Body. Afterwards Henry Yelverton argued for the Defendant, that the Writ of Appeal was not good, and so the Appeal ought to abate. The Writ here in Court, is a blank Writ, (album breve) (s) without any return at all, and therefore not be answered, the Writ not served at all. You declare, we come in, and the Writ not served, and so in this insufficient. It appears by the return that the Writ was directed to the Sheriff of Middlesex, returnable Octob. Michael, at which day the same ought to have been returned.—— The words of the return are these, by vertue of this Writ to me directed, I have taken the Body of Edward Morgan, whose Body I have here ready in Court, at the day, and as for the other two *non sunt invent. in ballivo nostro.* And at the end of the return was set down.—— *Respons. vic. Sabastian* Harvey, &c.

Cokeine. They returned this, but they were not then Officers to the Court, nor to the King, and so enabled to make the return, and therefore the return insufficient. The Writ was directed *Vicecomiti*, and so ought the return to have been by the Vic. none can make a return of a Writ, but such a person, who at the time of the return remained an Officer to the Court. If the old Sheriff be removed before the day of the return, the new Sheriff is to make the return, and to this purpose, is the Book of 22 E. 4. fol. 33. and 34. in the Case of a Writ of Error to reverse a false Judgment given before the Major and Sheriffs in the Court at Coventry, and Coke 3. pag. fol. 72. Westbyes Case, where it is resolved, that after the Election of a new Sheriff, and before delivery over of the Prisoners to him, they do remain in the custody of the old Sheriff, and after the delivery of them over to the new Sheriff, he at the day of the return, ought to return, *Cepi Corpus*; but in this case the return by the new Sheriff before any delivery over of the Prisoners to him by the old Sheriff, is no return at all in Law. And the old Sheriff can now make no return, he being no Officer at all to the Court, but the new Sheriff is the officer to the Court and ought to make his answer unto the Kings Writ to him directed, and he doth not here return a *Cepi Corpus*, but only an Endorsement in this manner, setting his hand also to the return, with this Postscript, (s) This Writ as it is above subscribed, I the now present Sheriff, have received from my Predecessor the old Sheriff, going out of his Office, and this upon the matter is no return at all. Proces may in some Case be awarded unto the old Sheriff for to bring in the Body of a Prisoner, but that is in Case where before he hath made a return of *Cepi Corpus, & paratum habeo.* And afterwards he is removed and a new Sheriff made, upon the non-appearance of the Prisoner, Proces shall in this case go to the old Sheriff but not otherwise. Where the old Sheriff is removed, the new Sheriff ought to make the return. Here the new Sheriff hath made a return, but the same is not good, being but of parcel of that which he ought to have returned. For as to the other 2. his return is *Non sunt invent. in ballivo nostro.* this his return is not good. For that he ought to have said, that those 2. nor either of them were to be found. An appeal may be commenced, either by Bill, or by Writ, and where it is by Writ, as appeareth in the old Book of entries Tit. Appeal. de mort. fo. 46. Pasch. 33. H. 6. Rott. 39.

22 E. 4. fo. 33. 34.

Coke 3 pa. fo. 72. Westbyes Case.

Old Book of entries tit. Appeal de mort fo. 46. Pasch. 33 H. 6 Rott. 39.

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there the Writ of Appeal is a Writ conditional (s) if he find Pledges, that then he ought to attach the Body of the party, and there Pledges were put in, the Appeal was there brought by a Woman for the death of her Husband at the day of the return, the parties appear in Court, at which day, the Sheriff *non misit inde breve*, the Plaintiff prayed to have another day for to declare, and for the Sheriff to bring in his return, the Defendant prayed that the Plaintiff might now proceed against him, and declare, this being the day of the Return; there it was holden by the Court, that if the Party did not declare on the day of the Return, the Appeal is then lost, and therefore, by the Order of the Court, the Plaintiff was to declare, notwithstanding, the Sheriff, had not made his return, but because no Writ of Appeal was served and executed, by reason whereof *versus eum de jure narrare non potest, petit breve Sicut pluries vic. com. prædict' dirigendum* for to attach the Body, and to have him there, and die, &c. and that she may not be put to declare in the Appeal before the Writ be served, executed and returned, and the Defendant being ready in the Court to answer the Plaintiff in the Appeal, if he would declare against him, and in regard the Plaintiff refused so to do, he prayed that he might be discharged of the Appeal, and for this cause it is there ruled, that the Appeal should abate, and the same there was accordingly abated. This Case may well be compared to the present Case now in question, for that here in effect is no return at all, made by the Sheriff, and this is the Cause of the Demurrer here. If the Sheriff makes his return, and doth put his hand to the Writ, clearly this is not good (but it is said) that the old Sheriff did put his to the Writ, if he were at that time, but he was out of his office, and so he was no Officer to the Court, and so it is in effect, as if he had not put his hand at all to the return, and so the return, being as no return in Law, is meerly void. But now it is to be considered, whether the hand of the new Sheriff to the Writ, shall aid it, and make it good; it shall not, for that he hath made no return at all, in his own name, for he doth not say, *Cepi corpus, nec, paratum hic habeo*, as he ought to have done, and therefore all this appearing so to the Court, it was prayed, that this Writ (being *minus sufficiens in lege*, to enforce the Defendant to answer to the same) may for this cause be abated. George Croke, the Writ is not good. First, where it said, *& fecerit nos secur' de clamore suo prosequendo, &c.* this is not good, for that he doth not shew as he ought to do, in what Cause this was in, and between what persons, this is omitted in the Writ, and therefore not good. Secondly, For that in the Appeal, he hath named himself, *frater*, and doth not say, as he ought to have done, *frater, & hæres*. First, he names himself ——— *hæres*, but this is only by way of addition, but in the point of the Writ, he ought there to have said likewise, *hæres*, but this is omitted, and so for this omission the Writ is not good. Note, that these two later exceptions were over-ruled, and rejected by the whole Court; afterwards this Case solemnly argued by all the Judges ——— Croke Justice, this is a Case of great Consequence, and Importance, Life on the one side, and on the other side, *Revenge, ultor sanguinis, strictum jus* is to be rendred to them both. Exceptions have been taken, some to the Writ, some to the Return, and some to the Act of the Court. As to the exceptions taken to the Writ, no just exception hath been taken to the same, but that this Writ remains good, notwithstanding all the exceptions taken to it, yet the exceptions were very forcible. First Exception, because it is not shewed against whom the plaint was, as to this *ex præcedentibus, & consequentibus*, this being considered, this is good enough, and a perfect Declaration, *in quo clamore, & versus quem*, this was, if you lay all together. Secondly, Because it is not expressed in the Writ, *Cujus hæres ipse est*, this is sufficiently expressed in, and by the Premises, the Course of the Chancery is so, *& Cursus Curiæ, lex Curiæ. Cursus Cancellariæ Lex*, and this is very true, the Writ is briefly alledged, for the avoiding of Tautologie in this, *& dicitur breve, quia rem breviter enarrat*, and the Rule of the Law is this, *quod necessarie intelligitur id non deest*,

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Exceptions to the Appeal.

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3. *deest*. Thirdly, As to the Return, this being Sanct. Michael. and doth not say proxim. futur. as to this, this shall be intended to be so, and it is not the course of the Court, so to mention this, for that the Law supposeth it so to be: these are not exceptions of substance, for to overthrow the Appeal. Another exception taken to the Return of this Writ, and this is grounded upon the Act of the Court; as touching the validity of this Appeal in the Law, this was dated Tr. 18. Junij retornable in 8 Mich. next ensuing, the old Sheriff took the Body, and returns a *Cepi Corpus infra Comitat. cujus corpus paratum habeo*, and for the others *non sunt in mea balliva*, the new Sheriff, *istud breve sic mihi deliberat' fuit in executione, &c. officij*, and the others are not, if this be good —— that this is good, and the old Sheriff, as to this, is a good Officer to the Court, and may well bring in the Body, *Cujus Corpus deliberari* to the new Sheriff —— the old Sheriff remains an Officer to the Court, until he be discharged by a Writ, *De exoneratione Officij*, untill this Writ comes to him, he remains an Officer to the Court, and a Writ may be directed to him, that he by Indenture, shall deliver all manner of Executions —— over to the new Sheriff, and therefore there is a notable Case, that if he do not deliver the Causes also, but Body only without the Causes, that this shall be an escape in him; if the old Sheriff returns a *Cepi Corpus, & paratum habeo*, if the Prisoner appear not at the day of the return, a Distringas shall be awarded to the old Sheriff, so that the old Sheriff may well say in his return to the Court, *paratum habeo*, for that he still remains a sufficient Officer to the Court, to return this next as to the truth of the return, *Corpus paratum habeo*, when as by the Record here it appears, that he was bailed, whether this shall make the return bad? that it shall not, but that the return is good; this intervenient Act (of Baylement) makes the Case the more intricate —— *ea occasione reddidit se*, it may be doubted, whether he may so do, when the Proces was in the same Court; it may well be, and he may well here be taken, upon the return of the Sheriff, and upon this the Court may proceed, so that notwithstanding all the exceptions that have been taken, the Appeal remains good, and the
2. Court may well proceed upon the Appeal. Williams Justice, The Declaration here is against Morgan, *Comparentem hic in Curia*, who takes notice of it, and demands oyer del Br. and a Demurrer is to the Writ, and to the other matter pleads *Nient culp.* so that now we are to speak to the validity of this Writ, whether the same, as it is, be good, or not; some things urged *ut amicus Curiæ*; The Court is not bound to look into any thing, but into that, of which a
1. doubt may be made. First, therefore it is to be considered, whether this
2. Writ be good, or not. Secondly, whether the return here by the Sheriff, as
3. the same is made, be good or not. Thirdly, whether here be any party in
4. Court, against whom he may declare in the Appeal. Fourthly, whether any
1. intervenient Act hath prejudiced the Cause any ways. First, as to the Writ, it is such, as was Error at the beginning, and there is no other form for the same, and there is no Book for to warrant these exceptions as have been taken, all the matter is contained in the Writ, and therefore it is called *Breve, quia rem breviter enarrat'*, it sets forth the intention and meaning of the parties, this —— *pro clamore prosequendo* —— *cujus hæres ipse est*, this ought not to be expressed in the Writ, and this is very plain, that the Writ, is good, notwithstanding this, *proxim. futur.* in many Cases this is be so but it is good in this Case, as it is expressed, and to this purpose is the
26 Ass. pla. 3. Case in 26 Ass. pla. 3. An Assise was discontinued, by the not coming of the Justices. An Attachment awarded to summon him to appear; and it is not expressed to be *ad Curiam proximam futuram*, and here for this omission the same fell to the ground, but it shall not be so in case of an Appeal, for the Law intends this, that it shall be the next ensuing, without expressing of it, so that the Writ remains good, notwithstanding these exceptions, and the Demurrer being generally to the Writ: which being good, the Demurrer is at an end, and falls to the ground: the Writ and the return here, are but one entire Record in

in Law. Secondly, as to the return here, this is good in Law, for before the Statute of York made 12 E. 2. cap. 5. Rastal Returns of Sheriffs fo. 345. pla. 3. no name was used to be put to the Return of the Writ, by the Sheriff, nor yet by any other Minister, or Officer, which was conceived to be inconvenient, whereupon complaint was then made of this in Parliament, and upon this it was ordained by the same Statute, that the Sheriff should put his name to every return made by him, but otherwise it was, before this Statute made, but now since this statute the Sheriff ought to put his name to every return by him made the which if he shall omit to do, this will make the return Erroneous, these things are here considerable, (s) First, the return: Secondly, the Act of the Court. First, as to the return, as it is here made, the new Sheriff thus returns, *Sic indorsat. fuit mihi deliberat.* both at the time, and since, this is a good return, and, as the case was, it could not be otherwise; something was here done by the old Sheriff, in his time, and some thing by the new Sheriff, each Sheriff is to make answer, for what was done in his time, the old Sheriff was still chargable with the body of the Prisoner, & each Sheriff to certifie to the Court what he hath done, as to the Exigents in the C. B. and here for so much as hath been done by each, to be certified accordingly, and for the rest, that to be with a *Sic indorsat. fuit*, and what each hath done, a return is to be made of it to the Court, who are to judge of the return, & therefore the old Sheriff (as to some purposes) is, and still remains an Officer to the Court, and of some things, acted, & done by him, the Court is to be certified by him of the same, and by his return, if he was not Sheriff, and yet he makes a return, this is void, and to no purpose, but otherwise it is here in this case, where it appears, by matter of Record, that he was Sheriff, by the Records, here it appears, that every Sheriff ought for to make his return to the Court, of that which he himself hath done, and of that, which the other hath done, the old Sheriff is an Officer to the Court, after a new Sheriff chosen, as appears by the Book of 22 E. 4. fo. 33, 34. for the Law takes notice of the old Sheriff, that he by the Writ to him, takes the body, and returns a *Cepi corpus*, and all this is entred of Record Trinit. 11 H. 4. fo. 82 Fitz. tit. Return del vic. pla. 53 Bre. al vic. to enquire of waste, who returns *quod mandavi Ballivo meo libertatis, qui nullum dedit mihi responsum*, for this cause the Sheriff was amerced, and a *sicut alias* awarded, for that by this Writ he is Judge, and hath power to enter into the Franchise; and in 33 H. 6. in a Writ of Annuity, a return was made by the old Sheriff, *quod nihil habet*, this —— return he made, as an Officer of the Court, and he may well be amerced, for his false return made when he was Sheriff, and this is usual here so to be done, the return of the old Sheriff in such a case is good, for that every one ought to bear, and support his own burden, so in this principal Case, the Writ is good, and the return well made by the old Sheriff. But posito that the Sheriff had put in no Writ —— The Appellant comes at the day, and the other appears, this shall all be now made good by this, for this hath been agreed, that he is the same person, and now all former defects, and insufficiencies by the appearance are made good; if the Sheriff return *mandavi ballivo, & quod nullum dedit mihi responsum*, and afterwards the party appears, this is good clearly, in 8 H. 4. fo. 21. In an Appeal, if he appears, and agrees that he is the same person, this is good, and sufficient, in L. 5 E. 4. fo. 69. In a personal Action in the C. B. Process continues till the Capias upon which the Sheriff returns *Cepi corpus, & languidus in prisona*, and afterwards upon the Writ of *Duces tecum*, the party appears before the Writ returned, and prays that the Plaintiff may count against him, and for that the Plaintiff could not deny but that he was the same party, but said, that he had no day in Court, until the Sheriff had returned his Writ, the which he hath not as yet done, and it was ruled by the Court, that the Plaintiff should declare against him presently upon this his appearance, and prayer to have him declare, and the party was bailed, and agreeing with this is the book of 33 H. 6. in the old Book of Entries Rot. 39. In an Appeal in this Court by a Feme, for the death of her Husband, at the day of the *Alias vicecomes non misit breve*, and the Defendant came, and prayed that the

2. Stat. of Yorke 12 E. 2. chap. 5. Rastal Returns of Sheriffs fo. 345. pla. 3.

22 E. 4. fo. 33, 34.

Tr. 11 H. 4. fo. 82 Fitz. tit. Return.

el vic. pla. 53.

33 H. 6.

19 E. 3. Tit. coron. 444.

4 Co. 45.

Yel. 204.

9 H. 5. 2.

8 H. 4. fo. 21.

L. 5 E. 4. fo. 69.

33 H. 6. old Book of Entries Rot. 39.

the Plaintiff might declare against him, agreeing himself for to be the same person, it is there agreed that the Plaintiff should either then declare, or the Appeal to be lost. And so in this case here, you allowing of him to be the same person, what is now to be done, it is to be considered. If upon demand, he shall say, that he is not the same person, this peradventure might be material, but not here, as this Case is, because it is here confessed, and agreed, that he is the same person, so that no material doubt, or Objection can be made, and this Case is here agreed to be so, and so the Writ here is good, and the Return is likewise
2. good. Secondly, In the next place, the Act of the Court, is to be considered; it hath been said, that in the body of the Record, the very Writ is recited, and that he *reddidit corpus suum ut in custodia marescalli—reddidit,—& ea occasione est in custodia marescalli* he defends this, here is the Writ, and upon this an appearance in 27
27 H. 6. H.6. there the party appeared gratis, and was bailed, and had a Supersedeas, & if Morgan the Prisoner here had prayed this, he might well have had it, the Court did hereupon bail him *de die in diem*, so that he going by Main-prise, none can declare against him *ut in custodia marescalli*, but he ought for to be in his cus-
Trinit. 7 H. 6. fo. 41, 42. tody, and so is the Book case in 7 H.6. fo.41. & 42. he ought to be in his custody, or no Declaration can be against him, and there it is said, that if a man be let at Main-prise, *de die in diem*, no man shall have a Bill against him, as against a man that was *in custodia*, and so when he is bailed, it bring all one: but yet the
9 E. 4. fo. 27. Note the difference between a Bill and a Writ original, as to the finding out of Pledges. party is still *in custodia* to some purposes, and so is the Book of 9 E.4. fo.27. if he declare against one, as *in custodia marescalli*, and he is not in his custody, this is not good, the Case there was in a Bill of debt against the Lord Ferrers, *in custodia marescalli*, the Bill was challenged, for that the Plaintiff had not found any Pledges, and the Lord being out of custody, the Plaintiff would have found Pledges there in Court, but could not, because the Bill was abated; but in an original Action by Writ, although he have not found pledges to the Sheriff, yet he may here find Pledges in Court, and so is the difference; but by the Book of
18 E. 4. fo. 9. b. Pledges but matter of form 2 H. 7. fo. 2. & fo. 17. 18 E.4.fo.9.b. by all the Justices en Bank Le Roy. It is there agreed, that if in any Bill, or Writ, Pledges are left out, that the Plaintiff at any time, hanging the Plea, may find Pledges, for that this is in the discretion of the Justices, and is but matter of form, 2 H. 7. fo. 2 It was moved En Bank Le Roy, where one is Plaint. by Bill, against one *in custodia marescalli*, & the Defendant emparles till the next Term, the Bill being bitwed, the Plaint. had not found Pledges, it was there questioned, whether he might then put in Pledges or not, and held that he
Note the difference between a Bill, and a Writ as to Pledges. 11 H. 4. fo.6.7. might, and accordingly Pledges were entred: a difference there was taken between a Bill and a Writ, for the Writ is, Si le Plaint. fecerit te securum, &c. & so is not the Bill. If a man be endicted of felony, and is bailed, appears by Main-prise, *extra custodiam marescalli*, and therefore cannot declare against him, 11 H.4. fo.6.7. In an Appeal of Mayhem, the Plaintiff counts, and the Defendant makes his defence, and afterwards saith, that the Writ was not served, for that the Sheriff had not returned Pledges, &c. and therefore he ought not to be put for to answer; there it is said, that Pledges are to be put in, and that this may be as well done in Court, as to the Sheriff, and when the party appears he may put in Pledges in Court, and the Defendant is to answer; otherwise it had been, if the Defendant had not appeared, there he ought to have been brought in by Process. In the Principal Case here, Morgan appears in Court, and takes notice of the
18 Eliz. Dyer pla. 348, & 349. proceedings against him in 18 El. Dyer, fo. 348, 349. pla. 14. an angry case between a Baron of the Realm, and a Nobleman. In an Appeal by Howel de morte fratris sui versus Fortescue, and others. Fortescue appears, the others not, the Plaint. counts against the others as Principals, and against Fortescue as accessary before and after the felony: Fortescue, appears and pleads in abatement of the Writ, that there was no such William Harrison de M. (against whom the Appeal was
The return of the Sheriff may be traversed by the Defendant, in favorem vitæ brought as Principal) *in rerum natura* the day of the Writ purchased, nor at any time after (the truth was) the name of Baptism was mistaken, (s) William H. for Thomas H. it was held in this Case by the two Chief Justices that although there was another William Harrison in another County, if it be

be not in the County of Bucks, where the Bill of M. is, or if he were dead before the Writ purchased, the Plea is good, and that *in favorem vitæ*, the Defendant may Traverse the return of the Sheriff. In the Principal case here, the Writ, and the Return are both good, and the Defendant appearing, and taking notice of the proceedings against him, there is no sufficient reason can be given, why the Defendant should not answer, and receive his Trial. Yelverton Justice, the Defendant here prays oyer of the Writ, and of the Return thereof, the Writ of Appeal here is good, the Pledges are nothing; where the Party is in Court at the day of the Return, he may appear, and the Sheriff may well make his return in 22 The Book of Assises pla. 3. where a Writ comes to the Sheriff, which is to be served by the Baily of the Franches, the Sheriff here ought first to take Pledges, before that he writes to the Baily for to serve the Writ, this is there so held by Sharde, that the Sheriff *de jure*, ought to take Pledges as before; but by the Reporter, the Baily may well take Pledges *de prosequendo*; but it is very clear, that Pledges may well be taken, either in the Court where the return is, or before the Sheriff, and this is usual: as to the exception taken because it is *Octabis Mich.* and doth not say *proximo futur.* this is good, notwithstanding this omission, for that it shall be intended to be the next, and so it is usual: as to the Objection made, because he doth not say in the Writ, *frater & hæres*, this is good, and needs not to be in: and it had bæn but Surplusage, if it had bæn so, for in the beginning; he names himself to be *frater & hæres*, and this is sufficient, and the conclusion is good, *ad respondendum prædictum Rowlandum, de morte prædict.* this is good, and so the Writ, as it is here, is clearly good. But the great point of difficulty here in this Case, doth rest upon two matters of the Return as to the Appeal, and whether the same be discontinued or not, wherein consideration is to be had. First, To the Return of the old Sheriff, and Secondly, to the return here of the new Sheriff; the Return here appears judicially to the Court, and the Court ought to take notice of it, and to have a due consideration of the same, although they are informed of this, by one only, *ut amicus curiæ*; here is no good return made in this Case by the old Sheriff, for that he is now antiquated, being out of his Office, and so no Officer to the Court, neither can the party come in upon this return; if the name of the old Sheriff had bæn only to the Writ, it had then been a good plea for Morgan to have said, that he was no Officer, and that the return was not made by an Officer of the Court, so that the Return made by the old Sheriff, is no good return in Law at this day; but it is said, that the new Sheriff here made the return; as to this, if the return made by him, was in the name of the old Sheriff, this is not good; as to his return here, nothing at all is here returned, as done by him, he saith nothing at all of the body of the Prisoner, but only mentions here an indorsement upon the return, the party ought not to appear upon this, the same being no ground nor warrant for his appearance; the Declaration here against him is, as in *Custodia Vic.* and the new Sheriff had him not in his custody, nor yet the old Sheriff, it doth not appear here by this return, that the Prisoner was at any time *in Custodia* of the new Sheriff, unless by the Indentures between them, it appears that he was by the old Sheriff delivered over to the new, as it appears Coke 3. pa. fo. 72. in Westbies Case; the Plaintiff here cannot declare against him, as being *in Custodia* of the old Sheriff, for that he is now no Officer to the Court, neither can he here declare against him, as being *in Custodia* of the new Sheriff, for that he never had his body in his custody, delivered to him by the old Sheriff, but yet he remains with him, and no Distringas here shall be awarded to the old Sheriff, to have the body of the Prisoner in Court, because that he is no Officer to the Court, and herein the Difference will be this, if the Sheriff returns at the day *Cepi corpus*, and have not the body ready, he shall then be amerced, and a Distringas shall issue to the Coroners. Secondly, if the old Sheriff at the day returns *Cepi corpus*, and that before the day of the return, he was removed, and a new Sheriff made, the Distringas here shall be awarded to the new Sheriff, (if it appears upon record, that he hath

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22 The Book of Assises pla 3.

Coke 3. pa. fo. 72. in Westbies case.

Note the difference in the returns, and where the Sheriff is to be amerced.

hath taken the body, but not otherwise. If the Sheriff returns *quod mandavi ballivo*, who answers *quod cepit corpus*, and brings him not in at the day, he shall be amerced, and a Distringas shall go to the Baily or the Sheriff for to bring in the body by him taken: In the Principal case here, the return as it is made, is not good: here the party Defendant hath appeared gratis, the Question now is, whether this his voluntary appearance shall make all to be good, which was otherwise defective upon the Return, this his appearance shall not make the same good, for that the Plaintiff here ought to declare against him, upon some Writ, or not at all: if the Defendant had pleaded here generally, to the felony, he might then have well proceeded to the trial of him, but where he appears, as in this Case he doth, and demurs unto the Writ, otherwise it shall be; then in the next place, it is to be considered of here, whether this Appeal be discontinued or not. As to this, the Appeal here is clearly discontinued, the Defendant was in *custodia marescalli*, the last Term, at the suit of the King, *& occasione prædict.* he rendred himself to the custody of the Marshal, and *octabis Michael.* he was bailed, how ought the Plaintiff now to declare against him? a man cannot be, at one and the same instant of time, a prisoner unto two (g) to the Marshal, and also to the Sheriff, they being two several Officers to the Court, he cannot be a Prisoner unto them both; if the Law be, that he is not in *custodia* of the Sheriff, but of the Marshal, then he ought to declare against him accordingly, and so upon the whole matter, the Returns here of the Sheriffs, are neither of them good, and the Appeal here is discontinued, and that so the same, by the judgment of the Court ought to be quashed. Fenner Justice, First, as to the exception taken to the Writ, because it is not said *filius & hæres* in the conclusion of it, as to this, the same is no good exception, but the Writ is good, this exception notwithstanding. Second exception, because it is *octabis Mich.* and doth not say *proxime futur.* this is no good exception, for where a man is bound to pay mony at the Feast of St. Michael. this by intendment shall be said to be the next Michaelmas after the date of the Bond, *à fortiore*, it shall be so taken and intended here in this Case, to be *octabis Mich.* next ensuing, so that the Writ is clearly good. Thirdly, as to the return of the Sheriffs, the return here of the old Sheriff is a bad, and an insufficient return, for he hath not performed that which he ought to do; here it is said, he took the body, and would have the body, this is not good, but he ought to have said, that he had taken the body, and that he had delivered the body over to the new Sheriff: if he had said, that he would keep the body, when as he was not Sheriff, this shall be in Law taken for an escape: the Law requires of the old Sheriff, when there is a new Sheriff made, that he ought then for to deliver the body of the prisoner to him, and there is no president in Law, to warrant this, that the old Sheriff shall make such a return without his delivery over of the body to the new Sheriff; the old Sheriff is not then Sheriff, and how then shall he say, *cepi corpus & paratum habeo*, whereas this is an escape in him? he cannot keep, and detain him in prison, when he is no Officer to the Court, how then can he say, *paratum habeo*, when he is no Sheriff? neither can the Court upon this award that he shall be in prison, because that this is no sufficient return, the same being made by one, who is no Officer to the Court, but is now out of his Office, there being a new Sheriff made; where the Sheriff returns, *Cepi corpus, & paratum habeo*, and brings him not in, then the Writ of *Duces tecum*, shall be awarded, for to have the body in Court, and that to be *sub pœna*, the Return, and the Writ is but one Record, and this being so, if the one be bad, so shall the other be likewise. In the next place, as to the appearance here, of what force, and validity the same here is, is to be considered, and as this case here is, the appearance of the Defendant unto this Writ, is as nothing at all, for that he here appears upon the Main-prise, but not unto the Writ, and if he appear not, he forfeits his Recognisance, so that he comes in, and appears here gratis, and that is, for to save the Main-prise, but he appears not unto the Writ, but if he will, he may appear here to the Writ, and he may also refuse so to do, if he

The Appeal discontinued.

3. Exceptions to the Writ.

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he please, but in the Case remembred of an Appeal brought by the Wife, for the death of the Husband, and both of them appear, the Defendant prays, that the Plaintiff may declare against him, and this the Plaintiff ought to do, for that there is no remedy to make him to appear, but there is good remedy for to make the Defendant to appear (s) by process of outlary, and so it stands in such a case, whether he will appear or not, and he may well refuse, if he be demanded for to appear, but otherwise it is of the part of the Plaintiff, for the Defendant hath no other remedy, for to make him appear, 5.
if he deny so to do, but only when they are both of them present in Court, to pray the Court to order that the Plaintiff may then declare against him, and then upon this praper of the Defendant, the Court will enforce him to proceed, and to declare against him. As to the last matter considerable in this Case (s) the Declaration of the Plaintiff in this Appeal, whether this be good, or not, as to this, the Declaration is insufficient, and the non-apparance will make the same good, that the Declaration is insufficient, for that in the Declaration is an Appeal, the hour ought to be therein as certainly expressed, as any other time when the wound was given: and in this Declaration, First, the same is laid to be *Circiter*, or *citra horam undecimam*, this is no certain designing, either of the day or hour, and therefore the Declaration for this uncertainty, in this particular is insufficient, for that not only the day of the death, but the hour also ought to be certainly expressed and set down in the Declaration, the which is not here so done, the day being expressed, but not the hour, the same being only alledged to be, *Citra horam undecimam* which is not good, being altogether uncertain, and so the Declaration for this uncertainty, is insufficient, and the Appeal 5.
ought to be quashed. Also the Declaration here, is his own Allegation only, and no matter in this of the other part, and therefore his Allegations therein ought to be certain, but herein he hath failed, and for this cause the Declaration is insufficient, and so the Appeal ought to be quashed. Flemming chief Justice. An Appeal is in Law to be very strictly looked into, so that no Error be in it, neither in the Writ, nor in the return of it, nor yet in any mean Process in the same, nor in the return of the same, nor yet in the Declaration upon the Writ of Appeal; the Judgment here in this final, and peremptory, and not to be reversed, but in Parliament, and if the party be hanged first, and the Judgment afterwards reversed by a Writ of Error, what will this avail the party? as to the matter here, and the proceedings in this Case, the party hath been attached, and upon this attachment *comparuit*, he hath appeared, and being here personally in Court, the Plaintiff hath proceeded, and declared against him; upon this, the Defendant Demands Oyer of the Writ, and of the return thereof, he now appears and takes advantage of this, and nothing can be here said against it, but here is a good appearance, he being brought in by the attachment, and so he comes in by the Writ, being thereby attached; the matter now to be considered in this case, is whether the Defendant shall be now enforced to answer unto this Writ, the same being insufficient in Law; as to this, clearly, he shall not, but it is without question, that his appearance no where is upon the Writ, and upon the Attachment he hath demurred hereunto, and this *non ut amicus Curiæ*, but this is done by him, *in propria persona sua*, and this his appearance is good. *Comparet*, whether this shall now be taken to be an appearance upon both, or upon this, which is, *& paratum habeo*, this is in another term, and another Record also, and it is not good, for the Court to seek out Records of another Term, nor yet to look into them. First, Judges are to proceed, *secundum allegata & probata*, and are not to go any further. Secondly, there ought to be an averrement here for to make these agree together, 1. *reddidit se*, and the Court bails him. Secondly, the Return is, *Cepi corpus & paratum habeo*, how these two can stand well together, is to be considered. In an Action of Trespass, a Capias issues to the Sheriff, who returns *Cepi corpus*, if at the day, he doth not appear, then a *Duces tecum* shall be awarded to the same

Sheriff,

Sheriff, continuing in his place, but if he be removed, then the Writ shall go unto the new Sheriff, and a Distringas may be directed *nuper vicecomiti, ita quod habeas corpus*: if a new Sheriff be elected, before the other hath made his return, and the new Sheriff informs the Court, that the old Sheriff hath taken the body, *Et non curat mihi liberari* — the Defendant appears in person, and prays that the Plaintiff may declare against him, if this appearance of the parties shall reconcile, and make good the return of the Sheriff, or not, is considerable in L. 5 E. 4. fo. 69. a Capias is directed to the Sheriff, who returns *Cepi corpus, & Languidus in prisona*, at the day the Sheriff doth not appear, but the party appears not upon the return of the Sheriff, but he appears at the day, upon his own accord, and prays that the Plaintiff may declare against him, this is there well argued, and it is there said, that this appearance of the party gratis the Court ought not to receive, for that the party was then in Prison, and came in, and appeared gratis, without any satisfaction given to the Court, how, and in what manner this could be, that he should be at large, and yet in prison at the same time, *Simul, & semel*, this being contrary to the return of the Sheriff, who returns *Languidus in prisona*; as to this it may be answered, that this may be well, for that the body in prison, by the Statute may be bailed and so at large, and appearing, being bailed, that he is the same person, it is there ruled in that Book, that the Plaintiff should presently declare against him, upon this his voluntary appearance, and this is the Judgment of that Book; but it is now to be considered, whether it shall be so in this case of an Appeal, or not; the Sheriff he cannot take bail, here the party hath appeared, without question, as upon the return of the Sheriff; it is true, that he hath appeared, upon this Appeal, he hath been attached upon it, he appears and demurres upon the Writ, and here the question will be, whether we may now look into the Writ, and examin the validity of the same, and also, into the return of the Sheriff, as the same is before us, and into the Declaration, all which the Court may well do: First, as to the Writ, the which is good and sufficient, notwithstanding all the exceptions taken against the same Octabis Mich. without saying, *proximo futur.* This shall be intended clearly to be so, without this particular expression. As to the next exception to the Writ, because he doth not say *frater & hæres*, this is more than addition, and intitling by, he saith that he doth appeal him *de morte fratris sui*, and this is sufficient, so that the Writ of Appeal here is clearly good. Secondly, As to the return of the Sheriff, the same being *virtute istius brevis mihi directi, Cepi corpus, & paratum habeo*, this Return made by the old Sheriff, and his hand set unto it, and so delivers over the Writ unto the new Sheriff, who makes his return in this manner, (g) *recepi istud breve, sic indorsatum*, he comes in by the Writ, by which he was taken by the new Sheriff, for none can return a Writ with a *Cepi corpus*, but he which is an Officer to the Court, and not the old Sheriff, for that he is not any Officer to the Court, but the new Sheriff is, for now, after a new Sheriff chosen, no process is to be served, nor any return to be made, but the same is to be done by the new Sheriff, and no return is to be pleaded, but that which is made by the new Sheriff, and not by the old, as to the old Sheriff, he ought for to deliver over all the Writs in his hands, being unto the new Sheriff; whether the return here made, be good or not, is the question; and herein, as to the Returns made by Sheriff, it is to be considered; whether this insufficient return, shall any ways prejudice a Writ well brought, whether he shall receive prejudice by the mis-return of the Sheriff: and here it is to be considered in what cases the Original, being well brought, and yet the Sheriff shall be amerced, and new Process to be awarded; and it is likewise to be considered, whether this shall be so in Cases of Appeals, what shall be done in such Cases, and what in such Cases, the Judges here in this Court are to do, and what Warrant is there for a Defendant to take any advantage of a bad return, made by the Sheriff. 33 H. 6. Rot. 39. in the old Book of Entries, before remembred, is a notable case, where the Sheriff at the first returns, that the Plaintiff had not found Pledges, what then shall be done with the Writ,

L. 5 E. 4. fo. 69.

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33 H. 6 Rot. 39. Old Book of Entrees.

Writ, in whom shall the fault be? it is there said to be in the Plaintiff, and what shall then be done? there it appears, if no pledges were found, this is the default of the Party, but where it is, *quod Vicecomes non misit breve*, there it is the default of the Sheriff; here the Defendant was ready, and appeared, and for that, the Plaintiff would not declare against him, his Appeal was abated; the Sheriff returns, that no Pledges were put in, this shall not destroy the Writ, but to have an *Alias*, and a *Capias*, and to this purpose are the Cases before remembred of 11 H. 4. fo. 82 Fitz. tit. Return del vic. pla. 53. and 18 Eliz. Dyer pla. 348, 349. but there it appears, that appearance of the party, doth not make all returns of the Sheriff to be good, for the Law gives advantage to the party, for to except against them; his appearance is, that he may have advantage by the same, and not to be by this concluded, to make all good that is done, for that this should be *oppositum in objecto*. As to the return here in this principal Case, whether the same be good, or Erroneous, is the question, in which it is to be examined, what return this is, which is here made, and by whom the new Sheriff here returns nothing, that was done by himself; but what was done by the old Sheriff; the new Sheriff ought to make the return, and this return is good, he ought to return something, and he ought to return that which was done by the old Sheriff, and no more, and so he hath done here, all which he ought for to do. In the next place, it is to be examined, in whose custody the body taken now is, whether he be in the custody of the old Sheriff, or the new Sheriff; the Proces shall go to the old Sheriff, who took the body, and a Distringas, to have the body in Court, and to this purpose he shall be said to be an Officer to this Court, for the old Sheriff is here chargable with the body, by him taken. It hath been said, that the old Sheriff, hath now no Authority at all in him after a new Sheriff chosen: as to this it may be Answered, that the old Sheriff may deliver up the body unto the new Sheriff, and he may bring in the body by him taken, in his custody, and until he have delivered all up unto the new Sheriff, which he had in his custody, and until this be all done by him, he continues still an Officer to the Court, and is responsible for them, so that here the return is good, and this shall be the return of the old Sheriff of that which he had done, and no escape can be, by this (as it hath been alledged) for if this should be an escape, (as hath been objected) then no Distringas should issue to the old Sheriff for to have the body in Court, and in this the Law is very clear, that a Distringas shall go to the old Sheriff, and so he continues an Officer to the Court, and against whom the Proces of the Court shall be awarded, as against an Officer of the Court. As to the Return, as the same now is in Court, whether the same be good or not, is in the next place to be considered. As to this, the Return as it here is, is no return at all, being only a return of that which was executed before; the old Sheriff here returns *non est inventus*, having delivered the body over to the new Sheriff, who returns nothing for himself, as done by him, but this only, which the old Sheriff had done, and this is not good, but he ought also to make some return for himself, but here it is not so. As to presidents in this Case, there are very many, but none in Cases of Appeals, but many Presidents there are in cases of Indictments, directly in point, as this Return here is: but nothing is here more to be done, we may well award a Distringas to the old Sheriff, for to have the body here in Court, for the new Sheriff clearly is not as yet chargeable with the body, as appears by the case in Trin. 22 E. 4. Fitz. tit. Return of the Sheriff pla. 33. where the old Sheriff will not deliver the Writ to the new Sheriff, it is matter of policy in the new Sheriff not to take it. All this matter is here brought before us by this Demurrer, to be considered of. The next matter here to be considered of, is the Declaration in this Appeal, whether the same be good or not. As to this, the Declaration here in this Appeal, is faulty, insufficient, and incertain, and that in many particulars which shall be shewed. If any faults be in the Declaration it is to be taken for a rule,

11 H. 4. fo. 82. Fitz. tit. Return del vic. pla. 53. 18. Eliz. Dyer. pla. 348. & 349.

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By the Statute of Gloucester 6 E. 1. cap. 9. these 8. Certainties to be expressed in the Declaration upon the Appeal.

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rule, that we cannot then proceed to a Trial by the Statute of Glocester cap. 9. No Appeal shall be abated, if the Appealor declare in certain, First, the deed: Secondly, in what part of the body: Thirdly, the year: Fourthly, the day: Fifthly, the hour: Sixthly, the time of the King: Seventhly, the Vill, or Town where the Deed was done: And Eighthly, with what weapon he was slain, and these ought to be certainly expressed in the Declaration, or the Declaration is not good. First, as to the Fact, this ought to be expressed to be of malice prepensed, and assault: As to this, it is here said, that Edward Morgan in the years, &c. the 8. and 34. ——— *Circa horam &c. percussit, & pupugit*, and doth not say ——— Anglice as he ought to do. See Coke 4. pa. fo. 40. Yongs case *percussit & perforavit*, these are *Synonyma, unam plagam mortalem*, this is sufficient, without saying any more, for that an Anglice is not to be used, (*ad plagam*) as to say Anglice, a deadly thrust, and wound, as appears Coke 5. pa. fo. 121, 122. in Longs case, and there it is resolved, that *Vulnus* and *Plaga*, are *Synonyma, & idem significant*, and both ways good, and that *Plaga* is the most usual word in Indictments. In the next place, as to the year, the 8. year of England, &c. Objection made, because it is not shewed, whether it were the 8. year of the Kings Reign of England, or of Scotland, it being not shewed which, it may be answered, that this shall be intended to be of England: as to this it shall not be so intended in cases of Appeals, no intendments to be in such Cases, but all is to be set down and specified in certain, this is not to be much stood or relied upon, but that which by the Statute ought to be certainly expressed is here left altogether uncertain; the day here is well expressed *prædicto die*. Fourthly, the hour is not certainly expressed, and in this I cannot be satisfied as to the hour ——— it is here laid to be, *Circa horam undecimam ante meridiem ejusdem diei*, what hour this shall be, I desire to be satisfied herein, the fact ought to be done within the compass of an hour *eodem die, loco, anno, comitat. postea* (*s*) *circa horam prædictam*, what hour is this, the fact ought to be laid, to be within the compass of an hour, and where it is here laid to be *circa horam undecimam*, what hour this shall be said to be, is altogether uncertain, for this shall be said to be part of the 11. hour, and part of the hour after this. *Circum circa*, is not good; if he had said *ante horam undecimam*, there no *circa*, but when there are 2 *circas*, the one of necessity ought to be longer than the other; if he had here said *circa horam undecimam prædictam*, this might have been good, but here it is without any prædict. and therefore it is to be taken for another hour, no presidents there are to have 2 *circas* in one Indictment, as here in this Case, for this is as a Circle about a Circle: 2 *circas* here not good, the same ought for to have been *hora prædicta*, and not with a *Circa*. Next as to the place *in comitat. prædict.* it appears in Stamford, that when it is said, *Locus prædictus*, the same shall not be taken for more than one, and so to be the same County *prædict.* there being but one before, here he hath named Middlesex ——— as to the addition of London ——— in 21 E. 4. fo. 24. 6. In an Appeal of murder brought by a Woman for the death of her Husband at the fourth day, *de quindena Paschæ*, the Woman, the appellant was demanded, but appeared not, whereupon it was prayed, that she might be Nonsuited. Fairefax there answered, that our Office is to be slow in Judgment, and not hasty, for if she come not in, the fourth day after, we will then give Judgment, for it may be that she is arrested, or ravished, in coming to the Court, and we will be well advised, for if we should give Judgment now, the Appeal is gone for ever: Two Towns are here named ——— (*s*) Fubbervil, and Turbervil, and Morgan is named of another Town; in the addition here it is laid to be, *in Loco prædicto*, without naming of the place. Trinit. 30 Eliz. Morgans Case, where two Towns were named as before, and he was named of another in the addition, but nothing was there said to it, by way of exception, and so he was condemned, and executed, and afterwards a Writ of Error was brought by the Peer, and the Judgment was reversed, for this Error only being, because it was laid to be *in loco prædicto*, without naming of the same place specially, be it here

Coke 4. pa. fo. 40. in Yongs Case.

Coke 4. pa. fo. 121, 122. in Longs case.

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Stamford.

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21 E. 4. fo. 24. 6.

Trinit. 30 El. Morgans Case.

here a County, in this Case it is not laid to be *in comitat. prædict.* it ought to have bæn here *in Loco prædict.* and to have named the same in certain, here it is laid to be, *tunc, & ibidem*, this is *incertum per incertius*, here; as to the weapon, that is well laid. As to the fact, *percussit, & pupugit, dans mortalem plagam Anglice*, this ought not to be so, with an Anglic. As to the hour, this is not well laid, 6.
being with a *circa* which is uncertain, and doth exclude the former, and so up- 7.
on the whole matter, the Declaration, in this Appeal, is altogether uncer- 8.
tain, and so for this incertainty in the Declaration, the Appeal ought to be abated, and the party discharged from this Appeal, and this he declared for to be his unalterable opinion. Williams Justice, As to the Declaration in this Appeal, we have delivered no opinion, as touching this, for that no exception was taken to the same, neither at the Bar, nor yet by any at the Bench, but only by Flemming chief Justice. It must be agreed, and cannot be denied, that if the Declaration be vitious, the Writ of Appeal ought then to be quashed, and made void. The Court gave command to the Counsel at the Bar, for to attend them with Presidents to these last exceptions taken by Flemming to the Declaration. At another day, Yelverton at the Bar did move the Court *quod breve cassetur*, upon this day was given by the Court, to shew presidents in this Case: and by the Rule of the Court, no Argument to be made at the Bar in this case, to these last exceptions taken, after that the Court have argued, and delivered their several opinions in this Case. Williams Justice, this may well be argued again at the Bar, when new matter was moved at the Bench, not spoken of before; the whole Court against him in this, and so was it held by all the Judges, in the Argument of Rutland, and Shrewsburies Case, here resolved, and that upon divers reasons, and matters, moved at the Bench, which were never moved at the Bar. As to Presidents, Holecrafts Case was shewed to the Court in an Appeal, where the same was laid to be *Circa horam*, and one Davis Case, where it was laid to be *Circa horam undecimam, die, anno, loco, ac circa horam prædictam.* Davis, and James Howell John, these two last Appeals were discontinued. Croke Justice, as to the Declaration, in this place, excepted against, the Declaration is good, and sufficient certainty in it, and so likewise of the County, and Town, this is good, and certain without any ambiguity; as to Holecrafts Case, that comes not to this Case here in question, here the place is named 8. times severally in this Appeal. Flemming chief Justice, you are not to deliver the reasons of your opinion, this is not the course, nor ever was it so, and no president can be shewed for to warrant this; you are only for to deliver your opinions, and to declare the same, whether you do agree, or disagree, without giving the reasons of your opinions, and according to this, is the president in Grendons Case in the Commentaries fo. 502 where Dyer chief Justice who argued last, took four exceptions not moved before, to which exceptions the Counsel there delivered their Answer in writing unto Dyer chief Justice, but did not argue this, and the other Judges did see the Answer, but did not give any reasons of their opinions, unto these Exceptions taken by Dyer, no more ought you to do here in this Case, but only to deliver your opinions, whether you do assent, or differ in opinion, without opening of your Reasons, one way, or other, but you are to keep your reasons to your selves, and so it is, and in all times before, it hath bæn the course, and order, and this ought now, and at all times to be so kept and observed. Williams and Croke Justices——against him very strongly in this particular. Yelverton Justice agreed herein with Flemming chief Justice, Williams and Croke Justices desired for to deliver their opinions, and the Reasons of their Opinions unto the Declaration, and to the exceptions, taken to the same, but Flemming chief Justice, Fenner and Yelverton Justices, would not to this agree, to have them to deliver their Reasons openly, but if they will so do, and that in private amongst themselves, within 2. or 3. days, to this they would agree, otherwise the Appeal to be abated. Afterwards, at another day, Croke Justice openly in Court delivered his opinion,

Plowdens Comment fo. 502.

and the Reasons thereof unto the Declaration, and to the exceptions taken to the same, if there appears to be any incertainty in the Declaration, either in the time, or place, which ought to be certainly expressed, this shall abate the Appeal, but here in this case there is no such incertainty in the Declaration, either in the expressing of the place, or the time here, in this case Hornesey is 8. times named before the *prædict.* so that here is sufficient certainty; the Stroke is laid here to be apud Hornesey, where it is expressed, *unam plagam*, no County named, as it is objected, as to this, it is twice expressed for to be in Comitatu Middlesex, and so there is no manner of doubt, or difficulty in this Case, but that the Declaration is good, and certain enough. As to the exception taken to the Declaration, to the point of time, that the same is not certainly expressed therein, being laid to be *circa horam undecimam*; as to this, there is no incertainty in point of time, as it is here laid, wherein the difference will be, if it had been here, with a *circa* upon a *circa*, this had been bad, and altogether uncertain, and would have abated the Appeal; here *circa* is named several times in this Declaration. First, *Circa horam undecimam.* Secondly, *Circa horam*, if the hour be certainly expressed before, if afterwards it is expressed again with a *circa*, this shall then be said to be a *circum circa*, and so bad, for incertainty; but here in this case, there is no such certainty of the hour before, and therefore to say here, *circa horam undecimam* is good, and no incertainty at all in this Allegation: as to the next exception, *Unam plagam mortalem*——Anglice, if those be words unperfect, and not proper in an Indictment, whether the Anglice shall aid this? the Judges here are to make the Exposition, and so here in this Declaration, there is sufficient certainty, in all respects, and so the Declaration is certain, and good, and the Appeal not to be abated. Williams Justice, Judges are to make Answer unto New exceptions taken, which were not moved, nor stirred before, and this they may well do, after that they have argued the Case. As to the Declaration, here in the first Writ is named, *die, anno & loco, & in Comitat. Middlesex. prædict.* the matter here considerable is this, whether in this Declaration, there be any incertainty, in the expression of the year, time, or place; that the Declaration is good, and sufficiently certain, in all the Points excepted against; but if there were any incertainty in the Declaration, in any of these particulars, the same should then be bad, and the Appeal abated, and that in *favorem vitæ*, because the same concerns the life of a man, which the Law much favours: the Statute of Gloucester 6 E. 1. cap. 9. as touching certainty, to be expressed in Appeals, the same is altogether in the Affirmative, but not in the Negative, as appears by Stamford and Bracton, Stamford lib. 2. cap. 20. touching the Count, or Declaration in Appell. fo. 80. (a) Cites *Bracton titulo de exceptionibus ad appello*, where he saith, that the Appellant shall not be constrained, for to express the hour, for he saith, *quod hora non est multum de substantia negotij, licet in appello de ea, aliquando fiat mentio*, there it is held by Stamford, that when the hour is expressed in the Declaration, the same is then made a very material thing; but Stamford there agrees with Bracton, that the Plaintiff of necessity shall not be compelled, to mention the hour in his Declaration: by the Common Law, and which kind of Declaration by the Common Law, a man may use now at this day, notwithstanding the Statute of Gloucester cap. 9. for that the Statute doth not prohibit this, the same being only in affirmance of the Common Law: here in this Principal case, there is sufficient certainty expressed in the hour, *circa*, being Englished is, about, neer, to, or by, all this is the proper construction of *circa*, and if it be so, in what way, or manner could the time be more certainly expressed? this could not be better nor more certainly expressed, than here in this Case it is, for that a man cannot by any way describe more certainly, a thing to be done *puncto temporis.* In the old Book of Entries fo. 47, 48, 49, 50. En. tit. Ap. de mort. Several presidents in this manner, as there pla. 2. *circa horam secundam post meridiem ejusdem diei*, and pla. 5. *circa horam nonam* and

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Statute of Gloucester 6 E. 1. cap. 9. Stamford lib. 2. cap 20. as to the Court or Declaration in appeal fo. 80. a. Bracton.

Stat of Glou. cap. 9. a Stat. in affirmance of the Common Law.

and pla. 4. *circa horam septimam*, and pla. 5. *circa horam quartam post meridiem ejusdem diei*, and divers other presidents there be there in like manner pla. 6. pla. 10. pla. 15. and so in the old Book of Entries, in title Endictment fo. 263. pla. 4. the like president *circa horam primam post meridiem ejusdem diei*, and Croke 4. parts fo. 41. in Heydons case, indicted for the death of Savage, where the president is, that *circa horam decimam ante meridiem ejusdem diei*, and no exception at all taken unto it, and so the like presidents are in the old Book of Entries fo. 43. in tit. Appeal pla. 1. where the Court in an Appeal de mort, was by the Wife for the death of her Husband, where the time is laid to be *Circa horam secundam post meridiem ejusdem diei*, and there fo. 45. tit. Appeal de Mayhem pla. 3. where the time in the Count is laid to be *Circa horam primam, &c.* All these are presidents in point, and the time laid, in such a manner, as it is here in our Case (g) *circa horam*, and no exception at all taken thereat, and therefore this is good, and certain enough, notwithstanding this exception taken; and these former presidents were in cases of Appeals, and the time expressed with a *Circa horam*, and no exception taken for the same, and they cannot be more certainly expressed, as in *puncto temporis*, and so the Declaration is good and certain, in this Particular point of time here, and it is also here *die, anno, & loco*, this is good and certain——*Nuper de London*, this is a good addition; if any thing be defective herein, the same may be amended, as appears by the Book of 21 Edward 4. fo. 37. and 44 Edward 3. fo. 6. b. where the Roll was amended in another Term, and this to be so done is there put (with a *mirum*) but there is no need of any such matter here, for here is no uncertainty at all, in the expression of the place; here the fact is laid to be in this manner——*malitiæ præcogitata, & unam plagam mortalem*——without *malitia*, but here lay and couple altogether, and it is good. *Loco*——here refers unto Midsex——In Nottingham——in such a Town *die, anno, loco, in Comitat. Nott.* this shall include the place, named Essex, and Hartford, *anno die & loco, in Comitat. Essex*, this includes the Place named——*unam plagam mortalem*, a deadly thrust, this may be a wound, or a stroke, *vulnus & plaga sunt Synonyma*, and the Englishing will aid, and amend this——*percussit, & pupugit unum & idem significant*, and this appears to be so, Coke 5. pa. fo. 121, 122. in Longs cases there, *percussit, & perforavit*, all one; and so upon the whole matter, notwithstanding any of the Exceptions taken, the Declaration is certain and good, and so the party to proceed in the Appeal. Flemming chief Justice, my words, opinion, and judgment in this case have bæn now arraigned, and answers endeavoured to be given unto the Exceptions by me taken to the incertainty of this Declaration, and upon all, that which hath bæn said, by way of Answer, I am no ways by this altered, but the more thereby confirmed in my Opinion, which before I have delivered, and to fortifie this by Presidents in Cases of Appeals, and for this, see the Presidents of Trinit. 39 Eliz. Rott. 872 B. R. Essex, and Hartford, and Hill. 42. Eliz. B. R. Rot. 577. and Trinit. 40 Eliz. B. Rot. Rot. 243. Hill. 42 Eliz. there one Blackwell did Appeal John Jones, and others, and other Presidents there are to this purpose. Williams Justice, the Declaration here shall be good without mentioning of any hour in the same, and so is Stamford fo. 80. in point, as before is cited——

Fleming chief Justice to the contrary, that the hour ought for to be as certainly expressed in the Declaration, as any other matter whatsoever, but this it seems doth not satisfie others, neither do the Reasons of others satisfie us, and therefore the Rule of the Court was, that for the incertainty in the Declaration, Judgment should be entred, that the Appeal for this cause should be abated. Note there were three Judges against two for this, and so this Rule of the Court was entred accordingly——*quod nota*——*Nota* also, that this was an angry Case, and did very much

Presidents in the old Book of entries fo. 47, 48, 49, 50. tit. Appeal de mort. pla. 2, 3, 4, 5, 6, 19, 15. and fo. 263. tit. Enditement pla. 4.

Croke 4. pa. fo. 41. in Heydons case indicted for the death of Savage, there it is Circa horam: old Book of Entries fo. 43. tit. Appeal pla. 1. & fo. 45. pla. 3.

Circa horam.

21 E. 4. fo. 27.
44 E. 3. fo. 6. b.

Presidents in point of Appeals.
Trin. 39 Eliz. B. R. Rot. 872 Essex & Hartford.
Hill. 42 Eliz. B. R. Rot. 577. Blackwell, and Jones: Trin. 40 Eliz. B. R. Rott. 243. Stanford fo. 80.

much trouble the Court, as appears by their several Arguments before.

Judgment entred that the Appeal should abate for incertainty in the Declaration, 3. against 2. Robinson the Accessory appears in Court.

NOte, that afterwards, Robinson, who was one of the Seconds, and did fly for the same, who appeared in Court, the Sheriff having returned for him, Non est inventus, he now appeared voluntarily, and moved the Court for to have this his appearance to be recorded——Williams Justice——if the Appeal be abated against the Principal, the same shall be also abated, as against the Accessory, as appears by all the Books. In an Appeal, all are Principals, here is no matter now in Court against him.——Yelverton Justice——his appearance may here well be taken, and recorded with a *cessat*——*ulterius processus* against him, and so was the Rule of the Court, he may now appear, for fear of imprisonment——and for that the Writ of Appeal was now abated, he comes not in now, by a *reddidit Se*, but his appearance here is a voluntary appearance of himself, and out of his own free will, upon a Return made by the Sheriff of a *Non est inventus*. Note that Man Secundary in this case, upon the appearance of Robinson, demanded of Yelverton, and of the other Counsel at the Bar, who were against the Appeal, whether they would not have the Plaintiff called, before that his appearance was entred; and they answered, that as this Case was, they would not have the Plaintiff called, and therefore by the Rule of the Court, his appearance was entred of Record without calling of the Plaintiff unto it, *quod nota*, the reason of this, was conceived to be, because the Writ of Appeal was by the Judgment of the Court abated, and the Entry was also by the Rule of the Court, *quod cessat ulterius processus* against him, *quod nota*.

The King against Morgan upon an Indictment of murder, Sir John Egerton the Prosecutor. Trin. 8 Jac. B.R.

NOta, that before this time, (g.) Termin. Trin. 8 Jac. Sir John Egerton, for the King, did prosecut an Indictment of Murder against Edward Morgan of the Inner Temple, Gentleman, for the murdering of his Son, by him killed, and for his Trial at the——Bar, a Jury of Middlesex did appear, and fourteen of them being called, appeared, and answered to their names, but Sir John Egerton the Prosecutor had some doubt of favour in some of them, by some secret labouring of them to appear on the behalf of Morgan the Prisoner, and therefore——Davenport being of Counsel, for the King did Challenge some of the Jury, and said unto the Court, that if they would agree to draw out two of the Jurors, which were returned to serve upon this enquest, the others should then be sworn for to try the Prisoner——The Court made him this Answer, we cannot cause any of those which are returned to be drawn out, and set aside, but you ought to make your Challenge to them, as they are called, and then when the others are sworn, which you did not Challenge, you are then to shew sufficient cause for to maintain your Challenge, for that the King, or any for him, cannot Challenge without good cause, but the party himself, the prisoner, *in favorem vitæ*, may peremptorily Challenge thirty four without any cause shewing, and as many more as he will with cause, shewing the same presently, see for this 3 H. 7. fo. 2. and fo. 12. 9 H. 5. fo. 7. Then the Counsel at the Bar for the King, moved the Court, that they might be suffered, to shew the cause of their Challenge, particularly as they did take the Challenge, unto this the Court made answer, and said, that if they had cause to Challenge any, they might Challenge them, as they were called, but they ought not to shew the cause of their Challenge, before that the other Jurors, which were not Challenged, were sworn, and then, and not before you are to shew the cause of your Challenge, and if the cause be sufficient, then the party Challenged shall be drawn out of the Pannel—afterwards, Morgan the Prisoner at the Bar, demanded of the Court, whether Davenport should Challenge any of the Jury for the King, he being not of the Kings Counsel, nor any of the Kings Counsel there present to inform against him, and to Challenge for the King: The Court made him answer, that any one may be received, to Challenge for the King

3 H. 7. fo. 2. & fo. 12. 9 H. 5. fo. 7.

Fo. 113. 114.

King, if he thinks, that any of the Jury be not indifferent, and after the Counsel for the King did Challenge all the Jurors, and being in doubt of the indifferency of the Jury, and of the sufficiency of their Challenge, they doubted, that this Jury was returned on purpose, and by great labouring in the return of them, for to make them favourable, and so for these, and other causes, not named, they left off their proceeding upon the Indictment (for the present) and put in an Appeal prosecuted by the second Son of Sir John Egerton (as before appears) the Writ returnable——*Octabis Michaelis proximo sequenti*, and so they made an end for this time. Then the Court said unto Morgan the prisoner, that he may now have Counsel assigned unto him, and therefore he desired the Court to assign him for this Counsel, the Kings Atturny General; the Court answered, that they could not assign the Kings Counsel, to be for him, but if they would they might be either for him, or against him. The Court upon this request, assigned him for his Counsel Serjeant Nicholls, Henry Yelverton, George Croke, and Thomas Crew, in this Appeal; afterwards Morgan prayed the Court that he might be Bailed, the Court made answer unto him, that they would be advised further of this, and so caused Presidents to be searched in such a Case, and if there be any such former Presidents to be found, then he should be bailed——Waterhouse Clerke of the Crown, and Officer of the Court, informed the Court, that they had made search for Presidents, and that they had found some Presidents directly in point, that in such a case the Prisoner might be bailed: The Court answered, that they would see and peruse the same Presidents; for now the Prisoner stands arraigned, and indicted of murder, and the Endictment is not gone, (by the bringing in of this Appeal.) It was then demanded of the Court, whether he should have his bail taken before he be arraigned upon the Appeal. The Court, as to this, said, they would be advised. At another time, the Court was moved again for the bailing of Morgan, and that upon the Presidents shewed, being amongst the Records of the Kings Bench, that the Judges may bail one, being endicted of murder.——Williams Justice —— if the default of the Trial had proceeded from a cause, on the part of Morgan the Prisoner, peradventure there he should not be bailable, but here in this Case, because the default proceeded from the part of the Prosecutor himself, and therefore in this case, he may well be bailed——Flemming chief Justice, and Fenner Justice agreed with Williams herein, that as this case here is, he may well be bailed——Croke Justice, it hath been alledged by the Prosecutor, that there was great labouring of the Jury, in this Case, but no proof made of it; if this had been so proved, peradventure then, he would not have been bailable, but here being no proof made of this, he is here well bailable. And as to the bailing of him, a President was shewed, where a man was indicted for high Treason, and was bailed. Another was endicted for murder, and had three several endictmens against him, and this was for the killing of the Constable of the King, and he was bailed. And so here, by the Opinion of the whole Court Morgan the Prisoner is here well bailable: and the Court did all agree to bail him, and did therefore command the Officer at a day prefixed, to bring Morgan again, with four sufficient Sureties, and then he should be bailed, and that the Defendant in the Appeal is bailable, as appears by the Book of 13 E.4. fo. 8. Afterwards on another day Morgan appeared with his Bail, who were these (s) Sir Thomas Munson, Sir Roger Dalyson of Lincolnshire, Sir John Digby of Bedfordshire, and Edward Morgan the Father of the Prisoner, the Bail were bound in several Recognisances of five hundred pound each of them for the appearance of Edward Morgan the Defendant in the Appeal at the time limited, and Morgan himself in one thousand l. bond to answer unto Rowland Egerton Plaintiff, in the Appeal, and so he was committed again to the Marshal, and the Bailies by some command would have arrested him, going from the Bar, upon the Appeal, and they did arrest him in the Hall, the Court sent for the Sheriff, and told him, that herein he had much misbehaved himself, in doing of this in the face of the Court. Flemming

Presidents shewn for the bailing of prisoners endicted for murder upon the putting in of an Appeal.

13 E. 4. fo. 8. Morgans bail.

Contempt of the under Sheriff, and Baily in the arresting of Morgan in the face of the Court, punished.

ming chief Justice said unto the Sheriff, that Morgan came not to the Court by his means, but in the custody of the Marshal, and so he was the Kings Prisoner, and it is the priviledge of the Court, to see such safely to come hither, and safely to return back again, and said further to him, that he could not arrest him upon that Proces; the Court demanded of Morgan, whether he would now yield his body, as arrested upon the Appeal, he answered, that he would, and upon this, by directions of the Court, a Record was caused to be drawn, and entred of this, (s) that the Under-Sheriff having arrested him by his Proces in the Appeal, that he had rendred his body, and a Warrant was made for his appearance, and the Under-Sheriff, and the Baily for striking and arresting of him, to answer for this their contempt by them so done in the face of the Court, and so Morgan the Prisoner, and Defendant in the Appeal, was set at large.

Vide Coke li. Entries fo. 56. 57. The Record of this Appeal at large with the num. Roll entred Mich. 8 Jac. B. R. Rot. 227.

Morgan set at large.

Appeal abated.

Note, That the Appeal being abated, by the Judgment of the Court, as before appears, afterwards the Prosecutor for the King did proceed against Morgan upon the endictment of murder for killing of Egerton, and upon this endictment Morgan having pleaded to it, Termin. Pasch. 9 Jac. B. R. came to the Bar, and the Jury appearing, he was tried upon the same Endictment, and all Challenges being released, the Jury were charged for to enquire of the Fact, and upon the Evidence, the matter was at large debated, and upon the Evidence, the question was, whether the Fact, as it appeared to be, was murder, or manslaughter——Croke Justice——*Convitium convitio tegere, est Lutum Luto porrigere*, There are three kinds of manslaughter. First, by sudden adventure. Secondly, by misadventure. And Thirdly, where it is in his one defence; he said unto Morgan the Prisoner, that for to send, or to accept of a Challenge—— if he had hapned to have killed you, it had been clearly wilful murder in him, but now you have killed him, you are therefore in the same degree also of wilful murder. If a Challenge had been sent, and then instantly, upon hot Blood, they had met, and fought, and one of them kills the other, this had been but manslaughter; but if after a Challenge sent, they do once sleep upon it, and so the Challenge is accepted of, and afterwards they fight, and one of them kills the other, this is murder in him clearly, for that this is done, *sedato animo, & intervallo temporis*, and so it is murder, here in this case, and therefore you are now to go from the seat of Justice, and to address your self unto the seat of mercy——Williams Justice.——If it were not for example sake, I would mingle Circumstances, observable in this Case, as to the Challenge here, this was sent, and received, and he pawsed upon it; here at nine of the Clock, the Challenge was sent, and the Weapons, and they met the next morning, and then they fight, and the one of them kills the other, what is the judgment of the Law in this Case, whether this be murder, or manslaughter? If two men fall out suddenly, they offer to fight, and are parted, they presently meet again in another place, and fight, and the one of them kills the other, this is not murder, but manslaughter, because this is done upon hot Blood; but in this Case here now in question, this is clearly murder, and this shall be as a president: for better it is, that you fall to the mercy of the King, than that Justice should be perverted. If there be two, or three, or six days after the Challenge before they meet, and fight, and then one of them kills the other, this is murder clearly.——Yelverton Justice.——As this Case is, the Law is clear, that this is murder, and it is no excuse for him to say, that he bore no malice to him before: for if one stab another, this shall be murder, for the Law in such cases, doth presume malice to be in him, otherwise this would not have so hapned, and this the Law calls malice apparent, and though the same cannot be proved, it is not material; a man cannot kill another in his own defence, which is manslaughter, but he shall for this forfeit all his goods, and to have the benefit of his Clergy allowed to him, and if he cannot read, then to be hanged: but in case of murder, he is not to have his Book allowed to him: but in this case, he is to Appeal to mercy. If a Challenge be sent, and received, and pawsed

Termin. Pasch. 9 Jac. B. R.

Three kinds of manslaughter.
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sed upon, and they fight, if death ensue, this is clearly murder on both sides: but if a challenge be sent, and accepted of, and they do presently agree to go into the field and fight, and one of them kills the other, this is but manslaughter: but in this case now here in question, this Fact, as it appears to be upon the evidence, is clearly murder, and this is a Case which hath been adjudged. Sir Thomas Lucas his case, where a challenge was sent, and accepted over night, and they did fight the next day, and the one killed the other, this was adjudged to be murder, and he was hanged for it—Fenner Justice agreed in opinion with them, that the Fact of killing here in this Case is clearly murder—Flemming chief Justice, as to the matter now in question, there can be no murder without malice, and malice may be proved divers ways, as touching the matters precedent, these are either publick, or secret, upon these the Law passeth no judgment, but in some cases the Law will adjudge this to be maliciously done, though that no proof can be made of the malice, as where a publicke officer is killed by another in execution of his Office, this is murder, for the Law doth here adjudge this to be maliciously done, and in this Fact, there is malice implyed; and so it is, if that two have a purpose, and intention for to fight, and they accordingly fight, and the one kills the other, this is murder, for here the Law intends malice. In this Case now in question, clearly here appears to be sufficient malice, to make this Fact here, to be murder, this abuse by reason of challenges, is now grown to be too frequent, and nothing can be more perilous and destructive, than to suffer this in civil Goverment, without being severely punished, and this is so frequently and advisedly undertaken, and that *animo deliberato*, that the greater care ought to be had of this, by way of prevention; stabbing, which is made murder by Stat. this was murder at the Common Law, before the Statute of 1 Jac. cap. 8. by the Statute of 1 E. 6. cap. 12. poysoning made murder, and all wilful killing shall be taken as wilful murder, and so of malice prepensed: Stabbing was wilful murder at the Common Law, for that in this is included, by apparent inference, malice prepensed, to precede the Fact, and that this was the cause of the stabbing, and of this opinion was Popham chief Justice of the Kings Bench, in his time, that such stabbing was murder at the Common Law before the Stat. made for the same, as before, the which Stat. *est Lex declarativa, & non introductiva*. In the Principal Case here, there was malice apparent, and divers degrees of malice, this acceptance of the challenge makes this murder clearly, when he accepts of the challenge, and agrees to fight with him: and in this case here, the Fact, as by the Evidence it appears to be, is clearly murder without any doubt. Nota, that in this Indictment there are three wounds mentioned—The Jury went together to consider of the Evidence, and of the directions to them given by the Court, they returned, and put their Verdict in writing, in as much, as they did not at all agree in their Verdict. Their Verdict was this, (s) we do find the Defendant guilty of murder, (but not according to the Endictment) for it is therein mentioned, that he gave him two wounds, the first was mortal, the which was under the right arm, and mentioned in the Endictment, of which mortal wound, he only died, and of no other, and they do not find any third wound given, as is mentioned in the Enditement, and that this was done by him, *ex malitia sua præcogitata*, and so concludes, that if the Court shall adjudge this Fact, to be a killing according to the Endictment, then they do find him guilty of murder; but not otherwise. The Court did then declare to the Jury, that this their Verdict thus given, is no Verdict at all. All the Jury did agree, that the wound under the right arm was mortal, and that of this wound he died, & that he was killed by Morgan: that this killing was murder, and that two wounds were by him given, one of them only mortal, and of which he died, so that they find but two wounds given, and say nothing of the third, there being three wounds laid in the Endictment, and one only to be mortal, of which he died, and this was all the finding of the Jury—Williams, & Croke Justices, that this is a good finding by the Jury, they having found the death of the party killed, and that he was killed by Morgan, who gave him two wounds, one of them under the right arm, which was

Sir Thomas Lucas his case.

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Stat. of 1 Jac. cap. 8. 1 E. 6. cap. 12.

Pophams opinion of murder in case of stabbing.

The Verdict of the Jury special

was mortal, of which he died, and this was murder, this is a good verdict, and by this, they have found the Prisoner guilty of murder. Flemming chief Justice differed from them in opinion in this, here the Jury do finde two wounds to be only given, and the first of them to be mortal, of which he died, and if this be a dying according to the indictment, this they leave to the Court, so that they find this specially as before, so that the Court were divided upon this Verdict, two against one. Morgan the Prisoner at the Bar perceiving that the Court did not agree, but differed in opinion, moved the Court for to accept of Bail for him. The Court all denied to accept of Bail for him, and as for the Verdict thus given by the Jury, of this *Curia advisare vult*, and so the matter was adjourned until another time, and Morgan the Prisoner was carried away from the Bar, *in Custodia.*

Morgans pardon offered to the Court, and by the Court allowed of, and he discharged, and set at liberty.

Note, that afterwards (s) the last day of Trinity Term 9 Jac. B. R. Edward Morgan was brought again to the Bar, and being demanded what he had to say for himself, why Judgment and execution should not be awarded against him, he offered to the Court, the Kings gracious Pardon, under the Privy, and the great Seal, and he humbly desired allowance of the same by the Court, the Pardon was received, and openly read, and afterwards the same was allowed of by the Court, with some good advice by them given unto him, and so by the Rule of the Court he was discharged, set at liberty and suffered *ad largum ire.*

Wolterton and his Wife Plaintiffs against *Day* Defendant.

Wolterton and his wife Plaint. against Dale Defendant. An action upon the Case for a promise entred Trinit 7 J. c. B. R. 1596.

IN an Action upon the Case for a promise. The Case was this, It was agreed between the Plaintiff, being a Feme sole Executrix of her former Husband, and the Defendant, in manner following, that upon the payment of 89 l.——— upon such a day, then to come, by the Plaintiff the Executrix unto the Defendant, and upon request made, the Defendant did assume, and promise, that he would reconvey certain Messuages, with other Lands unto the Feme Executrix, which were before conveyed to him by her former Husband (for the securing of mony, by him owing to the Defendant) she accordingly pays the mony on the day, and then doth request the Defendant according to his promise, to make the conveyance to her, the which to do, he refused, and upon this refusal, an Action did accrue unto her, afterwards she takes to Husband the Plaintiff, so that the Action now accrues unto him, as in right of his Wife, and they having no remedy to compel the Defendant for to make the conveyance at the common Law, but only in Chancery, (none at the Common Law) but only their Action, for the not performance of his promise, in the which Action, Damages are only to be recovered, the which damages, are only to go to the Husband, afterwards the Plaintiffs commence a Suit in Chancery, against the Defendant, to have a reconveyance made by him, to the feme Plaintiff according to his promise, upon the hearing of which cause the Court of Chancery did there Decree, that the Plaintiffs should pay unto the Defendant 100 l. more upon a day certain, then to come, and that after this payment so made, and upon request, the Defendant was Decreed to make the reconveyance according to the former agreement, and that this should be in full satisfaction and Discharge of the former agreement. The Husband according to this, and in pursuance thereof, payes the 100 l. unto the Defendant, who according to the Decree makes a Reconveyance of the Land, by a Feoffment unto the Feme Plaintiff, Executrix of her former Husband, of which reconveyance she did accept, and afterwards the Plaint. and his Wife brought her Action upon the Case, against the Defendant upon the first promise, and for breach of the same. The Defendant in Bar

to

to this Action pleads the Decrée made in Chancery and the performance of the Decrée, by payment of the mony Decreed to him, and the reconveyance by him made, according to the Decrée. To this Plea the Plaint. Demurred in Law, the only question being, whether, (as this Case now is, by reason of the Decrée, & performance of the same) the Action brought by the Plaintiffs, doth lye or not. Richardson for the Plaintiffs, that the Action is well brought, and that this Plea in Bar, is not sufficient, because there is no express averrement of any acceptance, or agreement to this by the Husband, for the conveyance was made to the wife, and by the acceptance of the wife, the Husband shall not be barred of his Action, in this plea, he ought to have averred an acceptance by the Husband, & an agreement, to that which was done to the wife of the Plaintiff, and this he ought to have done here in this Case, where the performance is not according to the first agreement, but by another matter, as by the Decrée here in the Chancery, or otherwise, there in pleading of the performance, in such manner he ought here specially to aver an acceptance by the Husband, (s) to say, unto the which he did agree, because that this is a thing collateral. On the other side, it was urged for the Defendant, that the Plea in Bar was good, for that by the Decrée, the reconveyance upon payment of the 100 l. was to be in full satisfaction and discharge of the first promise; if one do promise for to make a conveyance to another of certain Land, by such a day, and faits to do it, the other hath his remedy by way of an Action upon the Case, but in this Action, he cannot recover the Land, but only dammages afterwards, if the other doth make a Feoffment to him, in satisfaction of his promise, by this his Action, for the non-performance of the Promise, is gon; and as to the acceptance of the Feoffment in this Principal case, the same needs not to be pleaded, but here it is said, that this conveyance, was to be made, to a Feme Covert, and accepted of by her, and that this shall not bind the Husband, to this it may be answered, that the Husband takes by this, as well, as his Wife, and the same is, and shall be said to be in them both, until the Husband do disagree: also the 100 l. here was paid by the Husband, in performance of the Decrée, for which the Feoffment was to be made, and this to be in satisfaction, and discharge of the first agreement, and this to be by the Husband, and by his agreement, and all this is included in the manner of the performance of this Decrée, all which is fully set forth in the Plea, and this payment here of the 100 l. by the Husband to the Defendant, according to the Decrée, is a full agreement by him, that the Action which accrued unto him, for the first breach of the promise should be by this performance of the Decrée, gon, and discharged; and a Feoffment, may be very well pleaded in satisfaction of a promise broken, and so was it adjudged in one Platts Case, 3 Jac. B. and when the Feoffment is pleaded, this includes and implies an acceptance, and when the Plaintiff being the Husband here, pays the 100 l. to the Defendant, by this he takes notice of the Decree, and according to the Decree, and in performance thereof he pays this mony, and this is, and cannot by any construction, be otherwise taken, but to be in full satisfaction, and discharge of the former promise, and of this he cannot be misconusant. Richardson for the Plaintiff said, that this was but an implied assent, and as to the payment of the 100 l. by him, he did this by compulsion, being Decreed for to pay it, and he paid this, *secundum ordinem, & decretum prædictum*, and not in discharge of the former promise, so that this was not a voluntary, but a compulsory payment by him; and as to the certainty of acceptance, this ought to be shewed by way of averrement in pleading, which is here omitted in this Plea in Bar, and so the Plea not good. To this it was answered for the Defendant, that this being a Plea, and good to a common intent, is sufficient, and shall be good to all intents, but otherwise it is of a Declaration, which ought to be more certain. Williams Justice—a Discharge by word of a thing in action is not good, but the same ought for to be by writing, and so it hath been adjudged. Flemming chief Justice, the plea in Bar here is good, the Husband here had good cause of action, for the former breach of promise, in the which he was only to recover dammages, (his Wife being joyned with him in the Action) but no Land could

Ante 38. 39.

3 Jac. C. B. Plats Case.

this way be recovered, afterwards they commenced their suit in the Chancery, being willing, and desirous for to have the Land, the Cause there heard and decreed that they should have the Land, and that the same should be reconveyed according to the former agreement, but the Land being better worth than the damages, that might have been recovered, the Court of Chancery decreed further, that the Plaintiff should pay to the Defendant 100 l. more, and this to be in discharge of the first promise; the Feoffment is here made to the Wife, and the estate setled in her, by the payment of the 100 l. by the Husband, and by his going into the Chancery, and the payment by the Husband of this 100 l. to the Defendant in performance of the Decree, is a full and a good assent unto the whole Decree, and the same shall stand in force; and this payment by the Husband was not compulsory, but voluntary for he might have chosen whether he would have paid the 100 l. or to have taken his Action at the Common Law for his damages, but the Land could not be had, and damages likewise recovered by the Husband, the Defendant here would rather have kept the Land, than have parted with it, but upon the payment of the 100 l. by the Plaintiff to the Defendant, he was then compellable to perform the Decree, and to make the reconveyance which is here done by him, in performance of the Decree, and all this appears fully, and plainly by the very plea, which plea is good, and the bringing of this Action is not a disaffirmance of the Feoffment, this Decree was well made, and upon very good ground, and is good both by Law, and in Conscience. Note, the Court was before of this opinion clearly against the Plaintiff, that the Plea was good, and that the Plaintiff ought to be thereby barred of his Action, and the Rule of the Court was entred before for the Defendant, that this his Plea in Bar was good, *& quod Querens nil capiat per billam*, and the Court being afterwards upon another day pressed for their direct opinions, and resolutions in this case, they all of them *una voce*, resolved, *nullo contradicente*, as before, that the Plea in Bar here was good, and that the Plaintiff ought to be barred from any further proceedings in this Action, and so all the Judges agreed clearly in this, that the former Rule by them entred should stand, the same being as before, *quod Querens nil capiat per billam, quod nota.*

Judgment of the Court, quod Querens nil capiat per billam.

Goldney Plaintiff, against *Curtise* Defendant.

Entred Hill. 7. Jac. B. R. Rot. 864. Cro. James 251. 2 Bulst. 318. Mo. 810.

Pasch. 8 E. 4. fo. 2.

The Case upon a Covenant for further assurance, was this, A. enfeoffes B. or sells unto him two Yard Land, and covenants to make him further assurance, as the Counsel of B. shall devise: afterwards B. by advice of his Counsel, tenders to him a note of a fine to be levied: First, it was questioned at whose cost this fine should be levied, in regard there was no Writ of Covenant before hanging; it was held that this ought to be at his costs, who is to have the fine levied to him, according to the opinion of Markham Pasch. 8 E 4. fo. 2. where he saith, that if one be bound for to levy a fine to another, of an Acre of Land, he is not bound to sue forth the Writ of Covenant, but he who is to have advantage of the fine is to do it. The Court in this case were clear of opinion, that he ought for to levy the fine upon this note, notwithstanding there was no Writ of Covenant then hanging, for that this is the assurance, by his Counsel devised. It was also said by the Court, that fines are usually levied without any Writ of Covenant hanging, as fines levied before the Judges of Assise. It was also held, that when he hath bargained, and sold two Yard Land, and Covenants to make further assurance, and this to be by fine, this fine shall be of all the Acres contained in the two Yard Land, and this to be to the use of the bargainee and his Heirs, but it is not certain, how many Acres are contained within this. *Curia*, He levies the fine, and if there be more Acres than will make two Yard Land, the Covenant is well performed, and for so many Acres as shall make up the two Yard Land, this shall be to the use of the Bargainee, and his Heirs, and as to the Surplusage of his Acres, this shall be to the use of himself, and his Heirs, the Covenant

Covenant was, as before, to be performed upon request made, request was accordingly made, and signed by a note, and therein expressed in certain the quantity of Acres, which note contained more Acres than the two Yard Land, the Court was clear of opinion that this was good, and that this was done according to the usual form, *quod nota.*

Doctor *Ayray* Plaintiff, against Sir *Richard Lovelas* Defendant.

Dr. Ayray and Lovelas Case, as touching a usurpation.

The Case was this, 18 Januarij 14 E. 3. the King did grant a License to Robert de Eglesfield, for to found *quandum Aulam Collegialem sub nomine Aulæ scholarium Reginæ de Oxon: quæ per unum præpositum de dictis scholaribus juxta ordinationem præfati Roberti inde faciend. gubernabitur, &c.* Dr. Ayray being Provost of the said Colledge did present a Clerk to a Church being void, by the name of the Provost of the Colledge of the Queen in Oxon. and omitted the word (Scholarium) the question was, whether this presentation thus made by a contrary name of their foundation, with admission, institution, and induction thereupon, shall be a usurpation, and so gain the Patronage to them, they having thus done the first, second, and third time, without any manner of disturbance. It was in this Case held clearly by the Court, that this presentation thus made, by the contrary name of their Foundation, shall make no usurpation, nor gain any Patronage to themselves; here in this Case, there was no such name of incorporation, as they presented by, and so consequently, no usurpation thereby by them gained, and a confirmation, upon such a presentment, shall not make it good, but the Patronage remains, as the same was before such presentation made. Flemming chief Justice, the Provost here presents by such a name of incorporation, where as there is no such name, and his Clerk upon this his presentment, is by the Bishop admitted, instituted, and inducted, the question is, who shall be here said, to be the usurper: for clearly, this presentment, in this manner, shall make a usurpation, the Party which is so presented, shall not by this be the usurper, for that the presentment as to him, (being by a void name of incorporation) is void in it self, and he by this gains nothing at all, the Presentation of him, being by a contrary name, differing from the name of the foundation, but this Collation here by the Bishop, shall make him to be the usurper, and this was so agreed by the whole Court: But by the rule of the Court, and by the assent of the parties, this matter was referred to Mr. Serjeant Nichols, and Mr. Henry Yelverton, finally to end and compose this matter between the parties, and in case they should not end the same, then the same was by like assent referred unto Flemming chief Justice as Umpire, to end and determin this matter between the parties.

The matter ended by agreement.

Brickendell Plaintiff against——

Brickendels case, an Action upon a promise. 2 Cr. 250.

In an Action upon the Case for a Promise, the Case was this, A. did promise unto B. that if he would deliver unto him his two fat Oxen, *infra breve tempus*, that he would then pay unto him 100 l. for the Oxen, *infra breve tempus*; the Plaintiff in his Declaration sets forth, that he did *infra beve tempus* deliver the two Oxen to the Defendant, and that he had not paid him the 100 l. *infra breve tempus*; upon Non assumpsit pleaded, a Verdict was given for the Plaintiff. It was moved in arrest of judgment, that the Declaration was not good, for the incertainty therein, for that it is not known what time shall be said to be *breve tempus*, as if a man shall sell a Horse to another, for as much as he shall value the same, this is not good, for that his value is not known at the time. Sid. 38, 45, 397. Flemming chief Justice the Declaration is not good, for this incertainty in it, this *per breve tempus* here, is no certain time at all.

It is as if I sell a Horse for 10 l. to be paid *per breve tempus*, if he do not pay the money within as little a time as may reasonably be, he may well sell the Horse to any other, and this second sale shall be good, and so is the Book of 14 H. 8. fo. 18. 19. 20.. Wheelers case. Yelverton Justice, fourteen days after he delivered one of the Oxen, as by his Declaration appears, so that by this, he himself hath assigned, and set down what time shall be said to be the *breve tempus* of his part.——Flemming chief Justice, this is but a colourable reason. The Court all agreed that this Declaration is not good, for the incertainty in it, for *per breve tempus* here is as uncertain, what time this should be, as the Case of forbearance, *per paululum tempus* which was adjudged in the Exchequer to be no time, and so void for incertainty. The Case there was between Sackford Plaintiff against Philips Defendant in the Court of the Exchequer, In an Action upon the Case for a promise, grounded upon a consideration of forbearance *per paululum tempus*, this is held no good consideration for the incertainty of the time, for that *paululum tempus* is no certain time at all, and so was it adjudged here in this Court. Termin. Pasch. 8 Jac. In an Action upon the Case for a Promise of forbearance of his demand of money, *per paululum tempus*, and after he makes his demand presently, and upon this the other brings his Action upon the Case, grounded upon the consideration of forbearance, *per paululum tempus*, the Court were clear of opinion, that the Action upon the Case here did not lye, by reason of the incertainty of time, in the words of forbearance, *per paululum tempus*, which words contain in them no certainty at all, of any time, and so by the opinion of the Court, he which made this promise, to forbear his demand *per paululum tempus*, may make his demand when he pleaseth, and so here in this principal Case, *per breve tempus* is no certain time at all, and so was the opinion and Rule of the Court, that this Declaration is not good, for this incertainty in the words here——of *per breve tempus*. Fenner Justice agreed in this, that there is no difference betwæn this Case, and the Case which was here adjudged in consideration of forbearance *per paululum tempus*, this was here held void and uncertain, for that this can receive no certain construction in Law, for what time certain this shall be, and therefore void. Croke Justice of the same opinion, there will be a great difference betwæn *tempus conveniens*, *Tempus breve*, & *paululum tempus*, and of this the Law shall adjudge: it is said that the whole life of man is called *breve tempus*, but this *breve tempus* is so uncertain in it self, as that no contract can be grounded upon it. The whole Court agreed clearly in this, that the Declaration is not good for this incertainty, & therefore the Rule of the Court was, *quod Querens nil capiat per billam*.

14 H. 8. fo. 18. 19. 20.

Sackford Pla. against Philips Defendant in the Court of Exchequer. Termin. Pasch. 8 Jac. B. R. Ante 41. 1 Cr. 19. 3 Cr. 241, 2, 438. 2 Cr. 397, 505, 683. Mo. 853. Po. 206, 207.

Judgment of the Court, quod Querens nil capiat per billam.

Moore Plaintiff, against *Brown* Defendant.

IN an Ejectione firmæ for entring into certain Lands in three several Mills, the Declaration makes mention of no Mill in certain, the Defendant pleads a releas puis le darreine continuance, before the Justices of Nisi prius; the Justices of Nisi prius, have no power there to amend any fault in the Declaration, they have only power, and Authority to take the enquest, and when the Session is ended, their Authority then doth cease, and in this the Court agreed. Yelverton Justice, A man cannot plead a releas al Nisi prius after issue joyned, for so none should have Judgment: in 10 H. 7. fo. 21. a Nisi prius was taken at Canterbury, in an Action of Debt for Rent, the Defendant pleads levied by distress, upon this they were at issue at the Nisi prius, the Defendant pleads the releas of the same puis le darreine continuance, it is there held, that when this plea is pleaded, the Justices of Nisi prius cannot proceed to take the enquest, and to this plea of the Defendant, the Plaintiff cannot there reply, but he ought to reply en Banke. Fenner, Yelverton, and Croke Justices, after issue joyned, and a venire facias awarded, of such a Mill, the Sheriff returns Nul tiel ville, this is not good, for he cannot return, that thing which is contrary to the issue, and to the venire facias, to avoid the Tryal, à fortiori, one of the

An Ejectione firmæ. Essex. Nisi prius Releas pleaded, puis le darreine continuance. 1 Brownl. 145. Lanes rep. 81, 86. Cro. Jac. 261. 2 Ro. Abr. 630. Godb. 406. Yelv. 180. 10 H. 7. fo. 21.

the Parties himself cannot plead such a Matter. Also it was said by the Judges, that at the Nisi prius, the Power and Authority of the Justices of Nisi prius is only to take the Verdict of the Jury, and no other Plea, and in all this the Court agreed.

Penruddock and *Lanxfords* Case.

Exception taken by Yelverton, to quash an Indictment of murder being *quod, &c. percussit*, and doth not say *felonice percussit*. The Court held this to be a good exception. The Atturney General, urged that the Indictment was sufficient, notwithstanding this exception, for that the words *Murdravit*, doth imply felonice according to 5 E. 6 Dyer fo. 69. pla. 28. that *Murdravit* doth imply (*ex malicia præcogitata*) *ex necessitate* which is there omited, as *furatus est* implies *felonice cepit* being omitted. The Court were clear of opinion, that the exception was good, and the Indictment insufficient for this omission of the word (*felonice*) and the same is not supplied, by the word (*Murdravit*) and that the Case in Dyer is no Law. Fleming chief Justice & *tota Curia* clear of opinion, that the word *Murdravit* doth imply, *malicia præcogitata* being omitted, but the same doth not imply the word (*felonice*) being omitted, as in this Indictment here now in question, and in 18 E. 4. fo. 10. 6. pla. 28. where the Indictment was *quod furatus fuit unum equum ad valenc.* 20 *s. &c.* and it is there held by all the Judges, that the Indictment was not good, for that the word (*felonice*) was omitted, and that (*furatus*) doth not comprehend *felonice*, nor implies (*felonice*) in the principal Case, by the Rule of the Court the Indictment was quashed for want of the word *felonice*, *quod nota*.

Exception taken to quash an Indictment of murder for want of this word felonice 5 E. 6. Dyer fo. 69. pla. 28.

4 Co. 40. 41.

Indictment quashed by the Rule of the Court, for the want of felonice.

Davis Plaintiff, against *Hales* Defendant.

In case of Borough English, if one shews himself to be Heir of Lands in Borough English, that he is the sole Son of his Father, it was urged by Richardson at the Bar, that in his pleading to entitle himself as Heir unto this Customary Land, he ought not to say, that he is *propinquior hæres*, for by this he is always intended to be Heir at the Common Law, but he is to say that he is *Junior filius*, who is to inherit the Lands *secundum consuetudinem Manerii*. Williams, Yelverton, and Fenner Justices, clearly he ought to say that he is *propinquior hæres*; there were then shewed unto the Court, divers presidents of Court Rolls, of Court Barons, which were all of them, *propinquior hæres* generally. Williams Justice, if the youngest Son in Borough English dies, the middle Brother shall have the Land by the Custom.

How one in pleading shall shew himself to be heir to Borough English Lands.

Dowglas and *al'* Plaintiffs against *Kendall* Defendant, entred Termin. Mich. 7 Jac. B. R. Rott. 356.

In an Action of Trespass, The Case was this, the Defendant claimed common of Estovers, as appendant to his Messuage, and for this he claimed all the Thorns there growing, by prescription: the Plaintiff by the command of (Saltingstone the Lord) did cut down part of them; the Defendant took them away, and for this taking away, was the Action brought, and whether this Action thus brought will lie, is the question. The Point here being whether the Defendant may justifie the taking away of these Thorns, (claiming them

Act Action of trespass for Thorns cut down by command of the Lord, the Defendant claiming them all by prescription. Yel. 187. 2 Cr. 256. 1 Brownl. 219.

them all, as Estovers by prescription, after the Plaintiff had cut them down, by command of the Lord. It was argued for the Defendant, that as his case appears to be, by his prescription, he may take away the Thorns, being cut down, by the command of the Lord; it was urged, that by prescription or by grant, a man may have, and take profit *in alieno solo*, and to this purpose was remembred the Book case in Temps E. 1 Fitz. tit. Prescription pla. 55. where its said, that a man may have Land, and may plow, and sow the same, and may afterwards cut, and carry away the Corn, and when the Corn is cut, and carried away, another man may then have this land, as his several, and the other cannot meddle with the Land, but only for to plow and sow it, and then to carry away his Corn, being cut down, but his Cattel cannot feed, or depasture upon the Land, when he comes to plow, and to sow it, and to carry away the Corn, and he shall here have no other profit, but only the Corn; but here in this case the Defendant prescribes for to have a special interest in all the Thorns growing upon the Land, and by the Book of 10 H. 7. fo. 24. & 25. appeareth, that a man may have an Interest in Trees in anothers ground, and that either by grant, or by prescription. If a man have by special grant, the sole Pasturing of his Cattel in anothers ground, and that the Grantee shall not put in his Cattel, and afterwards he doth put in his Cattel, and the other takes them, and impounds them for damage fesant, it was questioned whether he might so do, in regard it was the free-hold of the other, but it was ruled here *per curiam* in Kendericks case, and the distress adjudged to be lawfully taken. H. Yelverton argued for the Plaintiff, that the Action of Trespass here is well brought, for he which hath the first possession, may well have an Action of Trespas against every one, but against him which hath the right, here the Defendant cannot justifie the carrying of them away, after they were cut down, by the commandment of the Lord of the Wast; here the Defendants claim is to have the Thorns by prescription, but this is to a special purpose (s) to be spent, and burnt in his house, and this can be no otherwise, but only in the nature of a common, here the prescription is to have the Thorns, and Trees growing on the Wast; when the Lord, or one for him, hath cut some of them down, the Defendant cannot now take away these which were so cut down before; it appears by the Book of 6 E. 6. Dyer fo. 71. pla. 47. in Ishams case of the Parkship granted where it is held, that the Lord may well (if he so please) dispark the Park, notwithstanding the grant of the Office of Parkship; but if the Herbage of the Park be expressly granted, then the owner cannot plow upon the soil: here in this case, if the Lord or any other by his appointment, cuts down part of the Thorns or Trees, the other by force of his prescription cannot take these away, for now, by this cutting down, the Lord hath disappointed him, that he cannot take them being cut down; for he which hath Estovers to burn, hath by this a special property, this may be defeated by him which hath the general property, and if the Lord, or one for him, cuts down all, the other cannot take them away, but makes himself liable to an Action upon the Case thereby. Thomas Crew for the Defendant, that the Action by the Plaintiff is not well brought. If a man prescribes generally, to have common of Estovers, if they are all cut down before he comes, he then comes too late to have them, but if he prescribes to have all the Trees there, otherwise it is; so that the difference will be, where he claims all, and where but part, and to Warrant this difference, Sir Thomas Palmers case Coke 5. pa. 24, 25, 26. was cited. George Croke, for the Plaintiff urged that the Prescription as it is here pleaded, is not good, and that for two Reasons. First, when he here claims Estovers for to spend in his house, he ought to have averred, that this was *quoddam antiquum messuagium*, as in 6 E. 6. Dyer fo. 70. pla. 40. Ishams Case, he ought to say that it was *Antiquum Parcum, antiqua Civitas, vel antiquus Burgus*, for that these Estovers are not to be extended unto a new built house. Secondly, if the House be new built, then he ought to have shewed, as it is in Lutterels Case Coke 4. pa. 4. 87. If he make new Chimneys, that he spent the Estovers in the old Chimneys, and not in the new, and so likewise to ancient Hedges, and not to

Temps E. 1 Fitz. tit. prescription pla. 55.

1 Cr. 413.

Kendricks case. 2 Cr. 208. Yel. 129.

6 E. 6 Dyer fo. 71. pla. 47. Ishams case.

Coke 5. pa. fo. 24. 25. Sir Tho. Palmers case.

1. 6 E. 6 Dyer fo. 70. pla. 40. Ishams case.

2. Coke 4. pa. fo. 87. in Lutterels case.

to new, here the Lord gave licence to the Plaintiff, for to cut down *spinas prædictas*, and names them, and they being so cut down, the Defendant cannot justifie the taking of them, and so consequently, the Action by the Plaintiff is well brought. Fenner Justice, if the House to which he hath Estovers fall down, and he builds it new again, he shall have his Estovers, and so is Lutrel's Case Coke 4. pa. Williams Justice, for to aver here, that this was *antiquum messuagium* is not necessary, if he had here granted all the Thorns, this had been good clearly, and by this he hath a property in them, and afterward the other can neither grant them, nor yet cut them down, and as well it shall be here in this case of a prescription, where he prescribes to have all the Thorns growing on the waste, and there shall be no end of this, if the prescription be for to spend them in his house, if in such a case he spends them otherwise, this is contrary to the prescription, and not warrantable, but will make him liable to an Action, this Case here doth very much differ from the general Case of Common Estovers here in this Principal Case: if the Lord cut down, the other may well take them, and so the Plaintiff here had no just cause of Action. Croke Justice, *qui omnia dicit, nihil excludit*, and when all the Thorns are here granted, all others by this are excluded from medling with any of them, and this Case hath been adjudged here in this Court, that if I have a Load of Hay, and another will come and mingle his Hay with mine, in this Case I may well take and detain the whole. Flemming chief Justice, here he hath these Thorns, in the nature of common Estovers: he which hath all the Thorns, hath an interest in them standing, but he cannot have any benefit by them, before he cuts them down, and if another do cut them down, as here in this Case he may well take them and carry them away, when the claim is thus by prescription, as in this case, the same is more large, than an ordinary Common of Estovers: here in this case he prescribes to have all the Thorns, none is to judge whether he spends more, he may spend in one year twenty Loads, and in another year an hundred Loads, but if he do not use them, but spends them another way, he is then liable unto an Action: in this case he needs not to aver that this was *antiquum Messuagium*, when he is here by the prescription to have all the Thorns, and part of them being cut down, his taking of them away, is no wrong to any one, and when he builds new Chimneyes, if he spends the Thorns upon the premises, this is well done and justifiable, and so if he make new hedges; he may spend all if he will, and leave none, but he which is the Grantor, cannot so do by him, this may be good by Grant, and so likewise it may be by prescription. Yelverton Justice agreed in this throughout, the owner of the Ground here can take none of the Thorns, for the other hath, and is to have all; he may take what Estovers he will, and may spare what, and how he will, and he may take what, and when he will, and this is a strange case. Fenner Justice agreed in all against the Plaintiff, and so by the whole Court *una voce*, none disagreeing, the Rule of the Court was *quod intretur judicium pro Defendente, & Quod querens nil capiat per billam.*

Coke 4. pa. 2.

3.

4.

5.

Judgment per Curiam for the Defendant, quod Querens nil capiat per billam.

An Action upon the Case.

An Action upon the case for Trover and conversion of three Munkeys or Musk-cats. 2 Cr. 262. 3 Cr. 19. Dy. 306. 307. Moved in arrest of Judgment, because he did not shew that they were reclaimed.

IN an Action upon the Case of Trover and conversion of three Munkeys and Divers Musk-cats, upon a not guilty pleaded a Verdict was given for the Plaint. it was moved in arrest of Judgment, that the Declaration was not good, because he doth not therein alledge that the Munkeys were reclaimed Flem. chief Justice, If the Action had been for 60. Musk-cats taken, and a Parret, the Action would well lye: In case of Hawks, there he ought to alledge in his Declaration, that they were reclaimed, but not so here in his Case of Munkies, the Court all clear of opinion that the Declaration here is good without

without shewing that they were reclaimed, and so by the Rule of the Court Judgment was entred for the Plaintiff.

Judgment given per curiam for the Plainriff.

Note where a man may justifie the taking, and detaining of the goods of another without being a Trespasser for so doing.

Note, that if two men be at strife, and contention about a Boat, one of them puts in Coals into the Boat, he which hath the right, and is the true owner of the Boat, carries away the Boat with the Coals in it, and keeps it: the question moved unto the Court, was, whether he may justifie this without being liable to an Action of Trespass for the same, and whether he may detain the Coals until they be replevied from him. Williams Justice, Corn may be distrained, damage feasant: if one saddles my Horse, and then puts him into his own ground, I may well come and take my Horse away, and keep the Saddle, and not be liable to any Action of Trespass for so doing; and because he puts his Saddle upon my Horse, I may well justifie the keeping of it, till he brings his Action for to recover it: and so it is, if one load my Cart with his Corn, or my Boat with his Coals, or the like, I may very well take my Cart, and Boat away, and keep and detain the goods without being any Trespasser, for my this so doing, and I may very well justifie the detaining of these goods, until he brings his Action of Detinue for to recover them again from me: the whole Court agreed in this clearly, and that the party was not bound for to unload his Cart, or his Boat, and so the whole Court did adjudge, that in this Principal Case, the detainer of the Coals, was lawful, and he no trespassor hereby, and that he might well detain the Coals, until the other brought his Replevin for to recover them, and this was the opinion to the whole Court.

Judgment per Curiam.

Dominus Rex, and Sir *William Fitzwilliams* against *Ives*.

An Indictment of Felony against a Purveyor upon the Stat. of 5 E. 3. cap. 2. Rastal. tit. Purveyors fo. 330. pla. 8. the case of the Purveyor taking Timber. Stat. 4 E. 3. cap. 3.

IN an Indictment of Felony upon the Statute of 5 E. 3. cap. 2. Rastal title Purveyors fo. 330. pla. 8. for the unlawful taking away of certain Timber Trees by the Purveyors, and upon the Trial at the Bar, the Case appeared to be this, the Party Indicted, being a Deputy Purveyor, *propter usum domini regis* did take certain Timber Trees, which Sir William Fitzwilliams had cut down for his own use, and these he took against his will, and against the form of the Statute, without prising, and tallying of the same, and converted the same to his own use. The Jury found his taking to be against the Statute, they found the whole matter, as it was, but gave a special Verdict, upon which verdict the only question was, whether this taking was Felony, or not in him, within the said Statute, the Statute of 4 E. 3. cap. 3. was read. It was urged that the Statute of 5 E. 3, is a general Law, and that nothing shall be within the Statute of 5 E. 3. which is not within the Statute of 4 E. 3. the Statute of 25 E. 3. cap. 6. was read for purveying of Timber, and cutting the same down. It was likewise urged that the Statute of 5. E. 3. doth not extend to a deputy Purveyor, but to the Purveyor himself. It was likewise urged, that the Timber which was here taken by him, was for the Kings Ships, (and not for his Mansion House) and this is given by the Statute of 25 E. 3. cap. 6. That this should be Felony, two matters were offered, as considerable in this case. First, if this taking be Felony in the Purveyor himself. Secondly, if the same be Felony in the Deputy Purveyor here, if the Stat. extends to him, the taking is then to be pur le hostel le Roy, the which signifies a Mansion House, this spoken properly, is taken to be for the Houses of Princes.—Inns of Court taken pro Hospitio. The jury here found him to be a Purveyor pro regalibus regiis, the Statute of Articuli super chartas edit. 28 E. 1. cap. 2. was cited concerning Purveyors. And the power thereby limited unto them, and how a Purveyor is to demean himself in his takings for the King. And there exposition is made del hostel le Roy. It was urged that this should be Felony

Stat. 25 E. 3. cap. 6.

1. 2. Stat. of Articuli super Chartas 28. E. 1. cap. 2. Reasons to prove this taking to be Felony.

felony within the Statute 1. by the Statute of Articuli super chartas cap. 2. by which Statute none are to be purveyors, but for the hostel le Roy; the which Stat. is to be extended to a house as well as for the houshold. 2. A second reason grounded upon the Statute of 5 E. 3. cap. 2. which hath reference unto the Stat. of 4 E. 3. cap. 3. and relates unto it. And the Statute shall be construed to be extended, to a deputy purveyor, as well as to the purveyor himself. John Harris argued that this is not felony within the Statute. The houshold of the King, ought to have another construction.——And other things——mentioned in the Statute, consideration is to be had, what these other things, shall be construed to be; the Statute of 4 E. 3. cap. 3.—— is also to be considered——by which it is ordained. And that if he take, and do carry away, by the Statute of 5 E. 3. cap. 2. an oath is to be administred by the Statute of 1 Jac. cap. 22 Rastal title Cordwainers fo. 59. by which it is enacted that no purveyor, or his deputy shall fell, or cause to be felled for the use of the Kings Majesty, any Oaken timber Tree, meet to be barked, but in barking time, (unless it be upon a special cause of necessity) for building or repairing of any his Majesties, Houses or Ships. Vide Stamford fo. 37. touching purveyors, and 11 H. 4. fo. 28. where Vitails are expounded, being taken by purveyors, in aid prier, where a purveyor, taking vitail al hostel la Roy, and is empleaded for it, that he shall have aid of the King. Williams Justice this taking of Wood by purveyors hath been censured in the Star Chamber, and this was one Sackfords case; And if he were censured, this taking then could be no felony. In this case now here in question, this taking, in manner as it is found by the Jury, is not felony. And this hath been, also formerly ruled, that a purveyor may take Wood, for the King, out of a Wood-mongers Wharf, but not of the provision, that a private man hath made for himself. A purveyor cannot cut down Wood growing, nor yet meddle with the freehold, of any man. But if a private man cut down Wood for to sell, a purveyor may well take this for the King, who is to be preferred, next unto himself, and before any other man. Flemming chief Justice and Williams Justice both of them, held this taking here to be unlawful. Flemming chief Justice where the Timber is cut, for to be sold, there the purveyor may take it for the King, according to the Statute, the same being first prised and other things observed, as the Statute requires. And this for the reason before given by Williams Justice; but otherwise it is, if the same be cut by a private man, for his own use. And he further said, that he and all the rest of the Judges, had before so resolved, as touching such takings by purveyors, for the King. And to this Resolution, they had all of them set their hands. And this they had done, to reduce it to a certainty, what the law was in such a case; and for the better redress, and punishment of all such unlawful takings by purveyors——the same tending very much unto the dishonour of the King, and great grievance of the People; It was moved in this case, upon the words in the Statute of 4 E. 3. cap. 3.—— and other things, and an exception was taken, because it is said Cepit, and doth not say Abcarriavit. But this exception was was overruled by the Court, that this was good by intendment, and cannot be taken otherwise. And as to those words in the Statute of——4 E. 3. (and other things) by the opinion of the whole Court, these words (other things) shall be construed, and intended to be things of the same nature with the former. And as to the matter of Felony; whether in this case, this manner of taking here, be felony, or not, the Court at this time, would be further advised of it, before they delivered their judgments therein. Flem. chief Justice. In the former resolution by the Judges before mentioned, as touching purveyors; There was nothing then mentioned, nor resolved by them as touching the point of Felony, in such a case, as this now appears to be——afterwards, at an other time this was moved again, as touching the point of Felony. Whether this taking of the Timber, as is here found, and for which the party stands endited for felony upon the Statute of 5 E. 3. cap. 2. be Felony or not. Williams Justice. If a

Stat. of 4 E. 3. cap. 3.
Stat. 5 E. 3. cap. 2.
Stat. of 1 Jac. cap. 22.
Rastal tit Cordwainers fo. 59.
Stanford pleas del corone fo. 37.
11 H. 4. fo. 28.
Stat. of 4 E. 3. cap. 3.
Stat. of 5 E. 3. cap. 2.

man takes my House, but doth not carry him away, is not this Felony? Flemming chief Justice, this is not Felony here, by the common Law, but so made to be by Statute Law. Williams Justice agreed with him herein, it is here laid
1. that he was a Purveyor, and did take, &c. Yelverton Justice. As to the endictment here for Felony, he is here out of the danger of the Statute, this being here but in the nature of a seiture, and here by this which was done, none is at prejudice thereby. By this Statute there ought to be understood of necessity a taking away. For what cause, ought there here to be a praising made, as by the Statute it is appointed, if he do not take the same away, and until this be so done, the King can have no benefit, nor the subject any prejudice; the praisment is not needful to be, if he take not the same away, the goods also ought to be taken, and if it be so, yet he is not in danger of the Statute, when he saith, I will have it for the King: and so for the matter of the endictment,
2. the same is not good, there being no just ground for it. Croke Justice of the same opinion, as to any matter here for to call his life in question, this enditement is not maintainable, this being for taking of Timber, this comes not here, within the danger of the Statute for Felony, see the Statute of Magna Charta chap. 21. touching Purveyors, and how they are to take for the King, giving satisfaction to the party, as the Statute appoints, and if a Purveyor do sell any Timber, without the will of the owner, for this they have been censured in the Star Chamber, and have been adjudged to lose their Ears for it, but otherwise it is, if they were felled before, (unless the same were for his own use,) There ought to be here, an effectual taking, if he saith only, I will have the same for the King, and so goes his way, and leaves it, this is good, and no harm by this done, the subject being not any ways prejudiced hereby, but the taking of other things, by the Purveyor, (as Victuals) contrary to the
3. Statute, this is Felony. Williams Justice of the same opinion, the Rules of Law are true, and by these Rules, Statutes are to be expounded, and the exposition is to be by the thing done upon the Statute, and he is not to be punished here, as for Felony: by the Statute, there are 3. damages, happening to the subject, the which ought for to be prevented. First, if he cut in the face of the House. Secondly, the Purveyor is not to take contra voluntatem domini. Thirdly, there ought to be a taking away, or he is not culpable; the Statute of 5 E. 3. cap. 2. extends not to Timber, the Houshold here, have no Authority to meddle with him for Felony; this taking here, as it is found, is not any Felony within this Statute, for that he hath no prejudice, by this which is done: if the King wants Timber, the Purveyors may take it of the Woodmongers, for his use. The party here, in this case had no remedy, but by his action of Trespass, Quare clausum fregit, and not to question him for Felony.
4. Fenner Justice of the same opinion, that this taking, as it is here found, is not within Statute of 5 E. 3. cap. 2. clearly, to make him, to be punished, as for Felony. If the Purveyor takes Timber standing and do notch, or mark it out for the King, the houshold, nor the Treasurer will pay, and allow him for it, unless the same do come to the use of the King, the Statute of 25 E. 3. cap. 6. imposeth a penalty on the Purveyor or taker, for cutting of Wood of any mans, growing about his House, To render to the party his treble damages for the same, to have one years Imprisonment, and to be forejudged of his office. Flemming chief Justice, the matter here considerable is, whether
5. this taking of Timber, by the Purveyor, as the same is here found by the Jury, be Felony, within the Statute of 5 E. 3. cap. 2. or not, these Statutes, concerning Purveyors, and their takings by way of Purveyance, for the use of the King, and of his houshold, were made, for to meet with the enormities of Purveyors, exceeding their power and Authority. It is to be considered, whether this Statute of 5 E. 3. shall be extended to any thing that is taken, by a Purveyor, though this which was now taken, happen but seldom times, as for matters of repair. No other intendment can be, upon this Stat. but for to meet with the daily takings, by Purveyors, (for Victuals) and

Stat. of Magna Charta cap. 21.

Stat. of 5 E. 3. cap. 2.

Stat. of 25 E. 3. cap. 6.

Stat. of 5 E. 3 cap. 2.

and with abuses in them the Statute of 5 E. 3. cap. 2. saith, No purveyor—for whom—for the King—his Houshold, and his children——it is not for Ships, or for reparations; to take the meaning of this Statute is not to extend to any Purveyor to have a Taylee, as to the taking of the Wood by a Purveyor, is it not a greater mischief, for to have a Purveyor to come, and to cut down Timber Trees, standing and growing in the view of a mans House? if for this cutting and taking in this manner, by a subsequent Statute, the party taking ought but to render Damages to the owner——à fortiori here in this case now in question, this taking shall not be Felony, the Statute of 5 E. 3. cap. 2. saith, that he shall be a Felon——but when——if he do take, and not praise, and make a Taylee——then, &c. and by the Statute of 25 E. 3. cap. 6. saith, that if any Purveyor, or Taker of Wood, or Timber, for the Kings use, do cause to be cut or felled the Trees of any man, growing about, or within his House, he shall for this pay to the party, treble Damages, shall be imprisoned for one year, and lose his Office, and by the Statute of Magna charta cap. 21. No Wood shall be taken for the King——Nec nos, nec ballivi nostri, nec alii capiemus boscum alienum, ad castra, vel ad alia agenda nostra, nisi per voluntatem illius, cujus boscus ille fuerit. By the Statute of 5 E. 3. cap. 2. it is made Felony in Purveyors, if they do take without praisment made, and Taylee between the Purveyors and the owners of the said goods so taken, the Statute of 5 E. 3. cap. 2. saith, That——the Corn, Cattel, and other Victual, and things which shall be taken for the use of the Kings House——and other things this is as much as if it had been said, (other things) or things of the same nature. Then as to the taking here, as it is found by the Jury, if one who is a Purveyor, comes to another, and saith to him, Sir, here are good Oxen that you have, and I do make stay of them for the Kings use, and he saith to him, come you and praise them, and he comes not, his mind being changed, you shall not now for this punish him here, as a Felon for this, but he ought also for to take them away, as the Statute saith, or he is not to be punished as a Felon; it is no Felony if the Subject have no prejudice, for he may go with them to the Market presently, and if the Purveyor do not come, he may well sell them, for he ought not to stay for him, a week or two; the Subject hath no harm, till there be a carrying away, contrary to the Statute, and this appears to be so by both the Statutes, the words of the Statutes being (taking) by this it is to be understood, to be such a taking, by which the Subject ought to be so grieved, as that he cannot bear it, clearly he ought not to have bæn endicted for Felony, for the taking of this Wood, in manner as the same is found neither is it Felony within the Statute of 5 E. 3. cap. 2. but this manner of taking, as it is found by the Jury, was a very great offence in him, and for the which he ought to be well punished, but yet not as a Felon, this taking of Wood being no Felony within the Statute of 5 E. 3. upon which Statute he is indicted, and so by the Rule of the whole Court, Judgment was given for the Prisoner, that this taking of the Timber, as it is here found, is no Felony within the Statute of 5 E. 3. cap. 2. and so the party endicted, was by the Rule and Judgment of the Court, freed, and discharged: quod nota.

Judgment given by the Court against the King for the party endicted.

Sir *William Turpine* Paintiff against *Forreyner* and others Defendants.

IN an Action of Trespass and Ejectment, the Jury found a special Verdict, and upon the special Verdict, the Case appeared to be this, a man being seised of a Manor, and of a Tenement in Fæ simple, and possessed also of a Lease for years in the Ville of Dale, by a Deed of bargain and sale, he doth give, grant,

An Action of Trespass, &c.

grant, bargain, sell, Enfeoff, and Confirm, unto another the Manor, Tenements, and all other the Lands, and Tenements which he hath in the ville of Da. the question was, whether by this deed of grant, bargain and sale, the Term for years doth pass or not. George Croke for the Plaintiff, that this lease for years doth not pass, but only the Lands in which he hath an estate of Inheritance, the words of the deed, will not serve, to carry this Estate for years, for he doth thereby give, grant, bargain, sell, enfeoff, and confirm, &c. The which words are of force, and effect, only to pass an Estate of Freehold, and Inheritance, and for 3. clauses, mentioned in the deed, this lease for years doth not pass thereby, 1. the words enfeoff, give, and grant——the Manor Freehold, and all other his Lands and Tenements, &c. Habendum to the bargainee and his Heirs, and this Deed, by these words, can by no intendment pass this Term, which is only a Chattel. Secondly, there is an express Covenant, in the conveyance, on the part of the bargainor, that he was seised in fee simple, of all the said Lands, contained in the said Deed of bargain and sale. Thirdly, there is also therein another Covenant by him, that he had an Estate in fee simple, in all the Lands thereby intended to be conveyed, and that he had good power and Authority, to bargain, and sell the same, so that it doth appear throughout the whole Conveyance, that there was no intention at all, on the part of the bargainor, for to pass this Term for years by the bargain, and sale, nor yet on the part of the bargainee, to have this lease for years passed unto him, but only, the one to pass, and the other to have an Estate of fee-simple, in all the Lands by this bargain & sale to him conveyed, and this being so, no violent construction shall be made, upon such general words; also if this lease for years should pass, by this deed of bargain and sale, a great inconvenience might thereby happen unto the bargainee, &c. If a great Rent were reserved upon this lease, if the same lease pass by this bargain and sale, the bargainee shall be then subject unto this charge, to pay the Rent, there being no clause in the deed to free and discharge him from the same; also by this deed, he hath granted, bargained, and sold, &c. but yet by this deed, no more doth pass, but that which he might lawfully pass by intendment of Law. Also by this deed, he doth bargain, and sell all his Lands——by these general words, this lease for years doth not pass, and so is the case in 37 H. 8. Brooks cases fo. 67 pla. 301 Brooke title Done pla. 41 Dicitur pro lege, if a man give omnia terras, & Tenementa sua, in Da. by this, leases for years do not pass, for that hæc verba, terras & Tenementa, shall be entended freehold at the least, and with this agrees——7 E. 6 Br. cases fo. 96 Pla. 438 Br. tit. grant pla.——155. If a man doth grant, omnia terras & Tenementa sua in Dale, by this, a lease for years doth not pass, otherwise it had been, if he had granted omnes firmas suas, by these words, a lease for years doth pass. But it may be objected, that this lease for years should pass, by other words, in the conveyance, (S) and all other his Lands and Tenements, and there were no other Lands in the said ville——to supply these words in the grant, but only this lease for years, and therefore the same should pass: to this it may well be answered, that this is no objection at all, for that this shall be intended, (all others,) &c. that this is as much as to say, all others, of the same nature, quality and condition as the other Lands, before mentioned were, and not otherwise, and therefore these general words, and all other Lands,——&c. shall not be intended or enlarged, by any construction, for to pass this lease for years, and to this purpose it was adjudged, 18 Eliz. 2. between the Lord North, and the Bishop of Ely. That where the predecessor of the Bishop, had made a lease to him, of his Manor house, of the Scite thereof, and of certain particular closes, and demesnes, by particular name, (and of all other his Lands and demesnes,) upon this, it was questioned, whether an ancient Park, and copihold Land, there should pass, and by the rule of the Court, neither of them did pass, by those large general words, for that neither the Park, nor yet the copihold, could be intended for to be demesnes, and that in such cases a grant shall not be construed by

3. Clauses in the deed to prove that the lease for yeare did not pass.

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37 H. 8 Br. cases fo. 67. pla. 301. & Br. tit. Done pla. 41.

Object.

Resp.

A violent construction shall not be made of general words. but by intention of Law.

by any violent construction, but according to the intention of Law; and therefore it is said in Plowdens Commentaries fo. 106. in Hill and Granges case, that ex præcedentibus, and consequentibus, optima fiat interpretatio, and that benigne faciendæ sunt interpretationes, and the same to be according to the intention of the parties, 12 E. 1 Fitz. tit. Grants pla. 87. a man levies a fine of a Manor, to which an Advowson is appendant, cum pertinentiis, the Advowson here doth pass, but there adjudged, that if the Advowson were not specially named, nor yet cum pertinentiis, the Advowson there would not pass, and so here in this case upon the whole matter, the Lease for years did not pass by this Deed of bargain and sale, and therefore he prayed judgment for the Plaintiff. Note, that this case, without any further argument, was ruled by the whole Court against the Plaintiff, (not upon the point in Law) whether the lease for years, do here by this deed of bargain and sale pass, or not, but for matter of pleading, for that the Trespass was not laid to be immediately upon him, the special verdict, reciting quod fuit possessionatus prout lex postulat, and for this cause, for default in pleading, the Judgment of the Court was against the Plaintiff, and the Rule entred Quod querens nil capiat per Billam. But Nota, that as to the matter in Law being whether this lease for years did pass or not, by this deed of bargain and sale, and by the general words therein contained, and so found by the special. Croke, Williams, Yelverton and Fenner Justices, declared their opinions, that as to this, they held it a strong case for the Plaintiff, that by the general words in this deed of bargain and sale, the lease for years here did not pass; quod nota.

Judgment for the Defendant Quod querens nil capiat per Billam, for the default inpleading, but per Curiam the lease for years here did not pass. 3 Cr. 293.

Haws Plaintiff, against *Loader* Defendant.

IN an Action of Debt upon a Bond against the Defendant as an Administrator unto J. S. who entred into the Bond to the Plaintiff, and for not payment of the mony by the intestate in his life time, nor yet by the Defendant his Administrator since his death, the Action was brought, the Defendant pleaded actio non for that he had no more remaining in his hands, but only to satisfie a Statute in which he was bound, & ultra ceo ad riens en ses maines; the Plaintiff replies and shews, that this Statute was only for performance of certain Covenants which were all performed, and no breach of any, so that he hath assets sufficient in his hands to pay this Debt, and it hath been here adjudged, this to be no good plea; the Court clear of opinion, that the plea in this case is not good, being in an Action of Debt against an Administrator, who pleads in Bar, that he only hath sufficient to satisfie a Statute, & ultra ceo ad riens enter maines, ql. Statute was by him kept on foot, to defraud Creditors, and therefore Judgment was given by the Court for the Plaintiff.

Debt upon a Bond, &c.

5 Co. 28. b. 2 Cr. 8, 35, 102, 182, 626. Dy. 80. 1 Cr. 467, 734, 822. 4 Co. 56, b. 60. a. 3 Cr. 362, 363. Yel. 29, 133.

Judgment for the Plaintiff per Curiam.

Syliard Plaintiff against——

IN a Replevin, for the taking of a Colt, and a Cow, the Defendant in the right of another, and as his servant, or Bailif, avows the taking of them, nomine heriotorum, shews that J. S. being Lord of such a Manor, and the Father of the Plaintiff being a free Tenant of the said Manor, and holding several parcels of his Lands of the Lord by fealty, and Heriot, and laies the custom of the Manor to be, that upon the death of every free Tenant, the Lord of the Manor for the time being hath used to have a Heriot for each parcel thus held, that the Father of the Plaintiff held several parcells of Land of the Lord of the said Manor, by Fealty and Heriot, and he dying, by his death, a Heriot was due to the Lord & tempore quo he did in the right of the Lord take the said Colt and Cow, nomine heriotorum for the said parcels of Land so held by him, and so for this cause he avows and justifies the taking.

Syliards case, &c.

To

Exceptions to an Avowry for taking Cattel for Heriots.

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Nota le difference between entire and several services.

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To this avowry the Plaintiff Demurrs, and for cause takes divers exceptions to the avowry, as first, because he saith, that he did take them, nomine heriotorum, and doth not shew in particular, wherefore he takes them. Secondly, he saith, that parcel of the Land was held by fealty and heriot, and so of another parcel held in like manner, this general avowry here of the taking of this Colt and Cow, nomine heriotorum, is not good, but insufficient, being for several services, and therefore he ought to have shewed in particular what he did take for the one, and what for the other; but where the Tenure is by an entire service, there he may well avow for the whole, and so is the Book of 44 E. 3. fo. 13. pla. 24. In a Replevin, the Defendant doth avow for Heriot, of one John, who died his Tenant of an Acre of Land heriotable. Also, the Declaration here is several, for the taking of the Colt, and of the Cow, and therefore the Answer unto this, ought also to be several. A Third, exception was taken to the Avowry, for that the custom here is not well, and sufficiently pleaded, the same being pleaded in this manner, that the Lord after the death of every one of his Tenants, is for to have a Heriot, (the Lord for the time being) First, it is said, that if any Tenant dies, the Lord (pro tempore) useth to have, after the death of every one of his free Tenants a Heriot, this contrary in it self, and so not good. A Fourth Exception, was taken to the Avowry, for that therein it is set forth, that if any Tenant die seised, the Lord is to have a Heriot, and doth not shew, of what estate he should die seised: for in one case, a Heriot custom, may be due, and in another case, it may be a Heriot service. Henry Yelverton argued to the contrary for the Defendant, the Avowant, and that the Avowry, and the justification thereby, is well, and sufficiently pleaded; he doth justifie here under another, (s.) under the Lord of the Manor, and shews how that the Father of the Plaintiff died, his free Tenant, and that by his death a Heriot, was due unto the Lord. As to the exceptions taken, First, because he doth shew specially, and in particular, wherefore he took them, as this he neds not so to do, for the Law saith, he takes them for Heriot, and this is a duty presently, and an interest setled; and here he shews for cause, that he took them nomine heriotorum, and this is well, and Br. tit. Heriot pla. 6. and Fit. tit. Avowry pla. 177. is a far stronger case, than the case here in question, there the case was in Trespass, for taking away his Beasts: the Defendant saith, that one J. held of him, and that he was to have a Heriot after the death of every one of his Tenants, and for cause shewed that J. dyed and had a Beef which was his best Beast, which Beef was esloigned, and that after the Land descended to one J. who died and had a Horse, which was his best Beast; and was esloigned, and for that he found the Beasts within the Land there, he did take them for the Heriots so esloigned, and this was there adjudged to be a good answer, and a good justification, for to say he took them for Heriots, and so in this case, it is sufficient to say generally, that of every Tenant dying, dominus manerii is to have a Heriot, so that the Avowry here is good and certain enough, and so praid judgment for the Defendant the Avowant. Williams Justice, the Avowry is good, and judgment ought to be given for the Defendant, according to the Rule in 2 H.6. fo.3. that if any thing be found for the Avowant, he is then to have a return, and so by the Rule of the Court, the Defendant is to have a return of these Cattel by him taken for Heriots: and by Williams, Justice, and Fenner Justices, the Avowry, and the justification is good, and well pleaded, and that the Defendant is to have a return of the Cattel, and so the Rule of the Court was, quod intretur judicium pro Defendente pro retorno habendo.

Judgment given for the Defendant.

Barton Plaintiff against *Sadock* Defendant, entred Pasch. 7 *Jac. B. R. Rot.* 416.

IN an Action of accompt brought by the Plaintiff being a Merchant, against the Defendant his Factor, for certain Jewels which he had delivered unto him for to merchandise for him beyond Sea, for his best profit; The Defendant by way of Plea saith, and averrs that he had sold the Jewels to Mulleshake, the King of Barbary for the best profit he could, and that he was to have returned the mony, (being 45 l. the which he hath not as yet done. To this the Plaintiff demurred in Law. The point only being whether this Plea, and the justification thereby, be in the judgment of Law good, or not. It was urged for the Defendant, that the Plea, and justification was good, and so the Plaintiff had no cause to demur, and to prove this, these Books were cited 9 E. 4. fo. 4. If a man bail goods to another, to keep as his own goods, and they are stolen from him, he shall be excused 2 R. 3. fo. 13. 14. pla. 26. in case of a Factor and 2 R. 2. Fitz. tit. accompt. pla. 45. in accompt of monyes received, to Merchandise withal, where it is said by Belknap, that if a man receive goods of another, to profit, and Merchandise withal as for him, the owner of the goods in this case shall stand to the good, and to the loss of all, as it happens, and falls out, and so it was urged here, that as the Master is to have the profit, so he ought likewise to bear the loss and prejudice, if any do happen; here by his plea he sheweth, that hath sold the Jewels, and this is sufficient, and he hath also here averred specially, that he hath sold them, for the best profit of his Master, and more he cannot say, and so concluded the Plea to be good. Henry Yelverton for the Plaintiff, that the Plea of the Defendant is not good, and so the Plaintiff had good cause to demur in Law; the Defendant here by way of Plea, saith, that he had sold the Jewels to Mulleshacke the King of Barbary by way of Adventure, and that he had done this for the use of the Plaintiff his Master, peradventure this may be so, and peradventure not, so that this his Plea and Allegation is altogether uncertain answer, and so not good: for he ought by his Plea to have made a certain answer, and to have certainly shewed, how he had performed the trust and Authority in him, by his Master reposed, the which he hath not here done, for he ought to have shewed, and averred in his Plea, that he had accounted with his Master, for the increase of the mony, being 45 l. and that at such a day he had received the mony, and so to this purpose is the Book of 22 H. 6. fo 55. and the Plea here is insufficient, and the Demurrer good, and prayed judgment for the Plaintiff. Williams Justice clearly, this Plea of the Defendant is not good, for the trial of this, see the Book of 41 E. 3. fo. 3. 4. pla. 8 if a man doth deliver goods to another to keep for him in his hands, he ought for these goods to render an accompt. Barbary may here be said to be in Kent, and so the same may well be tried, it appears by the Book of 3 E. 3. fo. 5. pla. 13. he which receives mony, for to render an Accompt, is to account for the profit which he might have made of the same. Yelverton Justice, if the Defendant were appointed to sell these Jewels in Barbary, he ought then in his plea to have the same certainty averred, to whom he had so sold them, and in what place he dwelt, all the Merchants agree, the common practice amongst them to be, that in such a case the Factor ought either to return the goods again, or else mony for them, to his Master. Williams Justice, the case before cited in 3 E. 3. where a Merchant gives a general Authority to his Factor to Merchandise for him, and to trust, the which is the usual manner of Trade amongst them for to trust, for a time certain 28 H. 8 Dyer fo. 29. pla. 193. In an Action of accompt, the Plaintiff counts, that the Defendant received Tinn of the Plaintiff for to render an accompt, the Defendant for Plea saith, that he sold the Tinn to one J. S. and took an Obligation for this mony, in the name of the Plaintiff

An action of accompt against a Factor. Yelv. 202.

9 E. 4. fo. 40. beside pla. 22.

2 R. 3. fo. 13. 14. pla. 26.

2 R. 2 Fitz. tit. accompt. pla. 45.

22 E. 6. fo. 55. 1.

41 E. 3. fo. 3. 4. pla. 8.

3 E. 3. fo. 5. new impression and fo. 68. old pla. 13. 2.

28 H. 8 Dyer fo. 29. pla. 193.

Plaintiff the Bayloz, this is there held no good plea in Bar of the accompt, but it is a good plea before the Auditoz by way of discharge. Yelverton Justice, it is set forth in the plea here, that he sold the Jewels to the King of Barbary, what remedy shall he have against the King of Barbary, foz the mony foz which they were sold? by the Book of 41 E. 3. fo. 3. the Defendant here ought to swear his Plea, which he hath not done, so that the plea, as it is here pleaded, is not good. Williams Justice, this is no good accompt made by the Defendant, foz these Jewels to him delivered by the Plaintiff, to say as he doth here by his plea, that he sold them to Mulleschalk, King of Barbary, this plea doth not amount to any accompt at all. Flemming chief Justice, the Defendants plea here is faulty, both foz the matter, and also foz the manner of it; the Demurrer here is both to the matter, and to the manner of the Plea, he ought to sell here foz the best profit of the Plaintiff his Master, and by the intendment of Law, he ought here to render a full and plenary accompt, and he ought in perfozmance of the trust in him here reposed by the Plaintiff, either to return the commodity again to his Master, which was delivered to him to Merchandise withal, foz the best profit of his Master, oz else to bzing the mony with him, foz which they were sold, and to deliver the same to his Master. In cases of Authozities given to one, (as in this case here) to sell any thing as a Facoz, in the due execution of this Authozity, he ought pzesently upon the sale thereof to have and receive quid pro quo, otherwise he doth not well perfozm the Authozity, thus to him given, neither ought he upon the sale thereof, to give him any further time, oz day of payment, but as he delivers the one, so he ought then pzesently, at the same time, to receive the mony foz the same foz which it was sold. Facozs ought foz to render true, just, and perfect accompts in discharge of the trust in them reposed: here he saith by his Plea, that he sold the Jewels (with which he was intrusted to Merchandise withal) to the King of Barbary, and that he had a Bill of him, foz payment of the mony; this is no good plea, foz the matter of it, foz that his Master can do nothing at all with this Bill, foz the recovery of his mony, but that this is a meer fraud and deceit, and foz which the Defendant is to be punished, and he ought to answer foz this; that which he hath here in his plea, the same may be true, and it may aswell be false: he ought to have sold here these Jewels, thus to him delivered, foz the best benefit of his Master, the which he hath not so done by this his sale (as appears by his Plea) in such a place, to such a person, and in such a manner. What if he had said in his plea, and justification, that the King of Barbary had taken these Jewels up, at such a pzice, and had pzomised payment of the mony, and hath not done it, this had been all one, as if he said, that he had been robbed of them, this is no colour foz him thus to justifie: if a man commands his Baily to sell foz him, so many fat Oxen, and if afterwards he calling of him to an accompt foz the same, who answers, that he had sold them, and being demanded to whom they were sold, foz what, and where the mony was, if he doth make this answer, that he had sold them to J. S. and that he hath his Bill foz payment of the mony, this is no good answer, foz that the party is never the better foz it, and he had no such warrant, to him given, to sell the Oxen, and to take a Bill foz payment of the mony, but his Authozity to him given, was to sell them foz ready mony, and to bzing the mony, foz which they were sold, with him. Also every Facoz hath not such a power given to him, to trust, foz the commodities by him sold, but some Facoz may have such a special power given him, thus to sell, & upon a day given foz payment, as he shall agzee, and see cause, but such a Facoz as hath only a bare Authozity foz to sell, hath not by this, a power, oz Authozity given him, upon sale made, to give day, foz the payment of the mony, but he ought to take & receive the mony pzesently upon the sale made. So if a man do authozise his Baily to sell any thing foz him, if upon his being called to accompt, saith he hath sold the same to such a one, and names him, but saith further, that he hath given him ten years time of payment of the mony, this is no good answer,

Mo. 462. cont.

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nor any ways justifiable, and this would be a very dangerous Case, and if way should be given by us for the allowance of such a plea, this would be a very ill president, and by such a way (if this should be allowed) all Merchants which do repose such trust and confidence in their Factors, may easily be deceived, and very much prejudiced thereby. Croke Justice, this is a very weighty case, and of great consequence; this Plea here of the Defendant is bad, and altogether insufficient, he had these delivered to him for to sell, & ad rationabilem computum inde reddendum, whensoever he should be thereunto required, and this is Lex mercatoria, and no Survivor to be between them; and the Defendant here had these goods to him delivered ad faciendum proficuum, meliori modo quo poterit, and if covin apparent, be used by him, as in this case here, it is, this is not rationabilis computus, nor can so be, so that this Plea here is clearly bad, and so the Court all agreed against the Defendant, the Factor, that this Plea was every ways insufficient, and that the Plaintiff had just cause of Demurrer, and so the Rule of the Court was nullo contradicente, quod judicium intretur pro Querente. Judgment per curiam for the Plaintiff.

Nota, that upon the return of a Commission, to certifie the Court of some proceedings, the Case appeared to be this. The Writ was directed unto eight Nominatim, and seven of them only do certifie, and whether this were good or not, was the question. Henry Yelverton excepted against this return, that the same was not good, for the Writ being here directed unto eight specially, and by name, all the eight ought for to joyn in their Answer, in this return, and this was the reason, which moved the Court to have the same Writ directed unto Sir Henry Lynley, as the eighth man, because that they intended all the 8. should make the return, and the return here made by seven, is not good; this is to be taken as a Principle of speech, that here is an enumeration of persons certain, and the same so done non exclusivè to exclude any, but positivè to include all, and that this should be so, appears by the Book of 2 Assisar. fo. 3. pla. 5. and 2 E. 3 Old impression fo. 35. pla. 2. and Brook tit. Attaint. pla. 47. An Attaint brought upon a Verdict, which passed before Judges of Oyer and Terminer, the Writ mentions that the Verdict passed before four Justices, and the Record proves that it was taken but before two, it was there said, that the Judges had no warrant for to take the Attaint, and the Court there agreed in this, that the Attaint should not be taken: the like Case see Termin. Hillar. 2 E. 3 Old print. fo. 21. pla. 15. Sir Francis Bacon Sollicitor-general argued to the contrary, that the return here by seven of the eight is good, for that this is a Principle in reason, and that infallible, quod omne majus continet in se minus, and upon this Reason is the Case in the Book of 31 Assisar. pla. 1. and Brook tit. Variance pla. 37. where Thomas de Westate brought an Assise of Novel Disseisin against James Franke, and makes his plaint of a Rent, the Defendant prays in aid of the King, the Plaint. had a Writ of Procedendo, by which Writ, it is supposed, that the Assise was arraigned before Stouse and Birton, whereas the same was arraigned before Sharde, Stouse and Birton, and therefore judgment was demanded, whether upon such a Writ, they would take the Assise, or not. Stouse there saith, that this Writ doth suppose no fauritie, for if it were arraigned before us three, ergo before two, and also we have the Writ, Si non omnes, and therefore answer, so that this is there ruled to be good, for if the same were arraigned before three, it was then before two, and with this agrees the case in Plowdens Comment fo. 393. a. in the Countee of Leicesters case by Manwood, where a Commission was granted to fifteen to take an indictment, Authority by the same given to them 15. and to every 4. of them, or more, whereof 2. at the least to be of the Quorum to take the endictment, and this was taken before 8. only, having a sufficient number of the Quorum. The only point was, whether this Endictment thus taken, was

A Writ directed unto 8. and 7. only certifie. Po. 129. Yel. 211. 2 Cr. 254.

2 Assisar. fo. 3. pla. 5. and 2 E. 3 old impression fo. 35. pla. 2 Brook tit. Attaint pla. 47.

Plowdens Comment. fo. 393. the Countee of Leicestes Case.

well taken, or not, it is there said, and cases put to prove it, that time certain, to which acts are referred, is material, and so likewise shall it be in case of place, as if one pleads Letters Patents bearing date at Westminster, where the same bears date at another place by 38 H. 6. fo. 34. 36. and 37. by Croke, Littleton, Moyle, and Prisot, for this variance he hath failed. Comment. fo. 393. divers cases there put, where a thing is referred to a number, this is material, as in a Redissesin upon the Statute of Merton cap. 3. in mandetur vic. quod assumptis secum custodibus placitorum Coronæ domini Regis, &c. it is adjudged in 23 E. 3. lib. Assisar. pla. 7. that the Writ shall abate, where the Sheriff takes with him but one Coroner, where there were more in the County, here in this case, the return by 7. is good, for that non presumitur pluralitas, unless the same be shewed; the Book of 28 H. 6. fo. 11. and 12. hath some shew of Authority, to make against me, where the case was this. A Writ of Error was directed to the Justices of the C. B. to remove a Record, and the Writ was in this manner, Rex Johanni Prisor, capital. Justiciario nostro de Bancò salutem, quia in Recordo & processu, ac etiam in redditione judicii loquelæ, quæ fuit coram vobis, &c. inter——— where it was Objected that the Writ was not good, for that the same should have been Coram vobis, & sociis vestris, the Records & les Rolles, being all of this form, and therefore there was no such Record here, and therefore this Writ was not sufficient for to remove any Record from thence, but he was enforced to sue forth a new Writ: another Case was there cited, to be in the Exchequer-Chamber, the which was Rex Thesaur. & Baronibus Scaccarii, &c. quia in Recordo, processu, ac etiam in redditione judicii, &c. quæ sint coram vobis, &c. and for that the Records of the Exchequer are coram Baronibus, and not Thesaurariis & Baronibus, he was awarded for to sue forth a better Writ. But in Answer to this, there will be a difference to be observed, for in the Cases before cited, this appears to you to be so, as Judges, and you do know this as Judges, that this was not to be so, and therefore, &c. but it is not so here in this principal case, for that this is not a matter that lies in your notice; also in the former cases remembred, the form is so, which is to be observed, and it would be very dangerous for to alter this form, and the Judges are to take notice of this, and so not alike here: there is no such usual course, nor yet notice, and therefore differing from the former, here the execution of this Commission may very well recipere majus, & minus, it may be that some of the Commissioners did not sit, and therefore they which did not sit, were not to certifie. Yelverton Justice, If a Commission be directed to three, may two of them meddle with the Execution of it? they cannot. Henry Yelverton, the return ought to be, as the Writ, or Commission is, which is here directed to them all, and so all of them ought to joyn in the return, and all to certifie. Yelverton Justice said to Sir Francis Bacon Sollicior, if you would have this to be a good Return here, it would be very dangerous, and you must herein overrule the whole Court, who are all of us of a contrary Opinion to you. Williams Justice, here is a special Commission directed unto eight, if seven of them only return this, this is not good, and we are so here to intend it, that they have all of them Authority joyntly, and not severally, and this Case here is not like the Case in the Commentaries in the Countee of Leicesters case before remembred, where it is with a Coram vobis, or before as many of them as should be there present, but here in this Case now in question, it is not so, and therefore all of them ought to joyn in the return, and because they have not so done, the return is not good. Bacon Solicitor, if a Writ be directed Coronatoribus, and there are four Coroners, if two of them return this, is not this return good? Williams Justice, where the Writ is directed generally to all, there all of them ought to joyn in the return; the whole Court agreed with him herein, and that in this case here they ought to have joyned in this return. Yelverton and Williams Justices, and the whole Court agreed with them herein, that the power here given to the 8. persons named in the Writ, is a joynt power, and not a several, and so ought to

38 H. 6. 34. 37. Comment. fo. 393.

28 H. 6. fo. 11. & 12.

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to be pursued by them in their return, and the same is not to be otherwise unless it be so set down and specified, and shewed in certain their power and Authority to be both joynt and several, otherwise it shall not be so construed to be joynt and several, but only joynt, and so it is here in this principal case, the Writ being directed to 8. and 7. of them only make the return, this return is not good, and so was the opinion of the whole Court clearly.——Flemming chief Justice, if a Writ of Diem clausit extremum directed unto 3. and be executed but by 2. of them, (unless it be expressed specially in the Writ, that the same may be executed, by them all 3. or by any 2. of them) this is not good, and so it shall be in all such special Commissions, they ought to be specially executed, according to the Commission to them directed, and they are not to vary at all from it. And so in this principal case the whole Court agreed clearly, that the return here made by 7. the Writ being directed unto 8. is no good return, but all the 8. ought to have joyned in this return, quod nota, this being the clear opinion of the whole Court.

The writ directed to 8. and 7. make the return adjudged this return not to be good. 2 Cr. 272.

Hampton Plaintiff, against *Courtney* Defendant.

IN a Writ of Error, the same was assigned in the manner of the entring of the Bail, the case appeared to be this, In an Action of Debt, Bail was entred for the Defendant, judgment was given for the Plaintiff, for the reversing of which judgment a Writ of Error was brought, and the Error assigned and insisted upon, was in the manner of the entry of the Bail, the same being sub pœna executionis, in adjudicatione executionis, the Error assigned, because that the Bail was taken, and entred but only for part, (S) for the execution, but not for the judgment, as it ought to have been, (as it was urged.) Nota per Curiam, that if a man be in execution upon a judgment, he cannot have Bail entred for him for part of the Debt upon the judgment, but the Bail must be for all, for the Bailment ought to be taken according to the judgment, and to be agreeable with the same the Bail is to be, sub pœna condemnationis, and all Bails ought so to be, and in this manner to be entred: per Curiam, Error may be in adjudicatione executionis, the Bail ought to be for the whole, here in this principal case, the Bail was taken as to the execution, but not as to the judgment, as the same ought to have been. Williams Justice, such manner of Bail ought for to be refused, and so he said, he always did——the Writ of Error here brought, and the Error assigned, was——in adjudicatione executionis, and the execution for Error in the same reversed: and the Court was moved to have the Bail now discharged, being only taken, and entred as to the execution, the which being for Error reversed, the Bail ought to be discharged. But the Court refused to discharge the Bail, for that clearly the Bail being once taken, stands for all, as well for the judgment, as for the execution, and therefore they would not discharge the Bail, notwithstanding the Recognisance of the Bail, was only pro adjudicatione executionis, but this by the Rule of the Court was to be amended, and made to be sub pœna executionis judicii, as well as for the execution, and so the same by the Rule of the Court, was ordered to be amended, and the Recognisance to be sub pœna condemnationis, as well as in adjudicatione executionis, quod nota.

A writ of Error in the entring of Bail.

The recognisance for the Bail amended per Curiam, and made to be for the judgment as well as for the execution.

Note, as touching the proceedings in the Court of Requests, and their jurisdiction the case was this. A man did take an Oath in the Court of Requests, in a business there questioned, concerning matter of freehold, & for this oath there

One questioned for perjury in an oath taken in the Court of Requests, where matter of freehold was in question. Yelv. 111. Noy. 114.

there so taken, he was brought into the Star-chamber, and there questioned for perjury in this Oath, and the perjury was fully proved against him, but whether this was perjury in him or not, the Oath being there taken by him in a business concerning matter of Freehold, was the only question, and for the better determination of this, the same was, by the Court of the Star-chamber, referred to all the Judges of England, to deliver their opinions in this case, whether the cause (in which this Oath was taken) was within the jurisdiction of the Court of Requests, or not. It was resolved by all the Judges meeting upon this reference, that the Court of Requests had no jurisdiction at all of the cause in which the Oath was taken, this being matter of Freehold, and for this cause, the Oath being there taken by him in a Cause of which they had no jurisdiction, it was clearly resolved by them all, that this Oath by him thus taken, was upon the matter no Oath at all, to bring him in question, for matter of Perjury, the same being by him taken Coram non judice, & this the was opinion of all the Judges of England upon this reference to them, as Williams Justice did cite, and remember the same, and that the Court of Requests had no power nor Authority to hear, and determin of any matter of Freehold, and so upon this resolution of the Judges, the party was acquitted for the matter of perjury, in the Star-chamber prosecuted against him. Williams Justice, clearly the Court of Requests hath no jurisdiction, for to decree matter, which concerns Freehold, and we will not suffer them to have any such Jurisdiction in such cases, which do not appertain unto them, and no consent of the parties to submit themselves, to the Judgments and determination of that Court in such cases, will any ways aid them, or give them any Jurisdiction, which by the Law doth not belong unto them.

Note, where upon a libel for Tithes, a prohibition, and where a consultation shall be granted.

Ante. 67, 68.

Nota, upon the Statute of 2 E. 6. cap. 13. the Parson libels for Tithes, and upon this the case appears to be in this manner, the Parishioner which was to pay his Tithes, sets them out according to the Statute, but they being so set out, he would not suffer the Parson to come and take them away, thinking by this means, and this way to avoid the Statute, and upon this the Parson libels in the spiritual Court for these Tithes, the Defendant there surmises, that he did not hinder him, from the having of his Tithes, but saith that he did hinder him, in coming for his Tithes one way, (which was the usual way) but that he might have come for them, another way, and upon this a Prohibition was praied, and granted, supposing, that here was no question at all, as touching the payment of Tithes, but as touching the way to come for them, and upon this whole matter, the Parson prayed a consultation. The whole Court clear of opinion, that such a setting out of Tithes, as the same appeared to be here in this case, without suffering the Parson to come and take away his Tithes, that is a Fraudulent, and no good and sufficient setting forth of Tithes, according to the Statute, and as the Statute doth require, which ought for to be a fruitful and effectual setting forth of his Tithes, for in so doing, he ought to set forth his Tithes, and also to suffer the Parson, to come, have, and to take away his Tithes, otherwise, unless he do also perform this, the setting out of his Tithes here is to no purpose, for to excuse him. And to the surmise here made for the way, The whole Court clear of opinion, that this is no ways at all material, and so without any further motion or arguments, by the Rule of the Court, a Consultation was granted, quod nota.

A consultation granted.

Ancient demesne a good plea, and where.

Nota, by Williams and Fenner Justices, That Ancient Demesne, is a good plea, in an Ejectione firmæ, and so it is likewise in a Replevin, and this was so agreed by the whole Court, and so is the Book of 10 H. 7. fo. 13. that the same is a good plea in a Replevin.

Nota,

Nota, by Yelverton Justice, That if an Inn do use the Trade of an Ale-house, this shall be within the Statutes of Ale-houses. Croke Justice, No Person is for to erect an Inn, without a Licence from the King. Fenner Justice, Statutes for Ale-houses, include all, (excepting only Booths in Fairs) not to keep an Inn, and an Ale-house: but to be suppressed, to keep an Inn, only for the relief of Travellers, the whole Court agreed in this.

An Inn not to use the Trade of an Ale-house the same being for Travellers. Hut. 99. 100.

The *King* against *Francis Lemman.*

Who was endicted, first, of manslaughter, and afterwards of murder, the endictment returned hither into this Court, exception was taken to quash the endictment, being that adtunc, & ibidem cum pugione in sinistra parte collis percussit ——— whereas it should have been (Colli) this was held a good exception by the Court, and that the Endictment is not good: the Court was then moved, that this exception was not to be taken to overthrow the indictment, because the party indicted, was outlawed upon this, before the Coroners: the Court then answered, that if it be so, this exception cannot be taken to the Endictment, and therefore the Court did order search to be made, and the Court to be informed, whether he stand outlawed, or not, and if so be outlawed, then he hath no other remedy, but a Writ of Error, and this is his right course.

Exception to quash an indictment of murder.

Tabbe Plaintiff against *Matthew* Defendant.

In an Action upon the case for words, upon not guilty pleaded, a Verdict was given for the Plaintiff, and upon a motion made in arrest of judgment, the words laid in the Declaration, appeared to be these (s.) being spoken by the Defendant to the Plaintiff himself. Thou (meaning the Plaintiff) hast hoistered Theeves, and stollen goods, and the Theeves, and the goods were found in your house, and the Theeves were had before such Justices, and committed by them to Prison, and were hanged, and if the Justice had not been your friend, it had been hard with you; it was moved in arrest of Judgment, that these words are not actionable, they being too general, as to the words, hoistered, that is, ostered or housed, this is all one, that these words should not be actionable, this Case was cited, being an Action upon the case for words (being) you were partakers with the Rebels in the North, and held not actionable for the generality of the words, in almuch as it was not laid in certain, that he had knowledge, that they were Rebels, as it ought to be laid, and for this reason it was here adjudged, that these words were not actionable, so here in this case, because it is not laid, that he knew a Felony was done, and that these were Felons, and the goods Felonious goods, and unless he knew this to be so, he can be in no danger, by housing of them, or their goods. The Court was clear of opinion, that the words, take them altogether, as they are here laid in this Declaration, are very Scandalous, and well Actionable, the latter subsequent Words, being Words of very great Scandal unto the Plaintiff, and so by the Rule of the Court, Judgment was entred for the Plaintiff.

An action upon the case for words.

Judgment for the Plaintiff.

Scot

Scott Plaintiff against *Scott* Defendant.

An Action of Debt for not performance of an award.

IN an Action of Debt upon a Bond, conditioned, for the performance of an award, and for the making of the Arbitrement, and award in Writing, under hand and seal, indented, and the same to be delivered before such a day, in an Action of Debt brought for breach of this, in not performing of the award, the Defendant pleaded Nullum tale fecit arbitrium, afterwards it was found, that the Arbitrement was under his seal, but not under his hand, and by the express words of the Condition, the same ought to be in Writing, under his hand, and seal, and also delivered. Williams Justice, the award ought to be also subscribed by him. Yelverton and Croke Justice, agreed in opinion with him, that his hand ought to be subscribed unto the award in pursuance, and according unto the very express words of the condition, that the same be by writing indented, and under his hand and seal, and so to be delivered, his own hand ought to be subscribed thereunto clearly by the Court. Croke and Yelverton Justices, if it be so, that he cannot write his name, he ought then for to set his mark unto the award, and in this the whole Court agreed, and so by the opinion of the whole Court, the plea of the Defendant stands good, and for this omission of the subscription, to the award, judgment was given for the Defendant, quod Querens nil capiat per billam.

Judgment given for the Defendant.

Baker Plaintiff against *Dickenson* Defendant.

A Prohibition to the Court at York.

IN a Prohibition to the Council at York, to prohibit them from holding of Pleas, in matters not there determinable by them, as in cases of Replevin, and Avowries, upon the same the Court clear of opinion, that they could not there hold plea of a Replevin, nor of an Avowry, these being determinable by the Common Law, for that an Avowry is to try the Right and Title of the Rent-service, and the right to a Heriot, these are to be determined by the Common Law, and not by the Council of York, and therefore in this Case, a Prohibition was granted by the Rule of the Court.

Maynard and his Wife Plaintiffs against *Towe* Defendant.

An Action of Trespass.

IN an Action of Trespass Quare clausum fregit brought by the Husband and Wife, upon not guilty pleaded, a Verdict was found for the Plaintiff, it was moved in arrest of Judgment, that the Declaration was not good, because he hath joyned his Wife with him in this Action, whereas the same ought to have been brought by him in his own name; where the Husband and Wife shall joyn in Actions, and where not, divers Cases were cited, the Books are many, and the reasons different. In this principal Case it was urged, that the Declaration is good, and that they ought to joyn in this Action, for it shall be intended that they are Joyntenants. Williams and Croke Justices, the Husband and Wife shall joyn in a Quare impedit, and so in Trespass, the whole Court agreed with them herein. It was objected that in this principal case, being in a Trespass, Quare clausum fregit, they ought not to joyn, but otherwise, if it had been in an Action of Trespass for cutting down of Trees, there they ought to joyn in the Action; but the whole Court was clear of opinion, that this Declaration

tion here by the Husband and Wife, in this Action of Trespass, Quare clausum fregit is good, and that they ought to joyn herein, so that it shall be taken by intendment, that they are here Joyntenants, and so by the Rule of the Court Judgment was entred for the Plaintiff. Judgment given for the Plaintiff.

Note, that a Prohibition was prayed, and granted to the Spiritual Court to prohibit them, from proving of a Will, by the which Will, Land was devised. It was held by the Court, that the Will is entire, and cannot be divided, and the same Will being for Land, and for goods, the same is to be proved here, for the whole, and not in the Spiritual Court for any part, not so much, as for the Goods, for that this being a Will for Land, and for Goods, the Land being the greater, and most considerable, shall draw all unto it, and shall make the probate of all to be here, and not in the Spiritual Court, for any part thereof, and for this reason a Prohibition was granted by the Court. Prohibition to a spiritual Court in case of a will made of land and of goods. Po. 199.

Shepherd Plaintiff against *Twoulsie* Defendant, entred *Pasch. 7 Jac. B. R. Rott.* 100.

IN an Action upon the Case for a Promise, upon Non Assumpsit pleaded, a special Verdict was found, and upon the special Verdict, the Case appeared to be this, the Defendant by indenture did demise unto the Plaintiff all his Tithe of Corn, and Hay, and the agreement between them was this, the Plaintiff should pay him for the Tithe 55 s. and this by agreement was to be paid at a day certain, then following, the Defendant having his Tithe, passed the same in this manner to the Plaintiff, and upon this agreement, and promise, being not performed, the Plaintiff brought his Action. It was found that the Defendant confessed the agreement to be so, but in Bar, he pleaded the Statutes of 13 Eliz. cap. 20. and of 14 Eliz. cap. 11. for the avoiding of Leases made by a Parson, by his absence from his living by the space of 80. days in one year, and also shews that one Stallow, who was the Parson of Sharrington, to whom these Tithes did belong, (and in whose right the Defendant claimed them) was absent from his Parsonage by the space of 80. days in one year, and shews in what year, and so by this his interest determined, and agreement with the Plaintiff, by this made void; but they found further, as the Plaintiff made it for to appear, that Stallow the Parson of Sharrington, was not absent in manner, as it was alledged, for that they found, that he did dwell in another Town adjoyning, but that he came constantly to his Parish Church, and there read Divine Service, and so went away again; they did also find, that he had a Parsonage House in Sharrington, fit for his Habitation, and whether this were an absence within the Statutes, as to avoid his Lease, that they left unto the judgment of the Court. Et si, &c. Yelverton Justice, this is a good Non-residency within the Statute of 21 H. 8. cap. 13. but not an absence to avoid a Lease made within the Statute of 13 Eliz. cap. 20. It cannot be said here in this case, that he was absent, for he came four days in every week, and in his Parish Church, did read Divide Service. Williams Justice, upon the Statute of 13. and 14 Eliz. the Parson ought not to be absent from his Church 80. days together in one year, (à Rectoria sua) but this is not so here, for he came to his Church, and read Divine Service there every Sunday, Wednesday, Friday, and Saturday, and therefore clearly this cannot be such an absence, within the scope and intention of these Statutes, as thereby to avoid his Lease. Yelverton Justice, he ought to be absent 80. days together, per spatium de octogin. diebus & ultra, and this to be altogether at one time, and so the same ought to have

An Action upon the case for a promise.

Statutes of 13, 14 Eliz.

have been said expressly, the which is not so done here, for that it appears here, that he was at his Parsonage house, and did there read prayers every Sunday, Wednesday, Friday, and Saturday, and so the whole Court were clear of opinion, that this absence here, as the same appeared to be, was not such an absence by the space of 80. days in one year to avoid his Lease within the said Statutes, and so the Defendants plea in Bar not good, and therefore by the Rule of the Court, Judgment was entred for the Plaintiff.

Stowe Plaintiff against *Holland* Defendant, entred Hill. 8 Jac. B. R. Rott.——

An Action of case for words.

IN an Action of the Case for slanderous words spoken by the Defendant to the Plaintiff, which words were these (s.) Thou art a Knave and a Rascal, for thou settest upon me in the high way, and there thou tookest away my purse, and my money from me; Upon not guilty pleaded, a verdict was given for the Plaintiff. It was moved in arrest of Judgment, that these words are not Actionable; for to make words to be Scandalous, and so Actionable, there ought to be a strong and forcible intention to make them so, for here he ought to have said, that this was Feloniously done, which is not here said, and so the words are not Actionable, Pasch. 38 Eliz. Davyes case, where the words were, being spoken of the Plaintiff, thou hast stollen by the high way side, these words held not to be Actionable, because he did not say, that it was Feloniously done. And so for one to say, Thou hast burnt my Barn will not bear an Action, because it doth not appear, that there was Corn in it; and by the Statute of 23 H. 8. cap. 1. it is not Felony to burn a Barn, unless there be Corn in it, and Coke 4. pa. fo. 20. Barhams case, the burning of a Barn with Corn is Felony by the Common Law, and by Statute of 33 H. 8. cap. 1. Clergy is taken away from such a Felon. Fenner Justice, in this principal case, the words are Actionable, if one should say of another, That he was laid of the Pox, these words are Actionable, and it shall be intended to be the French Pox. Croke Justice, if the words had been, Take hæd how you lodge such a one, for he takes purses, these words are clearly Actionable, and so in the principal case here. Yelverton Justice doubted of it. Croke, Williams, and Fenner Justices clearly in this principal case, the words are scandalous, and well Actionable. Williams Justice agreed with Croke Justice in the case put by him, and so by the Rule of the Court, the words in this Principal case are Actionable, and so Judgment was entred for the Plaintiff.

Coke 4. pa. 4. 20. Barhams Case.

Judgment entred for the Plaintiff.

Gollew Plaintiff against *Bacon* Defendant.

An action of the case for a promise.

IN an Action of the Case upon a promise, the Case appeared to be this. The Defendant did assume, upon good consideration, for to make unto the Plaintiff a good assurance of a Rood of Land, but performs it not: the matter questionable was, whether the Plaintiff (upon this non-performance, according to his promise) shall have his remedy against the Defendant, at the Common Law, by his Action upon the Case, grounded upon the promise, or whether he should go into the Chancery, and there by his Bill, seek for remedy, to have performance of the promise. Flemming chief Justice, if one doth promise for to give me a Horse for 20 s. afterwards he doth not perform this. I am not in this case to go and sue in Chancery for my remedy, but at the Common Law, by an Action upon the Case for breach of promise, and so to recover Damages, and this is the proper remedy, and the Common Law Warrants only a remedy at the Common Law, and if the Law be so

so in case of a House, à multo fortiori it shall be so, in Case of a promise to make an assurance of his Land upon good consideration, and doth not perform it, he is not to sue in Chancery for this, but at the Common Law, which is most proper. Croke Justice, if I do enter into a Bond, to one, to make him such an assurance of Land, and do not perform it, this is most proper for to be tried at the Common Law, where the penalty may be recovered, and so in an Action upon the Case, for breach of promise, this is most proper to be tried at the Common Law, where he shall recover damages to the value of the loss by him sustained by the not performance of his promise. Flemming chief Justice, agreed with him herein, and Yelverton Justices, of the same opinion clearly. Flemming chief Justice, there are too many Causes drawn into Chancery to be relieved there, which are more fit to be determined by Trial at the Common Law, the same being the most indifferent Trial, by a Jury of twelve men.

William Newman Plaintiff against *William Edmunds* Defendant.

IN an Ejectione firmæ brought against the Defendant, for the Trial of the Title to certain Lands, upon not guilty pleaded at the Trial, upon the construction of a Will, the Case appeared to be this. A man devised Land unto Williams and John his Sons, to be equally, and indifferently divided between them, and at their own proper costs and charges, the question was, what estate these two Sons had in the Land thus to them devised, by the words and meaning of the Will. Williams Justice clearly, they are Tenants in Common for their lives, and they have a Feesimple in one Moity, in possession, and the reversion of the other Moitie, the whole Court agreed in this, and that the assurances were to be made at their proper costs & charges Flem. chief Justice, admit that they have a joynt Estate, then the Father dies, a discent is cast upon the eldest, the Joynture broken, the one shall make an assurance to the other, and this at their proper costs and charges, according to the meaning and true intention of the Testator, the words of the Will are not here (equally to be divided) but the words are, to be equally, and indifferently divided between them; the whole Court agreed in this, that if a reversion do descend upon one Joyntenant, by this the joynture is severed, and here, by operation of Law, they are now become for to be Tenants in common: but if Land be given to two, and to the Heirs of one of them, and after the reversion descends upon one of them, this shall not sever the Joynture. The Court was clear of opinion, that in this principal case, the two Sons are Tenants in common, and the Books were cited of 34 H. 6. fo. 2. 28 H. 8 Dyer 25. where a man devised lands, to his Sons equally, it is there left a quere, whether they are Joyntenants, or Tenants in Common; but Coke 3. pa. fo. 39 b. in Ratcliffes case, where the Devise was of Land, in remainder, unto two Daughters, and to the Heirs of their two Bodies begotten, by equal portions to be divided, and therefore resolved, that the two Daughters were Tenants in Common in tail, and that these words in a Will (equally to be divided) makes a Tenancy in Common, according to the intention of the Devisor, and in this principal case, the Court all agreed, that the two Sons, by the words and meaning of the Will, were Tenants in common.

An Action of Trespass and Ejectment, the case upon a Will.

1 Cr. 443, 695. Mo. 558, 594. Hob. 172. 3 Cr. 75.

Coke 3. pa. fo. 39. b. in Ratcliffs case.

Nota, by the Court for a Rule, that if after the challenge taken to the Array, and two Triors elected, and sworn, and the Jury returned, found to be indifferent, afterwards the Defendant who challenged the Array, doth challenge the Jurors, by the Pole, he ought then to put in, and to shew the cause of his challenge presently, otherwise it is, where there are no Triors sworn, there he

Rules to be observed touching challenges of the Array & of other Jurors.

he is not to shew the cause of his challenge, until the other Jurors, which are not challenged, be sworn.

Note, where one doth challenge the Array, after that two Triors are elected by the Court and sworn to try the others, the cause of favour ought then to be shewed to the Triors, the which is called their issue, and after proof made of this, they are then to deliver up their answer to the Court, whether they do find them to be indifferently impannelled, or not; if they do answer, that they are not indifferently impannelled, this is then to be entred of Record, but if they answer, that they are indifferently impannelled, and so not quashed, then they are to proceed to Trial, and no special entrie is to be made of this, and so is the Book of 21 E. 4. fo. 59. b. where it is said, by Brian, that where a challenge is taken to the Array, but two Triors are to be elected and sworn to try the same, unless it be by agreement of the parties, and there the Prothonotaries being demanded by the Court what was the course, they answered, that if the Array be quashed, then there is an entry to be of the same upon the Record, but of otherwise it is, if the Array be affirmed; and in neither of these cases, the names of the Triors, by which the Array is affirmed, or quashed, are to be entred of Record; and agreeable with this, is the Book of 27 H. 8. fo. 26. a. where the Array was challenged by the Defendant, and two Triors chosen by the Court to try the issue, these Triors challenged the Court. nominated two other Triors, which were likwise challenged. Fitzherbert and the Court said they would nominate two other Triors, and that they were to be allowed of, without any exception to be taken at them: the Defendant there perceiving what the Triors would do, released the challenge, and afterwards as the Jury were called, challenged to the Polls, by the Court, the Defendant is to shew his cause of challeng presently, for when he doth release the challeng, this is a good Trial against himself, for by this he doth confess his challeng to be false, and this is stronger against him, than if it had been determined by the Triors, and there by the Court, the Triors that were sworn for to try the challenge to the Array, shall try the challeng to the Polls.

21 E. 4. fo. 59. b. the Array challenged, what is to be done.

27 H. 8. fo. 26. Challeng to the Array, and to the 2. Triors twice nominated, the 3. time to stand.

Observations as touching the manner of challenges to the Array.

Note, that Man Secundary did inform the Court, that this was the Rule constantly observed, and the manner of Entries, in such cases, where the Array is challenged, and by the Triors the same quashed, or affirmed. And Note, also by Man Secundary, that where one doth challeng the Array, and concludes to the favour, he may then give kindred in evidence; but if the same be a principal challeng, then he ought for to make mention of the kindred specially. Note also, that where one doth challenge the Array, this challeng ought to be read by the Council, in French, and if he pronounce the challeng himself, he ought for to pronounce the same in French; but if he do put the same into the Court in writing, this ought then to be written in Latin, and so the same ought to be Recorded in Latin, but to be repeated by the Council at the Bar in French.

Thomas Zouch chief Justice of the Kings Bench in time of E. 1. slain doing of Justice. Where the Array is challenged, and by Tryors found indifferent.

Note, that Mr. David Waterhouse, Secundary of the Crown side, in Court, said, That Thomas Zouch was chief Justice of the Kings Bench, in the time of King E. 1. and that he was slain, sitting in the the seat of Justice, (Not at Westminster, but in some other place, where he was executing of Justice) and that he was stiled by the name of Summus justiciarius Angliæ.

Note the difference where the Plaintiff and the Defendant, &c.

Note, where the Defendant doth challeng the Array, two Triors are chosen by the Court, and sworn, and find them indifferent, afterwards the Plaintiff challenges some of the Jurors by the Polls, he is not to shew the cause of his challeng presently, but to stay till the pannel be perused, and

and all the rest sworn, but if the Defendant do challenge by the Poll, he is to shew the cause of his challenge presently, and so is the course and practise, & so the difference is, where the Plaintiff doth challenge by the Polle, and where the Defendant after the Array challenged, and by the Triors found to be indifferent.

Hughes Plaintiff against *Keymish* Defendant Entred *Trin.* 7 *Jac. B. R. Rot.* 1490.

IN a special Action upon the case, brought against the Defendant for the Erecting of a Building, in a Yard, and on a void piece of Ground, adjoyning unto the Plaintiffs house, and thereby stopping up three of his ancient Lights, by which he saith, that he is damnified to the value of 20 l. the Defendant by way of Plea saith, that at the time of this Building by him thus made, his dwelling house was very ruinous, and in great decay, insomuch as that he was enforced to take down one side of it, and upon the same place for to erect a new Building, and further shewed, that the City of London est Antiqua Civitas, and sets forth the custom of the City of London to be, that where an ancient house hath been, that there upon this old foundation by the said custom, he may build and stop the adjoyning Lights of another, and so justifies, and upon this Plea and justification, in this manner pleaded, the Plaintiff demurred in Law. John Moore, for the Plaintiff, that this Plea and justification thereby is not good, and that the Plaintiff hath just cause to demur; the stopping up of ancient Lights is a great Nusans and damage, for that the Lights are as necessary as the house. It is here objected, that this justification is grounded upon the custom of the City, to build upon an ancient Foundation. In answer unto this, the custom here is not well pleaded, and this custom it self, as it is alledged and set forth, is not good, the same being in it self altogether unreasonable, for to stop up the Lights of another, by a new Building, which Lights are as necessary as his house. Also the Defendant here hath not by way of allegation set forth the Act of Parliament, for confirming of the customs; the Plaintiff here hath set forth that time out of mind, these Lights have been, and the Defendant cannot prescribe in this, that he time out of mind hath used to stop up these Lights; also the custom, as it is here laid, is unreasonable, for a man cannot prescribe to take away my inheritance, and in the Book of——43 E. 3. fo. 32. where an Abbot being Lord of the Ville of C. said that the usages of the Ville were such, that when the Tenant did cesse by 2 years, that the Lord may enter, and hold until the ——Tenant do make agreement with him, as touching the arrerages, and said, that he who was Tenant had cessed for 2. years, by force whereof he as Lord did enter, because the usage was only alledged for to be in this Ville, and in no other. It was there held by Knivet, and the whole Court, that this was an ill usage, to oust a man of his Heritage. It was also further alledged that the Act of Parliament, for confirming of the customs of the City of London, is a private Act, of which the Court here is not to take any notice, unless the same be specially alledged by the party, and so was it adjudged here in this Court. Trin. 29 Eliz. 2. between Bland and Mosley, cited Cook 9 Pla. fo. 26. in Aldreds case concerning a custom laid to be in the City of York. As to the manner of the pleading here in Bar, the same is not good, the Plaintiff complains here of a damage to him done by the erecting of Buildings, in a yard, and upon a void piece of ground, the Defendant by Plea saith, that he had an old House, part of which was fallen down, and that there he did Build the new, this is no sufficient answer to the Plaintiffs Declaration, nor yet to that, of which the complaint is made, being for stopping of his ancient Lights, for if one do charge another for words spoken

A special action upon the case for stopping of 3 lights, &c. Yelverton 215. Co. Entr. 20. Calth. 1. Godb. 183.

Objected.

Resp.

An ill usage to oust a man of his Heritage.

Trin. 29 Eliz. B. R. Bland and Mosleys case cited Cook 9. pa. fo. 50. in Aldreds case.

spoken in Middlesex, and he pleads, and justifies, as to words spoken in Essex, this is not good, so here in this case, the Defendant makes no answer at all to the Plaintiffs Declaration. Stevens agreed to the contrary for the Defendant, that the Plea and justification is good, a Fisherman may prescribe to dig the Land, and to fasten stakes to dry his nets, and this upon the soil and Freehood of another, the reason is, because this is for the publick good, and the other may also prescribe against this, for to have a certain benefit, or recompence given unto him for the same, this appeareth by the Books of 8 E. 4. fo. 18. 19. 21 E. 4. fo. 28. 6 Brook tit. Custome pla. 51. 11. 11 H. 7. fo. 25. b. Coke. 9. a. pla. fo. 58. in Blaud and Moseleys case, cited in Aldreds case, where it is resolved, that if one hath a lawful easement or profit by prescription, another custom, which is likewise time out of mind, cannot take the first away, for that the one custom is as ancient as the other; and it was resolved in a case betwæn Hammond, and Alsey Pasch. 34 Eliz. C. B. Rot. 275. that by the Custom, a man may build upon an old Foundation, and so was the opinion of Popham chief Justice. B. R. that such a custom was good, and so was it adjudged here in this principal case, that this custom is good, but because the Defendant here, in pleading of his Justification did not set forth by way of pleading, that he did erect this his new building upon the old Foundation as he ought to have done, for this cause, and for this omission, by the opinion of the whole Court, the Plea is not good, and so the Defendant hath failed in his justification, and that the Plaintiff had good cause for this omission, to demur in Law, and so by the Rule of the Court, Judgment was given for the Plaintiff.

8 E. 4. fo. 18. 19. 21 E. 4. fo. 28. Br. tit. Custom Pla. 51. 11 H. 7. fo. 25. Coke 9. a. pla. fo. 58. in Blaud, and Moseleys case, cited in Aldreds case. Hammond, and Alseys case Pasch. 34 Eliz. C.B. Rot. 275.

Judgment for the Plaintiff.

Note, that another Case of this nature was afterward, Mich. 10. B. R. brought by.

Newal Plaintiff, against *Barnard* Defendant, and entred *Pasch.* 10 *Jac. B. B. Rot.* 597.

A Special Action upon the Case was there brought by the Plaintiff against the Defendant, for stopping of thræ ancient lights, which had bæn there time out of mind, and that the Defendant had stopped them up totaliter ad damnum, the Defendant pleads in Bar, and thereby doth confess the stopping of two of the Lights, and part of the third, and justifies, and afterwards takes a Travers in this manner, absque hoc, that he stopt up the thræ Lights, aliter, vel alio modo, and in this Justification he shews the custom of London to be this, that any one may build upon an old Foundation, and upon his own Land, the which he had done, and so justifies. As to this Travers, exception was taken, that this is no answer at all unto the Declaration. Williams Justice, Plaintiff by this Declaration hath here laid to your charge, the stopping of 3 of his Lights, totaliter, and for the which he hath brought his Action, and your Travers here as it is taken, with an absque hoc, is no answer at all to this Declaration, but you ought to have answered, guilty, or not guilty, as to the residue, and so you ought to have pleaded, without taking of any Travers at all; for where there are thræ wrongs laid to be done, as in this Case, and the Defendant makes answer only unto two of them, and saith nothing at all to the third, this is no good answer, and so it is in this case here, your plea being that you have stopped two of the Plaintiffs Lights totaliter, and this you have justified by the Custom, by building upon an old Foundation, and the third in part, with a Travers taken, absque hoc, quod aliter, vel alio modo, the absque hoc, here goes to the second Lights before mentioned,

An Action upon the case for stopping up of three Lights totaliter. Yelverton 225.

Justifies 2. by the custom of London, and Travers to the other.

Exceptions to the Travers.

ed, and as to the third in part, this is no answer at all, for that you ought to have pleaded not guilty, as to the residue, and not to have taken a Travers, as to this, we know your meaning, by your saying; as to part of the third, this is no good pleading, but you ought, as to this third part to have pleaded not guilty, and therefore for this default in pleading, Judgment was given by the Court for the Plaintiff.

Judgment given for the Plaintiff.

Note, by Fenner Justice and the Court, if a man be bound by his Bond, to sell a House to J. S. and afterwards before any sale by him made to J. S. he sells the same House to J. D. that by this sale the Bond is clearly forfeited, and this to be so, notwithstanding that afterwards he doth repurchase the same House again.

Condition of a bond to sell an house to one, he sels it to another, the Bond forfeited.

Mirrel Plaintiff against *Nicholls* Defendant.

Note, that upon a Trial at the Bar by a Jury of Essex, in an Action of Trespass and Ejectment, upon the Evidence, and upon construction of a Will, the Case appeared to be this; John Cutting being seised in Fee simple, of Lands in divers places (s.) of the Manor of Allens, and Rumbals in Essex, and of divers other Lands also in Kent, and of two several moities of Lands, by several purchases, the one of them in Essex, and the other in Kent, makes his last Will in writing, in manner following, (s.) First, he deviseth to his Wife, the House in which he dwelt, called by the name of Allens, alias Rumballs, for the term of her Life. And as to my Moities, I devise all my Moities in Kent, unto Thomas Bearblock (his Son in Law) and under whom the Plaintiff claims making no other mention of his Moity in Essex, and he having but one Moity in Kent, the only question was, whether by these words (Moities) both the Moities should pass or not. In this Case, by Flemming chief Justice, and Yelverton Justice clearly, if one by Will doth devise his Land, in his own possession, and he hath Land in his own possession solely, and also other Land in his possession but in common with another, by these words in this Will, not only the Lands in his own possession, but also the Lands which he hath in possession, and in common with another, shall all pass by this Will. If a man have Lands charged with rent, and hath other Lands also, which are not charged with any Rent, and by his Will doth demise these his Lands charged, and all his other Lands charged, the Court clear of opinion, that by these words in his Will, notwithstanding, he had other Lands in Kent, besides the Lands named before, yet by the words of this Will, he shall not have the other Lands, but only the Lands that were charged, and this was the opinion of the whole Court, and so, as Flemming chief Justice observed, was the opinion of all the Judges of the Common Bench and of the Lord Chancellor when he first heard the Case, being put unto him, and so was it clearly held; and as to the words of the Will here, he having several Moities, one in Essex, the other in Kent, doth devise his Moities, and all his other Lands, which he had, or might have in Kent, unto Thomas Bearblock, the question was, whether this limitation of Kent, shall exclude Essex or not; the Court clear of opinion, that it shall not: for that the same is all, but as one Moity, being all purchased by one, (s.) by the Testator, and of one, and same person, and that by the name of his Moity, and as his Moity, and for this reason, the opinion of the Court was, that this in the Will of the devise of his Moities, (naming only Kent, that this clause shall extend unto both places, both to Kent and Essex, and that by these words, for both the Moities shall pass, and so was the clear opinion of the Court for the Title of Bearblock, under whom

Case upon the construction of a Will.

2 Cr. 22. 104. 1 Cr. 473. 474. 2 Co. 32. 3 Co. 9. Hob. 170. 171 Dy. 376. 261. 1 And. 124. 125 2 Bulst. 128. 9.

whom the Plaintiff claimed, and accordingly Verdict, and Judgment was given for the Plaintiff.

Verdict and judgment pro Querent.

Plat Plaintiff, against *Sleep* Defendant.

An action of Trespass and ejectment.

IN an Action of Trespass and Ejectment tried at the Bar, by a Hartfordshire Jury, upon not guilty pleaded, and opening of the Evidence, for the Title of the Plaintiff (being a Lessee of a lease for years) these points did arise. A lease for years made, upon a condition to be afterwards avoided by the reversioner, upon the payment of six pence, the Lessee enters by force of this Lease, and afterwards another enters upon him, and doth disseise him, the question moved was, whether the Tender of Six pence, might now be made by the Reversioner, for to avoid this Lease, after this Disseisin thus had. Sir Francis Bacon Solicitor General, that this Tender of Six-pence, to avoid the Lease, cannot now be made after the Disseisin; but the whole Court of a contrary opinion, for that this payment is a thing collateral, and the payment of this money to avoid the Lease, may very well be made, notwithstanding the Disseisin; upon the evidence, the Case appeared to go further (s.) a man having a term for years in his own right, and afterwards the reversion of the Inheritance, a Moity thereof doth descend upon his Wife, the question moved by Sir Francis Bacon Sollicitor General was, whether this descent of the reversion of this Moity, coming unto him in the right of his Wife, shall extinguish and drown his right and interest in the term, which he had in his own right or not. Sir Francis Bacon Sollicitor, that this descent doth drown and extinguish his interest in the term, so that he can now make no disposition thereof, but the whole Court (Williams Justice only excepted) was of a contrary opinion, for that this descent here unto the Wife of the Husband, being the Lessee of the reversion of one Moity of the Land, did come unto him in auter droit, and therefore this shall not drown, and extinguish the term for years, which he had, and was possessed of, in his own right, but that notwithstanding this intervenient Act of the descent, unto his Wife, he may yet well dispose of this term. Crooke Justice said unto Sir Francis Bacon Sollicitor, if you had put your Case a little further, that the Husband, after this descent, had issue by his Wife, so that he was thereby intitled, to be Tenant by the courtesie, and so that hereby, he was to have this in his own right, this would have very much enforced the Case, and made it the stranger for you, but as to this the answer was made, that the Husband had no issue here in this case, and so no opinion was given as to this case put by Croke Justice, where the Husband was intitled to be Tenant by the curtesie, this was only moved, but no opinion given therein, one way or other. Williams Justice, admit the first lease made by Lee to Conniseby, was upon trust for advancement of his Daughter, who married with him, the Husband may clearly dispose of this term, and no remedy at the common Law for it, for that he may very well by the Common Law dispose of this, the whole Court agreed with him is this. Williams Justice, if a lease for years be made to the Husband to the use of his Wife, the Husband may well sell this for a good consideration, and without all question this is good, and the Wife hath no remedy for this by the Common Law. Note, as to this point of the extinguishment of the term, by the descent of the reversion of a Moity of the Lands unto the Wife of the Termor (by the direction of the whole Court, except Williams Justice) to the Jury at the Bar, that this term for years, by the descent of the Inheritance of the reversion, of the Moity unto the Wife of the Termor, shall not extinguish the term, & therefore no cause to have the Jury to find this specially (though it be matter in Law) the Court having delivered their opinion therein, and so upon this direction the Jury gave a general Verdict for the Plaintiff; and Note, that this matter being the matter in Law, the Court was moved to stay Judgment. Williams Justice

A tender for to avoid a lease for years after the Lessee is disseised, and good.

Justice, that by the descent of the inheritance of the reversion of a moity unto the Wife, the interest which the Husband had herein for years, in his own right, is by this descent extinguished. Fenner, Croke Justices, and Flemming chief Justice, that by this descent, the term is not extinct, upon a motion then made, to have Judgment given according to the general Verdict for the Plaintiff. Williams Justice opposed the same strongly, that Judgment was not to be given at all; the other Judges differed from him in opinion in this, and did all of them clearly agree, that the Judgment ought to be given for the Plaintiff according to the Verdict. Flemming chief Justice then said unto Williams Justice, you ought not now to speak any thing to that which was the point in Law, thereby to hinder the giving of Judgment, after that the Jury had given a general Verdict, (be it the one way or the other) for the Plaintiff, or for the Defendant, for by their verdict so given, we are all of us to be concluded, and here they have given their verdict, according to our inclinations, and as they perceived our opinions to be, by declaring of the same to them at the time of the Trial, and as the points did arise, and were propounded, for our Judgments, which accordingly we then delivered, and therefore by their general verdict, we are now all of us concluded, and we ought now to give Judgment according to the Verdict, and that without any such exception to be taken, and so by the Rule of the Court, Judgment was given accordingly for the Plaintiff.

Williams Justice said to the Counsel at the Bar, as clear as it is that you are at the Bar, so clear it is, that by this descent the Term is extinct. Croke Justice, this a doubtful Case, but was of opinion that the Term was not extinct. Williams Justice did advise the Counsil to bring an Attaint against the Jury, for this their Verdict so given for the moity, the same being clearly extinct and gon. Judgment for the Plaintiff.

The President, Fellows, and Scholars of Saint *Johns Colledge* in *Oxford* Plaintiffs, against the Lord *Norris* Defendant.

IN an Action of Trespass, and Ejectment brought by Thomas Clark Lessee of the Colledge, against Thomas Hannes Defendant, who claimed under the Lord Norris his Title, this was brought for the Trial of the Title of Bagley woods, or Bagley common in Rudley, the Trial at the Bar by a Barkshire Jury, upon not guilty pleaded. Thomas Clark Plaint. against Thomas Hannes Defendant an action of Trespass and ejectment.

Nota, that upon entring up the evidence, the Plaintiff declaring upon a lease to him made by the President, Fellows, and Scholars of St. Johns Colledge in Oxford, by Indenture, upon perusal of the Declaration, the Plaintiff declaring upon their Lease made unto him, for Trial of their Title, there appeared to be this omission in the conclusion of the Declaration (s.) hic in Curia prolat. Williams Justice, this clause of (hic in Curia prolat.) ought of necessity to be in the Declaration, or else the same cannot be good, and therefore Williams Justice, and the Court did advise the Parties to agree, to amend the Declaration in this particular, before they proceeded any further, in opening of the evidence; but notwithstanding this advise they adventured to proceed without any amendment of this clause (which was so material, and omitted.) Williams Justice, clearly, the Plaintiff ought here to have said in the conclusion of his Declaration (hic in Curia prolat.) and that this exception is unanswerable. Nota, that in this case, the Ejectment Lease being made by a Corporation, they sealed the lease, and delivered it by their Atturney, having a Letter of Atturney from them to deliver the same. Curiâ, they cannot do this in any other manner, but by their Atturney, they are only Hic in Curia prolat. omitted in the Declaration makes the Declaration not good.

only to subscribe and seal the Lease, and to deliver the same by their Atturney, having their Letter of Atturney so to do. Note, that after a long evidence—as touching the Title, and the Jury being ready at the Bar to deliver up their Verdict, the Plaintiff being called (and distrusting of the Lessors Title) became Nonsuit.

Plaintiff nonsuit.

Sir *John Poultney* Paintiff against *Masse* Defendant.

An Action of Trover and conversion for Hay.

IN an Action of Trover and Conversion, of certain Hay, upon not guilty pleaded, the same was tried at the Bar by a Jury of Middlesex, and upon the evidence the Title appeared to be for Hay, which was claimed, as in right of Coltney Chappel. Note, it was observed in this case, that the Poultneys were Knights in the time of King Edward 3. and have so continued until this day in the same dignity, and this was thus observed for the antiquity of their name, and as to Coltney Chapel, Williams Justice, observed that the Statute of 1 E. 6. cap. 14. made for giving of Chanteries unto the King, the same is to be understood, that such Chappels are thereby given to the King, which were then in esse, at the time of the making of the Statute, or which were in in esse, before the Statute made, such as were in esse, in facto, at the time of the Statute made, or which were in esse, in jure in right 5. years before the Law made, and this he said to the Counsel, they were for to prove, or else they proved nothing: The whole Court agreed with him herein, quod nota.

Stat. of 1 E. 6. cap. 14.

Moved in an arrest of judgment that the venire facias is well awarded.

Note, an exception was taken in arrest of Judgment unto the Declaration, in an Action upon the case where the wrong was laid to be done, in divers places, and in three places Nominatim, the Defendant in Bar pleads by way of Justification, and fixes the same unto one place only, the venire facias, was taken from all three places, the exception takn was this, that the Trial was not good, for that the venire facias was taken from all the three places, where the same ought to have been taken but from one. Williams Justice, the venire facias here was well awarded, of all the three Villes, and they all three shall assess Damages; the whole Court did agree with him in this, that the venire facias was well awarded, being of all the three Villes, that were named, and so by the whole Court, this exception moved in arrest of Judgment was overruled, and so by the Rule of the Court, Judgment was entred for the Plaintiff.

Judgment given for the Plaintiff.

Thorner Plaintiff against *Field* Defendant.

An action upon the case for a promise, &c.

IN an Action upon the Case, grounded upon a promise, upon Non assumpsit pleaded, a verdict was given for the Plaintiff. It was moved for the Defendant in arrest of judgment, that the Declaration was not good, for want of a good consideration therein expressed, and for this, the Case appeared to be, that the Plaintiff sold a Horse to another for five marks, the Defendant being there present, did then and there say, that in consideration of the said sale, (if the party to whom the Horse was sold by the Plaintiff) if he did not pay him for the same, that the Defendant did promise him he would see him paid for the same: upon non-payment of this money by the Defendant, according to his promise, the Plaintiff brought his Action, and had a verdict for his money: the fault assigned in the Declaration, for to arrest the Judgment, was, for that it is not expressly laid in the Declaration, that the sale was so made at the instance and request of the Defendant, and this promise is also laid to be after the sale of a Horse was past, and perfected, and so

no

no good consideration to raise a promise. Williams Justice, if one hapned to be in Cheap-side in a Mercers Shop, and there buying of Silks, Velvets, or other commodities, and after he hath bought them, another being then there present, saith unto the Mercer, that if he do not pay you for them same, I will. Or if one do borrow 100 l. of another person, one being there present, saith unto him which did lend the mony, if he do not pay you, I will: notwithstanding all this, be so said, yet this promise in Law, will not charge him, unless he saith, (and that it be so expressly said in the Declaration) that he used these words (s.) deliver unto him, or such a one, at my request and desire, such Velvets, or such a sum of money, or any thing else whatsoever, and if he do not pay you for the same, then I will pay you for the same: such a Promise made in this manner, will well charge him, but otherwise not, (as in this principal case,) the promise being made after the sale of the Horse, and the same not made at his instance and request, the whole Court agreed with him herein, and that this was a good exception taken unto the Declaration, for by the opinion of the whole Court, this Assumpsit here, as it is laid in this Declaration, cannot charge him, it being not laid in the Declaration, that the sale or Loan was made at his instance and request, and that for this consideration, he did assume and promise, that if the other did not pay him for the same, he would, and if the same were laid in this manner, then by the opinion of the whole Court clearly he shall be charged by reason of his promise in this manner made, and so laid to be in the Declaration, but not as it is here laid in the Declaration, in this principal Case, and that for the reason before expressed. Croke Justice, if the promise be to pay this, at a day certain to come, and upon request, if in such a case the promise be made, that if the other, at the time appointed, do not pay him, then he will, in this case, he shall be charged by reason of this his promise. Williams Justice, and the whole Court, if the sale was not made at his instance and request, he shall not be charged, by reason of his promise so made, after the sale past, and therefore in this principal case, according to the opinion and Rule of the Court, the entrie was, Quod querens nil capiat per billam. Judgment for the Defendant.

William Viccaridge, the Brother and Heir of *John Viccaridge*, the party killed, Plaintiff, against *John Gelse* the Defendant, and Appellee.

IN an Appeal, for the killing of John Viccaridge his Brother. Note, that the Appellæ appeared, and being at the Bar to be tried by a Jury of Gloucestershire, who being called, a full Jury did appear, and one Cook, the first man, coming to be sworn, was challenged by the Appellæ, for favour, because he came in as a witness in the Appeal, and came in by proces to be a witness for the Appellant, and upon his examination in Court upon his Oath, he confessed the same to be so, and so the Triors sworn, found him not to be indifferent, being inclinable to favour, and so he was for this cause discharged; the next Juror was challenged by the Appellant, for that (whereas at Tewxbury, the Grand enquest found this fact to be but manslaughter) this Juror said, that if he served of the Jury, he would not find the same in any other manner, than as the Coronors enquest before had found it. Note, that the party himself did not hear him say so, but a friend of his, upon this the Triors found him not indifferent. Note, that the Appellæ challenged the next Juror for cause of kindred betwæn him and the Appellant, the which being examined upon Oath he confessed. The Appellee challenged all the rest of the Jurors peremptorily, and so there was no enquest to be sworn for trial of this Appeal. Stephens at the Bar moved the Court for to have an octo tales. The Court answered, that in an Appeal the Appellant may have a vigint. tales, or a quadragint. tales, and upon this motion, the Court granted him a decem tales returnable in Mich. Term next ensuing. Note, by the Court, that if both parties do challenge one and the same Juror, and ther Court saith——Soit treit, they cannot after this release this challenge, for then it is too late to do it. An appeal of murder Gloucestershire Jury at the Bar for the trial of the Prisoner. Challenges to the Jurors. A Deem tales granted returnable in Mich. Term.

John Hall Plaintiff, against *Thomas King* Defendant.

An action of Trespass and Ejectment, &c.

Hob. 73.

IN an Action of Trespass and Ejectment, upon not guilty pleaded, being tried at the Bar by a Jury of Hampshire, upon opening of the Declaration, the Ejectment Lease appeared to be sealed 8 Maii. 7 Jac. the Ejectment laid to be 13 Maii. 7 Jac. the Plaintiff brings his Action in Easter Term following, the Plaintiff failed in proving of the Ejectment. Curia, if the Plaintiff proves the Ejectment at any time after the Lease is made, and before the Action brought, this is sufficient, as the whole Court agreed, notwithstanding the Ejectment is here laid, at a time certain, which he cannot prove, this is not material, if he can prove the Ejectment at any time, before the Action brought, this is sufficient per Curiam; but because the Plaintiff failed to prove this, they went no further in their evidence, but the Plaintiff became Nonsuit.

Plaint. nonsuit. A man brought by Habeas Corpus taken by a Writ de Excommunicato, &c.

Note, that the Court was moved for the bailing of one who was taken by force of a Capias de excommunicato capiendo, upon the Statute of 5 Eliz. cap. 23. and came to the Bar by a Habeas Corpus. Williams Justice, he which is taken by force of a Capias de excommunicato capiendo, is not Bailable upon the Statute of 5 Eliz. cap. 23. the Statute of 5 Eliz. doth only dispence with the forfeiture of the 10 l. and such a person is not Bailable, and as to the other matter, the same remains, as it was before at the Common Law, and the Statute of 5 Eliz. dispenseth only with the penalty of 10 l. Yelverton Justice of a contrary opinion, and that in such a case he is Bailable. Flemming chief Justice, this is a Case which doth deserve very good consideration, and that before he would consider well of it, and also of the Statute of 5 Eliz. before he would deliver his opinion. Williams Justice, clearly he is not Bailable in this Case; afterwards at another time this was moved again unto the Court to have him Bailed.

Keysers case.

Yelverton Justice, that he is Bailable, and so it was resolved in one Keysers case, where he was taken by a Writ de excommunicato capiendo brought hither by a Habeas corpus, and upon cause shewed, he was Bailed by the Court, de die, in diem, but neither the Sheriff, nor any Justice of the Peace in the County, can Bail such a one, but this Court here may well Bail one, as in the case before, de die, in diem. It was further alledged here in this case, that in the Ecclesiastical Court, they would not there discharge such a one, being taken, and imprisoned by force of such a Writ, de excommunicato capiendo, without a great sum of mony there given, and a Bond entred into for the same, otherwise no discharge there. Yelverton Justie and the whole Court, the Bishop ought not to take such a Bond for the performance of their submission. The Rule of the Court here in this was, that upon their submission, they shall be absolved, without any such Bond entred into. Flemming chief Justice, they shall absolve them, and if they perform not according to their promise, and undertaking, they may then be taken again by the Writ De excommunicato capiendo, but the Bishop is to take no Bond of them for their absolution, to perform their submission, the taking of such Bond by them, being against the Law; and as to the Bailment, all the Judges (except Williams Justice) did agree that he was Bailable, and so by the Order and Rule of the Court, he was bailed, quod nota.

A man taken by a Writ de Excommunicato capiendo bailed per Curiam.

An action against Executors, &c.

Note, by the whole Court, as touching appearances of Defendants in the same Term, the Court upon special matter shewed unto them, may order the Defendant for to appear, and also to put in his answer in the same Term, whereas by the general course he may emparle, until the next Term, but the Court may put him by from this, upon good cause shewed unto them, and so was the Rule of the Court, this Term in a special case where the suit was for 2000 l. against Executors, and for a just Debt, the gound of the motion to the Court was, that this being an Action brought against Executors, that they in the interim would on purpose confess Actions unto others, with an intent for to defeat the Plaintiff of this his Debt, and therefore by way of preven-

prevention, as they had appeared, by the Rule of the Court, they were also to answer the same Term, in which the Plaintiff appeared, and declared against them, and not suffered in this case for to gain time by an imparlance.

Sallowes Plaintiffs against *Gurling* Defendant.

Action of Debt upon a Bond, for not performing of an award.
1 Brownl. 112.
2 Cr. 277.
Yel. 203.

IN an Action of Debt upon a Bond, upon Oyer demanded of the Bond, and of the Condition thereof, it appeared to be conditioned, for the performance of the award of four Arbitrators, mutually by them elected (with an ita quod) the said award be made, and delivered in writing, and this to be of all causes between them, and the same to be made by them all 4. 3. or by 2. of them, the Defendant pleaded that the award was void, for that but two of them made the award, and they did award matters to be done unto strangers, and not between the parties, and they awarded Bonds to be released; the Plaintiff demurred to the Defendants plea, The Point insisted upon was, whether this award thus made, be good or not, the submission being, with an ita quod, they four, three, or any two of them make the award, whether this be a good award here, being made but by two of them, and these two only set theirs hands to it, whether this be a good award made according to the submission, or not. It was urged for the Plaintiff, that this is a good award, and well pursuing the submission; if it be demanded by whom this award is to be made, to this it may be answered, that their power is distributive, to be by them four, three, or by two of them, and this all in one and the same sentence, so it is in the case of a Letter of Atturney to two, so as they both, or any one of them do it, this is as much here in this case, as if it had been said, conjunctim & separatim, this is a good recital, and it is parcel of the condition, and it is as well here, being thus expressed in this manner, as if it had been so expressed in the beginning, and the Book of 2 R. 3. fo. 18. b. is upon the matter adjudged accordingly, that it shall be all one, as if it had been said, conjunctim & divisim, and so is the Book of 22 E. 4. fo. 25. 26. & 27. Williams Justice, lay all the words together, and then the award here is to be made by four, three, or two of them, and not otherwise. Yelverton Justice, the Objection made is nothing, for here this is all but one sentence, and this gives a good power and Authority unto two of them for to make the award, the ita quod being that it be made by them all four, three, or by two of them, and this a very clear case. Croke Justice, the Arbitrement shall be intended to be made of all matters, if the others do not shew the contrary upon the submission, the Act is entire, but by the ita quod, their power and Authority is so thereby distributed, that the award here made by two of them is good, and pursuing the submission. Flemming chief Justice, the Arbitrement here ought to be of all causes, and they have so done, with an exception of Acquittances, or Bonds, whether this be sufficient to make us for to understand this, this ought for to be shewed, and made appear to the Court, that so the Court may understand it; here the exception is mentioned by the paties in the award, it is impossible for us to understand it, if it be not shewed to us, here they had certain notice of the Acquittances, otherwise they could not have made this exception in their award. Also the submission is to four of all causes, ita quod the award be made by them all four, three, or by two of them, and the same to be put in writing; the submission here is joynt clearly unto four, if it had been so, as two of them put this into writing, this had been good enough, & by this a new Authority is given to one, or to two, so as this is a condition to the precedent Authority, not as an addition, but only as a provision, and this is distributive—So as this is a plain condition. First, the submission here is to them all four joyntly, if there had been no more in the case, then it had been a joynt power, and this reference unto four gives them no power, nor Authority for to intermeddle severally, but joyntly, but then comes the subsequent clause of ita quod; So as the award be made by them all 4. 3. or 2. of them, this subsequent clause gives them here such a joint & several power, & Authority as the award

2 R. 3. fo. 1.
22 E. 4. fo. 8. b. 26. 27.

here made by two of them is good, also the exception here in the award (of the Acquittance, or Bond) is a good award made of the same, and so the whole Court did agree in this for the Plaintiff, that the award here made by two of the named Arbitrators was well made, and pursuing the submission, and that their award so made by them, (with the exception in the same) was a good award, and for the not performance of the same, the Plaintiff had just cause of Action, and so the Rule of the Court was quod intretur judicium pro querent.

Judgment for the Plaintiff.

The *King* against *Lorkin* Indicted.

Exception to quash Lorkins Indictment for killing of one Higgins.

NOta, exception taken by Sergeant Harris to quash the Indictment against Lorkin for killing of one Higgens, who were both of them fellow servants unto the Countess of Dorset, they fell out standing by the fire, per ignem stantes, & inter se confabulantes objurgabant simul, & inter se pugnaverunt, they went presently into the Park, juxta Knowles prædict. and there he assaulted him, and killed him; the exception taken was, because it is not shewed throughout the whole Indictment, in what place, nor County the Park was, where he was killed, and so no County, nor Town therein named, for the venire to be awarded from, and so no venire can be to try this fact. Williams Justice, throughout the whole Indictment, there is no percussit laid in the Indictment, it is laid, dedit, but not percussit, for the word dedit will not serve the turn, and for this omission of the word percussit, the Indictment is not good; the whole Court agreed with him in this exception. As to the other exception taken by Serjeant Harris, to the Indictment, the Court delivered no opinion at all; but for the last exception taken by Williams Justice, the Indictment was quashed, by the Rule of the Court.

Indictment for want of percussit quashed per Curiam.

Collins Plaintiff against *Roe* Defendant, entred *Hill.* 8 *Jac.* *B. R. Rott.* 109.

An action upon the case for a promise.

IN an Action upon the case, grounded upon a promise, the Plaintiff in his Declaration, laieth a Communication, and a promise thereupon by the Defendant, to procure an Indenture, and a surrender for not performance of the promise, the Action brought, and the Plaintiff declares ad damnum, and the Defendant demurred to the Declaration. George Croke for cause of demurrer shewed, that the Declaration is not good. First, it is therein expressed, that the Defendant was to procure an Indenture, and to deliver up the surrender, and no place set down where this was. Secondly, it is laid that he was to procure such a one for to surrender, he shews that he did surrender, but doth not shew, that this was done at his own costs; it is laid that there was a Communication had between them, this is well laid, and the time and place where this was, but then it is laid further, Super quo, the promise was made for to do two things, but no time, nor place shewed, when or where the promise was made; also it is laid, that he did promise to procure such a one to surrender; it is laid that he had surrended, but he doth not say, as he ought to do, that this was done by his means and procurement, for the truth was, that this was so done by reason of the Defendants payment. Henry Yelverton to the contrary, the time of the speech and Communication is laid here certain enough, & the place also, & the promise here is grounded upon the Communication and he sheweth that he had surrendred accordingly, this is well laid. Williams Justice, the alledging of the day, or place here, is not material, it is laid that at such a place and time the Communication was, this is well laid, and so it ought to be, but it is not requisite to have it so laid; also in the promise it is laid, quod postea

postea eodem die, & adtunc, & ibidem, this is well, and sufficiently laid. Yelverton Justice agreed with him herein: express mention is here made in the Declaration of the promise, and of the Communication, and the agreement afterwards is depending upon this, and the surrender is well laid, the same being shewed to be according to the agreement; the whole Court agreed in this for the Plaintiff, that the Declaration was good, and the Defendants demurrer overruled, and by the Rule of the Court, Judgment was given for the Plaintiff. Judgment for the Plaintiff.

Stubbs Plaintiff against *Flower* Defendant, entred *Trin.* 7 *Jac. B. R. Rot.* 963.

NOta, a Writ of Error was brought for to reverse an Amerciament (being offered) in a Court Leet, the Error assigned was, because the same was an unreasonable Amerciament. Noy, after that this Amerciament is once offered, you shall not afterwards have a Writ of Error, and assign for Error, that this Amerciament was unreasonable, and you shall never have a moderata misericordia, in such a case; the whole Court agreed clearly in this, that this is no Error now to be assigned, and therefore by the Rule of the Court, the same was affirmed. Error to reverse an Amercement in a Court Leet, &c.

ONe Vaughan did Libel in the Spiritual Court of Hereford, for Tithe Hay, a Prohibition was prayed, for that they did offer there for to try the validity of assigment of Leases, this being there made the question, the Court demanded whether the party had put in his surmise there, of this, and if they refused for to allow this, the Court would Prohibit them. Williams Justice, and the whole Court, they are not there to meddle with the determining of any contracts, nor yet with the validitie of assignments of Leases, these matters belong not unto them, but the Common Law, and therefore by the Rule of the Court, a Prohibition was granted. A prohibition granted to the Spiritual Court, &c.

Hooker Plaintiff against *Robinson* Defendant.

IN Writ of Error for to reverse a Judgment given in an Action of Debt, the Error overruled, and Judgment affirmed. Note that in this Case by Croke Justice, and the whole Court, it was agreed that the Principal and Bail are not to joyn in a Writ of Error, but the same is to be brought, and so prosecuted severally, quod nota. Principal and Bail not to joyn in a Writ of Error.

Note, that after the scire facias, to shew cause, a Writ of Error was brought, and an Error in fait was assigned (of which they being doubtful, moved the Court by Council, that they now might have the favour of the Court, for to assign an Error in Law, the whole Court made answer, that they might well assign as many Errors in Law, as they would (but with this proviso) that they be contained without the body of the Record, otherwise not. After a scire facias, an Error in Law assigned after Error in fait.

Fuller Plaintiff against *Righteous* Defendant, and entred *Mich.* 8 *Jac. B. R. Rot.* 641.

IN a Writ of Error for to reverse a Judgment given in an inferiour Court at Lime, the Error assigned was in the Judgment, the same being (quia videbatur Curiæ, Ideo concessum est per curiam quod, whereas the same ought to be (Consi- Judgment reversed quia concessum for consideratum. 3 Cr. 442. Yel. 130.

(Consideratum) this was a Judgment given in the Court at Lynne. Consideratum est is good, but Concessum est is not good, and so was the opinion of the whole Court: and as to the Judgment in Coke 1. pa. in Corbets Case fo. 83. and in Chudleighs case Coke 1. pa. fo. 119. being — Ideo Concess. est quod, &c. Cur. these Judgments are false printed, and Man Secondary informed the Court, that the Roll was right (s.) ideo considerat. est, quod nota.

2 Cr. 6. 386, 632. Hob. 17, 19, 194. 1 Ro. 771, 774. Po. 179. Coke 1 pa. fo. 83. in Corbets case, and fo. 119. in Chudleighs case.

Prodler Plaintiff, against *Clifton* Defendant, entred *Pasch.* 8 *Jac. B. R. Rot.* 627.

A Writ Error to reverse a Judgment. 2 Cr. 307. 2 Ro. 622. 623.

IN a Writ of Error to reverse a Judgment given in C. B. in an Action upon the Case Sur trover & Conversion of 300. Toddas Lanæ at Coventry. The first Error assigned was, that the Declaration was not good, (being Toddas Lanæ.) Williams Justice, this is no Error, for Toddas Lanæ is good enough, and very significant, and this is as well known, as Barellas Cervitie, and Pipas Vini; for these are Vocabula artis only to certifie the Court of this, and so the Court agreed clearly, that Toddas Lanæ is good, and that this is no Error. The second Error was moved, for that the conversion was laid to be apud Civitatem Coventriæ, and it is not expressed in the Declaration, in what place, or County this is, for the awarding of the venire facias, and for this cause the Declaration is not good, and to this purpose was cited Stamford fo. 154. b. where it is said, with a Nota, that in the venire facias, there ought to be these words (s.) De vicineto de tiel ville, ou lieu, if it be not in case where the place or ville is a City, there De Vicineto, to be omitted and left out, and 7. H. 6. fo. 136. b. and 4 E. 4. fo. 17. a. where it appeareth, that Words in London are resembled unto Hundreds in the Countrey, and that a Parish is as a ville, and that every Ward in a City, is a ville by it self, and to this effect is 8 H. 4. fo. 10. Here is no Parish nor place named, from whence the venire should come, and for this cause the Declaration is not good, here in the margent is Civitas Coventriæ, the conversion is laid to be apud Civitatem Coventriæ, and the venire facias is de Civitate Coventriæ, whether this venire facias be well awarded or not, is the chief matter insisted upon. George Croke that the venire facias here is well awarded, and so if it had been de vicineto Civitatis, this had been good likewise, and so was it in the case of Bristow, the venire facias was de vicineto Bristoliæ, and this held to be well awarded; where a thing issuable is laid for to be in a City, as in this Principal case here it is, there the venire facias is to be de Civitate. Note, that Man Secundary, and all the Clerks informed the Court, that the usual form was in this manner, the venire facias to be de vicineto, as de vicineto Westmonasteriæ, and de vicineto Civitatis Coventriæ, that this is good also. Williams Justice, when the venire facias is de vicineto, this is not to be of the place where, but of the place near adjoyning, and so is 7 H. 4. fo. 12. & 13 and a difference will be where mention is made of a City, which is a County in it self, and where not: De vicineto Civitatis is exclusive, there it is not to be de vicineto Civitatis, but de Civitate. Flemming chief Justice, de vicineto, this is the Neighbourhood, not the next adjoyning, but inhabiting there. Nota, that at another time (s.) Term. Pasch. 10 Jac. B. R. this Case was moved again, and the chief Error insisted upon, was in the awarding of the venire facias, the which as it was urged, was misawarded, the conversion being laid to be apud Civitatem Coventriæ in such a Parish there, and the venire facias was awarded de Civitate Coventriæ, for to try the issue. It was urged that this was misawarded, for that it ought to have bœn de Parochia, and to warrant this, Arundels case Coke 6. pa. fo. 14. was cited, where he was indicted for the murder of a Parker, and the Murder was laid for to be apud Civitatem Westmonast. in Com-

8 H. 4. fo. 10.

Note the difference where a City is a County in it self, and where not.

Coke 6. pa. fo. 5. Arundels case.

Comitat. Middlesex. (S) in quadam platea ibidem vocat. & in Parochia & in eodem Comitatu Middlesex. the venire facias there was awarded, De vicineto civitatis Westminster, and there resolved this Trial to be insufficient, and a new venire facias awarded, where it is resolved, that every trial shall be from that place, which by presumption of Law, may have the best and most certain knowledge of the fact in issue, to be tried, and so is the Book of 22 E. 4. fo. 4. Fitz. tit. visne Pla. 27. Upon the difference, where an action of Trespass is brought, and the same laid for to be in one, and where in two villes, and no such ville pleaded, in the first case, the venire facias shall be awarded, out of the body of the County; in the other case it shall be awarded out of the ville; so in a Trespass, laid to be in a Manor, the venire facias shall be De Manerio, unless it be alledged to be in a ville, then the same is to be from the ville, and so a Parish is more certain than a City.

Note, that afterwards (S) Temin. Mich. 10 Jac. B. R. this Case was argued again; and by Latten at the Bar, exceptions were taken 1. to the Writ, that the same is not good, the same being, if such a one fecerit te securum, &c. De quibusdam bonis, & cattallis: and this Writ is not good for the incertainty in it; for that he ought to have shewed what they are, in certain; and to warrant this exception, the Book case of 16 H. 6. Fitz. Action upon the Case Pla. 44. was cited, that the Writ ought to be certain, and to the same purpose was cited the Book case of 48 E. 3. fol. 6. Brit. tit. Action upon the case. Pl. 24. An action upon the case brought there against a Surgeon for undertaking of a cure, and not performing of the same, and doth not shew in the Writ the place where this his undertaking was; and for this cause the Writ there adjudged not to be good. It was urged also, that the Writ, ought to be as certain as the Count, and the Count here is not good, for that there is no certain place alledged for the awarding of the venire facias. It was urged, that there is variance in the Writ, Amia for Anna; also the condition is not good, the same being, ad valentiam, where it ought to be precii, upon the Lord Mounteagles Case, 3 Mariæ Dyer. Pla. 121. also the venire facias here is misawarded, Nul venire facias serra awarded of a Hundred, of a Forrest, or a City, being too general. Henery Yelverton at the Bar, that the venire facias is here misawarded, and so the Judgment is Erroneous, and to be reversed. 1. as to the Writ here, the same is not good; where the Writ doth comprehend in it matter of Title, there the same is not to be general but certain; the Count here doth not agree with the writ: the Writ here ought for to set forth the goods in special, what they are; here the Action is brought for Conversion De quibusdam bonis, this is not good, and in this case, the Declaration, is not to be with a supposal. In an Assize, the same is to be general, De libero Tenemento, so in Trespass, Quare bona & Cattalla, and this is good; but in this case of a Trover, and Conversion, the goods ought certainly for to be expressed, and not to be, as in this case, De quibusdam bonis: as to the venire facias, the same is misawarded, the venire facias, may well be De civicate, &c. De vicineto Civitatis, where the same is no County, but otherwise, where the City is a County in it self. As the City of Norwich, which is a County in it self: and if a venire facias be in such a Case De vicineto de Norwich, This is not good, but De viceneto Civitatis de Norwich, &c. had been good. George Crook, the Writ here is good, and ought not to comprehend all in certain, dicitur breve, quia rem breviter enarrat. Nicholls Serjeant; That the Judgment was well given, and so ought to be affirmed; That the Writ is good, notwithstanding all the exceptions taken against it: and this is here expressed according to the usual form. As to the venire facias, which is the chief point insisted upon, the same is here well awarded, being De civitate Coventriæ, and no difference there is, where a venire facias is awarded De vicineto, and where it is De vicineto Civitatis, as appears by the Book of Trinit. 10 E. 3. Pla. 3. in an Assize against an Infant, who Pleads in Bar a release of the Plaintiff made to the Mother of the Infant, dated at the City of York,

16 H. 6 Fitz. tit. action upon the case. Pla. 44. 48. E. 3. fol. 6. Bract. tit. action upon the Case. Pla. 24.

Trinit. 10 E. 3 Pla. 3 Case of York.

York, and the Witnesses named in the deed, which deed was denied, a Writ t the Sherifk for the Witnesses, and the Inquest of the same ville where the Land lay, this there tried per les gentes de la City de York; and where the awarding a venire facias doth stand with reason and Law, there the same is to be maintained, and so it doth in this case. Flemming chief Justice demanded, if they he upon search found out any Presidents to warrant the awarding of this veni facias, in manner as here the same is; for that Presidents shall direct and lee us in our Judgments herein; as to the Error assigned, that the venire facias i not well awarded, the Trover, and conversion is laid here to be apud Civitate Coventriæ, the venire facia is awarded De Civitate Coventriæ, this is well awarde Arundels case Croke 6 Pa. fol. 14. before remembred, is a notable case, as to thi purpose; here it is laid to be in the City of Coventry, the Inhabitants are t Neighbourhood within themselves, the venire facias here ought not to go to t County; the same is well awarded here in this case. As to the Writ, this i good notwithstanding the Objections made against it; Amia pro Anna, this i good; for if there be once a plain name, the prædict. refers unto it; it is lai that he was possessed De quibusdam bonis, at Coventry, which came to the hands the Defendant, who there converted them; this is his title, he had goods, lo them, and they were converted, the Writ is good, dicitur breve, quia rem br viter enarrat; in the Court all things are certainly set down, the conversion, tha is the chief point; if all should be set down in the Writ, it would then prove be longum breve; The venire facias here is good every ways, be it De vicineto, or vicineto Civitatis, so that here the Writ is good, and the venire facias well awa ed, and so the Judgment not Erroneous, but was well given, and to be affi med. And as to Presidents being searched out, Man Secundary now informed t Court, that upon search made, he found the Presidents to be various, some them to be De Civitate Coventriæ, others, De vicineto Civitatis, and others, De vic neto Civitatis Coventriæ, and such are the Presidents for York, Gloucester, Bristo De vicineto, & De Civitate Eborum; Croke Justice. De vicineto is not exclusive, but i clusive. It is more proper for the venire facias to be De vicineto Civitatis, than De vi neto only; where a Parish is laid, there the venire facias shall be, De Parochi where the Action is laid, the same is the proper place, for the venue. As to t Writ, the same is well, propter brevitatem dicitur breve. As to the Objectio made for the matter of variance, this is nothing at all; we are not to constru Logick, nor to spell Law. Flemming chief Justice, It appears upon search mad that many Presidents are this way, as in this Case, touching the awari ing of the venire facias, & à via trita we are not to swerve, and so he held t Judgment well given, and the same ought to be affirmed. Williams Justic as to the matter of variance, the same is no ways material: the Clerks he do never write their Court-hand with a dash, the Court-hand hath no pricks i it: There was an Action upon the Case brought here by Stepney Plaintiff, gainst Wolfe prædict, a Verdict and Judgment against John Wolfe; upon thi Judgment, a Writ of Error was brought in the Exchequer Chamber, t Error assigned was, for that the Action was brought against Wolfe, a the Judgment given against Wolfe predict. This was held no Error, a the Judgment there affirmed. So here you are to read this, as it ought be with a prædict. As to the Writ, the same is well, and as it ought to be, a therefore it is properly called breve, Quia breviter enarrat intentionem partiu And here all the whole matter is certainly set forth in the Declaration, a this is sufficient. As to the Objection, being De quibusdam bonis; this is good Objection. As to the exception taken to the Plaintiffs conclusion (bein ad valentiam,) whereas he ought to have said precii, that is no good exceptio for that the Conclusion is good both ways, the one way and the othe and so is F. N. B. fol. 88. H. I. K. directly in point. As to the awarding the venire facias in this Case, here is a County and a City, a City within t County, and both of them do make the County. Et triatio ibi fiat ubi po habere notitiam rei in quæstione optime, as Bracton observes, the City here is pa

Coke 6. pa. 4. 14 Arundels case.

1 Ro. Reports. 44.

Stepney Plaint. against Wolf.

F. N. B. fo. 88. H. I. K. Bracton.

cel of the County, parcel of the Corporation, the City was before the County, the City is a place local, and parcel within the County, the venire facias is good both ways, de vicineto Civitatis, &c. vel de Civitate well awarded both ways, venire facias de vicineto de Dale, this doth not exclude Dale. It was said that Worcester was no City, as to this, wheresoever the Bishop had his seat, this was called his Pallace, and the Town where this is seated shall be said for to be a City, and so is Worcester: the venire facias here in this case, was well awarded, be the same, the one way, or the other; the same is well awarded, and according to the former presidents in point, De Civitate, de vicineto Civitatis, & de viciento, all of them good, and well awarded, and in this the whole Court agreed that the venire facias here in this case was well awarded, and by the Rule of the Court the Judgment was affirmed for the Defendant in the Writ of Error.

1 Inst. 109. 6.

Judgment affirmed per curiam for the Defendant.

Orde Plaintiff against *Moreton* Defendant, entred *Mich.* 7 *Jac. B. R. Rot.* 539.

IN a Writ of Error for to reverse a Judgment given at Durham, where the Judgment was there given, by force of a Commission, directed unto nine, & the same executed by eight, this appearing here to the Court upon certifying & removing of the Record, and then questioned, whether this Record were well removed or not, the Record being here in Court, thus certified, it was questioned what the Court here should do in this case, whether they should now proceed upon this and take it for the same Record, and so to examine the Errors assigned; the Court were of opinion, that the best way would be (the Record being in Court) for the party Plaintiff to have a new Writ of Error de Recordo quod coram vobis residet, and upon this Writ of Error, the Court may proceed to examine the Errors upon this Record, as well as if the same had bæn well removed, & so this new Writ of Error is now accordingly brought, and according to the former directions of the Court, and this was assigned for Error. First, an Error en fait, because he appeared by his Gardian, where he ought to have appeared by his Atturney. Secondly, the Judgment Erroneous, being given at Durham by force of a Commission directed unto nine, and the same executed by 8. this assigned for Error, for that nine contains 8. but 8. doth not contain 9. minus non continet majus. Williams Justice, what Record ought they for to send, and certifie unto us here? that which was taken before them all nine, and not before 8. for that there was no such Record. Fenner Justice, a Writ is directed unto three Coroners, the one of them dies before the return, the other two may well make the return, and this hath bæn so agræd to be good. Yelverton Justice, if the Writ be directed generally Coronatoribus, and not nominatim, to such and such, there if one dies before the return the other which do survive, may well return the Writ, for they are Coroners. In the case of Authority, to be joyntly executed before eight, seven of them cannot undertake to execute this, nor yet for to certifie the execution of this, by alledging that one of them died before they could certifie, and they ought not to certifie the name of one which was dead, for that this is but a bare allegation. Nota, that afterwards this matter was moved again, Termin. Trin. 11 Jac. B. R. the Error then insisted upon was this, the suit at Durham was against an Infant, who appeared by an Atturney, and judgment there was given against him, upon this Judgment a Writ of Error was brought, and the Record removed hither, in B. R. and this assigned for Error, that he being an Infant within age, appeared by his Atturney, whereas he ought for to have appeared by his Gardian, and being at issue upon this point of Infancy, it was found that he was within age; this Writ of Error was discontinued, and a new Writ of Error brought, the Record being here de Recordo, quod coram vobis residet, and the same Error being pleaded, and a matter of fact, that 30 Junii 6. Jac. he was within age at Westminster, the other said that he was then at full age, this being the issue between them, he was upon Trial found to be within age, and the entry upon the Roll was

A Writ of Error to reverse a Judgment. Yel. 211. 2 Cr. 254. 2 Rol. 604. Ante 105. 1 Bronl. 150.

Error en fait quia appeared by Guardian when he ought to have appeared by Atturney. 2 Cr. 250, 289, 303, 219, 420, 680, 641. 3 Cr. 86. 1 Ro. 776.

Termin. Trin. 11 Jac. B. R.

coram nobis ubicunque tunc fuerimus in Anglia apud Westmonasterium, &c. the first Error, that here was no good Trial of this infancy, but that this was a mistrial. Henery Yelveron urged, that this Court del B. B. hath no original Conusance of this matter, and therefore they are not to meddle with it, the same being touching a matter done at Durham. Haughton Justice, the Error en fait is found, &c. we may well proceed here to give our judgments. Goldsmith at the Bar urged, that the Trial here is good, the issue infancy at Westminster, or or not, the other said, that at full age at Westmister this the issue, this is a good issue, & well tried, & so was it held in 32 Eliz. in one Throgmortons case, that a trial at the place where infancy is alledged to be, is good. Davenport, that this was a mistrial. Moor, the Trial was so had by the advice and directions of the Court. It was afterwards moved again, that this was a mistrial by Henery Yelverton, that the Jury are to try the age, where the state of the Land is alledged for to be, but otherwise it is where there is nothing else in question, but only the age which is meerly to be tried, and this may well be tried in any place, the venire facias duodecim liberos & legales homines, &c. coram nobis ubicunque tunc fuerimus in Anglia apud Westmonasterium, this is not good, this venire facias is vitious, and this is not helped by any of the Statutes of Jeofayles, by which Statute want of a venire facias is aided, but not a vitious venire facias, this is not helped by any Statute, Coke 9. pa. fo. 30. 6. 31. a. the Case of the Abbot de Strata Marcella, where the several kinds of Trials, and the manner how is mentioned, and there it is said, that in a Writ of Error, to reverse a fine for nonage, or in an Audita querela to reverse a recongnizance, or Statute for nonage, in these cases the age shall be tried by inspection of the Judges, and not per pais, the reason is this, because that what Judges of Record do as Judges, the same is not to be tried per pais, but by inspection of the Judges, but where an infant appears by Attourney, this is Error, and shall be tried per pais, and not by the Judges, divers Authorities there cited to this purpose, and Coke 6. pa. fo. 46, 47. Dowdales case, where several differences are put as touching Trials, where the place is local and material, and where not. It was also urged here, that the age here is not matter of necessity, but matter of conformity, and like unto assets, which may be well alledged to be in any place, and the like of a releas, and may be there tried where the same is alledged for to be, and so of nonage, which may be laid and tried in any place, and so it was cited to be resolved in the Exchequer-Chamber, in a case there betwæn Row Plaintiff and Martin Defendant. Haughton Justice, Orde is here Plaintiff in a Writ of Error to reverse a judgment given against him at Durham, for Moreton in an Ejectione firmæ. It is a Writ of Error de recordo quod coram vobis residet, the Error in fact before assigned, and now newly again assigned for Error, is, that he being an infant within age did appear by his Attorney, whereas he should have appeared by his gardein, and for the Trial of this, it was alledged that he was at Westminster Commorant, and within age there, the other said that he was at full age, and this issue was there tried accordingly. First as to the matter, the point in issue being infancy, this issue is well tried at Westminster. A Second objection made against this Trial, that the suit was in an Ejectione firmæ, in which the realty is to be recovered, and therefore the Trial of the age ought for to be where the Land is; notwithstanding this Objection, the Trial of the infancy here at Westminster is clearly good, and that by direct Authority, although the suit at Durham was in an Action concerning the realty, the same is to be tried where the age is alledged for to be; also the age here hath no manner of dependency at all upon the Land in Durham, and therefore the difference will be this, where the age that is to be tried hath dependency upon the Land recovered, and where not, &c. and so is the opinion of Prisot to be understood, in 39 E. 6. fo. 49. in an Action of Debt, brought upon a Bond against J. S. Nonage averred to be in Essex, the Trial of this was at Westminster, where the Action was brought, the Defendant con-

32 Eliz. 2. Throgmortons Case.

Coke 9. pa. fo. 30. 6. & 31. a. the case of the Abbot de Strata Marcella.

Coke. 6. pa. fo. 46. 47. Dowdales case.

Row Plaintiff against Moreton Defendant.

Note the difference where the age hath dependency on the land, and where not. Prisot.

confessed his Bond, and his entry into it, but said that he was born in Essex, and within age at the time of entring into the Bond, and this was tried at Westminster, because the nonage here had reference unto the deed (g) the Bond, which was confessed by him, but sought to be avoided by his nonage, so that the difference will be where the nonage hath reference to the deed, upon which the Action is brought, and where not. So where the nonage hath dependency upon the Land, there trial shall be where the Land is, otherwise not; here in this principal case the nonage hath no dependency upon the Land at Durham, but rests only upon the person, and his being within age which is only now the issue, and the Trial of this issue at Westminster is good, 5 E. 4. fo. 2. an Action of Debt brought against J. S. of London Yeoman in Middlesex, the Defendant said that he was a Draper, and not Yeoman, and demands Judgment of the Writ; where this should be tried, was the question, and by the opinion of the Court this shall be tried in London, and not in Middlesex where the Action was brought, and here it was but in a personal Action, and so it should be, were it in a Real. As to the venire facias, the Roll is well: as the Error for the awarding of the venire facias by the — venire facias apud Westmonasterium ——— ubicunque tunc fuerimus in Anglia, if Westminster be out in the last place, (as here it is) yet this is good enough; this is only matter of form; if this be not good, and the Trial had according to the verity of the matter, this is Error only in form, and therefore the same is well amendable: If the venire facias be de Dale and the Trial is at Sale, this is not good, nor yet amendable, but it is amendable here in this principal case, the Error here assigned is very clear, and apparent, that being within age, and appearing by Atturney, whereas he ought to have appeared by his Gardian, and this being found to be so, the Judgment for this cause given at Durham, is Erroneous, and ought for to be reversed. Dodderidge Justice, a Writ of Error is brought to reverse the Judgment given at Durham, the Record is removed hither, the Error assigned, that being within age he appeared by Atturney, whereas he ought to have appeared by his Gardian, and being at issue upon the point of nonage, the same is found that he was within age, this Writ of Error was discontinued, and a new Writ of Error brought upon the Record here in Court, quod coram vobis residet, and the same Error here now pleaded, being an Error en fait, (S) and that 30 Junii 6 Jac. he was within age at Westminster, the other alledged that he was then at full age, issue joyned upon this, and found that he was then within age, the Roll was for to be & Coram nobis ubicunque tunc fuerimus in Anglia apud Westmonasterium, as to the first matter moved, whether this be a mistrial here of the nonage, or not, that this Trial was well had, and no mistrial. As to the Trials of age, (if within age) in some cases the same is to be tried by the inspection of the Court, without troubling of the Country, and there is a special Writ to this purpose for to make him come into the Court, to be there inspected, and this appears so to be by many Books, and direct Authorities in point, as 17 E. 2. Fitz. tit. accompt pla. 121. in accompt Defendant pleaded deins age, and demands Judgment si Action, he was viewed by the Court, and found to be of full age, and so awarded to make answer, according to this is the Book of 25 Ass. pla. 2. & 48 E. 3. fo. 11. & Coke 9. pa. fo. 30. in the case of Abbot de strata Marcella, and if upon the inspection by the Court, the Judges are in doubt of the age, what is then to be done, is to be considered, and for that by 50 E. 3. fo. 5. 6. the Court cannot adjudge of this if it be doubtful, but then the same ought to come to be tried per pais, and herein the question will be, as touching the place where this Trial of the age shall be, and as to this the difference will be, where it is in a real, and where in a personal Action, where it is in a real Action and Infancy pleaded, and the same at issue to be tried, this shall be tried where the Land is, and not where the Birth is alledged for to be, and this appears to be so by 38 E. 3. fo. 17. 6. 18. a. & en 44. lib. Ass. fo. 10. 6. pla. 11. and 46 E. 3. fo. 6. b. 7. a. & 13. 11 H. 4. fo. 3. & 4. 19. 11. 6. fo. 51. a. If a releas be pleaded against

1 Cr. 424, 471 2, 541, 370, 853, 881.

Touching the trial of nonage how the same is to be.

48 E. 3. fo. 11 Coke 9. pa. fo. 30. in the Abbot de strata Marcellas case.

Note the difference as to the trial of nonage where in the realty or where in the personalty.

1 Cr. 818.

against J. S. of all his right, and he saith, that at the time of the making of the same releas, he was within age and born in another County, yet the same shall be tried where the Land is; and so in a Nuper Obiit, or in a Writ De partitione facienda between Parceners, if the one saith that the other is not the Daughter to the other from whom the claim is, and the other doth rejoyn, and say that she is the Daughter, and born in an other County, yet this shall be tried where the Land is, but otherwise it is in personal matters, for there the Trial shall be where the Writ is brought; and so is the Book of 21 E. 3. fo. 7. b. 8. a. in a Writ of accompt, and 3 H. 6. fo. 40. in an Action of Debt upon a Bond, in which for the Defendant it was pleaded, that at the time of the Sealing of the Bond, he was within age, this to be tried there where the Action is brought, so that in Actions Personals where Infancy is pleaded, the Trial is to be, where the Writ is brought, and so in other matters which do nearly concern the person of a man: here in this principal case the Action was an Ejectione firmæ, where a verdict and Judgment was had, a Writ of Error brought to reverse the Judgment, and for Error assigned, that being within age, appeared by an Atturney, whereas he should have appeared by his Gardian, the nonage being the matter in question, and issuable, this to be tried where the same is alleadged for to be (s) at Westminster, the Trial is to be where the Commorancy is alledged for to be, so that this Trial as it was is well had: as to the other matter insisted upon, being the venire facias 24, &c. coram nobis ubicunque tunc fuerimus in Anglia apud Westmonasterium, &c. the Kings Bench is where the person of the King is, otherwise it is of the Court of Common Pleas, as appears by the Statute Magna Charta. fo. 3. cap. 11. Communia placita non sequantur Curiam nostram, sed teneantur in aliquo loco certo, the Roll here is well, but the Writ is not so; if there were no venire facias this is aided by the Statute, but not a defective venire facias, and so a mistrial follows upon this, the same is well amendable, and so divers of the same nature have been here amended, in the Earl of Hartfords case in the Common Bench in the Roll it was De civitate Westmonast. and the Writ was Comitat. and this was Writ with (Com.) and a dash, and in the Commom Bench this was amended and made for to agree with the paper Book, which was right, Civita. and this made Comitat', &c. 2. minims turned into an O. the venire facias there at the first did agree with the Roll, afterwards the Roll was corrupted, and yet they did there amend the Roll, à fortiori here in this case we may amend the venire facias, there being only in the Roll a default of the Clerk, and no mistrial following thereupon, so here, in this principal case, the Error assigned is an Error apparent, and for this cause the Judgment is Erroneous, and so the same ought for to be reversed. Croke Justice agreed in opinion, that the Trial was good, agreed the difference well put betwæn real and personal Actions, so that an Action cannot be brought for Land, but where the Land is; otherwise it is personal Actions, the same may well be in a forrain County, as for nonage pleaded, the same is nearly personal, & sequitur personam; agreed the cases before remembred, as to the point of Inspection, here in this case there is a fit, and a proper Trial, if in an Action the parties are at issue upon a demisit, or non demisit, this shall be tried where the Lease was made, and not where the Land is, and yet this, sub modo doth concern Land. As to the Writ here, the same ought to be amended, being but matter of form; agreed the difference before put, where there is a mistrial, and where not, and also where it is matter only of form, & vitium clerici, the same is to be amended, and so was it done in one Kirtons case in the C. B. here in this principal case, the Original is well, and the Trial good, and this default, being only in matter of form, the same is to be amended; as to the Error assigned for the reversing of the Judgment, this now appearing to the Court to be so, is a very clear Error, and so the Judgment given at Durham is Erroneous, and ought to be reversed. And so the whole Court agreed in this, that for this Error assigned, and so now, by a Legal Trial found to be so, the Judgment is Erroneous, and ought to be reversed, and accordingly

The Earl of Hartfordshires case in C. B.

Kirtons case C. B.

ingly the same was so pronounced in Court (s) That for the Errors assigned and for other Errors apparent in the Record, the former Judgment given at Durham, in the Ejectione firmæ was reversed, and the party restored unto all, which he had lost thereby, quod nota.

The Judgment given at Durham reversed, &c.

Note, that the Court was moved for to have the Charter of Prince Henery filius, & primogenitus Jacobi Regis, being the Charter of his Creation, Prince of Wales, to be inrolled in this Court. Williams Justice, observed that the Prince natus est Duke of Cornwal, but he is made, or created Prince of Wales, and Earl of Chester, and that when there was an Earl of Chester, Writs were then directed to the Earl of Chester, or Chamberlanio nostro, and not Chamberlanio nostro as of the King, and so Writs directed, Principi vel ejus locum tenenti, and so it appears in the Register of Writs, and by the Rule of the Court, the Charter was inrolled, quod nota, and that this was so done according to the former presidents upon search made.

The Charter of Prince Hen. of his creation Prince of Wales inrolled by the Rule of the Court. 8 Co. 26.

Francis Holts Case.

NOta, that Francis Holt was indicted for a Recusant, and before conviction, he submitted, and afterwards upon his falling back again, he was indicted again, and submitted, and indicted the third time for a relapse.—Upon this Dodderidge, the Kings Serjeant did move for the King, to have the same to be certified unto the Court of Exchequer for this his relaps upon the Statute of 35 Eliz. cap. 2. by which Act he is to lose all the benefit he was to have by his former submission by the Act. Williams Justice, by the Statute it is to be so in case of Relapse, and therefore by the Rule of the Court, this was to be certified accordingly into the Exchequer.

Nota, that this case was moved to the Court, Lessee for life, remainder in fee, he in remainder cuts down Timber Trees, and sells them, Tenant for life, being a Woman, was informed against for Recusancy, the sale of the Trees was made by the assent of Tenant for life, the mony was brought in by the vendee into the Court of Exchequer; who should have this mony, was the question, by the opinion of the Court, he in the remainder, cannot cut, and sell, without the assent of Tenant for life, who did assent, the Recusant cannot be intitled unto this Timber, but he in the remainder is to have them; the Rule of the Court was, that the mony should be delivered unto him in the Remainder, being the Vendor, upon Bond by him entred into, for to repay the mony, if the Court should see cause, and to whom the Court should appoint, but that the mony should not be paid out unto him, before the Wood was delivered to the Vendee, but howsoever, the opinion of the Court was Clear in this, that the King could not be any ways intitled to have the Timber Trees so cut down.

Tenant for life being a Recusant not to be intitled to Trees cut down by him in remainder.

Tirlor

Tirlot Plaintiff against *Morris*, or *Morrison* Defendant, entred *Pasch. 9 Jac. B. R. Rott.* 285. or 286.

An action upon the case for words, &c.

IN an Action upon the Case for scandalous words spoken by the Defendant of the Plaintiff, being laid to be a Merchant, the words were these (s) Tirlot the Plaintiff is a Bankrupt: For speaking these words, the Plaintiff brought his Action, and upon not guilty pleaded, a Verdict was given for the Plaintiff. It was moved in arrest of Judgment, that the Plaintiff ought not to have this Action, for that he was an Alien Born, and a Merchant stranger, and out of the allegeance of the King, whether the Plaintiff shall have an Action upon the case for these words thus spoken of him, was the only question. Hen. Yelverton at the Bar, if these words had bæn spoken of an English Merchant, the words are scandalous, and the Action by such a one well maintainable; à fortiori, in the case of Merchants strangers, for that they, by the Laws of England, are enabled to trade here, and this is also to them strengthened by the Statue of Magna charta cap. 30. Omnes mercatores, (nisi publice antea prohibiti fuerint) habeant salvum, & securum conductum, exire de Anglia, & venire in Angliam, & morari, & ire per Angliam, tam per terram, quam per aquam, ad emendum, vel vendendum, sine omnibus malis, tolnetis, per antiquas, & rectas consuetudines. Heath for the Plaintiff, that the Action is well maintenable. Coke 4. pa. fo. 26. Byrchleys case which was Mich. 27 and 28 Eliz. B. B. where one said of an Atturney, that he was well known to be a corrupt man, and to deal corruptly, resolved there that these words were Actionable, because they did discredit him in his profession; and as to Merchants strangers by the Laws of this Realm, they are well enabled for to have personal Actions here, but not real Actions, as appears by 6 H. 8 Dyer fo. 2. pla. 8. also they are aided and enabled by the Statute of Magna charta chap. 30. to trade here as well as other English Merchants; and if these words had bæn spoken of an English Merchant, this had bæn a great discredit to him, and well actionable, and no difference here, and Merchants strangers are within Statutes made for Bankrupts, of 34 H. 8. cap. 4. and 13 Eliz. cap. 7. for Commissions to be awarded to enquire of the goods of Bankrupts, and of 1 Jac. cap. 15. Yelverton Justice, this Action here is well maintainable by the Plaintiff being a Merchant stranger, for calling of him Bankrupt, this Action is well maintainable by him clearly, for that an Alien Friend may well have here all Actions personals whatsoever, as Actions of Debt, and the like. Williams Justice to the contrary, that this Action here lieth not by the Plaintiff, because that he was alienigena, sub ligeantia of another, & extra ligeantiam domini Regis, such a Merchant Alien may well have a personal Action here, if the same be for his Merchandise, or for his House, for that in asmuch as the Law doth suffer him to Merchandise, and to have a House here, the Law doth also enable him, and gives him power to maintain a personal Action for the same by 20 E. 4. fo. 6. pla. 6. but clearly he cannot by the Law maintain any personal Action, for defamation of him, by any words spoken of him, this is the first case that ever I heard in this kind, and it is primæ impressionis, and in this case here, I hold with Mr. Littleton in his Chapter of Villenage fo. 43. pla. 198. that it shall be a good Bar to the Action for to say that the Plaintiff was an Alien. Yelverton Justice, and Croke Justice to the contrary, that such a Merchant Alien, may well have, and maintain such an Action upon the Case, for words spoken, tending to his Defamation, (as the words here spoken of him, in this case are) or he may well have an Action for an Assault and Battery upon himself. Flemming chief Justice, and Fenner Justice at this time delivered no opinion at all, one way or other

Coke 4. pa. fo. 26 en Byrchleys case Mich. 27, 28. Eliz. B. R.

Statute of 34 H. 8. cap. 4. 13 Eliz. cap. 7. 1. Jac. cap. 15. Statute for Bankrupts.

Littleton tit. Villenage fo. 43. pla. 198.

ther, but seemed to incline for the Plaintiff; and this being moved again at another time, the Court were clear of opinion for the Plaintiff, (all the Judges but Williams Justice) and therefore by the Rule of the Court, Judgment was entred for the Plaintiff, quod nota.

Judgment given for the Plaintiff.

Bowles Plaintiff against *Poor* Defendant, entred *Mich.* 8 *Jac.* *R. B. Rott.* 348.

IN a Writ of Error for to reverse a Judgment given in the C. B. in a Replevin, for the Avowant, wherein the cause was briefly this. A Rent was granted unto one and his Heirs, Habendum to him for his Life, and for the Life of 3 others, what estate this should be, was the only question. Geo. Croke for the Plaintiff in the Writ of Error, that this is but an estate for his own Life, and that the words (his Heirs) here are void, that his own Life, in the judgment of Law is greater unto him than the Life of any other can be, and to this purpose was cited Littleton in his chapter of Garranty fo. 168. pla. 738. & 739. where one did bind him and his Heirs to garranty unto Tenant for Life, the which is not a garranty of Inheritance, but only pur auter vie, so the case there is a Lease made of Land to one and his Heirs, for the Term of anothers Life, the Lessee dies leaving the other, for whose Life the Lease was made—the Heir of the Lessee shall have the Land, during the Life of the other, as a special occupant, so if one do grant an Annuity to another to have and to perceive the same, to him, and his Heirs, for the Term of anothers Life, if the grantee dies, after his death his Heir shall have the Annuity, during the Life of the other; but this is there left a quere, & on this quere, comes this principal case now in question, & that upon the point of the Avowry, where the Husband and Wife Avows for Rent due before and since the Marriage, and in this Avowry, they both of them joyn, whereas the Avowry ought to have been for that which was due before Marriage to the Wife, as due unto her, dum sola fuit: as to Littletons quere in the case of an Annuity, the Book of 19 E. 3 Fitz. tit. Accompt pla. 56. was cited, where by Hill. the Heir shall have the Annuity, and the Arrerages incurred in the same time, and by Wilby, the Heir shall have the Annuity, but not the Arrerages, saving only for his own time. Coke 1. pa. fo. 140. b. Chudleighs case, resolved, that an estate made to one and his Heirs, during the Life of I. S. is but an estate for Life upon which a remainder may depend by the Common Law, and divers Books there put to prove this, and Swinnertons case cited in 8 Eliz. Dy. fo. — 253 pla. 99. where a Rent was granted by fine unto F. Habendum sibi & assignatis suis during the Life of Cassandra, the Wife of the Grantor, and if it be behind, quod bene liceret dicto Wil. Fitzherbert, & hæredibus suis, durante vita dictæ Cassandræ distringere F. deviseth this Rent unto his Wife, and dies, Living Cassandra, this Rent was so conveied by fine, Sur graunt & render to the said F. the question was what shall become of this Rent, whether the grantee shall retain this as an Occupant, or whether the devisee of F.——shall have the same: there by the opinion of Dyer, the devisee—shall have it, For that by the clause of distress F. hath in this Rent a fee simple determinable upon the death of Cassandra. 11. E. 4. fo. 42. A Feoffment made to A. and B. and their Heirs, for the Life of an other, the remainder over, they in the remainder were received upon the death of the particular Tenant. 22 E. 3. fo. 19. 6. per Shard. If land be granted to a man and his Heirs, for the Life of I. S. his Wife after his death shall not be endowed, by the Book of 24 H. 8 Br. cases fo. 10. pla. 56 Br. tit. Forfeiture de ter. pla. 87. If Tenant for Life make a Feoffment to I. S. and his Heirs for the Life of the Feoffor, this is no forfeiture, for that this is but by way of Limitation of the estate 39 E. 3. fo. 25. Land is leased to one and to his Heirs, for the Life of the Lessor, and for one year after, an action of waste

A Writ of Error to reverse a judgment given in the C. B. 2 Cr. 292.

Littletons chapter of Garranty fo. 168. pla. 178. 739.

Coke 1. pa. fo. 40. b. in Chudleighs case.

Comment 2. part fo. 556. in Walsingham case.

waste is here well maintenable. Comment. fo. 556. in Walsinghams case, where it is held, that the Heir of the Tessee, (although there be a fee disrendable) shall not have an Assise of Mortdaunceſter upon a disseisin, nor the Wife of the grantee dower, and the Heir shall be punished in waste, so that in effect, the Heir is here but as an occupant, the principal case here was, A Rent granted to one and his Heirs, Habendum for his own Life, and for the Lives of 3 others, where an estate granted, shall be continued by way of occupancy, and where not. No occupancy shall be of a Rent, nor yet of an estate created, by the act of Law, as appears by 15 E. 3 Firz. tit. Scire facias, pla. 17. if an estate be limited unto one, for his Life, and for the Life of another, these words, for the Life of another, shall be void, and the same shall be, for his own Life, for that his own Life is greater than the Life of any other, and more dear unto him, and so is the Book of 19 H. 6. fo. 22. 23. the chief Error here in this case assigned, and insisted upon, was in the Avowry, for Rent due to him and his Wife, whereas it appears, that parcel of the Rent in arrear, and for which the Avowry was made, was due unto the Wife of the Avowant, before the marriage between him and his Wife, so that the Avowry ought to have been for that parcel of the Rent arrear, as due unto the Wife of the Avowant, Dum ipsa sola fuit, and so the Avowry for this cause not good, and the judgment Erroneous, & ought to be reversed. Hen. Yelverton to the contrary, that the Avowry here was well made, and the judgment well given, and so to be affirmed. As to the Error here assigned in the Avowry, the same is no Error. If a lease be made to J. S. for his own Life, and for the Lives of two others, this hath been Ruled to be a good estate, and usual, with such a limitation. If a Rent be granted unto two joyntenants, the Rent is behind, the one dies, the Survivor shall now avow in his own name for the whole, and yet this Rent was behind, in the life of the other. Yelv. Justice, If a man takes a Wife, having a Rent charge, and parcel of this Rent was behind, before the Marriage, who shall have the arrerages of the Rent, if the Husband shall not? Williams Justice, If I grant a Rent to you, and your Heirs for the Life of J. S. your Heirs shall have this Rent, and this shall so be, for the avoiding, and preventing of the gaining of an estate by occupancy, and so it hath been here ruled, in this principal case there is a Rent behind, unto them both, to the Avowant, and to his Wife, before their Marriage. The surest way for to plead this, is to say, a retro fore, dum ipsa sola fuit, but here as it is pleaded in this Avowry, the pleading, and the Avowry, as it was made by them both is good, and sufficient in Law, in as much as this whole Rent, is now due unto them both and that this is so, the same appears unto the Court judicially, that this Rent here, for which the Avowry is made, was due unto them both, and so the Judgment not Erroneous, but the same was well given, and so ought to be affirmed. Croke Justice agreed the case of the Rent, before put by Williams Justice, to be so, for to prevent occupancy: If a man takes an estate for his own Life, and for the life of 3 others, he shall have the benefit of all the 3 Lives, to grant the same over, or to charge the same, but not for to keep the same in his own hands, because that his own Life is greater by far to him, than all the other Lives are, and therefore if a Lease be made to one for the Life of J. S. and this is afterwards confirmed to him for his own Life, this is good to him now for his own Life, because that his own Life is greater; but if the Lease were made unto him, for his own Life, and afterwards confirmed to him for the Life of another, this Confirmation is mearly void; and so if a Lease be made to one for the Life of J. S. sans impeachment de wast, the remainder to him for Term of his own Life, the first estate, being the lesser, is now drowned in this, and makes him now presently to be punishable in wast, and so is the Book of —— 28 H. 8 Dyer. fo. 10. pla. 37. and with these agrees 5 H. 5. fo. 9. 3 E. 3. fo. 44. in Mary dela Idles case, cited Coke. 8. pla. 4. fo. 76. 6. in the Lord Staffords case, and Coke. 5. pla. fo. 13. a. in Rosses case, a Lease made to one and to his assigns, Habendum, to him during his Life, and the Lives of 2 others, he hath an estate here of Frank-tenement to continue during the 3 Lives, and the survivor of them, without any

15 E. 3. Fitz. tit. Scire facias pla. 17.

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5 H. 5. fo. 9. 3 E. 3. fo. 44. Croke 8. pa. fo. 76. the Lord Staffords case, Coke 5. pa. fo. 13 Rosses case.

any drowning of the estates, this Error assigned in the Avowry, is but matter of form, that the Avowry is good, the Judgment was well given, and not Erroneous, and so the same notwithstanding the Error assigned ought for to be affirmed. Flemming chief Justice, A Rent granted to one and his Heirs to have the same to him for his own life, and for the life of three others, his own life is greater than the lives of others, and shall drown the others, where the same is so by way of present interest; but where, (as in this principal case) here it is by way of Limitation that he shall have this, after his own life, for the lives of the others also, this kind of Limitation is good in Law, shall this Rent here in this case, go back again after the death of the first grantee, and during the other lives? clearly it shall not, for there is here one particularly limited, for to take this, and accordingly he shall have it, and his heir in this case, is not so to have the same as Heir by descent, but as his Heir nominatim, and as by way of Limitation only, and not in any other manner, he is to have it, as Heir, by force and vertue of the grant, and not as by descent, but by way of Limitation, and that for to prevent an Occupancy. If the grant here had been limited, to be to the grantee, and to his assigns for his own life, and for the lives of 3 others, in such a case his assignee shall have this after his death, during the lives of the other 3 persons. In the next place as to the Avowry, here the question is, what this Rent was, at the time of the distress taken for it, and the Avowry made, and how the same came to be due, a distress taken for the Rent, a Replevin brought, and an Avowry made. If a Man do marry a Wife, which hath a Rent (as here in this case it hapned) if the Wife dies before the Husband hath recovered this, he can have no remedy, for to recover this, after the death of his Wife, for that this is meerly a thing in action; and it is in the same nature, as in case of an obligation, which is made to a Woman sole, who takes a Husband, and dies living the Husband, he shall not have this obligation, nor any means now, for to recover the mony due upon the same, for this is a thing in action, the benefit of which cannot be had, but as in the right of his Wife, the which is now lost by her death, here in Law, and in a legal construction; all is one, be the same due before or after marriage. 7 H. 7. fo. 2. cited to this purpose. Flem. demanded of the Council for the Pla. if they had any Stat. Law in this case to help them? Geo. Croke made answer that they had not. Flem. the common Law is then clearly against the Plaint. for the Avowry here, as it appears by pleading, is good and sufficient, for that the Rent here in question, and for which the Avowry was made, the same was due either before, or else after the Marriage had betwen them, the same was due unto them both, at the time of the distress taken, and the Avowry made for the same, and so the Avowry is clearly good, and well Pleaded, and no Error in the Judgment, but the same was well given for the Avowant, and so ought to be affirmed. Williams Justice, If a feme sole doth owe me mony, and takes a Husband, I may very well have my Action of Debt against them, and count that they owe me so much, without saying dum sola fuit, and yet this was the proper Debt of the Wife, when she was sole, but now by the Marriage this is made also the Debt of the Husband, during the Coverture, and this was one Grubbe & Johnsons case here so Resolved. So here in this principal case, the Rent was due unto the Wife, and in arrear to her, dum sola fuit, and so the same continued at the time of the Marriage, and now by the Marriage, the same is also made to be the Rent of the Husband, and the same now (by the Marriage) is due, and in arrear to him, as well as to his Wife, and so the Avowry here as it is made, by them both, is clearly good, and the Judgment well given for the Avowants. Yelverton Justice; as to the grant of the Rent, this is a fee simple—determinable, Sur lour vies; and if it had been so limited, to him and to his assigns, for his life, and for the lives of 3. others, his assigns here after his death, shall have and enjoy the same, by force of this grant, and so if the Limitation had been to him, his Heirs, and assigns, for his life, and for the lives of 3 others, if he do not assign this over, then clearly, his Heir shall have and enjoy the same; and as to the Avowry here made for this

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7 H. 7. fo. 2.

Grubbe and Johnsons case.

ſent, in both their names for the ſame, by their Marriage, being now due, and in arrear to them both, the Avowry was well made, and the Judgment not Erroneous, but was well given for the Avowants, and the ſame Judgment ought to be affirmed. And ſo the whole Court did clearly agree in this, that the Avowry was well made, being made in both their names; that the Error aſſigned in the Judgment was no Error, but the Judgment was well given in the C. B. for the Avowants, and ſo by the whole Court nullo Contradicente the Judgment was affirmed for the Defendant in the Writ of Error.

Vaſtenope Plaintiff againſt *Tayler* Defendant, entred *Hill.* 8 *Jac. B. R.* 2 part. *Rott.* 1337.

An Action of Treſpaſs for a Treſpaſs done 7 Maii, Defen. juſtifies a Treſpaſs done 10. Maii.

IN an Action of Treſpaſs for breaking of his cloſe, and eating of his graſs—and this was laid to be done the 7 day of May. The Defendant juſtifies the Treſpaſs done the 10 day of May; to this juſtification the Plaintiff demurred, The queſtion was only this, whether this juſtification was good, or not? Williams Juſtice demanded whether in the concluſion of the juſtification, he ſaid, (which is the ſame Treſpaſs) anſwer was made, that the pleading was ſo. Williams Juſtice, the juſtification then is clearly good, notwithſtanding that he miſlaid the time of the Treſpaſs, and ſo it is adjudged in 21 H. 7. fo. 39. A. 6. where the difference is put by Conſtable Serjeant, and agreed by the Court, if the Treſpaſs be laid to be done on a day certain, and the Defendant doth juſtifie the ſame Treſpaſs, there he needs not to conclude his——juſtification, with this Averrment (s) (which is the ſame Treſpaſs,) but otherwiſe it is where he doth juſtifie the Treſpaſs, at another time, there he muſt conclude in this manner (which is the ſame Treſpaſs) or elſe the juſtification is not good. Fenner and Croke Juſtice agreed with Williams Juſtice herein, that the juſtification here was good. Yelverton Juſtice, to the contrary, the juſtification here is not good, for that it cannot be any ways intended to be the ſame Treſpaſs, when as he doth juſtifie for a Treſpaſs done at another day,——Williams Juſtice, and the reſt of the Judges,——againſt him in this, upon the difference which is taken, and ruled to be good, in 21 H. 7. fo. 39. which caſe doth clearly overrule this——our caſe in queſtion, that the juſtification here is good, and ſo the Court all agreed, (but Yelverton Juſtice,) and ſo the Rule of the Court was——quod querens Nil capiat per billam.

Note the difference.

Judgment by the Court for the Defendant.

Simpſon Plaintiff againſt *Brook* Defendant, and entred *Mich.* 8 *Jac. B. R. Rott.* 702.

Action upon the caſe for words, &c.

IN an Action upon the caſe for Scandalous words ſpoken by the Defendant of the Plaintiff, the words were theſe, He is not worthy to bear office in ſuch a place, for he keeps a Bawdy houſe in London: Upon not-guilty pleaded a verdict was found for the Plaintiff. It was moved in arreſt of Judgment, that theſe words are not actionable. Yelverton Juſtice, theſe words are ſcandalous, and will actionable. Williams Juſtice, if he ſaid that he keeps an Inn, and theſe words ſpoken of him, they will bear an action clearly, but without alledging of this, it is doubtful, whether they are actionable: in 27 H. 8. fo. 15. 6. it is there ſaid by Fitzherbert, that ſome words are mixt, and puniſhable by both Laws, either by the common Law, or in the Spiritual Court, as if one ſaith of an other that he keeps a houſe of Bawdry, the party may choose here whether for theſe words he will ſue him at the common Law, or queſtion him for the ſame, in the Spiritual Court: the Court being afterwards moved again, as touching theſe words they held the words actionable, and by the Rule of the Court Judgment was given for the Plaintiff.

Judgment given by the Court for the Plaintiff.

Shordiſh

Shordish Plaintiff, against *Faldoe* Defendant, entred *Hill.* 8 *Jac. B. R. Rot.* 248.

IN an Action of Covenant, the case appeared to be this, the Covenant was grounded upon certain Articles of agreement made between the Plaintiff and the Defendant, as touching a Lease to be made of certain Land by the Defendant unto the Plaintiff, at a certain Rent to be agreed upon, according to the quantity of the Land which was to be demised, and that the certainty thereof might the better appear, they entred into mutual Covenants, each of them to the other in this manner (s.) First, that there should be Measurers by them chosen and appointed, two by the one, and two by the other to be named, for to measure the ground which was to be demised, and if they found the same to be such a number, and quantity of Acres, then the Rent agreed to be paid for the same, was to be so much, according to the number of the Acres, which the Plaintiff was to pay for the same: the Plaintiff for breach of Covenant, in his Declaration sets forth a breach to be made by the Defendant in hindering, and disturbing of the Measurers in measuring of a Mote, parcella præmissorum, &c. George Croke for the Defendant took exceptions to the Declaration, that the same was not good. First, because that no time, nor place was specified in the Declaration, when these Measurers should be so appointed, nor where, nor yet when they were for to measure the Land. Secondly, because it is expressed in the Declaration, that the Measurers being appointed for to measure the Land, the Defendant did hinder and disturb them in the measuring of a Mote, parcella præmissorum, and doth not shew at all in his Declaration, where this Mote doth lie, and in what Town, there being two Towns and so no place for the venire. Thirdly, touching the manner of the disturbance laid in the Declaration, the same being (quod non permitteret admensurare) this is not good, there being no sence at all in these words of disturbance, but he ought to have said non permisit, and then he ought to have shewed also, wherein this disturbance was, and for all these causes the Declaration here is not good. Davenport argued to the contrary for the Plaintiff, that the Declaration is good, notwithstanding these exceptions; it is laid in the Declaration to be—quoddam stagnum parcella præmissorum, and laid to be in both the Towns; there are two Towns here, and if it be in either of the Towns, it is good enough, and if it be demanded of what place the Venue shall be, the same shall be of both the Towns. George Croke, Two Measurers are to be here appointed, and two others with them, it ought to be expressed at what time, in 3 E. 4. fo. 27. b. where a Lease for years was pleaded to be made, in pleading it ought to be shewed where the Lease was made, because it may be made in another County, than where the Land is; so here in this case, the place ought to be alledged, the same being issuable; and it is here also shewed, that he did not suffer the Measurers for to measure quoddam stagnum, but shews not in what Town this is, the same being issuable for the venire facias. Henery Yelverton, the venire facias here shall be of both the Towns. Williams Justice, when you lay here a breach, you ought to have said in the Declaration, non permisit, and not as it is here, non permitteret, for this is not good, but clearly the same ought to have been, non permisit; also the Declaration is—quoddam stagnum parcellam præmissorum, this is not good, he ought to have shewed in the Declaration, in what Town this had been, for the more certainty of the Venue, for the venire facias here shall be of both the Towns. Yelverton Justice agreed with him herein, and that the Declaration here is not

An Action of Covenant upon Articles of agreement for measuring of ground to be demised.

3 E. 4. fo. 27. b.

good, for the exceptions before taken to the same, and because it is not shewed in the Declaration here, in what Town this was, and accordingly (as Williams Justice did observe) this was overruled by Yelverton Justice at Oxford Assises, that he ought to shew specially, in what Town this was; for the venire, and so for the exceptions before taken, the Court was clear of opinion that the Declaration is not good, and therefore the Rule of the Court was, Quod querens nill capiat per billam.

Judgment given by the Court for the Defendant quod querens Nil capiat per Billam.

Torrey Plaintiff against *Adey* Defendant.

IN an Action of Debt brought upon a single Bill, the Defendant pleaded payment, which was found against him, and thereupon Judgment was given for the Plaintiff, and the Defendant was taken, and in execution; afterward he brings an Auita querela, and upon a single averrment of payment by him made, he was bailed, the party Plaintiff who had the Judgment, and the Defendant in execution came and moved the Court by his Council, to have some remedy in this case, for that such a plea of payment, against a single Bill, is no good plea, but against the Law, as appears by 1 H.7. fo. 16. a. in John Dones case, and 26 H. 8. Dyer pla. 6. and the Court was also informed, that this bayment was not in open Court. Williams Justice, there was no cause here in this case sufficient for the allowing of an Audita querela; it did not lie in this case, nor ought the same to have been granted: the whole Court agreed with him herein, and so the Rule of the Court was, and by special direction of the Court entred, that the Audita querela was illegally granted, and therefore to be quashed, and also that the bail should be taken off and discharged, and the party Defendant being then present in Court, was by the Rule of the Court to be then taken again in execution of the former Judgment for the Plaintiff, which accordingly was done, and an Attachment granted by the Court, against the two Atturneys, which did prosecute this Audita querela, and the bailment for the Defendant, and also by way of prevention, for the avoiding of the like mischief again for the future, the Court did all agree in this, and accordingly caused a Rule to be entred in Court, That for the future, no Audita querela should be allowed of, nor bail taken, upon any such Audita querela, but only in open Court, and not otherwise, or in any other manner, quod nota.

1 H. 7. fo. 16. 7. 27 H. 8 Dyer. pla. 6. 1 Cr. 157, 253, 260, 455. 2 Cr. 86, 100, 195, 377, 649, 3 Cr. 85, 195. 5 Co. 43. 6 Co 43. b. 44.

No audita. querela, nor bail thereupon to be taken, but in open Court.

Note, by Williams Justice, and by the whole Court, that if a Feme Covert, in the absence of her husband, (he being beyond sea,) doth bring an Action of Trespass, for an assault and battery made upon her, and this brought by her, in her own name, and in the name of her absent husband, that this action is well brought, and her husband being beyond sea, she may well bring such an Action, in her own name, and without her Husband, but she cannot be sued by another, without her Husband, though he be then beyond sea, such a suit cannot be maintained, before the return of her Husband; and therefore, in the case in question, the Defendants being sued by the Plaintiff, a Feme Covert in the absence of her Husband being beyond sea, and they having cause of Action, for divers Trespasses, as against the Plaintiff, and her Husband did move the Court, that the Plaintiff might stay her suit against the Defendants, until the return of her Husband, in regard that they cannot prosecute their suit against the Defendant, until the return of her Husband, in regard that they cannot prosecute their suit against the Plaintiff, before the return of her Husband, they assuring themselves, that at his return, he would agree the business, and therefore by the Rule of the Court, the Plaint. had day given her, to shew cause, why we would not agree to stay her suit, until her Husband returned, but the Court could not enforce to stay her unless she would consent thereunto, the Court being all very clear of opinion, that she may sue in her own name, without any restraint, in the

Where a feme Covert may have an action for an assault, & battery only in her own name, living her Husband. 1 In. 1328, 133. Mo. 851.

the absence of her husband, being beyond sea, but she is not to be sued by any one before her husband doth return again, quod nota.

Elizabeth Bradley Plaintiff against *Banks* Defendant, entred *Mich 8 Jac. B. R. Rot.* 407.

IN an Appeal of Manslaughter, the Defendant pleaded a former conviction before the Justices at York, that he there prayed his Clergy and had the same allowed unto him, and demands Judgment of the Court, &c. and pleads over, quoad feloniam & murdrum Non culp. Whether this plea were good, or not, was the question. It was argued for the Plaintiff, that this plea was not good, but very vitious, and that in divers respects. First, it appeareth by 2 E. 6 Brook title appeal pla. 124. that the Heir of a man killed, may as well have an appeal of Homicide of his auncestor, as of murder. It appears by 22 E. 4. fo. 19. In an appeal the Defendant pleads, the Plaintiff ought to reply Sedente Curia, and no Amendment shall be, but the same shall be Peremptory to them both: a man shall never justify, nor be suffered to plead in the defence of murder; the plea here is not good, because he hath joyned issue upon the murder, whereas he was not charged with any murder, in 22 H. 6 fo. 42. In an Action brought upon the Statute for a forceable entry (the Defendant pleads) as to the entry with force, and detainer with force, Non culp. by the Judgment of the Court, this plea is not good, because he makes answer to that thing, with which he was not charged, and with this agrees 14 H. 6. fo. 1. & 10 E. 4. fo. 6. one is not to travers that which is not alledged. 2. This plea here is not good for another reason. Inasmuch, as he was not before endited, (the enditment being void,) because the same was taken by a Jury, which came in without any Warrant at all, without any Warrant of the Court; the Sheriff did summon the Jury, De corpore Comitatus, See the old Book of Entries fo. 384. tit. Gaol delivery pla. & fo. 26. tit. proces en Assise. pla. 2. where such a Warrant is to the Sheriff, to return De quolibet Hundredo 24 liberos & legales homines, &c. so that here in this case there was no Jury at all upon the matter returned, because that what was done, was so done, without any Warrant at all, and so by consequence there was no enditment. 1 H. 6. fo. 1. In an appeal of Rape, in Conclusion he saith secund. form. statuti, the Writ was, ad respondendum secund. form. statuti, this is good, but if it were, cum appellat secund. form. statuti, this had been bad, for that the Statute gives no appeal, but he is to answer secundum formam statuti, and so here in this case. 3. This plea here is not good, for that this is a verdict of acquittal, and therefore this is no plea. As to the Objection made against this appeal, that here is a Discontinuance of the process; it was answered, that here was no Discontinuance at all. The Original Writ, at the day of the return, was then adjourned unto Mense Michael. 7 Jac. and a special Roll made of it, a Non est inventus was returned, and a Capias awarded, returnable Octab. Hillar. this Capias was faulty, being dated 7 days, before the award on the Roll, this is no Discontinuance, but only a miscontinuance, which is aided by his appearance: where there is one Writ for an other in course of process, and he appears upon it, this is but a miscontinuance; and for this was cited. 11 H. 7. fo. 5. a. b. & 21 H. 7. fo. 16. b. where it appeareth what shall be a Discontinuance, and what but a miscontinuance: if in the Term of Trinit. process is awarded, returnable Quinden Hillar. this is a Discontinuance of the plea, for that after a plea is commenced, the parties ought to have day for to appear in every Term (s) from Term to Term, until the plea be determined, if otherwise, it will be a discontinuance, as appears by 21 H. 7. fo. 16. 6. every process which doth issue forth, is only to bring in the party ad respondendum, and this being served, is obeyed by his appearance. 9 H. 5. fo. 2. In an appeal of Robbery, the process was sued to the Exigent, at which day,

An appeal of manslaughter. Defendant pleads a Conviction and clergy to him allowed. Cro. Jac. 283. Yelver. 204. 2 E. 6 Brok tit. appeal. pla. 124. 22 E. 4. fo. 19. 22 H. 6. fo. 42.

14 H. 6. fo. 1. 10 E. 4. fo. 6. Old Book of Entries, 384. tit. Gaol delivery pla. 1. & fo. 76. tit. process in Assise.

pla. 2.

11 H. 7. fo. 5. 21 H. 7. fo. 16.

Nota the difference between a Discontinuance and a miscontinuance of process.

day, the party appealed came in gratis and pleaded, Non culp. and he was foun Non culp. and the enquest did tax his damages to 10 l. there the party was a warded to go quit, but without his damages. The King here, hath lost a Sul ject, and therefore vengeance ought to be had, qui gladium accipit, gladio peribit, Su verba Christi: in 9 H. 5. fo. 2. the party being acquitted, in the suit of the party the process being Erroneous, the Sheriff upon the exigent, having returned Cepi Corpus, whereas it should have bæn Exigi fac. which is Erroneous, and thi appearing upon Record, and he now being of the Felony Legittimo modo acquie tatus, whether he shall be tried again at the suit of the King; but it was ther awarded that he should go quit, without being arraigned again, because tha the Original was good, and so is 19. e. 3 Fitz. tit. Corone pla. 444. If a man b acquitted upon his trial in an appeal, or upon an indictment, though there b Error in the process, yet the acquittal is good, because that he was indicted up on the Original, which was good, and not upon the process; and as to this mat ter of acquital, See Coke 4. pla. fo. 45. Vauxes case at large, where the reason o auterfoits acquit is expressed, because the life of a man shall not be twice put in je opardy for one and the same offence; here his appearance hath supplied all th defects in the process, and so in this case the plea is not good, the Writ of appeal and the proceedings thereupon is sufficient, and so prayed Judgment for th Plaintiff. Hen. Yelverton to the contrary, that the plea o the Defendant is good the Roll here is out of Doors; it is to be considered whether the Court can take notice of the Roll, in another Term, this cannot be done, and so it was here resolved, in the appeal against Morgan, and if this be so, this will lay a great stroke to the Root of this case; none of the cases that have bæn put by the other side, do come neer to our case here in question, saving only the case of 9 H. 5. fo. 2. which is a very good case, and there it appears, that an appeal is the nicest suit that is, and a very small matter will quash the same, if the same be not freshly pursued, and therefore Stamford hath it, unde eum instanter appellat, and so every process ought to be in an appeal, for the party is not to war cold in the prosecution of his suit and every process in an appeal is to be bear date the same day of the retorn; and if it happen to be but a day after, this will be a Discontinuance of the process, which no appearance can help, otherwise it is of a miscontinuance of process, and this appeareth by 1 H. 7. fo. 1. b. & 21 H. 7. fo. 16. b. appearance of the party will aid defects in the mean process, but the same will not help the default of the party: as to the Adjournment alledged, the Court cannot take any notice of this, you have come too short here 7 days, all this time you have slept, without issuing out of any process at all, so that here he did not appeal him instanter, it being 7 days after, before any process taken out; and there was no adjournment in this Record, neither ought the process to be taken out so soon when there was no Court sitting. An appeal doth vary from all other proceedings, for there shall be no amendment of the Writ of appeal, & if there be false Latin in it, the same shall not be amended, & this appears to be so by 13 E. 3 Fitz. tit. Corone pla. 121. where a Writ of appeal was abated, because that these words (s) (habeas hic) were not in the Writ, & the party was awarded to prison, & there Note, that he was not arraigned at the suit of the King, although the Court was well apprised of the year & day, the reason of this there given was, that the Court had no Warrant so to do, when the Writ was vitious, & the Court would not suffer the Writ for to be amended, & the reason of this is, because an appeal is the violent pursuing of a Subject unto death, & therefore the same is to be taken strictly, & that in all respects, in favorem vitæ: here in this principal case there is a failer, in every process, upon this Writ of appeal, for no process is here in this case taken forth, as the same ought for to be, so that the Plaint. suit here is lost, & that for the want of due & good prosecution It hath bæn said, that here the indictment was void, & the verdict void, as to this, though the same be insufficient, as against the King, yet betwæn common persons, the same remains in force, until it be avoided, & so all here remains good, till the same be reversed, so that the exceptions before taken unto th plea

Coke 4. pa. fo. 45. Vauxes case.

Stamford.

1 H 7. fo. 16. b. 21 H. 7. fo. 16.

Mich. 13 E. 3. Fitz. tit. Corone pla. 121.

plea, do fall to the ground, and are no ways at all material, he was not here indicted of murder, but of manslaughter, and for doing of the same suddenly, purposely thereby to deprive him of the benefit of the Stat. of 3 Jac. of the pardon, here he pleads over, as to the Felony, Non culp. this is not of necessity, so to be done, in an appeal, but he hath pleaded so here: the ancient learning of appeals is, and upon this difference, where he shall answer over to the Felony, and where not; where he pleads in disability of the party Plaint. for to have the appeal, he shall not there answer over to the Felony, but otherwise it is where he pleads matter in Bar of the appeal, as a releas, &c. and this appears to be so by the Books of 7 E. 4. fo. 15. a & 14 E. 4. fo. 7. a. It is clear also that an appeal doth as well lie for manslaughter, as for murder, and so is the Book of 2 E. 6. Brook title Appeal pla. 124. direct in point; also he ought not of necessity here to have answered — over to the Felony, as appears by the Book of 7 E. 4. fo. 15. a. his plea here as to the murder is void; if he had answered, and pleaded over, ad felloniam prædictam, this had bæn a good plea, and the Plaintiff ought also to have said — & prædictus querens similiter, but this the Plaintiff here hath omitted, and not joyned upon issue with him herein, and therefore this is a clear Discontinuance of the proceedings, on the part of the Plaintiff, and therefore prayed that the plaintiff, may be barred of his appeal. George Croke for the Defendant also, that the plea is good, notwithstanding the exceptions taken against the same. First he pleads, the indictment before the Commissioners taken at York, as before, &c. and also that the venire facias was of 2 Towns, whereas the same, ought to have bæn but of one, this is not void, but Erroneous. 2. Because it is contra formam statuti, this is good, and so ought to be, if he will take from him the benefit of the Statute; the indictment consists of 2 parts (s) 1. that The killed him, 2. that he killed him voluntarily, and against the Statute, and the Jury by their verdict, found him guilty, according to the indictment, of killing of him, at the common Law, but Non culp. contra formam statuti, all this by his plea he sets forth, and pleads over as before, so that his plea is good, and so prayed Judgment for the Defendant. The whole Court, (except Williams Justice,) agreed in this, that they were not to search for any other Record than this, which appears in the pleading. Williams Justice, in many cases, we may take notice of an adjournment, the whole Court agreed with him herein, but not to seek out a Roll, nor to search out what was done upon a former Roll before, the same being no parcel of the Record now in Court, not yet once mentioned in the Declaration. Williams Justice to the Plaintiff, you ought to have shewed the matter your self, for you can never help a Discontinuance; you ought to have said this in your Declaraction, and then we could have taken notice of it, but otherwise not; the Court agreed in this, that the Plaintiff ought to have helped her self here by an averment, and then the Court might have searched for the Records. Flemming chief Justice, every Discontinuance of process, doth clearly abate the Original, but so doth not a miscontinuance, and this is the difference; and if the Original be once abated, how can we then any ways help you, in your further proceedings, when as your Original is actually abated? Williams Justice, the apparance of the Defendant will well help and salve a miscontinuance of process, but there is no case in the Law, to prove, that any appearance will help and salve a Discontinuance of process. Flemming chief Justice agreed with him herein, the very same day that one process was determined, the party ought presently for to take forth a new process, and the same to be dated, on that very day, as the other was determined, and that without any interim; for if there be one day between the same, that the new process be taken forth but one day after the former was determined, this will make a clear Discontinuance of the whole, for this is not then as the same ought to be, for that the prosecution is not then recenter and instanter, as it ought to be. Croke Justice, the appeal ought to be pursued de die in diem, & de hora in horam, the whole Court agreed clearly in this, that no appearance will help, and salve a Discontinuance of process, but yet they gave time to the Plaintiff, for to search for Presidents herein, though the Court was clear of opinion

Note the difference where the Defendant in an appeal shall plead over to the Felony, and where not. 7 E. 4. fo. 15. a. 14 E. 4 fo. 7. a.

Note the difference between a discontinuance, and a miscontinuance.

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nion, that no Presidents could be found, to make this good. Croke Justice, the word murdravit in the indictment, may well stand for manslaughter. Williams Justice, If the indictment is murdrum, and doth not therein mention this to be ex malitia sua precogitata, this shall be taken only for manslaughter, and so hath it been ruled divers times, and so is 1 Mariæ Dyer fo. 99. pla. 63.——Yelverton Justice, the indictment is not good here, to take away from him the benefit of Clergy, but the verdict, as it was given, did enable him for to have his Clergy. Flemming chief Justice. If the indictment be contra formam statuti, and the verdict finds him Non culp. according to the indictment, grounded upon the statute, to take away his Clergy, yet clearly the party may well have an Appeal, and in the Appeal, the Defendant shall have a double plea, the one a plea in Bar, to the Plaintiff in the Appeal, and the other a plea in Bar to the King.

1 Marie Dyer fo. 99. pla. 63.

Williams Justice, If one kill another, and of this he is indicted before us, and the indictment is quod murdravit, we may clearly proceed for to arraign him. Flemming chief Justice agreed with him herein: the whole Court was clear of opinion, that in this case there was a Discontinuance of the Process, in the proceedings of them on the Plaintiffs part, which can no ways be aided, and that no amendment is ever to be allowed in case of an Appeal, and so the Judgment of the Court was clearly for the Defendant, and against the Plaintiff, for the quashing of the Appeal, and accordingly the Rule of the Court was entred, that the Writ of Appeal should be quashed, and abate, and the Defendant discharged, quod nota.

John Basepole Plaintiff against *William Freeman* Defendant, entred *Trin.* 8 *Jac. B. R. Rot.* 1222.

A Writ of Error to reverse a judgment given in the C. B. in debt upon a Bond, &c.
2 Cr. 285.
2 Brow. 309.

In a Writ of Error for to reverse a Judgment given in the C. B. in an Action of Debt upon a Bond, conditioned, and for performance of an award, the Error Assigned, and insisted upon, was upon a matter of Discontinuance, and as touching this Error, the case appeared to be this, that after the matter in Law, as touching the award, the entry upon the Roul was, that of this matter Curia advisare vult, until such a Term; nay this was upon the principal point, and the matter in Law, as touching the award, and the parties did overslip one whole Term, without moving of any thing at all therein, the question was, whether this were a Discontinuance, of all the proceedings or not, and herein the question was, whether there ought to be in such a case, the like entry, & continuance of proces, (after that the Court hath taken the matter wholly into their hands, and consideration,) as there ought for to be in other matters. It was argued for the defendant in the Writ of Error, that this should be no Discontinuance, & so no Error, because that this is the act of the Court, the which shall not make a Discontinuance, in prejudice of the party, for when the Court hath taken this matter into their consideration, to advise upon the matter in Law, and so to determine the same, by this the parties themselves, are ipso facto, discharged, and have not after this, any day in Court, and without this, there can be no Discontinuance, Curia advisare vult, be it for Twenty years, this, entry of it self, is a good Continuance of the matter in Court, without any other entry at all between the parties, for that this entry of a Curia advisare vult, is merly the act of the Court, and the parties have now no more to do, but for to attend the Judgment and Resolution of the Court herein. Yelverton Justice, clearly, this act of the Court is no Discontinuance. Goldsmith, for the Plaintiff, that this is a Discontinuance, and so the Judgment Erroneous, for as well, as by such an entry, one Term may be passed over, by a Curia advisare vult, by the same reason it may so be for a whole year, and so for seven years

years, by such an entry, De curia advisare vult, and nothing upon this done. George Croke for the Plaintiff, that after this entry, De Curia advisare vult, the letting slip of one whole Term, without doing any thing at all herein, is a Discontinuance of the proceedings in Court, by the Book of 46 E. 3. fo. 26. a. the Law will never give liberty to one, for to let slip a whole Term, without any proceedings; for as well as he may slip one Term, by the same reason a whole year; for in such cases, and upon such entries, the Court still useth for to give a day for this over, and then the same is to be moved again, and so to have a Rule from day to day, until Judgment be given, and not to pretermit any one whole Term, without a motion made to the Court for to deliver their opinions in the cause, or to have another day by the Court appointed for the same—— Williams Justice, In the old Book of Entries tit. Error per Discontinuance fo. 293. pla. 3. where it appears that such an entry, De curia advisare vult, may be from Term to Term, and if they let slip such an entry, in any one Term, this is a clear Discontinuance. George Croke. Upon such an entry, De curia advisare vult, they ought for to appoint a day certain for the same, ad audiendum Judicium Curiæ. Note, that as to the Error assigned, for the matter of Discontinuance, by letting pass a whole Term, without moving the Court for their opinions, after the entry— De Curia advisare vult being only the act of the Court; It was clearly held by all the Court (except Williams Justice,) that this was no Discontinuance, and so no Error for to reverse the Judgment given in the C. B. but that the Judgment there given, notwithstanding this Error, ought to be affirmed. As to another Error assigned, being a matter in Law, as touching the award it self, and the validity of the same, the Judges prima facie did somthing doubt of the same, and therefore they delivered no direct opinion therein; but by Yelverton Justice, if a man doth promise for to pay unto another 20 l. at Michaelmas, and this upon good Consideration, if he pays this accordingly, he demanded of George Croke being of Council with the Plaintiff, in the Writ of Error, whether this shall not be a good discharge of his promise? George Croke agreed this to be a good discharge of his promise; then Yelverton Justice demanded of him, what difference there was, betwæn this case before put, and the case of an Arbitrement, where the Arbitrators do award him for to pay this mony, so due as before; and so he was clear of opinion, that the award was good, and that by this award the party is discharged of his promise, this being a benefit unto him, and this was the principal case, after such a promise made for to pay 20 l. they submitted themselves to the award of, &c. who did then award him to pay the 20 l. this was a good award, and by this award, the one was to have the 20 l. and the other to be thereby discharged of his promise, and so a good award made for both parties; and if it be expressed in the award for to be, pro, and in consideration of the promise, then clearly, this is a good award, for there, by this he is discharged of his promise, and so there is an equal benefit to both the parties, (s) the payment of the mony, to the one, and to the other; that by this payment, the promise is gone, and he is clearly of and from the same freed, and discharged: the whole Court seemed to agree with him in this, that this was a good award, and so the Judgment in the C. B. well given, and to be affirmed; but as to this, (being the matter in Law) they delivered no positive opinion, (as to be bound by the same,) but inclined to be of opinion for the affirmance of the Judgment: see more of this at large, with the reasons of the Judgment. Coke. 8. pa. fo. 97. & 98. Basepoles case.

Old Book of Entries title Error per discontinuance fo. 293. pla. 3.

This was no discontinuance by the opinion of the Court. by all but by Williams Justice.

Coke 8. pa. fo. 97, 98. Basepoles case.

Scriven Plaintiff, against *Wright* Defendant.

NOte, that a motion was made to the Court, on the behalf of Scriven, that the Defendant being in execution, at his suit, for Debt to him due, and he having more liberty than was convenient for a prisoner to have, and that he lived at his pleasure, without any restraint, and therefore for the more speedy payment of his debt, the Court was moved to have him kept in arcta custodia (s) to be kept in fetters. Williams Justice, you can never shew any such president for this

A prisoner not to be in fetters but for criminal offences, not in case of an execution.

Croke Justice, he shall never be kept in Fetters, but for a Criminal offence, and not where he is in, upon an execution. The whole Court agreed in this clearly, that he should not have Fetters, but for Criminal offences, but ordered that he should be restrained of his liberty.

Foster Plaintiff against *Hill.* Defendant, and entred. *Hill.* 8 *Jac. B. R. Rot.* 1199.

An Action of Trespass, for breaking and entring his House, &c.

IN an Action of Trespass for breaking and entring his House at 11 of the Clock at Night, and taking of the Plaintiff away, and carrying of him before one Master Conniseby, a Justice of the Peace, & ad damnum; and the Defendant being a Constable, doth justifie by vertue of a Warrant to him directed, from Mr. Conniseby a Justice of the Peace, for the taking of the Plaintiff, and bringing of him before him, to answer; and the only question was —whether this justification was good or not. Williams Justice, the Warrant here is general, the Defendant shews here in this justification, that by vertue of the Warrant he came into the House, at 11 a Clock at Night, and did there take him, and brought him before Mr. Conniseby a Justice of Peace, this is no good justification clearly. George Croke. There was a Warrant sent out by a Justice of Peace to the Constable, and that he should immediately take him, that he came to his House, and bid him open the Door, the which to do, he refusing, he did break open the Door, and so took him away. Williams and Fenner Justices, he could not break open the House in the Night, for any thing, but for Felony. Williams Justice, this is a most perilous example, to break a mans House in the Night, by force, and by vertue of a general Warrant: also it is clear, that a Constable cannot justifie the breaking of any mans House, unless it be in case of Felony. Flemming chief Justice, this is the act of a Constable, this is a matter not worth the Argument, being so clear a matter agreed clearly with Williams Justice, that this justification is not good, and that a Justice of Peace ought not for to make such a Warrant, as was made in this case, unless that the same be, in case of Felony, or Treason, and he ought then, for to express this in his Warrant, and that for the greater care to be had in the execution of such a Warrant, in this case, the Constables Error cannot save him harmless; there is no doubt at all to be made of this case, it being very clear, that this act of the Constable is no ways warrantable and so the justification here is not good. Yelverton Justice agreed with him clearly in this, that this justification is not good, but the Constable is liable to be questioned, for this so unjust, and so illegal an act done by him, and his ignorance of the Law herein, will not excuse him, and it is resolved. Coke. 5. pa. fo. 19. b. and Semaynes case, the House of every man is to him, as his Castle, and Fortress; as well for his defence, against injury, and violence, as for his repose, and there fo. 92. for Felony, or for suspicion of Felony, the Officer of the King may break the House, and take the Felon: but there resolved, that the Sheriff, upon an execution, at the suit of a Common person, cannot break open the house of any one, for to do execution, much less may a Constable break a mans House, and take him away, by force of an ordinary Warrant from a Justice of the Peace, and not in case of Felony, nor of Treason, so that this was here a meer tortious act in the Constable, and no ways to be justified by him, and the Plaint. hereby very much wronged, and damnified, and hath just cause of Action; and the justification here, being not good, the Plaintiff hath good cause to recover, and so the whole Court agreed clearly in this, that the Defendants Justification here is not good, and so by the Rule of the Court Judgment was entred for the Plaintiff.

Semaynes case.

Bend 149.

Judgment given for the Plaintiff.

King

King and *Long* Paintiffs against *Lorking* Defendant.

IN an Action upon the case brought for scandalous Words, spoken by the Defendant, of the Plaintiffs, which words were these, (s) Mr. Master was Robbed of 40 l. and of so much Plate, and that Long and King have the same, and for which, (by God) they will be hanged; for these words thus spoken, the Action was brought, and the same laid to be ad damnum, &c. the Defendant pleaded not guilty, a verdict given for the Plaintiff. It was moved in arrest of Judgment, that these words are not Actionable. Henry Yelverton for the Defendant, that the words are not Actionable, because it is not here so charged, that they knew of the Felony, and consented unto it. Goldsmith for the Plaintiff, that these words are scandalous and Actionable, for where the life of a man may be taken away, & words are spoken to this purpose, such words shall be Actionable, and so it is here in this case, Mich. 36. & 37 Eliz. between Ball Plaintiff against Reanes Defendant. An Action upon the case for words spoken of the Plaintiff, being, He is a cunning knave, and acquainted with more Cutpurses than any man in Northamptonshire; and there is not a cutpurse within twenty miles of Wellingburrough, but he hath his part in it, adjudged, that these words were Actionable. Yelverton Justice, If the words had been these—— (s) such, and such were the goods of such a one, these words of themselves are not Actionable, but when he saith further, as here in this case, and for that you shall be hanged, this implies, that they were stollen, and by this it shall be intended that he knew of it, these words here are Actionable. Williams Justice, These words are very scandalous, and clearly Actionable; the latter words do here very much aggravate the matter of scandal. Yelverton Justice, If one do say of another that he hath deserved for to stand in the Pillory, it hath been adjudged, that these words are Actionable. Flemming chief Justic, In this case here in question, the words are to be laid together, for to prove his intention, and what he meant by his speaking of these words, (s) the beginning, the middle, and the end of these words, here a Robbery is laid to be done, and he hath the goods, for which he will be hanged, this cannot be done, unless he knew of it; without all doubt, such words may touch any mans reputation and credit, to be spoken of him, so that it is very plain, that by his using of these words, his meaning was, that he had not these goods honestly, but that he might be hanged for them, these words are very scandalous, and do import very great defamation; the fame and reputation of a man is as precious to him as Riches, nay, as his Life; clearly these words are Actionable. Croke Justice agreed in opinion that the words are Actionable, being spoken advisedly, (as here they seem for to be so spoken) they being malicious and very scandalous words, and so clearly Actionable, and so by the clear opinion of Fleming chief Justice, Williams, Yelverton, and Croke Justices, these words here as they are laid in this Declaration, are very—— scandalous and Actionable. Fenner Justice somthing doubted of the words, and that the latter words in the Conclusion did not aggravate the former words, but all the rest of the Judges differed from him in opinion, and so by the rule of the Court——Judgment was entred for the Plaintiff.

Action upon the case for words, &c.

Mich. 36. and 37 Eliz. Ball Plaint. against Reanes Action on the case for words.

Judgment given by the Court for the Plaintiff.

Berefoord Plaintiff, against *Presse* Defendant.

An Action on the case for words, &c. Cro. Jac. 275. Hutt. 76. Yelv. 107. 197.

IN an Action upon the case brought for scandalous words spoken by the Defend. to the Plaintiff, as namely,——you have spoken words——which I think are Treason—and upon this, he went unto a Justice of Peace, and informed

against him, who thereupon bound him over to the Assises to answer the same, & bound the Defen. bing a Minister, to prosecute, the which he did there accordingly, and the Plain. was acquitted by verdict; afterwards he brought his Action upon the case against him for speaking of these words, as before, upon Non Culp. pleaded, the Jury found for the Plain. it was moved in arrest of judgment that these words are not Actionable. Geo. Croke for the Defendant, that the words are not Actionable, being too general, the case was this, two were arguing together, the one of them said to the other, I can prove these words spoken by you, to be Treason, and this was as they were so arguing together, and therefore not Actionable; he said Mr. Beereford hath spoken words which are Treason, the which I can prove, the words spoken were these, and upon this occasion. (s) they being speaking of the——Benevolence of the King. the Plaintiff said, I care not for the King, nor yet for his Benevolence, these words spoken and upon this occasion, and thereupon the Defendant did speak the words to the Plaintiff, which words, lay altogether, are not actionable. John Moore for the Plain. that the words are Actionable; as touching Actions upon the case for words, these two grounds may be laid, to make words Actionable. First, the words must be spoken malitiously, and they are to be such words, as do tend unto the slander and defamation of the party, of whom they are spoken, and that he may be punished by the law for them. 2. They are to be such words, as do trench to his hinderance and discredit, and for which he might be imprisoned if true, and to this purpose, there was a case between Rewdam Plain. & Tucker Defen. An Action of the case for words being, Thou art a Concealer of Felony, and it lieth in my power to hang thee, these were general words, and shews not how, and yet they were adjudged to be Actionable, and there was a case in this Court. Hil. 5 Jac. Blanch Flower Plaintiff against Atwood. An Action upon the case for words, being, I will hang thee, for thou hast spoken words which are high Treason, adjudged that the words were Actionable, there it was moved in arrest of Judgment, that the words were too general, but the Court made answer, that the speaking of the words was matter of State, and therefore he ought not to utter the words precisely, adjudged Actionable, for that the speaking of these words is a great scandal, and there resolved, that for these words, (I will hang thee, for thou hast committed Felony,) an Action lieth. Henry Yelverton for the Defendant, that the words here are not Actionable; as for Blanch Flowers case cited, this doth very much differ from our case; to maintain an Action upon the case for words, there ought to appear malice and rancour of heart, and all this appeared in Blanch Flowers case, being I will hang you, in these words appears great malice; here in this case, one may speak Treason out of the mouth of another, & without any malice at all, & so prayed Judgment for the Defendant. Wil'. Justice, These are very naughty words, if a man speaks Treasonable words, is not this sufficient for to make him a Traytor, & sufficient to bring him within the danger of the Law? these words here, are scandalous, and Actionable; for these words, Thou art a Traytor, generally, no Action lieth clearly, but if he adds these words, (s) and I will prove it, then they are Actionable. Fenner Justice agreed that these words are Actionable. Croke Justice, If there be a peremptory accusation, and that he will prove it, these words will be Actionable, but if it be only a Caveat & forewarning by these words spoken, (s) as I doubt of these words and that he would go, and enquire whether these words were Treason; words thus spoken, and in this manner, are only by way of Reprehension, and not of accusation, I am in some doubt, and I will ask Counsel, whether the speaking of these words be Treason, if it were in this manner, this would very much mitigate the matter, but in this case here, besides the words spoken, here was a further prosecution, by informing of a Justice of Peace of the same, and so causing him to be bound to Answer the same at the Assises. In Blanch Flowers case, there was a peremptory accusation, which makes it a stronger case than this, here in this case in question there is a positive charge, as namely; you have spoken words, (which I think are Treason) or which are Treason, as I think, and then, (which shews his malice)

Rewdam Plain. against Tucker Defendant.

Hill. 5 Jac. B.R. enter Blanch Flower Plain. against Atwood Defendant.

malice) he complains to a Justice of Peace (and endeavours what he can to prove the words) but the party was acquitted, and so lay all the words and proceedings together, the words are then scandalous, and Actionable, and a great deal of malice appeared in the prosecution. Flemming chief Justice, These words are scandalous and Actionable, but he moved the Defendant for to pay the Plaintiff 10 l. for his damages, who answered that he was but a poor man, and unable to pay. It was therefore by the Court referred to Warberton Justice to make an end of it, but by the Rule of the whole Court, judgment was given and entred for the Plaintiff, but execution was to stay till Mich. Term. to see if an end might be made of it, in the interim, and also the Plaintiff by Order to release to the Defendant all his damages but 20 l. and so the Judgment was given by the whole Court for the Plaintiff, with a cessat executio for a time.

Judgment given for the Plaintiff &c.

Wale Plaintiff, against *Hill* Defendant, entred *Hill.* 8 *Jac. B R. Rot.* 1142.

IN an Action upon the case brought for a Conspiracy, for conspiring to indite him, for the supposed Counterfeiting of a Letter, contrary to the Statute made 33 H. 8. cap. 1. and for malitious prosecuting of the same indictment at the Assises against him, and that of this the Jury there did acquit him, and for this the Action brought, and declares ad damnum, &c. The Defendant makes a special justification in this manner, (s) he shews how there was a stranger that was unknown to him, and that this Stranger brought him a Letter from one of his friends, the which was a counterfeited Letter, and that with this Letter he had consened him of 30 l. that the Plaintiff, and he which brought this Letter to him, were both of them unknown to him, but very like, and that at the same time, when this Letter was brought unto him, three others were then present with him, and did see the delivery of the Letter to him, and they said, that if they did see the party again, and could hear him speak, they should know him again, that afterwards, they with him did see the Plain. and conceiving him in all likelihood to be the same party, they all agreeing this to be so upon all this suspition, he complained of him to one Mr. Collins a Justice of Peace, who sent his Warrant for him, upon his examination of him, finding good cause of suspition, did bind him for to appear at the Assises, and did also bind the Defendant to appear there, and to prosecute against him, the which he there did do accordingly, and came and shewed all this matter to the Jury, and that the Jury there did then acquit him, and so justifies his proceedings against him. To this justification the Plaintiff doth demurr in Law, so that the only point was, whether this justification be good or not. Davenport for the Plain. that the justification here is not good. It appears by 2 H. 7. fo. 15. 4 H. 7. 5. 26 H. 8. fo. 9. & 7 E. 4. fo. 20. that common fame in some cases may be a good justification in a false imprisonment, but this is to be taken, if the cause for which he was taken be publick, but otherwise it is where the cause is private, for taking of a mans goods in a private manner, there he ought to shew specially, that the goods were found with him, and in his possession, and not to go by belief, and to give credence to every particular man, but he ought for to shew some good and apparent Case to the Court, and so is 7 E. 4. fo. 20. 13 H. 4. fo. 2. by Hankford: if an Action of Debt be brought against J. D. and a Capias to the Sheriff, who by this Writ, takes a man named B. C. he may have a Writ De Faux imprisonment against the Sheriff, and he cannot here justifie, and deceptus de facie this will not serve his turn, but he ought to look to this at his Peril, and so concluded for the Plaintiff, that this justification is not good. George Croke for the Defendant, that the justification here is good, the conspiracy, as it hath been shewed was for conspiring to have the Plain. Indicted, for counterfeiting of a Letter, contrary to the Statute

An action upon the case for a conspiracy to indict the Plaintiff, &c.

2 H. 7. fo. 15. 4 H. 7. fo. 2. 5 H. 7. fo. 5. 26 H. 8. fo. 9. 7 E. 4. fo. 2.

Statute of 33 H. 8. cap. 1. it appears by the Book of 11 H. 4. fo. 91. a. that i is not material, whether the Justification be true or not, but there ought i the same to be alledged a Colourable cause of suspition, and then it is good. 4 Eliz. there was a case in this Court between Payne and Rochester, In an Actio upon the case in the nature of a Conspiracy, for procuring him to be Indicted for supposed Robbing of him; the Defendant justified, and in this his Justifi cation shewed how that he was Robbed, by persons to him unknown, and tha one of them was upon a brown Horse, and had a White Cloak, and was lik unto the Plaintiff, and upon this he complained unto Justice Gawdy, who upo his examination, finding cause to suspect him, did commit him, and bind hi over, &c. and he did likewise bind the Defendant for to prosecute against him the which he accordingly did, and the Jury did acquit him, and so justified. T this Justification the Plaintiff demurred in Law, and this was ruled to be a good Justification, and there is no difference between this case, and the cas now in question, but only in the names of the parties. The like case was in thi Court, Hill. 5 Jac. B. R. Rott. 857. between Cox and Worrel, In an Action upon th case for a Conspiracy, for procuring of him to be Indicted, for supposed Ravish ing of his Daughter, of which he was acquitted, the Defendant did justifie, an for cause did shew, that his Daughter did complain unto him, and cried, saying that she was Ravished by the Plaintiff, upon this he Complained to Sir Tho Grymes a Justice of the Peace, who upon his examination, found the matter ver suspitious against him, and upon this, he bound him over, and bound the Def to prosecute against him, the which accordingly he did, and the Plaint. was b the Jury acquitted, and this was here ruled to be a good justification, & tha the Action upon the case for a Conspiracy did not lie against him, and so in th case now in question, there—being no difference betwæn them here in this hi Justification: that the party Plaintiff was like unto the party that brough unto him the Letter (s) Similis vultu, and like in speech and so the Justification is good. If he had been here Indicted upon a law, whereas there was no such Law, this would be a void indictment but here this—Indictment was to bring him within the compass of the Law of 33 H. 8. cap. 1. that so he had done that Contra nos, which do frame, make, and counterfeit such false Letters and Tokens, thereby ad recipiendum pecunias, and here he was indicted for acting and doing o this, contra statutum in eodem casu edit. & provis. here he was acquitted by the Jury, but no cause of Action for him to have for this. Wil. Justice, If you had said, an shewed in your Justification that you had bæn Robbed, or cousened by this fals Letter, thus brought unto you, and that you had your self suspected the Plaint for the same, and that thereupon you had complained, prosecuted and given evi dence against him upon these or the like probabilities, this had made the Justi fication good, but here it is not so expressed, and so the Justification is in this to short, and not good. Flem. chief Justice, There was a case in the Star-chamber, th Poulterers case, who sent his man before him one way, and he was Robbed going down hill, another way, & supposed that the other Poulterer had Robbed him, his Servant said unto him, there goes one before as like the party that Robbe you, as can be; he demanded then of him if he was sure of it, whereupon h went to him, and then said it is he,—and upon this he did charge him with it, caused him to be indicted, & he was by the Jury acquitted, & so brought his Action if you will charge one upon suspition mærly without any other probabilities to warrant this, this then is a clear Conspiracy; but otherwise, where there ar good & seeming probabilities, they ought not to say that he is the same party, fo then if it prove not so, this is plain malice, or if the Justice of Peace to whom h complains, doth not find such matter upon his examination, as that he think him worthy of commitment, & yet the party will prosecute an Indictment agains him, & he is acquitted, here an Action upon the case for a Conspiracy well lieth for this is malice apparent. Croke Justice, Where it is laid in facto that there wa an offence committed, there to say, Communis vox & fama will well serv the turn, and suspition withal, but where no such offence was done, or com mitted

42 Eliz. B. Payne against Rochester.

Hill. 5. Jac. B. R. Rott. 857. Cox against Worrel.

The Poulterers case in the Star-chamber.

mitted there, otherwise it is, and this will be the difference, for if no offence were done in facto, then to prosecute him, is plain malice; and if he be acquitted for such a prosecution, an Action upon the Case well lieth; here in this Principal Case, the prosecution is not grounded upon his own suspition, but upon the suspition of others, and so for this cause, the justification is not good: this cousening by Letters is too usual a thing. If a man indict another upon probabilities, and relies only upon them, and the Party indicted be Acquitted, he shall not have for this an Action upon the case for a conspiracie; a man is to ground his indictment, and his prosecution thereupon, upon his own suspition, and this his suspition, ought also to be grounded upon other probabilities, and this ought to be his own suspition, and not the suspition of others, otherwise his justification will not be good, and herein he hath failed in this case, grounding his proceedings, and his justification thereby upon the suspition of these three other persons, which he saith were present with him, when the Letter was delivered to him, and that they said, that if they did see the party again, and heard him speak, they should know him, and so they afterward seeing the Plaintiff, and hearing of him speak, they conceived him, in all likelihood to be the same party, and upon this their suspition, he complained of him, and prosecuted against him, and the Jury did acquit him, so that here was nothing at all grounded upon his own suspition, and so his justification not good, and the Plaintiff for this had just cause of Action. Croke Justice, when a Robbery is done, it is very usual then to make Hue and Cry after the Felons, and to denote the parties by descriptions (s) of their Horses, visages, and apparel, and if they meet any in such a manner described, for to make stay of them; and it appeareth Coke 4. pa. fo. 14. in Cutler and Dixons case, that an Action upon the Case doth not lie, where a man doth pursue the ordinary way of Justice, and so by the opinion of Williams and Croke Justices, and of Flemming chief Justice, the justification here is not good, and the Plaintiff hath just cause of Action; but because the Court was not full, and the matter being in reference for to be ended by way of mediation, the Court did forbear to give any judgment in this case; and as concerning the Writ of conspiracy, see Coke 9. pa. 4. fo. 26. b. in the Case of the Abbot de strata Marcella, where it is said that by the common Law, no conspiracy lieth when the party was indicted: but although he be indicted, if the indictment be not sufficient in Law, the party shall have his Writ of conspiracy, and see Coke 9 pa. fo. 36. b. in the Poulterers case, where the Writ of conspiracy doth lie, and where not.

Coke. 4. pa. fo. 14. b. in Cutler and Dixons case.

Lucas Plaintiff against *Fulwood* Defendant.

An Action of Debt for the arrerages of an Annuity. Yel. 208.

IN an Action of Debt, the Declaration was in placito debiti, and declares as for an Annuity, as in a Writ De annuali redditu a retro fore, it was 10 s. de annuali reditu arere; upon the general issue pleaded, a verdict was given for the Plaintiff. It was moved in arrest of Judgment, that the Declaration here is not good, being in placito debiti, and by the Declaration it appears to be for the arrerages of an Annuity. It was urged for the Plaintiff, that the Declaration was good, being for 10 s. de annuali redditu, and that so it hath been in this Court adjudged, that for an Annuity granted to one for years, an Action of Debt well lieth, but otherwise it is for an Annuity granted to one for life, or in fee. Yelverton Justice, upon the first moving of this, conceived the Action of Debt to be well brought, and so if Lessee for years grants an Annuity to another for years, an Action of Debt well lieth for it. Williams Justice, he needs not to shew any matter of Annuity, but he ought for to count, as in another Action of Debt.

Yelverton

Yelverton Justice, the Declaration here is, debet & injuste detinet, (and also there is the word) (Substraxit) which proves this to be an annuity. Sr. Rob. Hitchin for the Plaintiff, that the Declaration here is good, and the action well brought, as it is laid; that an action of debt will lie for a rent-charge granted for years, because that it hath continuance, and so also for the arrerages, but otherwise it is in case of a freehold; here in this case, is the word (Substraxit) the which proves this for to be an annuity. As to the manner of the Declaration, if the same have matter of substance in it, if words, which are Nugatory be therein aded, this shall not make the Declaration to be bad and vitious. George Croke for the Defendant, that the Declaration is not good, and it appears, Coke. 5. pa. fo. 36. in Walcots case, that this is the matter of Substance, and not of form in the Declaration, and the Statute of Jeofails of 18 Eliz. cap. 14. doth aid Declarations which are only defective in form, but not such as are defective in substance, as this Declaration here is, and therefore prayed Judgment for the Defendant. Williams Justice, the Plaintiff here is not to have an Action of debt, if the Term do continue, but if the Term be determined, an Action of debt then lieth by him, & this in the debet, & detinet, and so is the Book of 9 H. 7. fo. 16, 17. where it is held, that if an Annuity be granted to one for years, as long as the Term continues, a Writ of annuity lieth for the same, but when the lease is determined, an Action of debt lieth for the same, and so is the old Book of Entries. fo. 151. in debt for an Annuity: but here the Plaintiff hath failed in his Action, for he hath brought his Action of debt, and declares for an Annuity, this is not good, but the Declaration is defective herein, in matter of Substance, and this clearly is not aided, by any Statute. Yelverton Justice, In this Declaration here there are all the words for an Annuity, and more also for debt, such a vitious Declaration as this is was never seen, (Substraxit) is the word for an Annuity; here in this case upon this Declaration, the Plaintiff cannot have Judgment, as it is an Action of debt, he cannot have Judgment, because, that it appears by his Declaration, that this was in case of an Annuity, neither can he have Judgment as for an Annuty, because that by his Declaration, he demands the same as a debt, and therefore he shall not have his Judgment, the one way nor the other: he ought not here to have declared De annuali redditu, but the same is, De placito quod reddat ei, &c. quas ei injuste detinet, &c. & unde, &c. and so is the form, as it appeareth by the Old Book of entries, as before is remembred, and it is clear, that this word (Substraxit) cannot be in case of debt, but in case of an Annuity. The Court, (for the reasons before alledged) were all clear of opinion that the Plaintiffs Declaration is not good, and therefore the Rule of the Court was, quod querens Nil capiat per billam.

Coke 5. pa. fo. 36. in Walcots case.

Old Book of Entries fo. 151.

Judgment given for the Defendant, &c.

Note, where a Supersedeas quia erronice, &c.

NOte by Williams Justice and the Court, That a Supersedeas quia erronice, shall not be granted, but where there doth appear to be an Error apparent in the very body of the Record, for if the party be taken, and imprisoned upon a Judgment and execution, (whereas he hath paid the mony) he shall not have here a Supersedeas quia erronice, nor no other remedy in Court, but only, an audita querela, and upon promise of enlargment, and not performing of it, an Action upon the case only lieth for this, and no other remedy.

Deane

Dean Plaintiff against *Newby* Defendant.

IN an Action of Debt brought, upon Nil debet pleaded, a Verdict was found for the Plaintiff. It was moved in arrest of Judgment by John Harris, because the Plaintiff doth not shew how this Debt did first grow due. It was adjudged here in this Court, upon this difference, where a man was in Debt to another in 20.l. he came to the party and desired him to forbear this for a certain time, and he would pay the same to him at a day certain by him prefixed, there if he sue him for this 20l. after the day, he needs not to shew how this grew due, for the taking of a day certain to pay the same, this proves the verity and certainty of the duty, that if a man be indebted to another upon a simple contract, and sues for it upon a promise to pay it, be it upon such a promise, or the like, the Plaintiff ought to shew the cause of this, and how the same grew due in his Declaration, and therein to specifie how, and in what manner the same grew due, for in the one case (s) in the latter it was a duty presently, but a day given for payment; but in the other case not so, and therefore he ought there to shew the special cause how the same did grow due, and so is the difference, which was agreed to be so by Henry Yelverton, and by the Court. Quod nota.

Where a Plain. is to shew how a debt sued for, became due, and where not.

Note the difference.

The Daughters of *Thomas Dens* Plaintiffs against the Executors of———*Dens* their Brother Executor of *Thomas Dens* his Father Defendants.

IN a Consultation prayed to the spiritual Court, the case upon the construction of a Will, and the question upon the case was this. Thomas Dens the Father did by his Will devise certain leases which he had of Land, unto Dens his eldest Son, except the sum of 140l. to be paid out of it, for portions for his Daughters, and afterwards makes his eldest Son his executor, and dies, and the Son makes his will, and his executors, and dies before payment of this mony to the Daughters, after his death the Daughters sued his executors in the spiritual Court for this mony as for a Legacy, to them given by their Father, and upon this a Prohibition was prayed and granted, Supposing this to be a Rent, or a Legacy issuing out of Land; and this day the Daughters did move for a Consultation, to have proceedings in the spiritual Court, in as much as this Legacy is not paid unto them, and in regard that no action of account lies against an executor, and so is Littleton pla. 125. & F. N. B. fo. 117. letter C. and so they have no remedy at the Common law, against an executor of an executor; the question here was, whether this shall be said to be a Legacy, the same being for to issue out of Land, or not. Henery Yelverton, this is not issuing out of any Land. Yelverton Justice cited 4. and 5 Ph. and Mar. Dyer. fo. 151. pla. 5. Note, that by the opinion of all the Justices of both Benches, that where a man doth devise by his last Will and Testament in writing, that his executors shall sell his Land, and that one part and portion of the mony his Daughter shall have for her advancement and dies, and his executors sell the Land, but do not perform the Legacies, and so for this the Daughter sueth the executors in Court Christian, a Prohibition well lieth in this case, because it is not a Legacy Testamentary, but issuing out of Land, by reason of the last Will, for the performance of which the Court Christian cannot meddle, but the party may well have an action of—accompt at the common Law, but by

Dens his Will and the Construction of it, &c.

Littleton pla. 25 F. N. B. fo. 117. letter, C.

9 Eliz. Dyer fo. 264. pla. 41. where a man devised his—soccage land to be sold by his executors, and the money had for the same, to be disposed of in Legacies, mentioned in the Will, and one of the Legataries after the probate of the Testament, sued in Court Christian for the Legacy, and a prohibition prayed, it was questioned, whether the Prohibition did lie or not, and there by Catline, Dyer, and Sanders, that the Prohibition did not lie, for that the money was assets in the hands of the executors and no remedy for a Legacy in the Temporal Court. Yelverton Justice, and the Court, such a Legacy is not to be sued for in the Spiritual Court, but by an Action of accompt, at the Common Law against the executors. Henry Yelverton, they cannot have an Action of accompt against the executors. Flemming chief Justice, this here is out of the reason of an accompt, and no remedy here but in the nature of a Legacy, when the money is received. Yelverton Justice, if a man devileth a Lease for years, to his executors, and doth devise, that his executors shall pay so much to his Daughters, in what Court shall they now sue for this, not in the spiritual Court, but here. Curia agreed with him in this. Henry Yelverton, no accompt lies against an executor, of an executor: the Court was moved, what remedy is there to be had for the money, by the Plaintiff, here in this principal case, and where the same being in the nature of a Legacy; the Court was clear of opinion; that they had no remedy at the Common Law for the same. Croke Justice, if it be a Legacy out of Land, there the same doth savour of the realty, and the same may be sued for here; but where it is not out of Land, there it is as a Legacy spiritual, and to be sued for in the spiritual Court, and not here: the Court did grant a Consultation here in this principal case. But the order of the Court, and that upon the prayer of the party Plaintiff, that in the Prohibition was this, for that they would pay the Legacies at Midsomer day next ensuing, and if not, that a Consultation shall be granted. And as for the Costs, the Court referred the same to Mr. Man Secundary, to consider thereof and to tax them. Yelverton Justice against the granting of the Consultation, for that they have their remedy at the Common Law, and to the which they ought for to resort, as their proper remedy. The whole Court against him clearly herein, and so by the Rule of the Court, a Consultation was granted for the Plaintiffs proceedings in the spiritual Court, (in case the monies were not paid them, at the time prefixed) quod nota.

1 Sid. 21, 85, 86.
Hob. 265.
2 Ro. 284, 285.
1 Ro. Rep. 12.
2 Sid. 45, 46, 47.

A consultation granted for the Plaintiff.

Doctor Layfield Plaintiff against *Hellicar*, Defendant.

An Action of Trespass, the Defendant doth justifi, the Plain. demurs.
10 Co. 88.
2 Cr. 317.

IN an Action of Trespass brought, Quare clausum fregit, &c. the Defendant pleads and makes a special justification in this manner, by intitling of himself under the Kings letters patents. To this plea the Plaintiff demurrs in Law, for that he intitles himself by the Kings letters patents, and doth not plead, (as he ought to do) (hic in Curia prolat.) the only question was whether the pleading here be good, or not. John Moor for the Defendant, that the pleading of this justification is good, though he do not plead, (hic in Curia prolat.) Henden for the Defendant, in this case, the Queen made a lease for 40 years, the patentee makes a lease to another for part of it, under which lease, the Defendant here doth claim, and so justifies, he having but a small Term, whether he in his justification and pleading, ought for to shew the principal patent, the which was made to his lessor, and the which belongs not unto him? his justification is good, without——pleading, hic in Curia prolat. Williams Justice for the Patentee, admit the Patentee maks 20 several assignments over, they all of them in pleading, ought to shew the Original patent, if so he that they do justifie under it. Henry Yelverton, he is here but an assignee of parcel. Williams Justice, in 28. H. 8 Dyer. fo. 29. pla. 200. where the difference is put, when the grantee of the King doth grant over all his interest, there the patent belongeth

to

to the Grantee, and therefore he is to shew the Patent, and to plead hic in curia prolat. but otherwise it is when he grants but only parcel of his interest away: the King cannot convey or pass a Lease to another, but by his Letters Patents, and in pleading of it, the place where it was made, and the date thereof ought to be alledged; and also in pleading to say hic in curia prolat. or else the pleading will not be good.

Note the difference where the whole, & where but parcel is granted as to the plea hic in Curia prolat.

Yelverton Justice did agree with him herein, that he is to shew in pleading the place of the date; in this Principal Case by the Rule of the whole Court, Judgment was given for the Plaintiff, for that the Defendants justification here was not good, because he claiming under the Letters Patents, did not plead hic in curia prolat. Williams Justice, And the whole Court clearly, the Defendant ought to have shewed in his justification, the place where the Patent was made; and divers Books there be for to prove this; and also he ought to have pleaded hic in curia prolat. And for this omission, the justification is not good, and so judgment was given by the Court for the Plaintiff.

Judgment given for the Plaint.

Rosse Plaintiff against *Pye* Defendant, entred *Trinit.* 8 *Jac. B. R. Rot.* 22.

IN an Action upon the Case Sur un Assumpsit, upon the Defendants plea the Case appeared to be this, the Defendant for good consideration, did promise for to appear at the next Assises, and to save the Plaintiff harmless there from a Recognisance, the which was entred into by him for his appearance there; in performance of this promise by way of plea, he shews that he procured a Certiorare to remove and certifie the said Recognisance, and that he had delivered this, tali die ad Assisas Edwardo Coke & Davidi Williams then Justices there of Assise; whether this be a good performance of his promise or not, as the same is here pleaded, was the only question. It was argued for the Plaintiff that this plea is not good, being no performance of the promise, 3 Assises fo. 4. b. a man was indicted at the Assises for the stealing of two Horses, this was removed by a Writ of Certiorare into the Chancery, and so in B.R. this was at the suit of one R. the Indictment removed cum omnibus ea tangentibus, and for that the Indictment was not according to the Writ, for this was de uno equo, this is there ruled to be no good removal, neither could he be arraigned, nor received in this manner: here the Recognisance was to have him to appear before the Justices of Assise, the Defendant here did assume that he would there appear and save him harmless, and in performance of this, by way of plea, he saith that he had procured a Certiorare, this no good plea; nor any performance of his promise, and so the Plaintiff hath good cause of Action, and his Action here is well brought. Yelverton Justice, it is a hundred to one that the Certiorare did issue out of this Court, it may issue out of the Chancery, but it is more usual to be here out of this Court; the delivery here of this Certiorare is issuable, and therefore he ought to have in his plea expressed a place where the delivery was for the venire facias, the which he hath not done, and so failing in this, his plea is not good. It was alledged for the Defendant, that as to the place, the same is expressed to be at the Assises, and this is sufficient. Williams, Fenner, & Yelverton Justices, clearly this is not good, but he ought to shew the place in certain, where the delivery of the Certiorare was for the venue, and this is a plain case, and there is no help for it, he having not here in his plea mentioned the place, for the Assises vary in the place of holding the same. Williams Justice, He ought also to have shewed in his plea, that this Certiorare was delivered at the then next Assises for that the Assises may be adjourned. Flemming chief Justice, He ought clearly in his plea to have laid a place specially, and certainly, for that this is matter in fact, and issuable; and notwithstanding, by the delivery of the Certiorare,

An Action on the case for a promise the case upon the Defendants plea. 2 Cr. 281. Yelverton 207.

their hands are staied, yet a place certain ought to be laid, and this on necessity ought so for to be in all cases, where the place is issuable. The Court were clear of opinion, that notwithstanding this Certiorare doth shut, and foreclose the hands of the Justices of Assises, yet they might very well have entred there his appearance. The Court were clear of opinion that in this plea, he ought to have expressed that this was the next Assises; and although this appears to the Court, to be the next Assises, yet he ought in his plea to have shewed this specially to the Court, for that the Assises might be adjourned to another place; and therefore the whole Court agreed in this that his Allegation in his plea that he delivered the Certiorare at the Assises, is not good, but that he ought to shew the place certain where the delivery of the Certiorare was, this being issuable, and as Flemming chief Justice observed, the places for the holding of the Assises are not certain, but oftentimes changed, at the pleasure of the Judges; and so by the opinion of the Court, the Defendants plea here is not good, and therefore by the Rule of the Court, Judgment was entred for the Plaintiff.

Judgment given by the Court for the Plain.

Briscoe Plaintiff against *Knight* Defendant, entred *Pasch.* 8 *Jac. B. R. Rott.* 271.

An Action of Debt upon a Bond for performance of Covenants. Yelverton 206. 2 Cr. 281. 1 Brnl. 113.

IN an Action of Debt upon a Bond, for not performing of Covenants, upon the Defendants plea, and the Plaintiffs breach assigned, the case appeared to be this; the Defendant for a sum of mony borrowed of the Plaintiff, did Mortgage his Land unto him by a deed Poll, and for better and further assurance divers Covenants by deed were made betwen them, that the Plaintiff should enjoy the Land quietly and free from all Incumbrances, and in the end of the deed of Covenants there was this Proviso, that if the Defendant should pay 80 l. unto J. S. which was owing to him by the Mortgagee, that then it should be lawful for the Defendant to enter into his Land, and to have the same again; and afterwards the Defendant did enter into a Bond to the Plaintiff, conditioned for the performance of all the Articles, Payments, Covenants, and Agreements betwen them; the Defendant doth not pay the 80 l. to J. S. upon this the the Plaintiff brings an Action of Debt against the Defendant for non-performance of the Covenants, he supposing this Non-payment of the 80 l. to J. S. (which was specified in the Proviso to be paid,) to be a breach of Covenants, and that this should be parcel of the Covenant. The Court was clear of opinion, that this Proviso is no part of the Covenant. Flemming chief Justice, It is by this Proviso provided, that if he pay the 80 l. that then he shall re-enter; this payment is not within the Covenant, and penalty of the Bond entred into for performance of Covenants, for he may choose here, whether he will pay this or not, for if he doth pay it, he may then re-enter upon the Plaintiff, and have his Land again, and then the Plaintiff was not to enjoy the Land by his Feoffment without disturbance, as he ought to do by the not paying of this 80 l. but the Covenant for quiet enjoyment of the same, is not broken by this Non-payment, for he is not compellable to make this payment, but this is a thing conditional (s) to be done, or not by him; if he pays it, then to reenter; if not, then the Plaintiff to enjoy the Land according to the Covenants; and according unto this, was the opinion of the whole Court clearly, that the Defendant may perform the Covenants here, without payment of this 80 l. and that the Non-payment of this is no breach of Covenant, and so the Plaintiff for this Non-payment, had no cause of Action upon his Bond against the Defendant, and therefore the Rule of the Court was, quod querens nil capiat per billam.

Judgment given by the Court for the Defendant. quod querens nil capiat per billam.

Sampson

Sampson Plaintiff against *Cranfield* and *Upton* Defendants.

IN an Action of Trespass for an Assault and Battery, ad damnum of the Plaintiff, the Defendants plead Non culp. a verdict found for the Plaintiff against both the Defendants, and the Jury assess several damages to the Plaintiff (g) so much against the one, and so much against the other severally, and costs to the Plaintiff entirely against them both. Richardson for the Defendants moved in arrest of Judgment; for that they being joyntly sued, the Jury have given against them several damages, whereas the same ought to have been joynt and entire against them both. The whole Court clear of opinion against him herein, that the Battery is several, and so the damages ought to be; and therefore the Jury have done well in this, in giving to the Plaintiff several damages against the Defendants; but costs entire are to be given to the Plaintiff against both the Defendants, and the reason why the damages are in this case to be several, because that the Battery of the one, cannot be the Battery of the other; and that the Battery of the one may be greater than the Battery of the other, but otherwise it is in Trespass for cutting down of Trees, for that this is a joynt act, and the damages are to be entire: but otherwise it is in this principal case of Battery against two, the Jury have done well in giving of several damages, & that for the reason before, because the one Battery may be greater than the other. Williams Justice, It is a very clear and plain case, that the Jury here have done well in their verdict, in giving to the Plaintiff several damages against the Defendants, but costs entire; see to this purpose, touching the verdict of the Jury, and Judgment according to the same 1 R. 3. fo. 1. b. 2. 3. 4. and so in this principal case, by the Rule of the Court, Judgment was given for the Plaintiff.

Action of Trespass for an assault and Battery against 2. verdicts for the Plaintiff, several damages.
2 Cr. 118. 351. 384. 11 Co. 56. 1 Cr. 860. 3 Cr. 54. 192.

Durand Plaintiff against *Child* Defendant, entred *Hill.* 8 *Jac. B. R. Rot.* 687.

IN an Action of Trespass, Quare clausum fregit; upon the Defendants Plea and justification, the case appeared to be this, the Defendant had a Close adjoyning to the High-way, being the waste (as was supposed) of the Plaintiff, Lord of the Manor, the Cattel of the Defendant coming out of his Close, did casually stray into the High-way, and for this Trespass by them done in the High-way, or waste of the Lord, was the Action brought by the Plaintiff as Lord; all which so appeared unto the Court upon the pleading. Croke Justice, If the Cattel of the Defendant stay there any time, and feed upon the Pasture, there the Plaintiff being Lord may have an Action of Trespass. Williams Justice, If my Cattel go into the High-way, who shall punish them, or me for them? None. He said to the Plaintiffs Councel, you may argue this as long as you will, ad Calendas græcas, but clearly this Action of Trespass here brought will not lie, and the Plaintiff was much blamed by the Court for bringing of this Action. Fenner Justice, The Cattel ought to feed in the High-way, but was against the Action of Trespass; the place where the Cattel were, appeared to be alta via regia, and so the stronger against the Plaintiff. Yelverton Justice and the whole Court disliked much of the Action, and were of opinion against the Plaintiff, but the matter in difference, between the parties, being upon Comprimise, the Court delivered no Judgment therein.

Ended by Comprimise.
2 Cr. 337. Yelverton 217. 1 Br. 221.

An Action of Trespass by the Plaintiff as Lord for a Trespass in his waste, by the Defendants Cattel.

The

The Earl of *Northumberland* Plaintiff against *Wheeler* and others Defendants, entred *Hill. 7 Jac. B. R. Rott.* 1133.

A trover and Conversion against a Copiholder for life, for cutting down Timber Trees.

Lutteral and Woods case, in the C. B.

Ante 50 51. 52.

IN an Action upon the case, for a Trover and conversion of certain Timber Trees, the case and question was, as touching the power of a Copiholder for life, for the cutting down of Timber Trees, and whether such a Copiholder may prescribe by the Law for to cut down Timber Trees, growing upon his Copihold Land, or not. Noy for the Plaintiff, that he cannot. Williams Justice, Such a Copiholder for life cannot prescribe for to cut down Timber Trees growing upon his Copihold Land, and to this purpose, in Lutteral and Woods case, in the C.B. it was adjudged in point, that a Copiholder for life, cannot prescribe to cut down Timber Trees—but by way of usage he may for reparations; and as touching usage,—and custom, it appeareth in 21 E. 4. fo. 28. b. that usage and custom to turn their Plow, upon the headland, not sowed with Corn, is good; but there it is said by Littleton, that a prescription against reason is not good, as if a custom be alledged, that none shall put his Cattel into his Land before the Lord do put his Cattel in, this is held to be a void custom, because it is against reason, for if the Lord will never put in his Cattel, the Tenants by this shall lose the profit of their Soil; but otherwise it is, where a day is limited; and to this purpose is 22 E. 4. fo. 8. a. b. pla. 24. and that a prescription which is against reason is void, and shall not be allowed by Law, see for this Littleton, fo. 46. pla. 209. & pla. 212. & 5 H. 7. fo. 9. b. & 10. a. In this principal case here the clear opinion of the Court was, that this prescription here for a Copiholder for life to cut down Timber Trees, is a prescription against reason, and so void in Law; and so was the opinion of the whole Court, but no Judgment was then given.

A Prescription against reason is void.

John Strong Plaintiff against ———

A Procedendo to the Court of requests.

Strongs case.

IN a Prohibition to stay proceedings in the Court of Requests, the case appeared to be this, a Bond entred into for payment of mony, upon the payment of which mony the Testator did promise for to deliver up the Bond to be cancelled; the mony was paid, but the Bond not delivered up; the Testator dies, afterwards the Obligor commenced suit in the Court of Requests, against the Executor, for relief in equity, and to have the Bond delivered up, the executor suggests, that he knows nothing of the payment of the mony, being no ways privy thereunto, and so prays a Prohibition, this being most proper for a Trial at Law; the other prayed a Procedendo, for that he had no remedy to be relieved at the Common Law, in regard that this promise made by the Testator, for to deliver up the Bond, is such a personal Assumpsit as that the same moritur cum persona, and therefore by the Rule of the Court a Procedendo was granted, there being just cause for him in this case to proceed in the Court of Requests, and there to be relieved. Note, in this case, by Williams Justice, Upon a simple contract made by the Testator, An Action of Debt lieth clearly against the Executor, and so it hath been before adjudged here in this Court; and so it is also if the Testator do promise to pay mony upon a good Consideration, and dies before payment, an Action upon the case lieth clearly against his Executor upon this promise, for payment of the mony, and in this the Court all agreed.

Debt against an executor upon a simple contract of the Testator.

An Action upon the case against an Executor for a promise by the Testator.

Note,

NOte that one was presented ex Officio, in the Ecclesiastial Court, for the not frequenting of his Parish Church; he there pleads, that this was not his Parish Church, but that he had used for to frequent another Parish Church, and to resort unto this, and because they in the spiritual Court would not receive his plea, the Court was moved for a Prohibition, for that by the Law, in the time of King H. 3 E. 3. & E. 4. they in the Ecclesiastial Court had not any power to intermeddle with the precinct of Parish Churches, neither are they there to judge, what shall be said to be a mans Parish Church, and so was the opinion of the whole Court, and therefore by the Rule of the Court a Prohibition was granted.

A presentment ex officio for not frequenting his Parish Church.

A prohibition granted by the Court to the Ecclesiastical Court.

Herne Plaintiff against *Lilborne* Defendant.

IN a Writ of Error for to reverse a Judgment given at Durham in a Writ of right there brought. Davenport for the Plaintiff in the Writ of Error, that the Judgment is Erroneous, and ought to be reversed, 27 February. 6 Jac. was the Test of the Writ—Licet solenniter exactus fuit, non venit, sed defaltum fecit, at the day of the appearance. As to the Errors, several imparlances there were, at four Terms, at the last day the party did not appear, and upon this default of appearance, a Judgment final was there given, the which Judgment is Erroneous: The first Error insisted upon was (the entry being) Quia dominus Episcopus Dunel. nobis remisit curiam suam, & after this no further proceedings in the suit ought to have been there —— but in Banco, and for this cause, the Judgment there given, est in hoc Erroneous, for when he doth remittere Curiam suam domino Regi, this suit is then to be removed by a Tolt, and this so appears in Fitz. Nat. bre. fo. 2 F. & fo. 3 F. & fo. 4. A. B. and with this agrees the Register. fo. 4. A. quia dominus remisit Curiam suam Regi, and there the form is expressed and set down excellentissimo Principi domino Henrico octavo, &c. and with this agrees the Old Book of entries fo. 246. where the letters of the Lord for remitting of his Court, are set down. The second Error, the Writ of right is here brought, the demandant comes, the Tenant imparles till an other Term, and so from one Term to an other, and then at the last day, Licet solenniter exactus non venit, &c. and upon this, Consideratum fuit per Curiam, that a final Judgment should be given, (s) quod recuperet per defaltum, this assigned for Error, that Judgment final ought not to have been given, according to Penryns case, Coke. 5. pa. fo. 86. a. where it is Resolved, that if the Tenant after the mise joyned makes default, Judgment final upon this default shall not be given, but a petit Cape, for that peradventure he may save his default, by Fitz. Nat. bre. fo. 6. A. upon default after the mise joyned the Judgment shall be final as well against the demandant by his Non suit, as against the Tenant, if he make default, after the mise joyned, and so is the Book of 35 H. 8 Dyer. fo. 56. pla. 17. & 1 Mary Dyer. fo. 103. pla. 8. that in such a case Judgment final shall be given against an infant, and so the difference is put in Fitz. Nat. bre. fo. 5 N. & fo. 6. A. where the default is before, and where after the mise is joyned; and as before it appears in Penryns case, that after the mise joyned upon a default, no Judgment final shall be given without a petit Cape before, & that upon the former reason given in 26 H. 8. fo. 8. it appears there by Fitzherbert, that in a Writ of right Judgment final shall not be given, till after the mise joyned, and there it is held, that if in a Writ of right, the Tenant doth vouch, and recovers in value, a Judgment final shall not be given for the Tenant against the vouchee, and so is 10 H. 6. fo. 2. that a Judgment final shall be given for the demandant, against the vouchee to hold quit; but for the Tenant a common Judgment en value against the vouchee, and not a final Judgment, and where a Judgment final shall be, and where not upon default of the Tenant after the mise joyned upon the meer right, but a petit Cape, vide 12 H. 7. fo. 10. & 12. E. 4. fo.

A Writ of Error to reverse a judgment, &c. Yelverton 211. 2 Cr. 292.

1.

F. N. B. fo. 2. F. fo. 3. F. f. 4. A. B. Register fo. 4. a. Old Book of Entries fo. 246.

2.

Penryns case 10 H. 6. fo. 2. Note the difference. 12 H. 7. fo. 10. 12 E. 4. fo. 21.

fo. 20. 21. en Taltarums case, by Fairefax, and in the Old Book of entries fo. 244. 246. and 247. and 1 Mary Dyer. fo. 98. pla. 51. and fo. 103. pla. 8. The Lord Windsors case. Walter for the Plaintiff, in the Writ of Error, that the Judgment given at Durham is Erroneous, and ought to be reversed; there is not a more usual course, than in such a case to have a petit cape, for if he be imprisoned, he hath good cause to save his default, by shewing of this; before the Statute of 27 H. 8. cap. 2. the Bishop of Durham was as a King, and might pardon all matters, and that he had Jura regalia; the Statute of 27 H. 8. did take away part of it; every Franchise and liberty hath his esse and commencement from the Crown; the King (notwithstanding this) hath power and Justice also remaining in him, for to do right and Justice, and this is tacita exceptio, in all grants of liberties by the King, and that this right may be done by his Judges. Treasons, Felonies, and Murders pardoned, per Episcopum, he hath his Judges, and they have their fees from him; and in Writs of Trespass, the Writ is of Trespass done contra pacem Episcopi, all this was so before the Statute of 27 H. 8. 24. so that now the Bishop cannot remittere curiam but unto the Kings Court, to be there tried, since the said Statute, and there is no Book in the Law, adjudged in point, that a Judgment final should be given, as in this case, the same was, for that after a Judgment final given, there is no remedy for to be had, and so the Judgment thus there given, is for this cause Erroneous and so ought to be reversed. Geor. Croke for the Defendant, that the Judgment was well given, and so to be affirmed, there being no sufficient Error assigned for to reverse the same. As
1. to the first Error assigned, the same being, because the Writ of Error was brought here and is Quia dominus nobis remisit Curiam suam, and therefore it hath been urged, that the suit ought to have been in the Court of C. B. and not there where it was, and therefore the Judgment there given, was for this cause Erroneous. Quia Episcopus remisit Curiam suam Regi; as to this it doth appear by the Book of 9 H. 7. 12. fo. b. that a recovery in the Court of C. B. of Land in Durham, is void, quia breve Domini Regis doth not run there: in 1 E. 4. fo. 10. it is there held by all the Justices, that if one be surety for another, to keep the Peace, and he breaks the Peace, and hath Lands in Durham, that in this case the King shall send to the Bishop of Durham, or to his Chancellour for to do execution; and when it is said, dominus remisit Curiam suam by Fitz. N. B. this is to be understood of the present Lord, but where the Land lieth in Durham, this is no cause for removal of the same, and by the Law, it cannot be, and this is the usual form, as appeareth by all the presidents. As to the second Error assigned,
2. being the matter of the greatest difficulty, and this is upon the final Judgment there given whether this ought to have been so done or not; where issue is joyned, and a Default, no final Judgment shall be given, without a petit cape. It appears by Trin. 12 E. 2 Fitz. tit. Judgment, placito. 234. & 235. that a petit cape is to be awarded before a final Judgment shall be given, upon a default, after the mise joyned, and so is Penryns case Coke 5. pa. fo. 85. & 86. that after the mise joyned and at the Nisi prius, the Tenant maks default, no Judgment final shall be given but a petit cape to be awarded, but this doth differ from the case here now in question, which is not so, but here it is upon an Imparlance, and a default, and so upon this default, a general Judgment is to be given, quod recuperet seisinam, & erit quietus, being a default after Imparlance, as here in this case a Judgment final ought to be given, and so the Judgment here well given, and where the default is, in contempt of the Court, there a Judgment final shall be given. 28 H. 8. Dyer. fo. 24. placito 152. and Mich. 19 E. 2. Fitz. title. Judgment, placito 239. as touching this, where the Tenant appears and Imparles, at the Nisi prius, the Tenant appears, and doth challenge the Enquest, after the Enquest charged, and returned to give up their Verdict, the Tenant departs in despite of the Court, and his default Recorded, at the day in Bank, seisin of the Land was here awarded, without any petit cape, because that his presence was Recorded, and afterwards he departed in despite of the Court, and so a Judgment final was here given, upon this default, without

Taltarums case Old Book of entries fo. 244. 246. 247. 1 Mary Dyer fo. 98. pla. 51. & fo. 103. pla. 8. the Lord Windsors case.

Trin. 12 E. 2. Fitz. tit. Judgment pla. 234. 235. Coke. 5. pa. fo. 85. 86. Penryns case.

Mich. 19. E. 2 Fitz. Judgment. Pla. 238.

without awarding of any petit cape. In 7 H. 4. fo. 19. A.B. if the Tenant makes default after Imparlance, and before any plea pleaded, this is in the nature of a departure in despite of the Court, and a Judgment final shall be here given, because he doth mock and abuse the Court. Hill. 13 H. 4. Fitz. title Judgment, placito 245. If the Tenant comes in and confesseth the Action in a Writ of Right, a Judgment final shall not be given, but a general Judgment, quod recuperet seisinam, and this shall be no bar: But it is there said, that if he do Imparle unto a day, and after makes default, there a Judgment final shall be given; and with this agrees 12 E. 4. fo. 21. But it hath been said that the difference is, if he Imparles to another day in another Term, and where it is in the same Term, according to 12 H. 7. fo. 10. and 12 E. 4. fo. 21. this is there in 12 H. 7. but the opinion of Vavisour, but by 10 H. 6. fo. 2. and by Hillar. 33 E. 3. Fitz. tit. Judgment, pla. 252. & 1 Mar. Dyer fo. 98. & fo. 103. that when the Tenant hath taken a day by imparlance, and makes default, there a Judgment final shall be given, and there are the Books for to prove this, (s) 38 H. 6. fo. 33. If the Tenant in a Writ of Right, after imparlance, makes default, the Judgment shall be final in a real Action, and in a Writ of right 39 H. 6. fo. 16. touching this, and more direct in point, if in a Writ of Right, the Tenant makes default before any plea pleaded, and after imparlance, the difference there taken where the Judgment shall be quod recuperet seisinam, and where not. In this case here, six several imparlances have been, and at the sixth he makes default. It was ruled in the Court of C.B. that if the Tenant do imparle, and this unto a day in another Term, or be it in the same Term, and at the day he doth not plead, but makes default, no difference there is, but in both these cases a Judgment final shall be given, and so this Judgment was well given, and is not erroneous, but ought to be affirmed.——Latten for the Defendant, that the Judgment ought to be affirmed, and that this final Judgment here in this principal case was well given, it appeareth by 3 H. 6. fo. 55. in a Writ of Right, Judgment final given upon the default of the Tenant by Babington in case of fee-simpe land, such a Judgment upon the default of the Tenant, shall be given against the land, and shall be as if it had been tried by the great Assise, and so is 13 H. 4. fo. 8. Fitz. title Judgment, pla. 228. If the Tenant in a Writ of Right, after the mise joyned, makes default, the Demandant shall have a Judgment final to recover seisin of the land without any petit cape, and this is contrary unto Penryns case, Coke 5 part, fo. 86. But against this it was urged for the Plaintiff, in the Writ of Error, by Walter, that a Judgment final is not to be given before that the Court doth see the final right of the parties: This here is a Writ of Right, and the right cannot be seen as yet upon the default, and therefore a Judgment final is not to be given. For the contempt of the Defendant, a Judgment final shall be given, and that for his contumacy (as the Civilians say) but this ought so to be, when it is in the same Term; he contemns the Court, and therefore the Court doth also contemn him. But the difference will be, where the same is in real Actions, and where in a Writ of Right: Where the same suit is in real Actions, there the party may have his remedy, and where he may have his remedy, there upon his default a Judgment final may be given; but where he can have no other remedy, there no Judgment final shall be given; the difference also will be where the imparlance is, in a real Action, and where in a Writ of Right; & where the same is at a day certain in the same Term, and where the same is to no day certain. In this case a final Judgment ought not to have been given, and so for this cause the Judgment is erroneous, and ought to be reversed—Williams Just. At the day of Appearance the Tenant did not appear, but made default, and upon this default a Judgment final was given, this Judgment is clearly erroneous, for that before the Judgment final had been given, there ought first to have been awarded a petit cape, and for this omission the Judgment is clearly erroneous; and in this the Court did agree in opinion with him: But by the whole Court, if after the mise joyned upon the meer right, the Tenant makes default, and a judgment final is given upon this default, without any petit cape, that

7 H. 4. fo. 19.

12 E. 4. fo. 21.

Coke 5 part, fo. 86. Penryns case.

Note the difference.

such a Judgment final is well given, (contrary to the Resolution in Penryns case) Coke 5 part, fo. 86. A. Williams Justice, The Writ here is not good, but erroneous. for that herein the Statute of 32 H. 8. cap. 2. for the Limitations of Writs of Right, and within what time they are to be brought, where the same is grounded upon the Seisin, or Possession of his Ancestor or Predecessor, and where upon his own Seisin or Possession, is not here duly observed, for that the same being brought upon your own Seisin, you ought to have declared infra trigint. annos jam ultimo elapsos, and so the Statute sets it certainly down, that you are not to declare upon your own Seisin in a Writ of Right, but in the same manner as the Statute prescribes, that is, to declare upon a Seisin infra tringit. annos ultimo elapsos; but where it is of the Seisin of the Ancestor, there to declare upon a Seisin infra sexagint. annos ultimo elapsos, and this being not so observed by him, is an Error unanswerable, and this is so adjudged in point, Coke 4 part, fo. 12. in Bevils Case, That in a Writ of Wright brought upon a mans own Seisin, he ought for to declare upon a Seisin infra trigint. annos ultimo elapsos; and so was it adjudged in my time in the Court of C.B. and this is so touched in Bevils case, and because he hath not so done here in this case, this is clearly Error. Flemming chief Justice, Yelverton and Croke Justices, did all of them agree with Williams Justice herein; and that the Statute of 32 H 8. cap. 2. is to the same effect, as hath been observed—— And so the whole Court seemed to be all of them clear of opinion, that the Judgment so given at Durham was erroneous; but the Reversal of the Judgment was not pronounced, the Opinion of the Court being declared, the Parties ended the same between themselves, without further moving of the Court herein.

Coke part 5. fo. 86. Penryns case.

Coke part 4. fo. 12. in Bevils case.

The Judgment erronious, &c.

William Heywood Plaintiff against *Samuel Smith* Defendant, Entred *Mich. 7 Jac. B. R. Rot.* 131.

An Action of Trespass and Ejectment &c.

IN an Action of Trespass and Ejectment, upon Non culp. pleaded, a special Verdict was found, and upon the Verdict the case appeared to be this: Tenant in tail, the remainder in tail, the remainder to the right heirs of Tenant in tail, Tenant in tail bargains and sells the land, and after levies a fine to the Bargainee with proclamations with warranty, and dyes, the Bargainee makes a feoffment over, this warranty descends upon the remainder man, and whether this warranty shall bar him, was the question: See the case at large upon the special Verdict, Coke 10 part, fo. 95. & 96. Edward Seymors case. Croke Justice, That Judgment ought to be given in this case for the Defendant. First, It is here to be considered what is wrought by this fine here, and whether there be any Discontinuance in this case, and this is the great knot of the case. First, If there be any Discontinuance here, as to this, the fine here doth not work any Discontinuance, and that for this reason; when Tenant in tail makes a bargain and sale, and the Deed is inrolled, by this all the estate which he lawfully had in him shall be by this devested out of him, but no more, and until Inrollment, nothing doth pass; six months passed before the Inrollment, hitherto no Discontinuance; the Bargainee by force of this enters, and was thereof seised; then comes the fine, which is no more but a feoffment of record, this fine is but a release of his right and warranty: If the Tenant in tail makes a lease for years, and afterwards grants here the reversion by fine, this is a Discontinuance, for he hath the freehold; but if he make a lease for life, and after grants the reversion by fine, this is no Discontinuance, unless executed. See for this Littleton in his Chapter of Discontinuance, fo. 138. placito 609. & fo. 139. 2. As to the warranty, what is here wrought by the same, being fallen upon the heir in tail, as to this,

I.

this, a warranty doth always follow the estate unto which it is annexed, and if the estate to which the warranty is annexed be determined, the warranty also shall be gone and be determined, as appears by Littleton in his Chapter of Warranty, fo. 168. pla. 738. & 739. And therefore if a Lease for life be made to one, with warranty to him and his heirs, if he be vouched by reason of this warranty, he shall only recover according to his estate for life, for where the estate is determined to which the warranty is annexed, if this estate be determined, the warranty is gone, and at an end; so here in this case, the warranty was knit unto a base fee-simple—quamdiu, and this determines the warranty, and with the determination of the estate unto which the warranty is determined, the same is gone and of no force. 3. As to the fine, so called quia finem litibus imponit, this is the most ancient and strongest assurance in the Law next unto a Recovery in a Writ of Right, this shall be a bar to the heirs of that estate, a collateral warranty shall bind the right, but gives no estate: If a Lease for life be made, the remainder for life, a collateral warranty is annexed unto the estate for life, this shall be determined with the same estate, and shall have no longer continuance, so that here in this case there is no discontinuance, and the collateral warranty here is no bar, because the estate to which the same is annexed is determined, and therefore in this case Judgment ought to be given for the Defendant. Williams Justice, The question here is, whether there be any Discontinuance by this bargain and sale, and the fine upon it with warranty; this is the great and sole question; the entry here of the Defendant is lawful, and Judgment ought to be given for him. It is first to be considered in this case, quid operatur by the bargain and sale, cesty que use cannot grant all his estate at the common Law, by the Statute of 27 H. 8. cap. 10. of Uses, Cesty que use in tail bargains and sells, and levies a fine also, nothing doth pass by this, but what he could lawfully pass, this is a sure rule at the common Law, and so is Littleton in his Chapter of Discontinuance fo. 136. pla. 598. & 600. & fo. 137. placito 608. that nothing doth pass by the grant, release, or confirmation of Tenant in tail, but that which he might rightfully pass without hurt or damage to other persons, having right after his decease, and there is no Authority in Law against this, and the Statute doth not give him any Authority for to do wrong, but he may grant his own estate which is for his own life, and so is Littleton placito 608. As to the bargain and sale here, be it by Tenant in tail, or by Tenant in fee-simple, nothing doth pass by the Statute of 27 H. 8. cap. 16. of Inrollments before the Deed be inrolled, within six months, or nothing at all shall pass thereby; but when the Inrollment comes in due time, it shall then, by way of Relation, be said to be in the bargainee from the beginning. The Act of Parliament gives no power or authority to the Tenant in tail to do any wrong or prejudice to his Issue; and therefore if Tenant in tail do bargain and sell his land intailed, and before Inrollment of the Deed, he levies a fine, this shall work a Discontinuance, because he takes here by the fine. Rents and Commons at the common Law, the Law did not create them, but they were created by the wit of man, and this bargain and sale may fitly be compared to Rents and Commons: The Rule of Law is Quæ perspicue vera sunt, non egent probatione: If Tenant in tail be of a Rent to him and to the heirs of his body, the wife is endowable of this. The fine here in this case was levied after the bargain and sale was perfected; it is now to be considered, Quid operatur by this fine: As to this, nothing is wrought by it, the same being only a Corroboration and a Confirmation of the bargain and sale, and to no other purpose shall this fine enure: And as to the warranty, the same here shall be in the nature of a releas, but if no estate had been precedent, then he should have taken by the fine, for that this is a feoffment of Record; but where there is an estate precedent, there the fine doth operate no further than as a Confirmation and Corroboration of the same estate; but where there is no precedent estate, then the fine makes a Discontinuance, but not otherwise. If a fine be levied unto two, and to the heirs of one of them, they have an estate in Common; a fine is to operate according to the estate. As to the warranty here, this shall

Littleton fo. 168. pla. 738. 739.

3.

1.

Littleton Discontinuance fo. 136. pla. 598. & 600. fo. 137. pl. 608.

2.

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shall have no greater force than the fine, this shall not be extended any further, but be guided by the Estate to which it is tyed, and the Estate by this shall never be inlarged, for a warranty shall never inlarge an Estate, but may strengthen the same; if one comes in by way of escheat, there he shall not have the benefit of a warranty, because he is in by title; but if he come in by way of estate, there he shall have benefit of the warranty, because that so this warranty doth run with the estate; and so if one comes in in the per, or in the post, he shall have benefit of the warranty. In 39 El. in the C.B. in a case betwæn Jennings and Jennings, where Tenant in tail made a Lease for thræ lives with warranty, according to the Statute of 32 H.8. cap. 28. the remainder to his brother in tail, the benefit of this warranty shall come unto the brother, as it was there ruled, and then this warranty shall make no Discontinuance, neither shall the Act of Parliament do wrong unto any one. If tenant in tail makes a Lease for life, and an Ancestor collateral releases to him with warranty, this shall work no Discontinuance, for that this collateral warranty here shall go no further than the estate to which it is tyed: Here in this principal case nothing doth pass by the bargain and sale but a base fee-simple, and here is no Discontinuance in this case; the Defendant here claims under a good title, and so Judgment ought to be given for him. Yelverton Justice accordingly, that Judgment ought to be given for the Defendant. In this case it is first to be considered, what estate doth here pass unto the barganæ. 2. Quid operatur by the fine. And 3. Quid operatur by the warranty. As to the two first Questions, they are in some clearness, but all the question and difficulty is in the last. As to the first, (s) the bargain and sale, this makes no Discontinuance; and this is very clear and plain also: The fine subsequent shall work no Discontinuance, for that is levied upon the same possession which the bargainæ had; and a fine which operates upon the possession, shall not alter the possession upon which it works, and this is a sure ground in law. It cannot operate by way of estoppel, and so is 6 R. 2. Fitz. title Estoppel, placito 211. And although there are words contrary in the fine, yet the same shall enure upon the estate precedent, and not otherwise; here in this case the fine shall enure as a release and confirmation, because it enures upon the estate precedent. In the next place, as to the warranty, the remainder here continues in the same estate as it was, and this fine here is no barr to the heir in remainder, the remainder continuing in him to whom it was limited. If a man makes a Lease for life to one, the remainder over in fee, Tenant for life grants his estate to another, to whom an Ancestor collateral of him in remainder doth release with warranty, this release doth not inlarge the estate of him to whom the release was made, because the reversion did continue as before, as appears by 33 E. 3. Fitz. title Release, placito 42. 41 E. 3. Fitz. title Garranty, placito 15. 45 E. 3. fo. 21. b. and 1 H. 5. fo. 1. But otherwise it is, if the Tenant for life had bæn disseised, and then an Ancestor collateral had released to the disseisor with warranty, this shall bind, because that the estate for life, and the reversion also, was devested by the disseisin at the time of the release with warranty, as appears by 21 H. 7. fo. 11. a. For the rule of the Law is, that where the remainder is removed and displaced at the time of the warranty annexed, and before the warranty doth descend, there is no Discontinuance by this, where the same estate doth continue without alteration; but where this is removed, notwithstanding the particular estate be regained, yet by this there shall be a Discontinuance; but where there is no alteration of the estate, there can be no Discontinuance. A second Reason that this is no Discontinuance, because that he is in of an other estate than that unto which the warranty was annexed, and therefore the same can work no Discontinuance, neither shall he have any benefit of the warranty; and this appeareth by the 22th Book of Assises, placito 37. that a man shall not have any benefit of the warranty if he be not in under the same estate to which the warranty was annexed; and where an estate is made with warranty, if once defeated, the same is gone, as appears by Littleton in his Chapter of Garranty, fo. 169. pl. 741. Also a warranty shall never inlarge an estate, but the same is always to go with the estate,

39 Eliz. C. B. Jennings against Jennings.

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33 E. 3. Fitz. title Release, pla. 42. 41 E. 3. Fitz. title Garranty, pla. 15. 45 E. 3. fo. 21. & 1 H. 5. fo. 1.

22 Assises pla 37.

Littleton Chap of Garranty, fo. 169. pl. 741.

state and shall be according to the estate to which it is annexed, and shall determine with the same, and so is 2 H. 4. fo. 13. The difference will be, where the warranty is confined to an estate, and where not, but is of a higher nature; where it is confined to an estate, the same shall not go any further than the estate to which it is confined, and so is 46 E. 3. fo. 4. placito 11. If a man makes a feoffment in fee to one and his heirs with warranty, the second feoffee shall take benefit of this warranty; but where a Lease for life only is made with warranty to him and his heirs, the assignee shall have no benefit of this warranty, for the reason before expressed. As to the other matter moved, whether this warranty here in this case shall be a bar or not, for to bar the remainder man, the special Verdict ought to have found this upon the Book of 7 H. 5. fo. 6. that a Jury by their Verdict at large, shall not find a collateral warranty; here the warranty is not pleaded, and so therefore the Jury cannot find it; and upon the whole matter concluded that Judgment ought to be given for the Defendant. Fenner Justice accordant, that Judgment in this case ought to be given for the Defendant; here in the Devise it is not found that the Land was Socage Land, and where a man will convey fee-simple Land according to the Statute of 32 H. 8. cap. 28. he ought specially for to shew this; Agreed in all other points with the rest of the Judges, and concluded that Judgment ought to be given for the Defendant. Yelverton Justice, In answer to that which was alledged by Fenner Justice, because it is not shewed to be Socage Land, this need not so to be in this case, for that this was a house in London, and so the same well devisable by the common Law and Custom. Flemming chief Justice, Here he was seised of this house in London, which was devisable by the custom, and this being in London, shall well pass by devise by the custom without the aid of the said Statute; but otherwise it is, if it were in another place, and not in London, but being in London, and held in capite, it shall pass by devise by the custom, without finding of this to be according to the Statute of 32 H. 8. cap. 28. for Devises. The first point here considerable is, whether the entry of Thomas Cheney the heir of the remainder man, be lawful or not: It is clear that there is nothing but the warranty to take away his entry, and if this doth not take it away, then is his entry lawful; if no warranty were in the case, then clearly, and without any question, his entry had been lawful. As to the bargain and sale here made by Tenant in tail, clearly this is no Discontinuance, for that Tenant in tail by grant, and without livery, can never make a Discontinuance, for this bargain and sale here doth not carry a more ample and large estate, but such as the Tenant in tail hath in him to pass, and this is but during his life; but this is so far, and in such manner out of him, as that he cannot punish, or controul the bargainee by any Action of waste, as appears by Littleton, title Discontinuance, placito 650. The Heir of the Bargainee shall have a base fee descendible, and such a fee, of which his wife shall be endowed, and dowable, not against the Issue in tail, but against the heir of the bargainee the wife of the bargainee shall be dowable. So that this is clear, that by this bargain and sale no discontinuance is wrought thereby. The next matter to be here considered, is touching this fine, and to see Quid operatur by this fine, and whether by this fine the remainder of John Cheney be drawn out of him, and so turned into a right or not; as to this, the same is not turned into a right, but if they all do dye, notwithstanding any thing which hath been done, this shall descend unto him in possession. In the next place, as to the warranty, and Quid operatur by this, the nature of this is, to bind the possession of him, or of them, from whom this doth come, but not to bind those which have the possession; the possession of others it shall not bind, but the right only (if he have a right) and so clearly, notwithstanding all this, there is no Discontinuance in the case. This fine here doth bar the intail, and all the issues of his body, but it doth not bar others; if there be issues and assets, there the fine will be a bar as to the warranty. If Tenant in tail makes a bargain and sale, and afterwards enters upon the bargainee, and makes a Feoffment to another, and dyes, this is not a Discontinuance of the State tail, because

Note the difference.

63 E. 3. fo. 4. pla. 11.

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Littleton title Discontinuance placito 6503.

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because he was not then seised by force of the tail, but by disseisin, and if the entry and feoffment here shall not make a discontinuance, à fortiori the fine here shall make no discontinuance; so that nothing is here wrought by this fine but only thereby a bar to Henry Cheney that levied the fine, and to the heirs of his body. And to this estate here there is a warranty knit, the warranty is knit to this estate, and before this doth descend, the remainder is removed, and he hath only a right; the proper nature of a warranty is to be knit unto an estate, and where there is any alteration of the remainder, it is then to be considered how far this shall be a bar. It appears by Littleton in his Chapter of Garranty, placito 739. and with this agrees all the Books, that a warranty being annexed unto an estate, doth determine with the estate unto which it is annexed: Here in this case a lineal warranty is knit to the first estate, and a collateral warranty unto the remainder; a warranty shall never be extended for to enlarge an estate, or to be of force any longer than the estate to which it is annexed, shall have continuance, and the warranty here goeth no further, but to the estate given by the fine. If a man have an estate with warranty, and he aliens this, the warranty by this is gone and determined, and shall not go to his assignee; for separate the estate to which the warranty is annexed, and the warranty is gone; if the warranty be annexed unto his possessions, if an other comes in in the post, the warranty shall not bar him. By 7 E.3. pla. 34. & 46 E.3. fo. 4. if a man makes a gift in tail, and warrants the land to him, his heirs and assigns, the Tenant in tail makes a feoffment in fee, and dyes, in a Formedon in Reverter he shall rebut the donor by force of this warranty, the which is good Law, being intended of a gift in tail before the Statute of Westminster 2. cap. 1. de donis conditionalibus, for that then the warranty was annexed unto an estate in fee-simple, and the donor had only a possibility of Reverter, the which may well be barred by a Collateral warranty. 45 E.3. fo. 21. b. Tenant in tail with warranty makes a Lease for life, this is only a discontinuance for life: If an Ancestor collateral of the Tenant in tail releases to the Tenant for life with warranty, and dyes, and the Tenant for life dyes, this warranty shall not bar; but otherwise it is if the Tenant for life be disseised, and then a collateral Ancestor doth release with warranty, because the estate was discontinued. It is in the next place to be considered here, whether the warranty in this principal case shall be extended unto the estate in fee-simple made by the feoffment, clearly it shall not. If the Feoffee be vouched, what estate shall he recover? He shall recover no more in value than according to the estate to which the warranty was annexed, and no more than he shall recover by reason of this warranty, no further shall he be barred by reason of the same; and then when the estate to which the warranty is annexed is avoided, the warranty also shall be at an end, and the right revived. As to the last matter considerable in this case, this is only found by verdict, and not pleaded; if the collateral warranty here in this case shall bind the remainder man, the same shall then bar, though not pleaded; for the rule of Law is, that in such Actions in which one cannot plead, there the matter to be pleaded shall be found by verdict, and this is well; but where the party may plead, there the same is to be pleaded by him. In an Ejectione firmæ and Action of Trespass, and in an Action upon the Statute of 5 R. 2. cap. 7. a warranty is not to be pleaded; the nature of a warranty, and to have benefit thereby, is to be by way of voucher and rebutter in a real Action, and by no other way can a man have benefit of a warranty; a warranty is to be always saved for the benefit of the party, and the same is not to be overthrown: Where a man hath a warranty, and is impleaded in a real Action, and he hath a way and means to have advantage by the warranty, but he doth omit the same, he by this his laches shall lose the benefit of the same for ever after; but if it be in any other Action where he cannot plead this warranty, as in an Ejectione firmæ, and other personal Actions, a collateral warranty cannot be pleaded by way of bar, but though he cannot plead the same in these cases, yet he shall have benefit of this warranty without pleading of the same, and that in this manner, by his giving of the same in Evidence to a Jury, and the same is

Littleton Chap. Garranty, pla. 739.

Stat. of West. 2. c. 1. de donis conditionalibus.

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As touching the pleading of a warranty, where to be pleaded, and where not.

Note the difference where in a real, and where in a personal Action.

is to be found by the Verdict of the Jury, and this is very clear by many Authorities, as by 3 E. 4. fo. 4. b. & 5. a. 1 H. 7. fo. 12. a. b. 20 H. 7. fo. 4. a. 21 H. 7. fo. 32. a. b. 27 H. 8. fo. 22. b. & fo. 23. So that a collateral warranty may well be given in Evidence, and found by the Jury upon Non culp. pleaded in an Ejectione firmæ; and so upon the whole matter, he concluded with the rest of the Judges, that Judgment in this case ought to be given for the Defendant. Nota, that Yelverton Justice in his Argument did somewhat doubt of this last matter, because they had not pleaded the warranty, but this was only found by the Jury by the special Verdict, and he grounded his doubt upon the Book of 7 E. 3. before remembred. But Flemming chief Justice, clear of opinion in this to the contrary, and that upon the difference before taken, where the same was in a real Action, where he may plead this warranty; and where in a personal Action, where he cannot plead; and if it should be otherwise, then all would flee and resort unto real Actions: But the nature of this warranty is such, that the right of it in such Actions in which it cannot be pleaded, that the same shall always be saved for the benefit of the party. And so by the whole Court, Nullo contradicente, Judgment was given and entred by the Rule of the Court for the Defendant, quod nota.

7 E. 3.

Judgment given by the Court for the Defendant.

Clarke Plaintiff against *Gurnell* Defendant, Entred *Pasch.* 8 *Jac.* *B. R. Rot.* 530.

IN a Writ of Error to reverse a Judgment given in the C. B. in an Action of Covenant, wherein the case appeared to be this: The Plaintiff there did covenant and agree 7 Jac. to let a Ship for fraight to one Boothby, and that the said Ship, with the first wind that should happen, should sail out of the Isle of Line, to such a place, &c. and Clarke covenanted for Boothby, that he for the Fraight of all the premises, would pay unto the Plaintiff Gurnell the sum of 184 l. pro tota transfretatione omnium præmissarum, &c. for this mony the Action was brought in the C. B. and a Judgment there had against Clarke for the same, upon which Judgment a Writ of Error is brought. Hen. Yelverton for the Plaintiff in the Writ of Error, that the Judgment there given is erroneous, and to be reversed; and for Error alledged, that the Declaration is not good, because it is not laid therein, that the Ship came thither, and the Covenant for the payment of the mony doth depend upon the other Covenant concerning the Ship, the Plaintiff by his Declaration doth not well entitle himself to have his Action; it appears by 18 H. 6. fo. by Fortescue, if one do covenant with another to be his Steward for so much wages, in an Action by him brought for his wages in this Court, he ought to surmise and set forth that he hath performed his service, which doth intitle him to his Action: And so here in this case, he ought to shew that he had taken in the fraight, and performed what on his part ought to be performed. Here in this case the Covenant is entire: it appeareth in 6 E. 6. Dyer fo: 76. pla. 29. & 30. that the word (pro) makes a Contract to be conditional, as pro maritagio habend. A man doth covenant for to make an estate, if the marriage take not effect, the Covenant is discharged. So in an Annuity granted pro consilio impendend. stop the Counsel, and the Annuity is gone: So if a man grant to another a way over his land, & pro chimino illo the other grants to him a Rent-charge, if the way be stopt, the Rent-charge is gone: So that (pro) makes a Condition; and this is all one, as if it had been in consideratione inde 15 H. 7. fo. 10. b. If a man doth Covenant to serve another for a year, and he doth covenant to give him so much for his years service, if he will bring an Action for his mony, he ought to shew that he hath served him; and so in the principal case here, the Plaintiff before

A Writ of Error for to reverse a Judgment, &c.

18 H. 6. fo. 1. per Fortescue.

before he can recover the mony, ought to shew performance of that which was to have bæn done of his part, the which is not here done; and so for this defect and omission in the Declaration the same is not good, and so consequently the Judgment for this cause is erroneous, and ought to be reversed. Geo. Croke, That the Judgment is not erroneous, but was well given. The Covenant here was to pay so much, (pro transfretatione omnium præmissarum) though he do not go, yet he is to have his pay. And to this purpose is the case in 48 E. 3. fo. 2. b. & 3. A. where one did covenant to serve another in the wars in France, with so many Esquires at Arms, and he did covenant and promise to pay him so much for the same: An Action of debt was there brought for the mony; it was there alledged, that he ought to have shewed performance of the service, but ruled that he ned not so to do; but the Judgment there was a respondes ouster, notwithstanding the said Exception; and with this agræs Coke 7 part, fo. 9. & 10. Ughtreds case. It appeareth by the Book of 3 H. 6. fo. 33. b. 34. A. if a man do promise another 20 l. a year for to be of his counsel such a day and year, for two years next ensuing, in an Action brought for his mony, he ought to shew in his Count, that he was with him, and did give him counsel, for this is that which is the first cause of the duty; but if it were a promise to pay so much, upon the promise of the other for to do such a thing, there in this case it is a promise against a promise, and the one of them may have his remedy by way of Action for the mony, and the other his Action for breach of promise. 10 Eliz. Dyer fo. 270. pla. 23. where the Office of the Steward of a Mannor was granted to one, and a Rent-charge granted to him pro exercitatione & occupatione officij illius, there it is a Quære whether he shall not be charged, in the pursuing of his remedy for the Rent, to shew that he had exercised the Office, for that if he have not this done, the Annuity and Rent is determined, and made not distrainable: This agræs with 3 H. 6. fo. 33. but both these do differ from the case here in question; for here in this case, it is one Covenant against another, and so the Judgment is well given, and not erroneous, and so to be affirmed. Yelverton Justice, Where the payment is to be made upon performance of a matter precedent, there the party is to alledge performance of the matter before he can maintain an Action for to recover the mony; but otherwise it is, where the matter to be performed is subsequent to the payment; and Ughtreds case, Coke 7 part, fo. 9. & 10. is good law, and nothing at all against this. The case before remembred in 6 E. 6. Dyer fo. 76. pro maritagio, one covenants for to make an estate, this (pro) makes a condition, and is matter precedent, the performance of which ought first to be laid down, before the estate covenanted to be made for this can be obtained: The principal case here is not like the case where there is one promise made against another, there they ought to have their several Actions upon the several promises, the one against the other; but it is not so in the case here, for before he can here have the mony covenanted to be paid, (pro transfretatione, &c.) he must expressly lay the performance of that which was to be done on his part, being matter precedent to the payment, which is the preparation and setting forth of the Ship, the which is not here so done, and for this omission the Declaration not good, and so the Judgment not well given, but is erroneous, and ought to be reversed. Flemming chief Justice, If the Covenant were that he should take all the Wares into the Ship, and so to transport them, and then the other doth promise and covenant for to pay him so much for the same, or doth covenant that when he returns to London to pay him so much for the same, here of necessity he ought to shew his taking in of the Wares, and the transportation, and his return, before he can recover the mony against the other, and this he hath here failed to do in his Declaration, and so the Declaration for this defect is not good, and for this cause the Judgment is erroneous, and to be reversed. Williams Justice, This difference may be taken, here they are not as several Covenants, and so one against another; but they are here as Concomitantia. If the one doth covenant for to transport Goods from place to place, and the other covenants to pay so much for the same, these are several Covenants, and the one may well have his Action against the

Coke 7 part, fo. 9, 10. Ughtreds case.

Coke 7 part, fo. 9, 10. Ughtreds case.

6 E. 6. Dyer fo. 76.

the other merely upon the Covenant, and for breach of the same, but in the principal case here, there is matter precedent to be done to intitle the party, to have the money Covenanted to be paid, and that is the preparing of the Ship, the Lading of the goods into the Ship, and the transporting of them, &c. And then for all this the money Covenanted to be paid, the which he cannot recover, before performance of the former part to be done by him; and this he ought to have alledged in his Declaration which he hath not done, and so the Declaration not good, and the Judgment Erroneous; but the Court not being full, the reversal of the Judgment was not pronounced, but the same was adjourned to another time, though the opinion of the three Judges was; that the Declaration was not good, and so the Judgment Erroneous.

The Judgment Erroneous by the opinion of three Judges.

Mary Moore Plaintiff against *Gerrard Moore* Defendant.

IN an Action upon the case for a Promise, upon Non assumpsit pleaded, a Verdict was found for the Plaintiff, and the case appeared to be this; one at the request of the Defendant, and for him (but with the parties own money) did buy certain Wares and Commodities, the which were for him transported into Ireland, and the Defendant at whose request this was done, did assume and promise for to repay the money, so by him to be laid out, for Non-payment whereof the Action was brought and found for the Plaintiff. Dodderidge the Kings Serjeant moved for the Defendant in arrest of Judgment, that the Declaration here was not good, because he doth not therein Averr, that these goods by him thus bought, did ever come to the use of the Defendant; the matter only here considerable is, when the Plaintiff did buy Wares at the request of the Defendant and for him, and he promising to repay him the money laid out, whether this do transfer any property to the Defendant or not; and whether the property remains to him who bought them; that the property doth still remain in him; he ought also to have averred further in his Declaration, that when the goods were delivered to him, that he then promised for to repay the money, and for this omission, the Declaration is defective, and for this cause Judgment ought for to be arrested. Williams Justice, If the case had been that you do promise that such monies as the Plaintiff shall lay forth and disburse, for such goods for you, to be transported into Ireland for you, you do assume and promise to pay the same; is not this a good promise, and upon good consideration? clearly it is, and gives a good cause of Action to the Plaintiff, if the money be not paid. Yelverton Justice, If I do request one for to buy such a Gelding for me, and do promise that I will repay him again, and he buys this Gelding for me accordingly, clearly he may well have an Action upon the case against me for this money upon my promise, and I may take the Gelding, and before my taking of him, the property of the Gelding is not in him, who bought him to my use, but the property is in me, who requested him to buy the Gelding for me, quod tota Curia concessit; so here in this case there was a promise for to repay all such monies as should be disbursed for him, for certain Merchandises to be transported into Ireland, for not payment of which monies, the Action here is well brought against him, and the Declaration is good, and so Judgment ought according to the Verdict, to be given for the Plaintiff. The whole Court agreed in this, that this is a clear case for the Plaintiff, that the Defendant ought for to repay this money, notwithstanding the goods were not bought with his proper money, and that the Plaintiff here hath just cause of Action; that the Declaration is good, and Judgment to be given for the Plaintiff.

An Action upon the case for breach of promise, &c.

Note, that the Counsel for the Plaintiff informed the Court, that the Plaintiff was in forma pauperis, & therefore prayed that the Plaint. might not pay the bor, because, as it was alledged, the Plaint. was not worth so much as to pay the bor.

Nota, le difference touching a forma pauperis. Judgment given per curiam, &c.

Williams Justice, you ought to pay the Box, this notwithstanding, and the difference is this, where yo do recover, there you are to pay the Box, though you sue in forma pauperis, otherwise where it goes against you: The whole Court were clear of opinion that the Declaration here is good, that the Plaintiff hath just cause of Action, and therefore the Rule of the Court was; quod intretur judicum pro querente, and the Box paid.

Skipwith Plaintiff against——— the Inn-keeper.

Skipwiths case, in a Trover and conversion.

IN a Trover and Conversion: The case appeared to be this; A stranger comes to an Inn with my Horse, and there leaves him to stand at Hay, unknown to the owner; the Horse there eats out his price and value; the party which left him there, comes not to pay for him; afterwards the true owner of the Horse hearing of him comes to the Inn, and there finding of his Horse, demands him of the Inn-keeper, who refused to deliver him unless the mony there owing for him was paid; the question moved to the Court was this, how the Inn-keeper should come to his mony, and whether in this case he may retain the Horse, until he be paid and discharged for his Meat, in regard that he which left the Horse there, was not the true owner of the Horse: The Court in this case were divided, by the opinion of two of the Judges, the Inn-keper here may well retain and keep the Horse, till he be satisfied the mony there owing to him for his Meat; and by two other of the Judges, that he could not retain and keep the Horse from the true owner for his Meat, being not left there by him, but by a stranger unknown to him. Williams Justice, and Croke Justice both of opinion clearly, that the Inn-keeper may retain and keep him for his Meat, till he be paid and satisfied for the same, for that the Inn-keeper here is not bound to take knowledge of the true owner of this Horse, thus left to stand in his Inn at Hay by another. Yelv. Justice, and Fenner Justice held the contrary that in this case the Inn-keeper cannot retain and keep the Horse from the right owner, coming thither and demanding of him, till he be paid for his meat, being left by a stranger unknown to the right owner, but that he must have his remedy against the party which left the Horse there, and of him (or of no body) have his satisfaction for the time that the Horse continued there. Flemming chief Justice was absent, and so the Court remained divided in this case, and no more said in it; the parties afterwards agreed.

2 Cr. 188. 189. Mo. 876. 877. 3 Cr. 271. 272. Pop. 127 179. 1 Ro. Rep. 149. 2 Ro. Rep. 438. 439. Pop. 207.

Ended by an agreement between the parties.

A man bound to appear in B. R. before the day, &c.

Note, that one was bound by Flemming chief Justice, for to appear in B. R. Croke moved the Court for to have his appearance respited, in regard that he was arrested in the interim, at the suit of another, and imprisoned, so that he could not appear. Williams Justice, if a man be bound by a Recognisance for to appear in a Court of Record, if before the day of his appearance, he is arrested at the suit of the King; and before the day of his appearance he is imprisoned, this shall discharge his Recognisance; but if he be arrested at the suit of another, and imprisoned, by reason of which he cannot keep his day, he by this hath broken his Recognisance, and this is the difference to be observed for good Law. The whole Court in this case did seem to incline, that in this case he should be discharged, because that he was before the day arrested and imprisoned, so that it was not in his power for to appear. Williams Justice, he might have entred bail upon the second arrest, and imprisonment, and so to have enlarged himself, and appeared; the rest of the Judges against him herein that by reason of his imprisonment he is to be discharged of his appearance. See Littleton in his Chap. of Continual claim pla. 436, 437, and 438. where imprisonment shall excuse appearance for to make a continual claim, and shall avoid a discent, or an utlagare, if he be imprisoned at the time.

Note the difference where a Recognisance for appearance shall be forfeited, and where not.

Note

Note, that in a Writ of Error for to reverse a Judgment given, the Error assigned was, that an Infant appearing by his Gardian, and coming to his full age, did continue still by his Gardian, whereas he then should have been by his Atturney, and judgment was so given for him; and to reverse the Judgment, this was assigned for Error. Williams Justice, and the whole Court clearly that this is no Error, but the Judgment ought to be affirmed, for the Judges ought not to take notice, when he comes to his full age, and therefore by the Rule of the whole Court, the Judgment was affirmed.

Infant appears by Gardian, &c.

Judgment affirmed per curiam.

Armitage Plaintiff against *Dison* Defendant.

IN an Action upon the case for a promise to pay, &c. the Plaintiff declares of divers sums disbursed for the Defendant, quæ quidem summæ in toto se attingunt to the sum of 23 l. whereas it was but 20 l. Upon the Non Assumpsit pleaded a verdict was given for the Plaintiff, and this matter of the miscasting was moved in arrest of Judgment. It was urged for the Plaintiff, that this being but only a mistake in the casting up, is to be amended, and so was it held in one Gaughtons case a Dyer here in this Court, who sold divers pieces of Cloth; and for every piece he was to have so much, who brought his Action upon the case for the said sum, and it was found for him, and in casting up of the sum there was the like mistake; and it was moved in arrest of Judgment, but it was overruled, and by the Rule of the Court the same was amended. Williams Justice, I was of Counsel in the said case of the Dyer, which case was, as it was cited and adjudged for to be amended, the like case was here in this Court; A case of a Rent for 39 s. due, and he to whom the same was due did demand 3 l. it was here held that he ought to have tendred the 39 s. and for that the same was not tendred, this was here adjudged for to be a forfeiture, and that the other may enter for the same, in regard that he demanding of 3 l. in this is included a demand of the 39 s. So if a man be indebted to me in 20 l. and I bring an Action for 30 l. I shall recover my 20 l. Williams Justice, And the whole Court in this Principal case, the mistake in the casting up, is to be amended according to the true casting up, and so by the Rule of the Court, the sum was amended.

An Action upon the case for a promise, &c.

Gaughtons case Dyer in B. R. Poph. 180.

The mistake amended.

Pothill Plaintiff against *May* Defendant.

IN a Prohibition, the case was, the Defendant being Parson of D. did libel in the spiritual Court for Tithes for Silva cedua, and for the Herbage for depasturing of his Geldings; the Plaintiff there shewed that they were his Hackny Geldings which he kept for his pleasure, and for himself and his servants to ride upon being his saddle Horses; and this plea being there refused, for this cause he prayed a Prohibition: the whole Court were clear of opinion, that there was good cause for a Prohibition, for that these Horses are not Tithable, nor any Tith Herbage is to be paid for them; otherwise it were if they had been Cart-horses which he had to till his Ground, or for Cattel bought, and fatted to sell again for gain; for these he ought to be answerable to the Parson for the Herbage of them, but not for the Herbage for his Geldings by him kept, and used only for his pleasure; but if it was for Working-Horses for the Cart or Plow, or for fat Cattel, bought and fatted to sell again; of such Cattel allowance is to be made for their Herbage, because that a Profit doth come in by them; but otherwise it is of saddle Horses. The whole Court agreeed in this, and therefore in this case, by Rule of the Court a Prohibition is granted:

A Prohibition granted, &c.

A Prohibition granted.

Daby Plaintiff against *Holbroke* Defendant.

A Writ of Error to reverse a Judgment, &c.

IN a Writ of Error for to reverse a Judgment given against the Plaintiff, being an Infant, the Error assigned and insisted on was, because that the Judgment given against him, was quod capiatur, the which ought not so to be, upon the Book of Mich. 16. & 17 Eliz. Dyer. fo. 388. placito 41. where if an Infant be Plaintiff by his Procheine Amy, after his full age makes an Atturney, and then becomes Nonsuit, he shall not be here amerced, for that he is within age, and if so, then no Capiatur ought to be awarded against an Infant, and therefore this being here so awarded is a clear Error, and so the Judgment Erroneous, and for this Error to be reversed. Williams Justice, A Judgment quod capiatur, ought not to be given against an Infant, for that an Infant is not to be imprisoned; and therefore it appears by the Book of 14 Ass. placito. 17. where an Infant was found to be a disseisor and not imprisoned, because he was within age; and with this agrees 10 Ass. placito 1 Brook title Imprisonment placito 37. 38 Ass. placito 10. Fitz. title Imprisonment placito 27. and Brook title Imprisoment placito 62. & 38 E. 3. fo. 5. all do agree in this, that an Infant shall not be imprisoned 43 Ass. placito 45 Brook title Imprisonment, placito 75. an Infant is found a Disseisor, so that he ought to be imprisoned; he shall be pardoned per Curiam, quia Infans. Pasch. 43 E. 3 Fitz. title Imprisonment placito 16. In an Assise, it was found for the Plaintiff, adjudged that he should recover seisin of the Land, and that the Tenant should be amerced and taken; but because it appeared that he was within age, he was neither to be amerced nor imprisoned, but both of them pardoned, quia infans. 30. Ass. placito 18 Fitz. title Imprisonment pla. 10. & Br. tit. Imprisonment pla. 46. In an Attaint brought by an Infant, which passed against him, and he was there adjudged to prison, and yet an Infant, but by 41 E. 3 Fitz. title Imprisonment pla. 17. an Infant Nonsuited in an Attaint, shall not be imprisoned, quia Infans. 16 Ass. placito. 7 Fitz. title Imprisonment placito 25. & Br. title Imprisonment pla. 45. a feme Covert being found a Disseisoress, with force and Arms, shall be imprisoned, but contrary it shall be in the case of an Infant, 14 E. 3. fo. 18 Br. tit. Imprisonment placito 43. Two were found Disseisors with force and Arms, the one of them was an Infant but of 18. years of Age, and therefore he was not imprisoned, but the other was; so that by these Authorities it appears, that an Infant shall not be imprisoned, for any cause by his Body, and according hereunto, there are two direct pesidents adjudged in point in this Court, as Williams Justice observed, that an Infant shall not be imprisoned by his Body, and therefore in the principal case here, the Judgment given against an Infant ——quod capiatur is Erroneous. Also by Williams Justice, a Nobleman for his contempt shall be fined; but there is no case in the Law to be shewed, for to warrant this, that the Judgment against an Infant should be quod capiatur, (unless it be only in case of Felony) (this excepted) there is no case in Law, for to warrant this Judgment, here given against an Infant, quod capiatur: The whole Court did agree with him herein, that this is a clear Error, and therefore by the Rule of the Court for this Error apparent, the Judgment was reversed.

30 Ass. pla. 18. Fitz. title Imprisonment pla. 10 Br. title Imprisonment pla. 46.

14 E. 3. fo. 18. Brook tit. Imprison. placito. 43.

Judgment reversed per Curiam.

Tut Paintiff against *Kerton* Defendant.

Action upon the case for words, &c.

IN an Action upon the case for scandalous words spoken by the Defendant of the Plaintiff, being high Sheriff of his County, and a Justice of Peace, the words were these—(s) He—meaning the Plaintiff, hath cousened the Earl of Hartford

Hartford of as much as he, (innuendo the Plaintiff) was worth, and lays the speaking of these words to be ad damnm 2000 l. Upon Non culp. pleaded a verdict was given for the Plaintiff. It was moved in arrest of Judgment that these words are not Actionable. Yelverton, Croke, Fenner, and Williams Justices, Clearly these words are not Actionable. Williams Justice, There was a case here in this Court adiudged, where an Action upon the case was brought for words by a Merchant Plaintiff, for scandalous words spoken to him, which words were these (s) Thou art an errant Knave, for you have Cousened all Coventry; and upon a motion in arrest of Judgment it was adjudged by the whole Court here, that these words were not Actionable, and so in the principal case here, the Court was clear of opinion that the words are not Actionable, and therefore the Rule of the Court was, quod querens nil capiat per billam. Judgment per Curiam, &c.

Petty Plaintiff against *Waight* Defendant.

IN an Action upon the case for scandalous words spoken by the Defendant, to the Plaintiff, which words were these. (s) Thou art a thief, for thou hast stollen my sheaf of Corn, ad——damnum. Upon Non Culp. pleaded a verdict was found for the Plaintiff. It was moved in arrest of Judgment that these words are not Actionable. The whole Court clear of opinion, that these words are scandalous and Actionable, because it was Corn lying upon the Ground; and so if the words had been, Thou hath stollen a bushel of my Apples on the Ground, these words have been here adjudged to be Actionable; otherwise it had been, if that he had said my Apples out of my Orchard, there not Actionable; but if the words had been, Thou hast stollen two Armfulls of my wood, these words are Actionable; and so here in this principal case, because the Corn was made up in sheaves, and the party hath a special property therein, and therefore this is Felony, and for this cause these words thus here spoken to the Plaintiff, are very scandalous and well Actionable, and so by the Rule of the Court, Judgment was entred for the Plaintiff. Action upon the case for words, &c. Mod. Rep. 89. Judgment given by the Court, &c.

Nota, that an Action of Trespass was brought by the Master for an Assault and Battery of his Servant, the which Assault and Battery was, for giving of him a Box on the Ear, ad dammum. Upon Non Culp. pleaded a verdict was given for the Plaintiff. It was moved in arrest of Judgment, that the Declaration was not good, for that it is not laid in the Declaration, per quod servitium amisit; by the opinion of the whole Court, the Master shall not recover any damages if his servant was not wounded, so that by reason of this he hath lost his service, and so he ought for to lay it in his Declaration, or the same is not good. Williams Justice cited one Glanvils case, in an Action of Trespass, for an assault and Battery, which was for giving a Box on the Ear unto a Knight, and for which he brought his Action, and did recover 200 l. damages for this. In the principal case here, for the omission of these words in the Declaration per quod servitium amisit, the Declaration is not good, and the Rule of the Court was, quod querens nil capiat per billam. An Action of Assault and Battery, &c. Glanvills case. Judgment, &c.

Nota, by Williams Justice, And agreed by the Court, that if a man do make a Joynture by deed unto his Wife, during the Coverture, and afterwards of this Land the Husband and his Wife do levie a fine, yet clearly, this shall be no bar to her from bringing of her Writ of Dower, but that she may well have this after the death of her Husband.

The

The case of the Constable of *Stepney*.

Touching the election and chusing of Constables, &c. The case of the Constable.

Nota, that a Writ of Restitution was prayed, for to restore a Constable to his place where he was Constable, being chosen for the Ville of Stepney, and sworn by the Justices of Peace, and displaced again, of which Manor the Lord Wentworth was Lord, which Constable of his was removed before by the Justices of Peace at their Quarter Sessions, (and after put in again by the Lord) —Williams Justice. Justices of Peace are to elect Constables of Hundreds, and also high Constables, and these as they are to be chosen by them, so they are also removeable by them, if there be cause for it; but if it be in a Manor and the Constable is chosen and sworn in the Court Leet, the Justices of Peace here have no power nor Authority for to displace him: But they may fine him if there be cause for it. Yelverton Justice, agreed with him herein, that a Justice of Peace cannot displace such a Constable being elected, and sworn to be Constable in the Court Leet, (as here in this case he was) Also a Justice of Peace is not to elect a petty Constable. In the principal case, here the custom of the place was that the Neighbours in the Hamlet were to make choice of such an one to be their Constable, and to present him to the Lord Wentworth Lord of the Manor, and then to have him sworn, a Justice of Peace cannot displace such a Constable. In this case the matter was, the Justices of Peace did remove and displace this Constable, (thus elected and sworn,) and did elect and swear an other, to execute the place of a Constable there, and they of the Hamlet according to their—Custom did chuse their former Constable again, and displaced the other, and upon this he prayed a Writ of Restitution to be restored to his place of Constable again, being formerly chosen and sworn to execute the same, by the Justices of Peace. Williams Justice, There is no president of such a Writ of Restitution for a Constable. But an order by the Rule of the Court was entred, that the first displacing of the Constable chosen by the Vill, and approved of by the Lord, was altogether unlawful, and the Constable chosen and sworn by the Justices of Peace to be removed, and the first to be Constable again, and so to continue according to the Election of the Hamlet; and that the Justices of Peace have no power in this case over him, as to displace him, but that the Lord who did approve of the choise of him, may again for just cause remove and displace him, and so may the Justices of Peace do by the Constables of the Hundred or high Constable, for good cause. And all this was clearly so agreed by the whole Court, and so no Writ of Restitution granted; but an Order by the Rule of the Court, for the restoring placing and setling of the first Constable, (chosen by the Ville approved of the Lord, and sworn) in his place again.

No Writ of Restitution for Constable to his place.

Hewet Plaintiff against *Painter* Defendant.

An Action of Debt upon a Bond, &c.

IN an Action of Debt upon a Bond, the Defendant demands Oyer of the Bond, and of the condition, the condition of which Bond was; that the obligors were for to pay all such sums of mony for Tithes which should be levied, and upon the Oyer of the condition the Defendant demurrs in Law, and the question was touching the exposition of the words (which shall be levied) whether these words shall not be construed, in this manner. (s) levied or to be levied; and also whether levied or taxed or assessed shall not be said, in construction of

of Law, to be all one, and as touching this it was urged, that words shall be taken & construed according to the intent of the parties; and intention and construction of words shall be taken according to the vulgar & usual sence and manner of speech, within those places where the words are spoken, as in Lincolnshire, where 8. strikes make a bushel: the Judges of the Common Law are to take notice of particular usages in several places, as of London measure in buying of cloth there, and so the particular usages, and the manner or speech in particular Countries, is to be be respected, as in common parlance to say of one in such a place, that he hath straynd a Mare, this is taken for distrained, with such an averment of the usage there to be so. If an Action upon the case be brought against one, for the taking of a Silver salt, and it was a Silver saltsellar; this was excepted against, but adjudged here, that the Action was well maintainable, for that this is all one in Common speech and parlance, and to this purpose a case was cited to be adjudged in the C.B. that King Stephen by his Letters Patents, did grant unto one Alga maris; which word (Alga) doth signifie a weed which came in with the flowing of the Sea at a new Moon, and was but of small value; this was there ruled to be a good grant of the Wreck, which the water then brought in with the said weed.——Croke Justice, The demurrer here is not good, as to the words, (s) taxed, rated and levied, idem significant, being all one, and to the same purpose & effect. Alga maris is a weed, which comes in at the same time only with the new Moon, there they did make a favourable construction rather than to suffer the grant to be void: so where it is said here, levied or to be levied or taxed, this is all one, 9 E. 4. fo. 22. An Action of Debt upon an obligation brought against one as Executor, conditioned that if one T. which was Register of the Plaintiff, and his receivor of divers profits within the Archdeaconry, should truly pay unto him omnia recepta, & recipienda, in the said office, that then the said obligation to be void; shews that T. which was his receiver, and had received divers sums, and made the Defendant his Executor; and the Defendant by way of plea said; that he had paid unto the Plaintiff all which his Testator had received, he was here to give an account for both. Flemming chief Justice, and Williams Justice, agreed herein, that this goeth unto both, (recepta, & recipienda.) Fleming chief Justice, Levied, that is, to be levied, and according to the custom of the Country, taken for taxed, he shall be bound by this for to pay all such sums of mony, as the Sheriff shall levie; by this is to be understood all such sums of mony, as shall come to the Sheriff for to be levied. Malleries case, Coke 5. pa. fo. 111. where an Abbot and his Covent made a Lease for years, reserving Rent yearly to him, or his successors; that this shall be taken and construed for him and his successors (or) there taken for (and); & as touching construction of words, they shall be taken according to the Common parlance, phrase and custom of speech where the words are spoken, 27 H. 8. fo. 27. b. the meaning and intent of parties is to be observed, and to this purpose Fitzherbert there puts the case, that if two do make a Contract for 18. Barrels of Ale for a certain sum of mony, and he which bought the Barrels of Ale would have had into his bargain the Barrels also, when the Ale was spent; but it was adjudged that he should not have the Barrels, for that the common usage was, that the vendor should have the Barrels again, and the intent of the parties never was that the vendee should have the Barrels, but only the Ale; so if a man do Covenant with another, that if he comes to his house he will give him a cup of Wine, if he come he shall not have the cup also; for that this was never the intent of the party: the case remembred of Alga maris was this; King Stephen, by his Letters Patents did grant unto such a Town neer the Sea, Alga maris, which as Virgil observeth, is a weed growing in the Sea; having a leaf like unto Sea grass or Sea weed, being very bitter and sharp; which word did import a grant of the wreck, for that words are to be taken according to the intent of the parties, and this intention and construction of words shall be taken, according to the Vulgar and usual sense, phrase and manner of speech of

Malleries case Coke 5. pa. fo. 11. a.

As touching the Exposition of words to be according to the usage, and common parlance of the place where spoken.

of these words, and of that place where the words are spoken, as the case before remembred, of straining of a Mare taken for distraining, and an Action upon the case was brought for words spoken by the Defendant of the Plaintiff, That he was (Mainsworn) these words were taken and construed according to the common parlance of the place where the words were spoken, and so to be all one with Forsworn, and so was it accordingly adjudged in the Court of C. B. in the case of Alga maris, and so in the principal case here to pay all such sums of money which should be levied, the same is to be so construed, and understood, (s) levied, or to be levied, taxed or assessed this is all one; which sums the Defendant here in this principal case was to pay, by the condition of this Bond; the demurrer overruled by the Court, the Defendant having no just cause to demur, but the Plaintiff a good cause of Action, and therefore by the Rule of the Court, Judgment was entred for the Paintiff.

Judgment given for the Plaintiff.

Holland Plaintiff against *Harecourt* Defendant, entred *Hill.* 8 *Jac. B. R. Rott.* 1136.

An Action of Debt upon a Bond, &c.

IN an Action of Debt, brough upon a Bond; upon Oier demanded the condition was this, that Holland the Plaintiff was to go with such a Ship, unto such a Port, to Guyana, and when he did directly return back again Laden, Harecourt the Defendant, was to pay him so much money for the Mariners wages, and for his Hire; the Plaintiff sets forth in his Declaration, that he did accordingly go the Voiage, and that he had bœn at Guyana, and returned again, and that the Defendant refused to pay the money, upon which refusal the Action was brought; the Defendant by way of Bar, pleads that the Plaintiff had not performed his Voiage, alledging, that viagium ad Guyana nondum finitum, and so not to pay the money. The Plaintiff replies and set forth, that he hath performed his Voiage to Guyana, and returned again, and so the money due to be paid unto him; the Defendant rejoyns, and sets forth, that it was but a Months sayl thither, that he had made it a longer Voiage, and so a greater charge, and that he had not directly returned, the right and direct way. To this Rejoynder the Plaintiff demurs in Law; for that this was a Departure, and whether this manner of pleading in the Rejoynder was a Departure or not, was the question. In this case and as to this question, it was said, and agreed by the whole Court, that where a pleading doth pursue and fortify the former matter pleaded, this shall be no Departure, but otherwise it is, where there is new matter pleaded. As where a man pleads that J. S. Died withou Heir, the other says, that J. S. had an Heir, and names him, the other again by pleading shews that the same J. S. was attainted, and thereby his Blood corrupted, and that so he died without Heir; this pleading doth satisfy the former matter, and so is no Departure, and so if one be bound for to enfeoff another, and pleads performance, the other pleads that he hath not performed, having made no Feoffment unto him; the other by pleading comes and shews that he hath performed the condition, in this manner, (s) that he made unto him a Lease for years, that he did after releas unto him and his Heirs, though this be a good performance of the condition, by the Book 17 E. 4. fo. 3. a. Brook title Conditions placito 158 yet this is a Departure, being new matter. In this principal case here, Holland the Plaintiff was to go with such a Ship unto Guyana, and when he directly returned again, then Harecourt the Defendant was to pay him so much for the Mariners wages, and for his own Hire

Where there shall be a Departure in pleading, and where not: where the plea doth fortify and where a new matter is pleaded. Note the difference.

hire, the Court was clear of opinion for the Plaintiff, that he had just cause of Action for due debt now upon his return, to be paid to him by the Defendant. But some question happening to arise upon the pleading, and the parties perceiving the opinion of the Court which way they inclined, they did mutually agree to have the matter ended and composed between them by agreement, and so they reserved themselves to parties chosen by them, finally to end and determine the same between them.

Ended by Agreement.

NOta, As touching a question propounded by Walter, when a Lease should be said to begin: Flemming chief Justice took this difference, where a Deed is delivered to begin à die datus, and where it is à datu; where a Deed is delivered for to take his force and essence à die datus, in this case it is exclusive, and the day of the date is excluded; but otherwise where it is à datu, there it is inclusive, and the day included. This difference holds place, and is good where it is in a case and point of interest that is conveyed or passed from one to another, as in case of a Lease for years, or any other interest that is passed, and so is Claytons case Coke part 5. fo. 1. But where it is in matters of Account, where no matter of Interest is to be passed or conveyed: As if one be to be accountable to another, and that by Deed, be the same to be done à die datus, or à datu, in this case no Interest passing by the Deed, be the same à die datus, or à datu, it is all one, and no difference between them, as was clearly held by Flemming chief Justice, and so agreed by the Court.

Note the difference where a Deed is to begin, &c. Dyer 186. 307. 1 Inst. 46. b. 5 Co. 1. Hob. 73. 140. Mo. 40. 2 Cr. 135, 164, 258.

Note the difference between matter of Interest, and in matter of Account.

Moore and *Lanckfoordes* Case.

BEing Indicted upon the Statute of 8 H. 6. cap. 9. for a forcible Entry, and the Indictment found against them, A Writ of Error by them brought to reverse the Indictment; the Error assigned was for the want of an (adtunc) the Indictment being existens liberum tenementum of J. S. and doth not say adtunc existens —— and also it is not said in the Indictment that (ibidem) they did enter —— It was urged that the several Indictments against Williams and Skidmore, upon the same Statute of 8 H. 6. cap. 9. were both of them reversed for want of (adtunc). Hen. Yelverton, This hath been divers times ruled here for to be a good Error, as in the Cases before cited; for it may be (existens liberum tenementum) before or after, and not adtunc, and therefore he ought to say adtunc existens, or it is not good. Williams Justice, If in the Indictment he had begun with the day, time, and year, then all which doth follow after shall be taken, and intended to be at the same time; and for this was cited — 5 E 6. Dyer pla. 68. & 23 H. 7. in Kellaway fo. 98. and the like Indictment was here reversed the last Term for want of (adtunc) for that it may be existens liberum tenementum twenty years before. Flemming chief Justice, and Williams Justice, all being here coupled together, the day, the time, and the place, then the words make all good, for thereby it appears that it was his Freehold, and the time being laid when he entred, this Indictment may be good enough without saying (adtunc) and so they seemed both of them to hold clearly, that this Indictment was good, yet they did not over-rule it, but gave time to search for Presidents.

A Writ of Error for to reverse an Indictment, &c.

Eynan Plaintiff against *Bridges* Defendant, Entred *Trin.* 8. *Jac.* *B. R. Rot.* 1222.

An Action of Debt upon an Award for not performance of it, by payment of money awarded to be paid.
Yelv.214.
2 Cr. 300.
1 Inst.265.292.
Yelv.156.
Hob.216.
Hob.121.
5 Co.70.
2 Cr.170.
Mo.865.
1 Brownl. 178.
115.
2 And.116.
Bendl.117.

IN an Action of Debt brought for not performing of an Award made for payment of mony, the case appeared to be this, The parties mutually referred themselves to the arbitrement of others by them chosen, and Bonds by them entred into each to the other for performance of the Award, the Arbitrators made their Award for payment by the Defendant to the Plaintiff at a day to come; the Award was made the 24th day of March for the payment of mony to be made, by the Defendant to the Plaintiff, at Michaelmas then next ensuing; for not payment of this an Action of Debt brought in bar, of which Action the Defendant pleads a Release made to him by the Plaintiff of all Actions and Demands, bearing date the 10th day of April; and it appeared by the Award that the Plaintiff was to make a Release unto the Defendant of all Actions and Demands from the beginning of the World unto the 10th day of April then next ensuing. The only Question was, Whether by this Release thus made, the payment of the mony awarded to be paid by the Defendant to the Plaintiff at Michaelmas then next following by force of the Award, be absolutely gone and released by this Release, or not. It was urged for the Plaintiff, that this payment thus to be made at a day to come by the Defendant to the Plaintiff, by force of the same Award, is not by this Release discharged and released by the Plaintiff, but that the Debt still remains due unto him, and that he hath good cause of Action to recover the same by this Action brought by him upon his Bond, for performance of the Award, and that this Release shall be no bar unto him; wherein it is to be considered, whether this were a debt due unto the Plaintiff at the time of the Release made by him, or not, and when the same doth first commence and begin to be a debt and duty in him. And as touching this, it appears by Littleton in his Chapter of Releases, pla. 512. that if a man be bound to pay such a sum of mony at the Feast of St. Michael next, if the Obligee before the said Feast do release unto the Obligor all Actions, he shall be barred by this Release, for that this is a duty presently, but the payment is put in respite until a day to come; but otherwise it is, in Littletons case, pla. 513. of a Lease for a year, rendring to him at Michaelmas next 40 s. and before Michaelmas he releases to the Lessee all Actions, this Rent is not released, for that it is not a duty till the day of payment, and so is the opinion of all the Judges in L. 5 E. 4. fo. 40. and so is the Book of 9 E. 4. fo. 13. a. 67. Choke, That in case of a Bond, the sum to be paid at a day to come, is a duty presently; but it was urged, that in case of an Annuity to be paid at a time to come, it is no debt before the time of payment be come; And so in case of an Arbitrement, an Award made for to pay mony at a day to come, it is no debt nor duty until the day come, and therefore not to be released in this manner before the day, as in the principal case here it was of all Actions and Demands, and therefore this Release shall not free and discharge the Defendant of and from the payment of the mony awarded to be paid by him to the Plaintiff at a day to come, and so the Plaintiff hath good cause of Action. Williams Justice, In case of an Obligation entred into for payment of mony at a day to come, this clearly is a debt and duty presently, and may well be discharged by a Release made of all actions and demands before the day of payment comes; but it is as clear, that it is not so in the case of an Annuity, nor in case of an action of debt for not performance of an Award made for payment of mony at a day to come, for in these cases there is no present debt nor duty before the day of

Note the difference where money is to be paid by Bond at a day to come, and Rent to be so paid, and a Release made before.

payment

payment do come, and for this cause not to be discharged by a Releale of all Actions and Demands before the day; the whole Court inclined to be of the same Opinion, but no Judgment was then given for the Plaintiff: But the Court was of Opinion that he had good cause of Action, and not to be barred by this his Release thus pleaded against him. This Case was not moved again, but was ended betwæn the parties, they perceiving which way the Court inclined in their Opinions.

Norcot Plaintiff against *Heywood* Defendant, Entred *Mich.* 8 *Jac. B. R. Rot.* 350.

A Writ of Error for to reverse a Judgment in an Action upon the case.
3 Cr.442. Yelv.130. 2 Cr.6.386, 632. Hob.17, 19.144. Ante 126. 1 Ro.771,774. 1 Co. 83, 119. 8 Co.59,60,61, 62. 2 Sid.70. Judgment reversed per Curiam. Pop.203. 2 Bulstr.133.

IN a Writ of Error brought for to reverse a Judgment given in an Action upon the Case in an inferiour Court; the Errors were assigned by Coventry for the Plaintiff in the Writ of Error, that the Judgment given was erroneous. The first Error was, That the Judgment was Ideo concessum est per Curiam; whereas it ought to be Ideo consideratum est per Curiam. The second Error, That the Judgment was Quod capiatur, whereas it ought to be Quod sit in misericordia. The Court were clear of Opinion that both these Errors are good, and to be allowed of, and that the Judgment is erroneous. And for these Errors, by the Rule of Court, the Judgment was reversed.

Holts Case.

A Prohibition to the Spiritual Court, &c.

IN a Prohibition prayed unto the Spiritual Court, the case appeared to be this, (s) Holt was presented, instituted, and induced to the Parish Church of Storrinton; afterwards Doctor Wickham draws him into the Spiritual Court, questioning of him for some matters, as touching the validity of his induction; and upon this a Prohibition was by him prayed. Williams Justice, A Prohibition here in this case ought to be granted, this being directly within the Statute of 45 E. 3. cap. 3. for here the very title of the Patronage comes in question, with the determination of which they ought not there for to intermeddle; also matter of induction, and the validity thereof, is determinable at the Common Law, and not there by them in their Court, and therefore for to prohibit their proceedings in this case, a Prohibition ought to be granted: The whole Court agreed with him herein; and therefore by the Rule of the Court a Prohibition in this case was granted.

A Prohibition granted by the Court.

Busby Paintiff against *Hadderton* Defendant, Entred *Hill.* 9 *Jac. B. R. Rot.* 182.

An Action upon the Case for a Promise, &c.

IN an Action upon the Case for a promise, upon Non Assumpsit pleaded, a Verdict was found for the Plaintiff, and upon a motion in arrest of Judgment, the case appeared to be this: The Plaint. sold unto the Def. a parcel of sugar at 17 d. ob. the pound quæ in toto se atting. to so much, & afterwards the Pl. sold unto him another

parcel for so much, quæ in toto se attingunt to such a sum, and afterwards the Plaintiff sums up all together with this quæ in toto se attingunt to such a sum, in consideration of all which, the Defendant did assume and promise to pay this unto the Plaintiff, which last sum in the last casting up, quæ in toto se attingunt to so much is (11 d.) more than the two former sums truly cast up amounted unto, the promise was to pay the last sum as it was cast up, in which the mistake was, and this was moved in Arrest of Judgment, for that this doth not now appear for to be one and the same contract, because that (11 d.) more is in the last casting up, quæ in toto se attingunt to such a sum, than is revera in the two former sums, and therefore it was urged by Geo. Croke for the Defendant, that for this cause Judgment ought to be arrested; and to the same purpose he remembred a case adjudged here in this Court, but afterwards reversed by a Writ of Error in the Exchequer Chamber, and that upon this reason, because that the sum cast up in the last total (which was promised to be paid) was less by a peny than the other several sums truly cast up amounted unto, and so this appeared not to be the same contract, and for this reason the Judgment was reversed, and the same reason is here for the arresting of this Judgment; there the last total in the casting up was (a peny) less than the former sums; and here in this case the last total in the casting up is (11 d.) more than the former sums, but the reason is the same in both cases —— Williams Justice, It is very clear that these words in the last total, quæ in toto se attingunt to so much, are words merly superabundant, if the several sums before (being the ground and consideration of the promise to pay) are cast up right, for that the Assumpsit to pay hath relation to the other several sums for which the goods were delivered. The like case was here in this Court adjudged, being one Lantons case, and affirmed upon a Writ of Error in the Excheq. Chamber, where like variance was in the casting up of the last total, the former sums being right, and this was held to be amendable, and was here amended, and the last total amended, and made for to agree with the other sums; and so this variance and mistake here in this case in the casting up of the last total, is amendable, and ought to be amended, and made to agree with the other sums which are rightly cast up. Croke Justice, The contract here hath reference unto the parcels before named in particular, and if it appears in the casting up of the last total, quæ in toto se attingunt to so much, be the same more or less than the before-named particular sums do amount unto, then this non est idem, but a several contract. —— Flemming chief Justice, The Assumpsit here is the ground and cause of the Action, and therefore if one in consideration of a horse of 10 l. price delivered to him, do promise to pay unto him 20 l. for the horse, this is true and good, and this his promise shall bind him to pay the 20 l. And it may be so here in this case, if the promise be to pay so much here, as by the casting up of the last total it is said to be, this will then bind him to the performance thereof: And as to the Amendment where a mistake is in the casting up of the total, this is true, as it hath been observed, and the same is matter amendable in many such like cases; but herein this difference is to be observed, where the Plaintiff frames his Declaration according to an account of particular sums taken by himself, and where it is by the parties which do assume to pay for the several commodities delivered quæ in toto se attingunt to such a sum wherein the mistake is, if it be by the partie himself, and there is more cast up in the last total than in the former, this is not idem, nor yet amendable; but otherwise it is where the same so is done by the party which doth assume. Yelverton Justice, Put the case to be without any such casting up, with a quæ in toto se attingunt to so much; as if one do sell an horse to another for ten pound, or an Ox for five pound, and for this he promiseth to pay him twenty pound, clearly this is good, and he shall be bound to performance by this his promise; the difference is good which hath been taken, where the variance and mistake is the default of the Clerk in casting up of the sum, and so mistakes in the total, this is matter amendable, and the same hath been usually amended; but otherwise it is where the variance and mistake is meerly the default of the party himself, in casting up of the total, this is not amendable, but this

Lantons case in B.R. and affirmed in a Writ of Error. Ante 171.

Note the difference where a mistake in casting up of a sum is amendable, and where not.

this case now here in question, doth something differ, for that the former sums, which the parcels delivered amounted unto, were cast up right in the quæ in toto se attingunt, but the mistake is in the casting up of all together in the last and general total, this may in reason be amended, and made to agree with the former sums which are cast up right, if the Presidents of the Court will warrant it—— Man Secondary informed the Court, that he had Presidents direct in the point for Amendments of such mistakes of the party in casting up of the last total, where the former sums were right; upon the producing of which Presidents, this mistake in casting up of the last total, was by the Rule of the Court amended, and made to agree with the former sums; and by the Rule of the Court Judgment was entred for the Plaintiff.

The mistake in casting up of the total amended, &c.

Smith Plaintiff against *Flint* Defendant.

IN an Action upon the Case brought by the Plaintiff for slanderous words spoken by the Defendant of the Plaintiff: Upon Not guilty pleaded, a Verdict was given for the Plaintiff. It was moved in Arrest of Judgment, that the words were not actionable. The words being, that the Defendant said of the Plaintiff, That he had harboured and received his Son into his House, having notice of him before, that he was a Seminary Priest. The Court were all of them clear of opinion that these words are in a high measure scandalous and actionable, for that the same Offence is made Felony by the Statute of 27 Eliz. cap. 2. and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

An Action upon the Case for words.

Judgment given for the Plaintiff.

Baker Plaintiff against *Baker* Defendant.

IN an Indictment of Felony, and an Outlawry upon it, a Scire facias against the Ter-tenants to seise the Goods of the party outlawed, in stay of which two Errors were assigned for to reverse the Outlawry, and Bridgman for the party outlawed alledged Diminution of the Record, there being in the Court a Transcript of the Record of Indictment, but not the Record it self. Williams Justice, In case of Error upon Indictments to reverse them, the body of the Record it self is to be removed, and a Transcript of it is not sufficient. Flemming chief Justice, If the Error be assigned in the Outlawry, only Diminution may be alledged, there being only a Transcript of the Record; but if the Errors be assigned upon the Outlawry, and also upon the body of the Indictment, here in this case the body of the Record ought for to be removed, and to be in Court, and a Transcript is not sufficient, and so it was in this case; and therefore by the Rule of the Court a Certiorare was granted for to remove the Record it self, and that afterwards Diminution may be alledged.

Error for to reverse an Outlawry upon an Indictment.

Note the difference.

A Certiorare granted for to remove the Indictment.

Umphery Plaintiff against *Damyon* Defendant.

IN a Trial at the Bar by an Essex Jury, in an Action of Trespass and Ejectment, this Case upon the Evidence came in question. Lessee for years rendring rent payable at Michaelmas next coming, upon a condition of re-entry for default of payment. Afterwards the Lessee is ousted by a stranger, the disseisin continues till the day of payment, and after the rent is demanded by the Lessor, and not paid. Dodderidge Serjeant moved this question, to have the resolution of the Court in it, inasmuch as by the disseisin the condition is in suspense, whether the Lessor may enter for the condition broken, the Land being in the hands of a Disseisor: he urged by way of Argument for his Client, that the Lessor could not enter for a forfeiture,

An Action of Trespass and Ejectment, &c.

forfeiture, but that he might come and distrain for his rent behind upon the Land. But by the whole Court clearly, and without any question, he may enter upon the Land for the Condition broken, for that in whose hands soever the Land is, the same is, and shall be subject to this Condition of Entry for Nonpayment of the Rent; or if he will, he may distrain for the same. And by Flemming chief Justice, The Entry of a stranger upon Land leased shall not take away the Re-entry, or any Condition of any person; the whole Court agreed with him herein.

Ellis Plaintiff against *Parke* Defendant.

An Injunction out of the Chancery after three Verdicts to stay the Plaintiff from praying his Judgment. 2 Bustr. 194, 301. 2 Sid. 463. Mo. 59.

NOte, That after three several Verdicts passed for the Plaintiff, the Defendant preferr a Bill in Chancery, and procures an injunction thereby, prohibiting of the Plaintiff from praying to have his Judgment according to his Verdict, so that for this cause, and for fear he durst not demand to have his Judgment. Yelverton moved the Court in this, to see if they would give direction for to enter the Judgment without the prayer of the party. Williams Justice clearly of opinion, that in this case Judgment may well be entred without the prayer of the party, the Court by information having notice of this, that the party is barred from praying of his Judgment by reason of the injunction. Flemming chief Justice, Though the party be enjoyned from praying of his Judgment according to his Verdict, yet this Court cannot be prohibited from granting of Judgment, and therefore if any one will pray Judgment for the Plaintiff, he shall have it upon this —— Yelverton at the Bar, said that he was not served with any injunction, and therefore he for the Plaintiff (who was injoyned) prayed Judgment for him, the which was granted him by the whole Court; and so by the Rule of the Court, Judgment was entred for the Plaintiff. See to this purpose the Book-case in 22 E. 4. fo. 37. Brook tit. Judgment, pla. 86. a notable case touching this matter in Trespass by the Husband for taking the Goods of the Wife, and carrying of them away dum sola fuit; a Verdict for the Plaintiff, and 20 l. damages; an injunction came unto him out of the Chancery, that he should not proceed to Judgment sub pœna 100 l. There by Fairefax he may pray Judgment notwithstanding the injunction; and if he be injoyned, his Attorney may pray it; and by Hussey, no hurt can come to the party if he prays his Judgment; and if for his so doing he be committed to the Fleet, he may have a Habeas Corpus, and be discharged here, where the Court will do all they can for him. The Court there said, that if the Plaintiff would pray his Judgment, he should have it, & ex hoc patet, that the Court will never give Judgment, unless the Plaintiff, or some one for him, do pray the same.

Judgment prayed and given for the Plaintiff, &c.

Stevenson Plaintiff against *Powell* Defendant, Entred *Hillar.* 9 *Jac. B. R. Rot.* 164.

An Action of Covenant by an under Lessee, &c.

IN an Action of Covenant, the case appeared to be this, (s) Lessee for 21 years rendring rent, with a Condition for to re-enter for not payment of the rent, the Lessee doth lease parcel of the Land unto the Plaintiff for a lesser term, at, and under a lesser rent, with this special Covenant, that the

the Plaintiff being his under Lessee, should enjoy this without the impeachment of him, or of any other, occasioned by his impediment, interruption, means, procurement, or consent, and afterwards the Defendant did not pay his Rent reserved upon his conditional Lease, by reason of this not payment of his Rent cause of Entry was given to his Lessor by his default and negligence in not paying his Rent: And for this cause, by force of the condition, the first Lessor did enter into the whole, and so by this avoided the term of the Plaintiff, being the second Lessee: And for this cause the Plaintiff here brought his Action of Covenant against the Defendant, his Lessor, for that by this means, (s) by his Non-payment of his Rent, the Plaintiff was defeated of his Lease, and so a breach of his Covenant, being not suffered to enjoy his Lease by reason of his default in not paying of his Rent. The whole Court clear of Opinion that here was a breach of Covenant on the Defendants part, by not paying of his Rent according to the condition of his Lease, and that for this cause the Plaintiff hath just cause of Action for breach of Covenant, his Lease being avoided by the Defendants neglect and default; and therefore by the Rule of the Court, Judgment was entred for the Plaintiff.

Judgment given for the Plaintiff *per Curiam.*

Ordeway Plaintiff against *Orme* Defendant.

NOta, That upon a Trial at the Bar in an Action of Trespass, this question did arise as touching a Prescription, which was this, quod quilibet pater familias, (Anglicè a housholder) in Da. time out of mind, ought to have common of Pasture in another Vill. Geo. Croke, In all corporate Vills the Tradesmen have ancient Houses, and have used for to keep their cattel within the Vill, and to have common of Pasture within the fields adjoyning. Williams Justice, Who shall be said to be a housholder within this Prescription is uncertain; but if the Prescription had been to have common belonging to a house, this had been good; but the Prescription as it is here laid to be, cannot be good, and so it hath been ruled in the Court of C.B. The Court all agreed with him herein, that this Prescription here is not good. Hen. Yelverton, The Lord Chancellor hath likewise overruled this in like manner in Chancery; and for this vide Coke 6. pa. fo 60. & 61. in Gatewards case, and 15 E.4 fo 29. & 32. & 33. the Case concerning Coventry: The Rule of the Court in this principal case was, That a Juror should be withdrawn, and so the matter to be ended by agreement, for that the Prescription being the ground of the title that was made, was over-ruled by the whole Court to be a bad Prescription; and so accordingly a Juror was withdrawn, and the Jury paid indifferently between the parties.

A Prescription for every Housholder to have Common of Pasture in *alieno solo* not good.

2 Bulstr. 86. 7.

A Juror withdrawn by direction of the Court.

The King against *Hastings* and others.

NOta, That Hastings and eighteen others were endicted for a Riot in Lincolnshire, and J.S. of Huttoft, Yeoman. Exception was taken to quash the Indictment —— because there was no addition of the place where the Parties indicted did dwell, for that the place of Huttoft is only for J.S. the last party named, but no addition of any place for the rest; and for this cause it was prayed that the Indictment might be quashed. Williams Justice, The word Yeoman goes to all, reddendo singula singulis, but the place here named of Huttoft doth not go to all, but to the last man named; and for this default of addition of a place where the other Parties Indicted did dwell, for this cause, by the Rule of the Court, the Indictment was quashed, and the Parties Indicted discharged.

Judgment for a Riot quashed, because no place named where the Parties dwell.

Nota,

A submission to stand to the umperage of a fifth, &c.

NOta, That this Question was moved unto the Court, arising upon a submission to an Award, where the submission was of all Actions, Suits and Quarrels unto four persons, and the Umperage of another, and the Assumpsit was mutually to stand unto and perform the order of them five. The four persons, and the fifth as Umpire, did make the Award, and the party submitting, did refuse to perform this Order and Award so by them made; the question propounded was, Whether this Award thus made, was made according to the submission or not. Williams Justice, That the Award was well made, and pursuing the submission; but otherwise it had been, if in the submission they had been divided in the submission; as if it had been in this manner: That if the four could not agree in their Award, that then the submission to be to the umperage of a fifth man, then these five could not all of them joyn in the making of this Award; but the submission being here to four, and to the umperage of a fifth, they all five may well joyn in their Award; and so the Award here made by them all five is clearly good and well made, according to the submission, and the same Award ought to be performed. The whole Court agreed with him herein.

Harris Plaintiff against *Sherley* Defendant, Entred *Trin.* 9 *Jac.* *B. R. Rot.* 1321.

A Writ of Error to reverse a Judgment upon a Bond, &c.

IN a Writ of Error for to reverse a Judgment given by default upon a Non sum informatus pleaded in an Action of Debt upon a Bond of 80 l. The Error assigned was, That the Original was against Sir Francis Harris de Browton, and the Declaration was de Brownton. As to this it was answered, That Misnosmer is not to be pleaded after Imparlance; and so this Plea here is not good after Judgment. Williams Justice, Variance is not aided by any Statute Law; and it appears by 9 E. 4. fo. 51. b. where a Judgment in a Writ of Annuity was reversed, because that the Writ was Præcipe quod reddat 26 Marks 6 s. 8 d. and in the Count the 6 s. 8 d. was left out; and for that it did disagree, and not warranted by the Writ, the Judgment was reversed, for that this was not Misprision, for the Count is by the Party, and not by the Clerk. And so if the Original be J. S. de Aggrave, and the Declaration is de Dedgrave, this is a Variance and not helped by any Law. Yelverton Justice, It is true as hath been said, that a man shall not plead Misnosmer in such a case; but here it is not so; for this is a plain Variance: And this appears for to be so upon the Record, being here in Court; and the Statutes which are made to help the default of a Letter or a Syllable, the same are of no force at all to help such a default in Declarations. The whole Court was of the same Opinion, that by reason of this Variance the Judgment is erroneous, and the same is out of the help of any Statute: And so by the Rule of the Court, for this cause the Judgment was reversed.

Judgment reversed by the Rule of the Court.

Williams

Willins Paintiff against *Fletcher* Defendant.

IN an Action upon the Case in the nature of a Conspiracy: The Case did appear to be this: Fletcher in the County of Northampton, preferred a Bill of Indictment against Willins for being a Common Barretor, and he was sworn before the Justices of Peace, that the matter in his Bill contained was true: Upon this the Jury gave a verdict against Willins, for which he brought this Action upon the Case, in the nature of a Conspiracy, pretending that by reason of his Oath the Indictment was found by the Jury against him. G. Croke for the Defendant, That this Action doth not lye against him, for that he is only one person, and doth only take his Oath upon the Indictment; but a Conspiracy is, where two, three, or more do conspire for to Indict one; and the same lieth not against one, where he only comes in and swears to the truth of his Bill; for if this should be taken for a Conspiracy, no Indictment would then be preferred by any one upon the reason given in Cutler and Dixons Case, Coke 4 part fo. 14.b. for that then no man would dare to complain, if for so doing he should be liable to an Action: And so upon this reason it was likewise lately adjudged here in this Court, in Porter and Griffins Case, that in the like Case with this now in question, an Action upon the Case in the nature of a Conspiracy would not lie; and if a Juror, or a Witness do come in upon his Oath, an Action upon the Case for this lieth not against him. The whole Court was clear of opinion, That in this principal Case here, an Action upon the Case, in the nature of a Conspiracy, doth not lie; and therefore by the Rule of the Court Judgment was given for the Defendant, quod querens Nil capiat per Billam.

An Action upon the Case in the nature of a Conspiracy, &c.

Porter and Griffins case, ad. in B. R.

Judgment by the Court for the Defendant.

Wemstone Plaintiff against *Webbe* Defendant.

IN an Action upon the Case for a promise, the Case appeared to be this; J. S. being possest of Goods, makes his Will, and makes the Plaintiff his Executor; the Defendant, in consideration that the Plaintiff would forbear to joyn in the probate of the Testament, & relaxaverit totalem executionem of the Will of the Testator, the Defendant did assume, and promise, that when the Plaintiff came to such a place, that he would pay him——11 l.——and did aver in facto, that he came to the place such a day, that he had forborn the probate of the Will, and had made the Release, but the Defendant, according to his promise, had not paid him the 11 l. whereupon he brought his Action, and declared ad damnum. Upon Non Assumpsit pleaded, a Verdict was given for the Plaintiff. Geo. Croke for the Defendant, moved the Court in Arrest of Judgment, that the Declaration was not good; for that for one Executor to relinquish to another, this is no benefit, but a trust, and so the same is no good consideration for to ground a promise upon to pay money. Flemming chief Justice, Abstaining and reliquishing is renouncing; and as to the words (totalem executionem) this is as much as to say totaliter. Williams Justice agreed with him herein; and that this doth amount to as much, as to forbear. The whole Court agreed in this, That here was a good consideration, and that the Plaintiff had just cause of Action; and therefore, by the Rule of the Court, Judgment was given for the Plaintiff.

An Action upon the Case for a Promise, &c.

Judgment for the Plaintiff.

Harrison Plaintiff against *James* Defendant.

An Action of Debt for mony won at play, &c.

IN an Action of Debt brought by the Plaintiff against the Defendant, for mony won of him at play, the Defendant prays that he may be admitted to wage his law; and upon this prayer, the Court gives him a day for to perform this; and at the day assigned, he by his Counsel moves the Court, that he may have the benefit for to waive the wager of his Law, and to have the matter tried by the Country: Unto this the Plaintiff refused to consent, being demanded by the Court; and therefore, by the Rule of the Court, a defecit de lege, and his Non-appearance was recorded. Note, That Waterhouse an Officer of the Court, and Clerk of the Crown Office, did then say, and affirm, that by the course of the Court the Defendant might at any time, without the assent of the Plaintiff, waive his wager of Law, and stand to a trial by the Country: But notwithstanding this his Information, the Rule of the Court was entred, ut supra.

Defecit de lege entred.

Sir *William Herberts* Case.

Note the course of the Court to be observed, &c.

NOta per Curiam for a Rule of the Court, to be duly observed by all, That in not pursuing the Order of the Court upon the filing of a Declaration against any Prisoner, being in the Marshalsea, for to proceed unto Judgment, upon a Nihil dicit, before due notice given unto him of all the whole proceedings had against him, that so he may appoint an Attorney; and if he will have no Attorney, then to send unto him a Copy of the Declaration against him; and so was it done in this Case of Sir William Herbert, who was brought hither by a Habeas Corpus in December last, and was had to the Prison of the Kings Bench, and that a Declaration was filed against him at the suit of J. D. in Mich. Term before for a Debt of 200 l. for mony won at Dice; and that in Termin. Pasch. proximè sequent. he had got a Judgment against him by a Nihil dicit, and this without any notice at all given to him, or to his Attorney, he having an Attorney that dealt for him. And for this matter and great abuse by these undue proceedings against him— Whitlock did move the Court on the behalf of Sir William Herbert, to have a stay made of entring of the Judgment, and also to have an Attachment against the party who had in this undue manner proceeded against the express Order and Rule of the Court. The whole Court did very much dislike of these proceedings, and did therefore refer the examination of the whole matter unto Mr. Man Secondary of the Court for to examine the same, and to certifie and inform the Court of the whole proceedings; and if this prove to be true, according to the Information, that he came in by a Habeas Corpus in December, and the Declaration filed against him in Mich. Term before, and this against him as being in Custodia Mariscalli, when he was not then in his custody; if this appears upon examination to be so, the proceedings are very illegal, and there will then be just cause to stay, and to supersede the Judgment, and to grant an Attachment against the partie to answer these his unjust and illegal proceedings, and to be punished for the same.

Note the course of the Court for amending, &c.

Note, That Man Secondary did inform the Court of the course of the Court to be observed; unto which the whole Court did agree, and that for a Rule of the Court for to be duly observed for the future, That after a Plea here entred in this Court at any time before the Replication of the Plaintiff, the Defendant may either amend his Plea, as he shall be advised by his Counsel, or else he may put in a new Plea, if he shall be so advised.

Warrains

Warren Plaintiff against —— Defendant.

NOte, That upon a Judgment given here in B.R. a Scire facias issues, and the same returnable in this Term by the Rule of the Court, the return of this cannot be staped, but in favour of Purchasers; when the Return is filed, the Court may then give a longer time to put in their Plea to the Scire facias; and like wise for to imparle: The motion was made to stay the Return of the Scire facias from being filed, which the Court would not grant.

The return of a Scire Facias not to be stopped from filing.

Morgan Plaintiff against *Soke* Defendant, Entred *Mich.* 9 *Jac.* *B. R. Rot.* 95.

IN a Writ of Error for to reverse a Judgment given in the Court of C. B. in an Action of Debt there brought by the Plaintiff against the Defendant, as Administrator of J. S. who pleads; that before the Writ purchased, the administration to him was revoked, and committed to another; and saith, that at the time of the Writ purchased, he then had Assets in his hands to the value of 200 l. in mony, but before the Judgment given against him, he had delivered this over unto the new Administrator; and all this being so confessed, the Plaintiff said that this revocation and assignation, and all that was thus acted and done between them, was by fraud and covin between him and the party to whom the second Administration was granted, he being his Brother, and upon this they were at Issue, and the Jury did find the covin, and gave a Verdict for the Plaintiff, and against the Defendant, and upon this Verdict Judgment was given in the C.B. for the Plaintiff, quod recuperet debitum de bonis testatoris, & ceo absolutely; upon this Judgment a Writ of Error was brought here in B. R. and the Error assigned was, because that the Judgment here given was absolute, whereas it ought to have been conditional, (s) si tantum, &c. The whole Court did very much disallow of this Error; and all the Judges did hold clearly that the Judgment being absolutely given was good, and not erroneous; and they were not to be constrained in this case for to give a Judgment conditional, but their general Judgment was good, and so by the Rule of the whole Court the Judgment was affirmed.

A Writ of Error to reverse a Judgment, &c. Yelv. 219. 1 Brownl. 116.

Judgment affirmed per Curiam.

Dingley Plaintiff against Sir *James Creyton* and —— the Manucaptors of —— *Wade* Defendants.

NOte that in an Audita querela the course is for to take bail by Manucaptors by Recognisance, for to prosecute cum effectu, and upon the whole matter the Case appeared to be this, That Wade a Feme covert did acknowledge a Statute, the Husband died, the Wife was taken in execution by her body, and thereupon brought her Audita querela, and therein sets forth, that when the Statute was by her acknowledged, she was then a Feme covert, and that upon this she was let to bail, and bail taken, and averred that the mony in demand was paid and satisfied in the life time of her Husband. Geo. Croke moved the Court for stay of the Scire facias, which was to issue forth upon breach of the Recognisance,

A Feme covert acknowledged a Statute, &c.

until trial was had of the former matter in issue, the issue to be tried being, whether at the time of the Statute acknowledged she was a Feme covert, or not. Yelverton moved the Court against the Manucaptors, because the proceedings had not bæn pursued cum effectu, a whole year and more being passed, and nothing at all done, so that by this Laches, there is a forfeiture of the Recognisance. The Court was moved by the other side, for to have a continuance of their Suit to be entred. Yelverton then moved the Court, and prayed, that upon a continuance entred of the matter and suit, that there be also a Recordatur entred for their benefit, as to the forfeiture. Yelverton Justice, If there be in this case a lawful forfeiture of the Recognisance, there is no reason that the act of the Court, by an entry of the continuance of the suit and trial, should deprive the other of the benefit which the Law gives unto them, in case there be cause of forfeiture of the Recognisance. Williams Justice, They might here in this case have moved the Court for to have had a Discontinuance of the suit entred, but seeing they have omitted this, the other may now well move the Court for to have a continuance of the suit entred; and this may well be done by the Court, without any entry of a Recordatur of the forfeiture. Upon this Man the Secondary, being by the Court demanded how the Presidents and Usages had been in such a case, who thereupon answered, That all the Presidents and Usages in this, and the like case, is wholly in the power and discretion of the Court to cause such an entry to be made of the continuance of the suit, wich a Recordatur, or without the same, as the Court shall see cause; and if they cause an entry to be made of the continuance of the suit, with such a Recordatur, the same is then so done by the Court in favour of the party, who is to have the benefit by the forfeiture: And therefore in this principal case, by the Rule and directions of the whole Court, an entry was made of the continuance of the suit with such a Recordatur as was prayed of this forfeiture, and a Day appointed by the Court for trial of the Issue.

Where a continuance of a suit may be entred, with or without a Recordatur.

NOte that the Court was informed, that one Sir Anthony Ashley had bought the Recognisance which was forfeited, out of a purpose and intent for to vex the Manucaptors, and did prosecute a suit against them upon the same. As to this, Williams Justice, It is very clear that a man may buy or purchase in a Recognisance or a Statute, thereby to free and discharge his own Land from the execution of another, or to prevent such a charge, he may well buy or purchase in such a Recognisance or Statute, and may by this charge his own land by another, and may procure a friend to purchase this in for him, and so to extend the same upon his Land, thereby to prevent such a charge by another, but not thereby for to charge or molest another with it. And in this case it was agreed by all the Judges, that upon trial of the Issue, if it went against the woman, execution cannot again be sued against her but for the whole, the same ought for to be sued against the Manucaptors, and their Recognisance (being the sum which the Debt is) the same is to be extended for it, if the matter in issue be found against the woman, but not otherwise for the forfeiture, for that they shall be but once charged; and if the matter in issue upon the trial be found for the woman, her Manucaptors are then to be clearly discharged by the opinion of the whole Court.

NOta; By the opinion of the whole Court, that the High Commission Court will not, neither can they proceed in the determination of a matter, as touching Incontinency. Geo. Croke moved the Court for a Prohibition, because, that as he alledged, they would proceed there in such a case of Incontinency. The Court denied for to grant a Prohibition, because they conceived that they would not hold plea in such a case, and advised them for to suggest this matter there unto them, and if they would not allow of it, the Court would then grant a Prohibition.

Prohibition to the High Commission Court for holding plea of Incontinency.

Horne

Horne Paintiff against *Harrison* Defendant, Entred *Hill.* 8 or 9 *Jac. B. R. Rot.* 552.

IN a Replevin, the Defendant justifies the taking, for that J.S. was seised of the land in fee, where the taking was, and that he as his servant, and by his command, did take and distrain the Cattel there, damage fesant, and so justifies. The Plaintiff to this replies, and saith, That true this is which is alledged; but saith farther, that long time before J.D. was seised in fee of the same land, and thereof made a lease to him at will, and takes a Traverse in this manner, absque hoc, that J.S. did command him for to enter, and to take the cattel. To this Replication the Defendant demurs in Law, and the Plaintiff joyned in demurrer. The only matter in question, and insisted upon, was, touching the validity of the Traverse. By the opinion of the whole Court, the Traverse was ruled good; for that the Plaintiff here in this case could not Traverse any other matter but the command —— Man Secondary informed the Court, that if it had been in case of a lease for years, or for life, then in such a case the seisin of the other ought to have been traversed, and not the command, and so it hath been here adjudged before; but otherwise in case of a lease at will made, as here in this case: The Court agreed in this; and so this Traverse being here ruled to be good, Judgment was given for the Plaintiff, and to have a return of Cattel.

A Replevin for Cattel.

Defendant justifies as Servant, &c.

A Traverse to the command of the Servant to enter, &c.

Judgment for the Plaintiff, and to have a Return.

Hamlen Plaintiff against *Hamlen* Defendant, Entred *Hillar.* 9 *Jac. B. R. Rot.* 695.

THe case appeared to be this, an infant Plaintiff appears by his Atturney, and in his Replication this so appears. Afterwards the Plaintiff became Nonsuited in the Action, and costs given against him according to the Statute of 4 Jac. c. 3. Afterwards the Plaintiff by his counsel moved the Court to have some mitigation of the costs for this cause, for that the Proceedings by the Plaintiff, being an infant, were by Atturney. The Court denied to mitigate the costs, for now after Nonsuit and costs given according to the Statute, the parties are out of Court, and the Plaintiff hath now pretermitted his time, and that he being Plaintiff, this is his own act for to be Nonsuited; and the Court declared, that after his being Nonsuit, they could not in this case give him any remedy. It was then said privately, that they would have remedy by bringing of a Writ of Error. Man Secondary made answer to them, That by a Writ of Error they could not in this case have benefit after a Nonsuit. Nota, That upon an Evidence given to the Jury at the Bar, for the trial of a supposed forfeiture by a copyholder of his copy estate, being of a copy-manor of the Lord Mountagues: The point and proof of the forfeiture was in manner as is here expressed, (s) That one came to the Lords Court with a stranger, who was not known to the Homagers, nor was ever seen before or after by any of them, he here in the Court of the Mannor, before the Jury and Homage, did swear and depose, That J. S. a Copyholder of the said Mannor, had made a lease for years of his Copyhold land, by words, for to begin at Mich then next ensuing for ten years, contrary to the custom of the said Mannor, and so a forfeiture. And so upon this Oath taken before the Homagers, they found, and did present the forfeiture. One witness did testifie, That he had promised the other to make such a Lease to him, but that after this promise, he continued still in possession for the space of 9 years before his death, and so thereof died seised. The Land was of the nature of Burgh English. The Lady Mountague did prosecute for the forfeiture. It appeared upon proof, that the copyholder had drawn a lease of his freehold land, and of his copyhold tenement also, but that he never sealed the same, and to avoid a forfeiture, it appear'd that he made a lease for 1 year only of his copy-land according to custom, and covenants with the Lessee that he shall enjoy this land de

An Infant Plaintiff appears by Attorney, &c.

What shall be said to be a forfeiture of a Copyhold estate, and what not.

de anno in annum, during ten years, this was only by way of covenant, and that for this he had 20l. in hand paid him, and old covenant, that if he did put him out after one year, or at the end of any one of the years, and not suffer him for to enjoy all the land, that then the 20l. which he had all before hand, should be accounted for the rent of the last half year, so that he had no certain term made to him by the Copyholder of his Copyhold estate; and whether upon the whole matter, as the case appeared to the Court, upon the Evidence to me, this act of the Copyholder shall amount to make a forfeiture of his Copyhold estate, was the question. The whole Court was clear of opinion, that for a Lord of a Manor to avoid a Copyhold estate for a forfeiture, by making of a lease of his copyhold land contrary to the custom, there ought to be very direct and certain proof made of a certain lease, with a certain beginning and ending of it; and so in like manner of any other thing supposed to be acted and done by a copyholder, and contrary to the custom of the Manor, thereby to make a forfeiture of his copyhold estate; this must all appear certainly to the Court, and the oath of a stranger made in the Lords Court to this purpose, shall not be of any force or effect to prove a forfeiture, especially when the Copyholder still continues in possession, and so dies seized of his copyhold estate, and this never came in question till after his death. And if such a presentment as this was in the Lords Court, shall be allowed of upon such an oath made by a stranger, as to make a forfeiture of a copyhold estate, every copyholder then might be in continual danger to lose his copyhold estate. The Court did also clearly agree, that if the copyholder did promise for to make such a lease, and it is not proved in facto that he did make the same, this is no cause for to make a forfeiture of his copyhold estate. Croke Justice, If any such lease was made as is here alledged, it appears that this was made in the time of the Lord Mountague, Lord of the Manor; so that the forfeiture, if any were, was in his time; and so take the case to be this, That a copyholder makes a lease of his copyhold land, and so a forfeiture being contrary to the custom of the manor, if after this he continues still in possession, and the Lord of the Manor dies, and afterwards his widow, or he which hath the Manor, doth receive rent from the copyholder, it is clear that he shall never after this acceptance of rent, take any benefit or advantage of the forfeiture; and so it might be here in this case; for here it was the Lady Mountague that did question the copyholder for this forfeiture in this case now in question; this presentment was made long time after the supposed forfeiture, and then the copyholder being dead, his heir was but a year old, and had not there any Counsel to speak for him when the presentment was made, and so they presented the forfeiture. The Court did very much dislike of the proceedings in this case against the copyholder. Williams Justice, Magna est veritas & prævalebit; The Court then said to the Jury at the Bar, that here appears no proof at all to be made of this lease alledged to be made by the copyholder; and if there was a lease by him made there, yet no forfeiture: And according to this direction of the Court, the Jury did find for the Infant copyholder against the Lord, that there was no such Lease made by the copyholder as was presented for to make a forfeiture, and so to intitle the Lord to the copyhold estate. Yelverton Justice, If a copyholder makes a lease for one year, warranted by the custom of the Manor, & sic de anno in annum, during ten years, this is clearly a good lease for ten years, and so such a lease made by a copyholder will make a forfeiture of his copyhold estate; but if he makes a lease of his copyhold land for one year, and covenants that after the end of this year he shall have the same for another year, and so in this manner de anno in annum during the space of ten years, this is no such lease as shall make a forfeiture of his copyhold estate, for that here he hath no lawful estate but for one year only. The Court agreed with him herein: And as touching the like lease, see 28 H. 8. Dyer fo. 24. pla. 151. & Plowdens Commentaries fo. 273. b. in Say and Fullers case, & 14 H. 8. fo. 14. b. & Coke 6 part, fo. 35. b. in the Bishop of Bathes case.

What shall make a forfeiture of a Copihold estate, and what not.

Poph 215.

The Bishop of Bathes case.

Price

Price Plaintiff against *Atmore* Defendant, Entred *Trin.* 8 *Jac.* *B. R. Rot.* 439.

IN an Action of Trespass and Ejectment, the Plaintiff declares of a lease made unto him by one Smith, and upon Not guilty pleaded, the Jury found a Special Verdict; upon which Special Verdict the Case appeared to be this: The Lord Windsor being seised of land (being the land in question) 13 Eliz. did make a lease of this Land unto Thomas Moor for the term of 60 years; by force and virtue of which lease Thomas Moor possessed, did make his last Will and Testament, and thereby did devise the said term, and the occupation thereof, during all the said years, and all his interest therein, unto Margaret his wife, if she shall so long live, and continue sole; and if she dies within the term, then he deviseth all the residue of the years then to come unto John his son, and to the heirs of his body, and makes Margaret his wife sole executrix of his Will, and dies. Margaret the executrix enters especially, claiming this term as a Legacy. John the son dies (having) issue living his mother (the first devisee) and makes his wife executrix of his Will. Margaret the first devisee makes her will, and dies within the term, and before any assignment made of the term, the executor of Margaret assigns this term over unto Atmore the Defendant, the widow and executrix of John, with her second husband, assigns this lease over unto Smith, the Lessor of the Plaintiff, so that the only point in question was, whether of these two assignees should have the residue of this term; the determination of which question rests only upon the consideration of the validity of the second devise, of the residue of the term, unto John the son, whether the same were good, or not; and whether the mother, being the first devisee, by her act, may prevent this second devise; whether the executors of John, and their assignee, being the Lessor of the Plaintiff, shall have this contingent remainder in the term, John being dead in the life time of Margaret, the first devisee. Upon the first opening of this Case, the whole Court were clear of Opinion, that the executrix of John should not have this; for that by the death of John, in the life time of his mother, the first devisee, and so before the possibility did fall, this possibility is now quite gone. And to this purpose was cited Welden and Elkingtons Case in Plowdens Commentaries fo. 520, 521, 522, & 523. and Coke 1 part fo. 154, 155. The Rector of Chedingtons Case, Brooks Cases, 33 H.8. fo. 48. pl. 209. temps H.8. fo. 74. pl. 334. 2 E.6. Br. cases fo. 84. pl. 388. 28 H.8. Dyer pl. 7. 6 E. 6. Dyer pl. 74. & 4 Mariæ Dyer, pl. 140. the words here in this principal Case were, That the wife of the devisor, by the devise should have, occupy, and injoy all his interest in the term, if he should so long live. The Court upon that which was now urged, was of Opinion, That the assignee of the executor of Margaret, the first devisee, should have the remainder of the term; but the Court at this time would not over-rule the same, but gave further time for the arguing of it: And accordingly, at another time, (s) Term. Trin. 10 Jac. Br. Mr. Dason of the Middle Temple argued for the Plaintiff—In this Case these two questions are considerable: First, Whether this devise in remainder of a term be good, or not. Secondly, Admit this devise of the remainder be good to the son, then when he dies in the life time of his mother, the first devisee, and who dies also within the term, whether the executrix of the son, shall have the residue of the term by this devise, that the executrix of the son shall have the same; and so consequently the Plaintiff here hath a good title to him derived from the assignee of the executrix of the son, and the devisee in remainder; the determination of this rests only upon the true construction of this Will made by Thomas Moor, 7 E. 6. Brooks Cases fo. 95. pla. 437. Brook tit. Grants pla. 154. & Brook title Leases pla. 66. a man possessed of a Lease for forty years, grants so many of the years as shall be behind, at the time of his death, this is a meer void grant for the incertainty of it, but such a devise by Testament is good, 10 Eliz. Dyer pla. 272. a Termor grants his

An Action of Trespass and Ejectment &c. 4 Leon. 246. 401. Mo. 831. 758. 807. 810. 1 Ro. Abr. 916. Cro. Jac. 510. Post. 847.

10 Co. 51.

The Point in the Case.

Termin. Trin. 10 Jac. B.R. this Case was argued again.

his term, Habendum after the death of the Grantor, this is a void Habendum; and the term passeth presently by the Premisses, as it is there adjudged; but all this in case of Grants: as to construction of Wills, such a remainder limited upon a Grant, is void; but otherwise it is in case of a Will: And the reason of this is given in Paramour and Yardleys Case in Plowd. Com. fo. 540. because that the makers of Wills for the most part are ignorant of the Law, and of the Rules of Law, and in this regard, a favourable construction is to be made of Wills, and they are to be construed according to the intent and meaning of the Testator. In 38 Book of Assises pla. 3. & 39 Book of Assises pla. 17. & Perkins fo. 104. pla. 541. a man devises that his Executors shall sell his land, and distribute the profits for his soul in pious uses: (Distribute) the Judges expound this for to be a conditional estate, and fee-simple (as it is in Littleton fo. 9. pla. 383.) that if the Executor do not sell, the heir shall enter; and so in Paramour and Yardleys Case before remembred; where a man devises land to one and his heirs, and in the latter part of his Will he grants a Rent to another, this latter Grant and Devise by the intendment and construction of the Law, shall be first according to the intent and meaning of the Devisor, otherwise this devise of Rent out of land before devised, shall be void, 2 E. 6. Brook title Devise pla. 13. A man devises the occupation of his Plate to one for life, and that afterwards this shall remain unto another, this is a good remainder, 33 H. 8. Brook title Done, placito 57. & Brooke title Chattels pla. 23. Lessee for years devises his term, or other his chattels or goods, to one for life, the remainder to another, and dies, the Devisee enters, and doth not alien in his life time, nor give, sell, nor yet forfeit the goods, he in the remainder shall have the same; but if the first Devisee doth sell, give, or forfeit them, he in the remainder is then without remedy, 28 H. 8. Dyer pla. 7. A Termor devises his term to his eldest daughter, and to her issue, the remainder to his youngest daughter. The eldest dies without issue, her husband aliens, by Baldwyn and Shelley, the youngest daughter is without remedy, because it was a void remainder of a term, as it is of a chattel personal. Englesfield to the contrary, by reason of the intent and meaning of the Devisor, 6 E. 6. Dyer pla. 74. Lessee for years devised his whole term to A. Proviso that if he dyes living I. S. then the residue for to remain to I. S. A. aliens and dyes, I. S. is without remedy, 4 Mariæ Dyer placito 140. he in remainder is without remedy, where the first Devisee aliens. Coke 4 part fo. 66. b. in Fulwoods Case, Resolved that such a remainder man cannot assign his remainder over, before it happen, the same being but a bare possibility, and not assignable over. Coke 8 part fo. 96. b. in Mannings Case, where it is said, That it lyeth not in the power of the first Devisee to bar him which hath the future devise, for that he cannot transfer more over unto another than he himself hath, as it is there resolved, Mich. 26 and 27 Eliz. in the Kings Bench, Thomas Perpoint Lessee for 99 years, devised his term in these words: I devise my Lease to my wife, during her life; and after her death, I will the same to go to her Children unpreferred; makes his wife his Executrix, and dyes, she enters, and possesseth her self, ratione doni, & legationis, and marries with Sir Thomas Fullesburst, against whom one recovers 140 l. Debt in the Court of C. B. and by force of a Fieri facias to the Sheriff the term was sold, the Wife dyes. First, in this Case it was resolved, That there was no difference where the term, and where the use and occupation of the term devised; and with this agrees the third Resolution in Mannings Case, Co 8 part, fo. 95. b. Secondly, Resolved, that by the sale, either by the Wife, or by the Sheriff, by force of the Fieri facias, after that the Wife was of this possessed, as of a Legatory devise, this shall not destroy the Executory devise, although that the person to whom this was devised, was then uncertain, as long as the Wife was living, and that this possibility cannot be defeated by any sale made by the first devisee; all which appears in Mannings Case. The second Point here is, Whether the Executrix of John Moor, shall be in the same degree here, as the Testator was in, that she shall be in the same degree, wherein it is to

Paramour and Yardleys Case, &c.

Paramour and Yardleys Case.

Coke 4 part, fo. 66. b. in Fulwoods Case.

Coke 8 part, fo. 96. b. Mannings Case.

Coke 8 part, fo. 95. b. Mannings Case.

to be considered, whether this be an interest in John Moore the Son, or a contingent possibility; this is an interest in him, and not a contingent possibility, and then the same is well assignable over, and so the Plaintiff coming in under the Assignee, hath a good title; and so prayed Judgment for the Plaintiff. Williams Justice, The Executor may have a possibility, if a Lessee for years grants this to one if he shall live so long, this is good here in this Principal case, this is an interest in the Devisee John, and not a possibility. It appears by Weldens case in the Commentaries, that a Devise shall have a reasonable intendment and construction, as by construction to have the latter words in a Will placed first, and it is not strange that two may have an interest in one and the same thing; here John the Son had a good interest in him, the which shall go to his Executor; and here the word Heirs, is a word of limitation but not of Estate. Hen. Yelverton argued for the Defendant, three points have been here moved in this case; two of which are to be agreed, but not the third; & that this is only to be argued, being the sole point: That the Will here is good, is not to be questioned, and that the Son here was likewise to have the remainder of the Term, after his Mothers death; this is very clear and no ways to be questioned: but when John the Son dies, (as in this case here he did) living his Mother, and before his remainder did fall, whether his Executor now shall have this, is the sole and only question considerable in this case; and here the Executor of the Son shall not have this, and then consequently the Assignee of the Executor being the Lessor of the Plaintiff can have no Title, nor the Plaintiff under him; and in this case it is to be considered, whether at the first by this Will, John Moor the Son had a bare possibility, or an interest if no interest, but a possibility, then Weldens and Elkintons case in the Commentaries, is our express case in terminis, and the Judgment given there in that case, is a Judgment in point for the Defendant here; and the reason given there makes for the Defendant here; there it is said to be an interest, and therefore the Son to have it, and so his Executor, if he dies before it happen; but here it is no interest, but a bare possibility in the Son, as it is now agreed at this day, and so was it held Patch. 25 Eliz. in the C. B. in Carters case, and in Hemmingtons case 29 Eliz. in both of them adjudged that a release of this is void, and therefore no interest. Coke 4. pa. 4. 66. b. in Fulwoods case, our case is there put for to be a possibilitie, and so this not to be granted by the Son, in the life time of the Mother, nor yet to be released; ex hoc sequitur, this can be no certain interest, but only a bare possibility the which cannot go to the Executor. It appears by the Rector of Chedingtons case, Coke 1. pa. 24, 25. that a contingency shall not go to an Executor, here in this principal case there is only a possibility in John his Son, and no interest because that the Wife may survive the Son and live out the whole Term, and then nothing can come to the Son, and therefore this doth sound to be only in possibility, and not in interest; also the Executor is not to have any thing, if there were not an interest in the Testator, or that the same hath relation to some former grant; here this Estate which John the Son is to have by this devise, the same is not by him grantable over, releasable, extendable or assignable, and therefore this was no interest in him, but a possibility; and so when he himself dies before this happens, this shall not go unto his Executor, and so the Plaintiff claiming under an Assignee of the Executor of John can have no good Title, and therefore he prayed Judgment for the Defendant. Flemming chief Justice, John Moore the Son by this devise, hath nothing but a bare possibility, he hath no manner of interest, but upon a meer contingent and casualty, and he dying before this falls, it is very plain and clear, that his Executor shall not have this possibility. Williams Justie, It may be made a good question, whether this remainder of a Term be good or not, and in this there will be a difference, where a man doth grant the Land it self, and where the Term. Edwards case put Coke 1. pa. fo. 25. in the Rector of Chedingtons case was adjudged contrary to Weldens case in the Commentaries, a Term granted to one, if he shall live so long, and that if he dies within the Term, that it shall remain to another, this was resolved in

Comment. Weldens case.

Welden and Elkintons case in the Comm. fo. 516. 517.

Hemmingtons case. Fulwoods case.

Chedingtons case.

Edwards case pur Coke 4. pa. fo. 25. in the Rector of Chedingtons case.

Jewel and Sparks case.

Jewel and Sparks case to be void remainder, for here de minimis non curat Lex, the Law makes no account of a remainder, upon a lease for years, after the life of another. Flemming chief Justice, John the Son hath here by this devise, a good possibility in remainder of the Term, but where he dies before the same falls, as in principal case here he did, this shall never go unto his Executor. Williams Justice, There will be a difference where one hath a Term for years, and doth devise the Land to another for such a time, if he shall live so long, and if he dies within that time, then the same for to remain to another, this is a good remainder; but otherwise it will be, if he deviseth all his interest in the Land, to one for Life; and if he dies within the Term, then the same to remain to another, this is a meer void remainder, for that no remainder here can be of this, after a life in being. Flem. chief Justice differed in opinion herein, that such a remainder of a Term is good, but that the same shall not go to his Executor, where the Testator, that had the remainder died before the same hapned, as it fell out in this principal case, and in this all the whole Court were of opinion against the Plaintiff, that this Executor of John the Son should not have this possibility, in regard that the Testator which had the remainder, died before the same hapned, and was attached in him, and so the Plaintiff claiming under the Assignee of the Executor of John the Son, who made the lease to him, hath no good title, and therefore by the Rule of the whole Court, Judgment was given for the Defendant, and so entred. (s) quod querens Nill capiat per billam.

Note the difference where a Termor doth devise the Land to one, and where his whole, &c.

Judgment for the Defendant, &c.

Nota, touching ley gage. 2 Sid. 366. 2 Ro. 131.

Nota, by the whole Court, that in an Action of Debt, where the Defendant may wage his Law, if he confesseth part of the Debt; and wages his Law for the residue, and a Judgment is given and entred for the Plaintiff, for that which is confessed after this Judgment, the Plaintiff cannot be Non-suited as to the residue, but he ought to appear, when the Defendant comes for to wage his Law, for this part of the Debt.

Nota, as touching matter of challenge, &c.

Nota, that where the King is party in a Trial here, if the other side challenge a Juror, he ought here to shew his cause of challenge presently, and two Triors shall be chosen. (s) the two former which are sworn, and they are for to inform the Court, whether for this cause shewed, or for any other cause, the Juror challenged be indifferent or not.

The King against *William Levet* Defendant.

A Quo Warranto for claiming of Liberties, &c.

The Earl of Arundel against the Earl of Northumberland upon the matter.

IN a Quo Warranto brought for usurpation of divers Liberties within the Town of Petworth, as the Bailiwick, the keeping of a Fair, and Market there; and the ordering of the Market, and taking of Toll of all, &c. The Defendant justifies under the title of the Earl of Northumberland. This was tried at the Bar by a Jury of Sussex, the Defendant in his justification, shews the right and title of the Earl to be this, (s) 5. Ph. and Mar. the honour of Petworth was by Act of Parliament conveyed unto the said Earl of Northumberland, & hæredibus masculis de corpore; the remainder to Henry Piercy Esquire in tail, with all Markets, Fairs, Bailiwicks, Tolls, &c. the which Earl died, and this descended to the now Henry Earl of Northumberland, as Son and Heir of the said Henry Piercy, and shews that such Liberties, and Priviledges he had within

in the Town of Petworth, and that there being an Officer called the Baily and Portreeve of Petworth, and that as incident to this Office, he had the overseeing of the Markets, and Fairs, there; and also to take Tolls of every one, &c. by reason whereof he did take Toll of some of the Tenants of the Earl of Arundel; and hereupon this matter came in question, and that chiefly between the two Earls, whether this taking of Toll was lawful or not, and the chief matter in issue was, whether the Manor of Petworth be within the Honour of Petworth: And then Secondly, whether there be any Honour of Petworth or not, and if there be, then the matter in Law was; whether this Honour of Petworth, was held of the Honour of Arundel or not: And Thirdly, whether there was such an Office of Bailwick, and if there were such an Office; whether the same was within the Town of Petworth; and then whether they have used to take Toll of all persons, or not; and whether they have used to take Toll of the Tenants of the Honour of Arundel For proof that Petworth was an Honour: First, there was shewed the grant of H. 2. Son of Maud; the grant and confirmation by H. 2. Dux Normandiæ, de honore de Petworth; and there it is called an Honour, and a Barony in the time of Rich. 2. who made a gift, and grant unto John Holland Duke of Exeter, of all his Manors, Honours and Baronies of Petworth; in the time of Rich. 3. an ancient Book was shewed, called Cockermouth and Petworths Books of Demises, of the Lands of the Earl of Northumberland; in which he himself de tempore in tempus calls himself Lord of the Honours of Cockermouth, and Petworth. In 3 H. 7. a Feodariship there mentioning his Lordship, and Honour of Petworth; in 12 H. 8. he is called Lord of the Honour de Cockermouth, and Petworth; and so in 22 H. 8. and in 32 H. 8. in an Act of Parliament, this is there called the ancient Honour of Petworth; and so in the Deed of purchase of this in 5 Ph. and Mar. it is there called, and so passed by the name of the ancient Honour of Petworth; and divers other Manors, by the said former Act of Parliament were then annexed unto this Honour of Petworth, having but three or four before. In 19 E. 4. it is there called magnum dominium de Petworth. In 2 H. 7. it is called Petworth cum membris. Hubbard the Attorney General; none can claim an Honour, but he must draw and derive this from the King. And as to the ancient Deed produced, to prove this to be an Honour in the time of H. 2d. It was observed by Dodderidge, that he was not King at this time. Hubbard the Kings Attorney General affirmed, that there was never any Earl of Normandy since the conquest, but he was King. Dodderidge clearly, he was not King at this time, when the grant was made, for he Intitles himself Dux Normandiæ; and the Deed was to such, & amicis nostris, after which manner, the King did never write, but would still call himself King, and so he was then but a Subject; but afterwards he was King, (he was King before in right) but Stephen was King de facto; and by the mediation of Maud the Empress, his Mother, the Dukedom of Normandy was granted unto him; and Stephen did continue King. It was objected, that no Honour can be held, nor created by a Subject, and that a Barony cannot be held of a Subject. Yelverton Justice, These words Dux Normandiæ, & amicis nostris do make it very clear and manifest, that he was not then King; for there was never any King that in his grant did write amicis suis, but did always name himself King. But as to the objection made by Dodderidge, that in ancient times, Kings did always use for to put their Seals to their Grants, and to name and set down the certain date of the same. The whole Court was against him in this. Williams Justice, clearly a man may have an Honour, or a Barony by prescription, but he cannot hold a Barony of a Subject; and if one who hath a Barony doth grant this unto another, this is to be held of the King; and so by the opinion of the whole Court, a man may have an Honour, a Barony, or an Earldom by prescription; but this is to be held of the King. Croke Justice, as to the Charter shewed of H. 2. Charta Henrici Ducis Normandiæ, he was not then King clearly, for he could not so be during the life of Maud his Mother; and Stephen was then King by usurpation; If this was an Honour before

Touching the Honour of Petworth.

In the time of H. 2. grant and confirmation.

and afterwards granted over, as it might be, the same continues an Honour still but no Honur can be held of a Subject, but of the King. Williams Justice, It is the Common use of great men, having divers Mannors for to call one of them his chief Mannor and his Honour, and so to draw all the others to do, and perform their suit and service unto this, and so in time, by reason of such appellation to gain unto him for this, the name of an Honour; but such appellation only can be no good proof of an Honour. Of the other party it was then urged that Petworth was no Honour, but that the same was parcel of the Honour of Arundel, and to prove this, there was shewed an Ancient Book called Extenta terrarum comitatum of the Earl of Arundel, and of 8 Hundreds there named for to be belonging to the Earl of Arundel, and his Honour; and Petworth being one of the eight, it was from hence urged and enforced, that Petworth was no Honour, and that no Honour can be held of another, but here Petworth is held of the Honour of Arundel: and it was from hence enforced, that Petworth was no Honour, and there was a Judgment shewed in 7 E. 1. That Petworth was parcel of the Honour of Arundel, and the same was held of the Honour of Arundel by 22 Knights Fees, and that the same was never mentioned as an Honour, and that the Earl of Arundel held of the King in Capite. Dodderidge objected, that Petworth was no Honour, for that it wanted a Court Leet, the which every Honour of any esteem, hath unto the same belonging. Nicholls Serjeant demanded, whether a Tenure of an Honour by prescription might be of a common person or not, he held it well might so be. Williams Justice, the Act of Parliament recites Petworth for to be an ancient Honour, and as an Honour in 5 Ph. and Mar. the same was then passed, and to this Honour, 2 Mannors were then annexed, so that if it be proved to be no Honour, then this annexation is void, for the Act did not make this an Honour. Yelverton Justice, An Honour cannot be held of a Subject. The Honour of Dover, and of Wallingford, held of the King in Capite. Nicholls Serjeant objected, that the issue her being, whether the Mannor of Petworth be parcel of the Honour of Petworth; it is by this agreed by both sides inclusive, that there is an Honour of Petworth otherwise the Mannor cannot be parcel of it. Yelverton Justice, if no Honour then no Mannor can be parcel of it. Williams Justice, If the Mannor be parcel of the Honour time out of mind, the same ought then for to be an Honour time out of mind. Two things are here to be proved. First, that this was an Honour, time out of mind. And Secondly, that this Mannor is parcel of it. Nicholls Serjeant, 400 years since, in King Stephens time, then it was an Honour, and ever since so called, and reputed one, and demanded whether an Honour, which is one by prescription, may be held of a Subject; and he thought it might so be, but by Dodderidge it cannot. Williams Justice, The King cannot annex unto an Honour other Mannors without an Act of Parliament for the same. Nicholls Serjeant demanded whether the King may create the Mannor of another for to be an Honour. Henry Yelverton, that he cannot, neither can he make my Chase to be a Forrest. Hubberd Atturny General, Williams Justice, and the whole Court, the King cannot create an Honour, but by an Act of Parliament. Williams Justice, Appellation makes not an Honur, without other incidents unto it. In the Kings Grants and Recitals therein to be of the Estate of the King; where such Recitals are necessary and where not, in matters which do operate by way of discharge, there the grant is good by general words without any such Recitals, otherwise where the same is for to raise a charge upon the Demesnes in his hands, there the same is not good, without a special recital. In this case it was well observed, that at this day, the Earl of Arundel only hath his Earldom by prescription, the beginning of which is time out of mind, not within the memory of any one, so that his Earldom is the most ancient in the Realm.

Touching the Honour of Arundel.

7 E. 1. a Judgment, Petworth held of the Honour of Arundel by 22 Knights Fees.

An Honour cannot be made but by Act of Parliament.

Not

Nota, that the Jury here found Petworth to be an Honour, and also that the Manor of Petworth, was parcel of the Honour of Petworth; they found also that there was a Bailwick, and a Portreve of Petworth, and that they had the ordering of the Market and Fair; and that they have used to have Toll of all (except of the Earl of Arundels Copyhold Tenants, and free Tenants.) Williams Justice, If the Jury are charged with divers issues, and being ready at the Bar to give up their Verdict; the party cannot then waive any of the issues. Flemming chief Justice, and Yelverton Justice, of the contrary opinion, that there may be a waiver for the King; and so Hubberd Atturny General came into the Court, and did accordingly waive divers of the issues. It was said, that it appears by proof, that villa de Petworth did hold by 22 Knights Fees of the Honour of the Earl of Arundel; but no Honour is named to be held of him. Fleming chief Justice, The issue was, whether the Manor of Petworth, be a parcel of the Honour of Petworth; this an Honour (implicative) agreed by both sides, for if no Honour, then there can be no parcel of an Honour: An Honour ought to consist of Lands, Liberties and Franchises; and the Manors parcel of an Honour, may be held of the Earl of Arundel; but it may be questioned, whether the Liberties are held. Flemming chief Justice, If the Verdict be once pronounced, they cannot take it in part, and wave part of the issues; for the Verdict ought to be entire and such issues, for which there was evidence given, such issues cannot be waived for the King, when the Jury, after evidence given are at the Bar for to give up their Verdict; but other issues may be waived. As to the Toll, the issue was that they had this of all, as well of the Tenants of the Earl of Arundel, as of other strangers; the Jury do find that they had the same of some, that is to say, of all strangers, but not of others, that is to say, of the Tenants of the Honour of Arundel. The whole Court did all agree, that the Jury in this had done very well, and had given a good Verdict; and in this case they had found well and directly, and that their Verdict was according to the evidence, and well pursuing the same. Yelverton Justice, If the prescription had been laid generally to have had Toll of all the Tenants of the Earl of Arundel; this had not been good: but agreed that the Jury had done very well in this Verdict given by them; and in this the whole Court did agree, and accordingly by the direction of the Court, the Verdict of the Jury was taken and so entred.

The finding of the Jury Petworth to be an Honour.

What issue may be waived, and what not.

The Verdict for the Earl of Northumberland.

The *King* against *Edward* Lord *Vaux*.

Hubberd the Atturny General of the King, did exhibit an Indictment against Edward Lord Vaux Lord of Harridon, and this was for his refusal to take the Oath of Allegiance; being lawfully offered unto him, accordingly as in this case it is provided by divers Laws of the Land; he then being of the age of eighten years and more: this he refused to take, and so all this was certified to the Court, under the hands of divers of the Privy Council, 1 Martii 9. Jac. the Oath was offered to him at Westminster. The Lord Vaux being present at the Bar, was demanded by the Clerk of the Crown, (having read the Indictment to him) whether he was guilty or not, of the matters contained in the Indictment. The Lord Vaux desired the Court for to assign him Council for to speak for him; he being very Ignorant of the proceedings of the Laws of this Land. Hubberd the Atturny General said unto him, that there was no need of Council for to be assigned to him in this case, for though he do pretend Ignorance in himself, in the Laws of the Land, (of which no Subject of the Land ought to be Ignorant) for that his Ignorance of the Law will not excuse him, if so be that he do offend against the Law; but as this case is, he cannot be Ignorant of the Fact, (s) of the refusal by him,

An indictment against the Lord Vaux, &c.

him, he having observed the time when this was, the place where, and the persons who did offer the Oath to him; and before whom this refusal so was, and therefore he cannot be ignorant of this, and to this he may well answer, without any Council at all, as to the matter of Fact, (s) his refusal to take this Oath, whether he had done so or not, and he did therefore press him without any further delay, to make direct answer unto the Court, one way or other.

Nota, that for this his refusal, he was by the Privy Council committed to the Fleet. Flemming chief Justice said unto him, that no Council in this case was requisite for him, for if he be guilty or not of the matter contained in this Indictment, (s) his refusal to take the Oath being lawfully tendred unto him, this doth rest meerly in his own proper knowledge, unto which he may well make answer. The Lord Vaux then answered and said unto him, that the King gives strength, and life unto the Statute, and that he did never refuse for to take this Oath, according to the Kings exposition of it. The Court made answer unto him, that this Oath ought to be taken by him, according to the very precise words of it, and that verbatim as the Oath his: and so was it fully agreed upon, by all the Parliament, and the same is not to be taken in any other manner; and he stands here indicted, for refusing to take the same Oath, according to the form of the Stat. in this case provided for, and therefore ought to make answer whether he be guilty or not of this refusal. Hubbard the Atturney General said unto him, in your answer that you will take the Oath, according to the Kings exposition of it; in this your so saying, you do offer hereby very great wrong unto the King, for to make others to believe, that the King hath a particular exposition of this Statute to himself, and contrary to the said general Act of Parliament; the which is not so, for the King did never make any other exposition, contrary to the words of the said Statute, neither doth he any ways allow of the taking of this Oath in another manner, contrary to the form specified in the Statute. Williams Justice said unto him, that if he refused to take any line or any word expressed in the Oath, this is a refusal of the whole, and said, that this Oath was made only to give unto the King a true Testimony of our true and faithful allegiance unto him; and that this should be so, it doth in a very high measure concern the safety of the King. The Lord Vaux made answer to the Court, that if any part of this Oath did touch the Counscience of his Subjects, if it be the pleasure of the King, to make a safe exposition of the Oath, he would then take it accordingly, and he said (and to this the Court agreed) that the King hath said that the sole effect of the Statute is, that he may be certified of the true allegiance of his Subjects, and to this he never had, nor will refuse to take any such Oath. Fleming chief Justice did press him for to answer directly, without any more Circumlocution, whether he was guilty or not guilty: lest that he by his contempt to the Court should double his offence. Hubbard tht Atturney General did then move the Court, that if he would make no other answer, that then the Court would direct a Judgment for to be entred against him, that he stood mute according to the Statute of 33 H. 8. cap. 12. Rastal in title Trial fo. 415. The Lord Vaux made answer to the Court, that he would take so much of the Oath as concerned the Kings temporal Jurisdiction. The Court answered him, that if he would make no other answer, they would then cause a Judgment by a Nihil dicit to be entred against him. The Lord Vaux then demanded of the Court, whether he should be tried by his Peers or not. Flemming chief Justice said unto him; that first, he must answer whether he be guilty, or not guilty: and this being done, he shall then have his Trial according to the Law; but afterwards, before his answer he said, that he was not here in this case to be tried by his Peers: and upon this he said that at the Common Law, in these four cases only, a Peere shall be tried by his Peers, (s) in Treason, Felony, misprision of Treason, and misprision of Felony, and the Statute Law which gives such Trial, hath reference unto these, or to other offences made Treason or Felony, his Trial by his Peers shall be as before, and to this effect are all these Stat. (s) 32 H. 8. cap.

Stat. of 33 H. 8. cap. 12. Rastal tit. trial fo. 415. at bottom where one stands mute.

Where a Trial of a Peer shall be by his Peers, and where not, at Common Law.

cap. 4. Rastal title fo. 404. placito 10. 33 H. 8. cap. 12 Rastal title Trial fo. 415. 35 H. 8. cap. 2 Rastal tit. Trial fo. 416. and in all these, express mention is made of Trial by Pears. But in this case of a Premunire, the same being only in effect but a contempt, no Trial shall be here in this of a Peer by his Pears. And so the whole Court did agree in this, that he could not here in this case be tried by his Pears. Croke Justice demanded of him, whether he did think that the Pope hath an Authority, or that any power under Heaven had Authority for to draw him, or any Subject whatsoever from his true allegeance to his Prince; and whether he did think that the Pope could discharge him from his Oath of allegeance, when he pleased. The Lord Vaux made this answer, that he neither could nor would dispute this, whether the Pope by his Power and Authority could discharge him of his Oath; and further said, that he could not determine of the Power and Authority of the Pope. Croke Justice said unto him, that for any one to make any doubt of this, the same is a very great sign, that there is no true allegeance in him. See the Statute of 3 Jac. cap. 4 Rastal title Crown fo. 88. b. & 7 Jac. cap. 2. & 6. as touching the Oath of allegeance, and the form of it. The Kings Sollicitor said, that he hath observed four sorts of Oaths instituted to testifie the true allegeance of Subjects to the King. The First, was an Oath at the Common Law, taken in the Court Leet. The Second, in 28 H. 8. cap. 7. a more sharp Oath; as touching the Supremacy. Thirdly, 1 Eliz. cap. 1. altering the former Oath of Supremacy in some respects. The Fourth, the Oath of allegeance now in question, instituted as before in 3 and 7 Jac. which is a more mild Oath than the others, as it appears, and is in manner agreeing with the form of the Oath taken in a Court Baron. The Lord Vaux made answer, that he thought it better to swear from his heart, his true allegeance to the King; than to swear to a matter of the which he in his Conscience hath some Doubt; and that such an Oath by him taken, shall be for the greater safety of the King. Flemming chief Justice then said unto him, that seeing he had thus refused for to take the said Oath, as the same is set down in the Statute, and so thereby appointed to be taken, he thought that he would never truly open and declare the matter contained in his heart, for that he so refused to perform the outward matter, which ought for to testifie his inward allegeance to the King. The Lord Vaux did afterwards confess the Indictment: then Hubberd the Atturny General prayed Judgment against him for the King. Yelverton Justice said unto the Lord Vaux, that nothing was tendred unto him to do, but the same which ought to be tendred unto all the Kings Subjects, and further he said unto him, that he and all those which should offend in this manner, have incurred the danger of a Premunire, the which he hath here done by his refusal for to take this Oath of allegeance; being duly tendred unto him, and therefore he pronounced Judgment against him according to the Statute of 16 R. 2. cap. 5 Rastal tit. provision & Præmunire fo. 328. b. To be out of the King Protection; his Lands, Tements, goods and Chattels to be perpetually forfeited to the King, and for to be imprisoned during his Life.

12 Co. 49.

Four Oaths to testifie the allegeance of subjects.

Judgment given against the Lord Vaux, &c.

Mary Semaines Case.

IN a Prohibition, where the case was, Lands and Goods were devised in one the same Will; which Will was offered to be proved in the Spiritual Court; and hereupon a Prohibition was prayed. The Court clear of opinion that they are not to prove this Will; for they have no power to meddle with the Probate of a Will concerning the Land, and they cannot prove this Will: as concerning the Goods, without medling with the Land. Flemming chief Justice, The Probate of the Will there for Land, is not so much as an evidence to a Jury, to prove the Will. The whole Court agreed, that here was good cause of a Prohibition. Clench, one of the Officers of the Court, informed the Court, that

A Prohibition to the Spiritual Court, &c. Ante. 111.

that in one Roffies case being the like, a Prohibition was granted. Henry Yelverton said, that Bromley the Kings Solicitor was wont to say, that in such a case the probate of a Will before the Ordinary, being a Will of Land, was of no more force and effect than probate of the same before I. S. In this case a Prohibition was granted by the Rule of the Court.

A Prohibition granted per curiam.

Semaine Plaintiff against——Defendant.

A Copiholder surrenders to the use of his Will.

NOta, that in an evidence given to a Jury at the Bar, upon an issue—of Will or no Will; the question moved to the Court was this. A Copiholder surrenders to the use of his last Will, whether the land doth pass by the surrender, or by the Will. Williams Justice, it is very clear that the Will is only declaratory, declaring the uses of this surrender, nothing doth pass by the Will, but all doth pass by the surrender; Coke 6. part fo. 18. in Sir Edward Cleres case, one doth Covenant to stand seised to the use of his last Will, or makes a Feoffment in Fee to the use of his last Will, nothing here passeth by the Will, but by the Feoffment. Flemming chief Justice agreed with him herein, and in Sir Edward Cleres case, when a man makes a Feoffment to the use of his last Will, he himself hath the use in the mean time, and may limit Estates, according to the power reserved to him upon the Feoffment, and upon the Limitation, the Estates shall take effect by force of the Feoffment, and the use is directed by the Will, so that in such a case, the Will is but only directory. Williams Justice, the issue here in this case is condidit Testamentum necne, this is the direct issue to be tried, and not condidit Testamentum, ou non—modo & forma, for si condidit, tunc declaravit. Si non condidit, non declaravit: the Jury found that he made the Will.

Sir Edward Cleres case.

Browning Plaintiff against *Fuller* Defendant.

A Writ of Error to reverse a Judgment, &c.
2 Cr. 299, 409, 412.
2 Sid. 98, 249.
Sir John Savadges case.
1 Cr. 551.
Hob. 38.

IN a Writ of Error to reverse a Judgment given in an Action of Debt, brought by an Executor, as Executor; the Error assigned was, for the omission of this clause in the end of his Declaration. (s) Et profert hic in curiam literas Testamentarias, whether this omission was Error or not, was the only question, for the determining of which it was questioned, whether this clause, be matter of substance, or but only matter of form. Will. Justices, Clearly this is matter of substance, & so was it adjudged in one Sir John Savadges case, that this clause was matter of substance, for the omission of which in an Action of Debt brought by an Executor, & a Writ of Error brought to reverse the Judgment, this was the only Error assigned, and for this Error the Judgment was held Erroneous by the Court, and reversed and so in this principal case here, by the opinion of the whole Court, this is very clear and apparent Error, and for this Error by the Rule of the Court the Judgment was reversed.

Judgment reversed per curiam

Dean

Deane Plaintiff against *Eton* Defendant.

IN an Action upon the case for scandalous words spoken by the Defendant of the Plaintiff, which words are these, (s) That the Plaintiff had placed a Woman in such a ones House, to the intent for to Poison her; with an Averment in the Declaration, that he had placed this Woman in that House for to attend, and look unto an old Woman in the said House not being well: upon not guilty pleaded, a Verdict was given for the Plaintiff. It was moved in arrest of Judged for the Defendant, that these words are not Actionable, because that there is not here laid any Act to be done, but an intention to have an Act done, and that therefore this is no scandal. Williams Justice, The Action is here brought for the discredit and slander he hath by reason of these words thus spoken of him, and not for any Act done; These words do tend very much to his discredit, he being high Sheriff at this time, and a great Officer, and out of his care placed this Woman in the same House, for to attend the old Woman in that House; she being aged, and not well, and therethereforе it may very strongly be enforced, that these words do sound very much to the slander and discredit of the Plaintiff, and are well Actionable, for that ex sensu verborum, construction is for to be made; and to this purpose there was a case here adjudged in Mrs. Passfields case, the words there were these, (s) Mrs. Passfield writ a Letter to one for to Poison her Husband; for which words, an Action upon the case was here brought, and Judgment was given for the Plaintiff, and the same Judgment affirmed in a Writ of Error in the Exchequer-chamber, and so here, as in this case, ex sensu verborum, without any Act done, if the words in themselves are malitious, and do tend to the discredit of the party of whom they were spoken, as here they are in this case; and therefore by the opinion of the whole Court, These words are scandalous, and well Actionable, and so by the Rule of the Court, Judgment was given for the Plaintiff.

An Action upon the case for words spoken by the Defendant of the Plaintiff.

Mrs. Passfields case.

Judgment given for the Plaintiff.

Nota, that an exception was taken to an Indictment upon the Statute of 8 H. 6. for a forcible entry; the exception was, because the entry was into a Rood of Land, or into half a Rood of Land, and for this incertainty it was moved, that the Indictment might be quashed. This was Ruled by the whole Court, (Williams Justice only excepted) to be a good exception. Williams Justice, This Indictment is clearly good, and that he could shew a direct Judgment in point for this. Man Secondary informed the Court, that he could shew the contrary, in point of Judgment in the like case, in an Ejectione firmæ, and the like exception taken in arrest of Judgment, and Ruled a good exception. In this case for this Exception by the Rule of the Court, the Indictment was quashed for this incertainty.

Exceptions to an Indictment upon the Stat. of 8 H. 6. &c.

Indictment quashed, &c.

David Waterhouse his Habeas Corpus.

NOta, that a Habeas Corpus was granted by this Court to the Warden of the Fleet, for to have here in Court the Body of David Waterhouse, the same returnable at a day certain, at which day the Warden of the Fleet did refuse to make his return, and to bring in the Body; upon this Henry Yelverton moved the Court to have a Rule entred against the Warden of the Fleet, & the same returnable at another day, to bring in the Body upon a pain, upon this motion; the Rule of the Court was, that he should return the Body of David Waterhouse the next day sub pœna 20 l. and by the whole Court, so are all the

A Habeas Corpus sub pœna to the Warden of the Fleet, &c.

Presidents, be the party imprisoned for Felony, or for Treason; the Officer under whose custody he is, ought for to obey the Writs of Habeas Corpus coming from this Court, and if the same was directed unto the Lieutenant of the Tower, all should be one.

An exception taken against a Witness. &c. Mod. Rep. 21. 73. 74. 107. 1 Sid. 109. Hob. 92.

NOta, by Flemming chief Justice and the whole Court, in a Trial at the Bar, where exception was taken against a Witness, to prove the Excution of a Deed of Feoffment by livery of Seisin, where the case was, a Feoffment in Fee was made to the use of J. S. and two Witnesses were subscribed to prove the livery of Seisin, afterwards one of these Witnesses had an Estate at Will made unto him of part of this Land, and he being produced to Witness the Execution of the Feoffment by livery & Seisin, was excepted against, because he was now a party interessed in part of the Land; & so his Oath was to make his own Estate good; but notwithstanding this exception was disallowed by the whole Court, and that he might well be sworn as a lawful Witness, to prove the Executing of a Feoffment by livery and Seisin, this being in affirmance of the Feoffment, and accordingly, by the Rule of the Court, he was sworn, and his Testimony received and allowed of.

Dockley Paintiff against *Bury* Defendant.

An Action upon the case for a promise, &c.

IN an Action upon the case, grounded upon a promise, the case appeared to be this, the Plaintiff having two parts in a Ship, which was going to France for Stones, he did grant unto the Defendant the moity of his gain which he should have in this Voiage, and in consideration of this, the Defendant did assume and promise that he would be at the charge of the moity of the losses, which the Plaintiff should sustain in the same Voiage, and did likewise assume and promise to pay so much as should amount unto the moity of the losses, upon request; which he hath not performed, and for this cause the Action was brought; the Plaintiff in his Declaration averred, that his loss in this his Voiage, amounted unto 40 l. and more, so that his part of the losses, as appeared upon account, amounted unto 22 l. 1. s. the which he had requested the Defendant for to pay him, which he refused to do; upon a Non assumpsit pleaded, a Verdict found for the Plaintiff; It was moved in arrest of Judgment for the Defendant, that the Declaration was not good, for the incertainty of the consideration to raise the promise, for which incertainty that which was granted, being only a possibility; the which was altogether uncertain, and this is the consideration upon which the promise here was made, which consideration is not good for this uncertainty in it, and so the consideration failing the promise is not good. Williams Justice, If there was at the beginning a possibility, and afterwards the same is reduced unto a certainty, this is clearly a very good, and sufficient consideration for to raise a promise, and it could not be better. Yelv. Justice, What more certainty can there be in adventure? none at all; this possibility and uncertainty, is now by this his return, well reduced unto a certainty; and so the same is good, being now all made certain by the account had, and made of the gain and loss, being now by this all made certain. Yelverton Justice and Williams Justice, This is a common thing, and very usual for one to grant the benefit, or the moity of the benefit which is to come to him, by such a way or means, and this is good; and may be resembled to the grant of a Parson of his Tithes, as appears in Perkins in his Chapter of Grants, fo. 20. pla. 90. and so there, if one grant all the Wool of his Sheep for years, this is good, and so by the opinion of the whole Court, in the principal case here, this is a good and a sufficient consideration, and certainty sufficient therein, and that the Declaration is good; and so by the Rule of the Court, Judgment was entred for the Plaintiff.

Judgment given for the Plaintiff per curiam.

The

The *King* against *Springal.*

NOta, that exceptions were taken unto Springals Indictment, the same being Quia erexit quandam januam, apud Hornesey in Com. Middlesex, in via regia ducent. unto Higate, and doth not shew in what County Higate was, but Nota, that in the margent, (Middlesex) was written. Hutton moved the Court, that notwithstanding this be so, yet it doth not hereby appear to the Judges as Judges, in what County Higate here was. The whole Court clear of opinion, that the County being writ in the Margent, doth well aid this, and so take off this exception, and that this word (Middlesex) writ in the Margent, shall well go unto Higate also, and so the Indictment is good by the opinion of the Court, but otherwise it had been, if in case of Felony by the whole Court.

Exception to an indictment, for erecting of a gate.

Indictment good per curiam.

The King against *Clarke.*

NOta, that exceptions were taken unto Clarks Indictment being for murder of, &c. The First, Exception taken was this, that the assault and affray is therein expressed to be 12 Februarii at Oxford, and that he gave him a blow on the right side, in this manner expressed, (s) dans eidem——unam plagam mortalem, & adtunc, & ibidem, without shewing of any time certain, when this blow was given. Secondly, it is set forth in the Indictment, that he being thus struck, Languebat à duodecimo die Febr. usq; 13. die Februarii, so that (à) doth exclude 12. die, and usq; doth exclude 13. die, and so no day laid at all, 3. —quo quidem 13. die Febr. inter horas, quartam, & quintam obiit, this is laid insufficiently, being an impossibility. Fourthly, and so the said Robert Clarke prædicto 13. die Febr. did kill and murder him. Yelverton Justice, there ought to be a perfect hour between them, being laid to be inter horas, &c. ejusdem diei, this is not good. Williams Justice, in case of Indictments, no such exception is allowable by Law, as to the incertainty of the hour, otherwise it is in case of Appeals, by the Statute of Gloucester, 6 E. 1. cap. 6. so that this exception here as to the hour, is of no force; but here in this Indictment there is no place laid where the stroak was given, and for this omission here, the Indictment is not good, for the place where the stroak was given ought to be certainly laid, and so is Longs case, Cok 5. pa. fo. 120, 121. that the place where the stroak was given ought to be certainly laid, for he may assault him at one place, and give the stroak to him at another place, as in Lacyes case, Coke 2. pa. fo. 93. put in Binghams case. Croke Justice, as to the point of time, these words, adtunc & ibidem refers to all the whole sentence, as to words (inter horas) by these words: there is a distinction of time denoted, as time past and time to come, here it is said, That he killed him the 13 day, which cannot be as it is laid, so that this is a fault incurable. Will. Justice, and the whole Court agreed with him in this, that the Indictment is not good, but he ought to have said in the conclusion (s) and so he killed him, modo & forma prout. The Court held the Indictment insufficient for these exceptions, and therefore by the Rule of the whole Court the Indictment was quashed.

Exception taken for to quash Clarks indictment of murder.

Longs case indictment quashed per curiam.

Nota, Exceptions taken for to quash an Indictment of murder. The 1. exception was taken, à sessione justiciar. & doth not shew what Sessions this was, & this being omitted, is not certain to the Court, whether they had any Authority or not. 2. The fact is laid to be in this manner, that 2 Jac. and such a day he did assault the party with a sword, and give unto him unam plagam mortalem, but shews no place where this assault was made. Will. Justice, this Indictment is not good, because there is no place mentioned where the stroak and wound was given.

Exceptions to an indictment of murder.

It is also expressed in the indictment, that Eo ictu instanter obiit, this is uncertain, and so the indictment not good. It is also laid in the indictment quod cum quodam gladio percussit, but neither time nor place, of this specified, and so not good; also it is expressed, that eo ictu dedit, to the party killed, unam plagam mortalem, and no place expressed where this was, neither the length, nor yet the breadth of the wound set down, and so the indictment not good, the whole Court was clear of opinion, that for the exceptions, the Indictment was not good, and that therefore by the Rule of the Court the indictment was quashed, and the party discharged of this; but by the Rule of the Court, the Kings Attorney General ought to see such Indictments, and to be made acquainted with them, that so such gross mistakes may not be for the future.

Judgment quashed by the rule of the Court.

Note where a Bar is to be amended, &c.

Nota, by Yelverton Justice, and agreed by the whole Court, and a Rule entred by directions of the Court to be duly observed by all for the future, that in all legal proceedings here, if in pleading the Bar and Replication be both of them bad, and to be amended; here in such a case, both of them shall be amended without any costs at all to be paid, the Plaintiff and Defendant being both of them in this case, in the like degree faulty; but if the Bar be only bad, and the Replication good, in this and the like cases, the Bar is to be amended, but here costs are to be paid to the Plaintiff.

Prohibition quia, grounded his Libel for Tith Wool, &c.

Nota, in a Prohibition praied upon a Libel in the Spiritual Court for Tithe Wool, the suggestion was, that he in his Libel sets forth, that he ought for to have the Tenth; and this pretended to be by a custom, by which he is to have the same, without the view or election of the party, upon this suggestion, a Prohibition granted, and the same grounded upon this custom, and Declaring in the Prohibition; the other demurs in Law, and striks out this part of the custom alledged, (that he was to have the tenth) without the view or election of the party, (and this by him so done before the demurrer entred) and so prays a Consultation. The Court in this Case granted a Consultation, as to the Tithe to proceed there; but for to proceed at the Common Law, as to the custom and that without any amendment, the same is to be as it was laid before, for that he cannot strike out or alter any thing, or any part of it after the Demurrer, and in this the whole Court agreed.

No amendment or alteration after a demurer.

Collins Plaintiff against *Goldsmith* Defendant.

Debt for Rent behind, the Defendant pleads an entry, &c.

IN an Action of Debt for Rent behind, reserved upon a lease for years, the case appeared to be this. A man makes a lease for years, rendring a yearly Rent, the same payable at two Feasts in the year, (s) at our Lady-day, and Michaelmas, and if it be behind in part or in all, by the space of six days after any Feast of payment, that then it shall be lawful for the Lessor to enter, the Lessor brings an Action of Debt for Michaelmas Rent behind. The Defendant being the Lessee, pleads in Bar, and shews that for Rent due, and behind at Lady-day, before the Plaintiff his Lessor had entred upon him, and out of the possession, expulit & amovit the Defendant his Lessee: and so as it was urged by Henry Yelverton for the Defendant, by this his entry, he hath suspended his Rent, and the Plaintiff hath not shewed any new re-entry by the Defendant his Lessee (as he ought to do) and this to be before Michaelmas for to revive his Rent. Williams Justice, there is no necessity for the Plaintiff to do this, for he may enter before Michaelmas and revive his Rent, and when he hath here brought his Actionon of Debt for his Rent, as in this case the

Lessee

Lessee ought for to shew this his entrie, and by this his entrie a suspension of his Rent; and he ought also to conclude and say that of this he did continue still the possession, and so was in possession at the time of his Action brought, but he having not shewed this, the Plaintiff hath just cause to recover his Rent behind, and for the recovery of which the Action of Debt is here well brought. Yelverton Justice held the contrary, for that here the Lessor himself being Plaintiff for his Rent, and an entrie made by him, and so thereby a suspension of his Rent, being by way of plea alledged against him, he ought to shew the re-entring of the Lessee before Mich. and this ought not for to come on the part of the Lessee himself, to shew his continuance of the possession, but it is sufficient for him to plead in Bar, the first entrie of the Lessor to make a suspension of his Rent; the which possession in Judgment of Law, shall be taken still to have continuance, unless that the Lessor himself (being Plaintiff in the Action for his Rent) do shew the contrary by his alledging that the Lessee had re-entred again, and so by this had regained the possession, and this the Plaintiff ought to shew and set forth himself, thereby to revive his Rent; and so to enable him to bring his Action for the recovery thereof. Croke Justice agreed with Yelverton Justice herein, for that his Rent being once by his own entrie suspended, the same cannot be revived again without the re-entrie of the Lessee himself, and this ought clearly so to be shewed by the Lessor himself, thereby to enable him to have this his Action of Debt, for recovery of his Rent, but without this his so doing, he cannot have it, and he not having so done, cannot be intitled to have and maintain this Action of Debt here for his Rent, and so the Action by him is not well brought nor can be maintained, and so the Court being divided, two against one for the Defendant, and against the Plaintiff; but the Court not being full Judgment was not now given, though the better opinion was clear against the Plaintiff. This was afterwards ended between the parties, perceiving the opinion of the Court, and was not moved again.

A Lessor enters by force of a condition for non payment of Rent, and after brings an Action of Debt for a subsequent Rent without shewing of any re entry made by the Lessee to revive his Rent, by the better opinion of the Court it lieth not.

Nota, by Williams Justice, to which the whole Court did agree, that after the darrain continuance, this plea was pleaded, Actio non, and sets forth for cause, for that he had released unto the Defendant all Actions, and demands. Curia clearly this is a good plea.

A plea of a releas after the darrain continuance is good &c.

Nota, that an exception was taken to quash an Indictment for a Rescous, because the same was not laid for to be Vi & armis, by the Rule of the Court, for this omission the Indictment was quashed, and by the Court a Capias, and an Exigent lieth in this Writ.

An Indictment quashed for want of Vi & armis. 2 Cr. 443, 526, 537. Hob. 180. 2 Bulst. 35.

Nota, that usage was pleaded for to have a Capias for the first Process, the same being contrary to the Rules of the Common Law, and contrary to the course of this Court, and to the Statutes in this case made and provided, by the Rule of the Court, this usage is not good, nor to be followed.

Nota, touching usages for Proces.

Nota, that an exception was taken for to quash an Indictment, taken upon a presentment for a Nusans, the exception was this, in the indictment, the same was laid for to be in via regia, but it is not laid where this place is, nor yet in what County; the Indictment therefore ruled by the whole Court not to be good, and the party by the Rule of the Court discharged.

Exceptions taken to an Indictment.

Butts

Butts Plaintiff against *Jennings* Defendant.

A Writ of Error brought by the Plaintiff an Infant, &c.

IN a Writ of Error to reverse a Judgment givent in the Court of C. B. in an Action of Debt there brought against the now Plaintiff, and a Judgment there given against him, for to reverse which Judgment, a Writ of Error is brought, and for Error assigned; it was shewed that at the time of the Judgment given against him, and now, he is still within age, and this is laid to be ad grave damnum ipsius, &c. and upon this, the Court did inspect him, and upon the Inspection, he appeared to the Court, to be within age. Williams Justice demanded how he came here, for to be inspected by the Court. Man Secundary made answer, that he hath brought a Writ of Error for to reverse this Judgment given against him, and assigns this for Error, that he was and is still within age; and so by this means he comes hither to be inspected by the Court. Williams Justice, In a Writ of Error brought by an Infant for to reverse a fine by him levied for Infancy, here in this case, he is to be inspected by the Court; but it is doubtful, whether in this case, of a Writ of Error by him brought, for to reverse a Judgment given against him in an Action of Debt, he shall be inspected by the Court, or not. Man Secundary made answer, that this is a usual course for him in such a case, to come into the Court in this manner, by his Writ of Error for to be inspected; and a Scire facias is to issue against the others, for to come in. Flem. chief Justice, and Yelverton Justice, clearly we may well inspect him, when he comes in by Writ of Error; and by the opinion of the Court, if he be of full age, the other side ought for to aver this, and day was given by the Court to to the other side for to shew cause, or else for this Error the Judgment to be reversed, and no cause being shewed, by the Judgment of the Court Judgment was reversed.

Judgment reversed per curiam.

A Writ of Error to reverse a fine, &c.

Nota, that a Writ of Error was brought for to reverse a fine levied for want of a Proclamation, the case was this. A fine being levied with Proclamations according to the Statute of 4 H. 7. cap. 24. the Error assigned for to reverse this fine, was for that no Proclamation was made the first day. The whole Court was of opinion, that this was an Error apparent, for to reverse the Proclamations, but the Fine still remains as a good fine at the Common Law, and so for this Error the Rule of the Court was to reverse the fine, as to the Proclamations only, but the same still to remain as to the fine, for to be and remain still as a good fine at the Common Law.

A fine reversed as to the Proclamations, &c.

Atkins Plaintiff against *Wheeler* Defendant.

In a Trover and conversion, the place only where the goods came to the Defendant.

NOta, that in an Action upon the Case upon a Trover and Conversion of certain Goods, by the opinion of the whole Court clearly, no other place is to expressed in the Declaration, but only the place, where the Goods came unto the Hands of the Defendant.

In consideration of forbearance, per breve tempus, &c.

Ante 41, 91, 92.

Nota, That in an Action upon the Case, grounded upon a promise. Croke Justice, if in case of an Obligation, a man is bound for to pay unto the Obligee such a sum of mony, infra breve tempus, after the sealing and delivering of the Bond

Bond, by construction of Law, this shall now be paid within some convenient time after, upon request made. The Principal case here was, that in consideration, that he would forbear him, per breve tempus, he did assume and promise for to pay him, infra breve tempus after Easter. The Court was clear of opinion, that this breve tempus here in this case, by construction of Law, shall be said, and construed to be presently for to be paid in time convenient, that is, he shall be presently paid upon such a promise, and this to be so by the Rule of the whole Court.

2 Cr. 250, 397, 505, 683. 1 Cr. 19. Mo. 853. 2 Sid. 38, 45, 397. 3 Cr. 241, 438.

Moss Plaintiff against *Townsend* Defendant.

NOta, that if a man do leave his Horse in an Inn in London, and there he Eats up in Hay and Provender more than he is worth. In such a case the Court was informed, that the custom of London was this; that the Horse should be praised by the Innkeepers next neighbour, and afterwards to be sold for payment of the mony there owing for him; the Court was clear of opinion that this was a good custom as the same was alledged. Mountague Serjeant and Recorder of London; the custom of London as to the Innkeepers is this. (s) If one brings a Horse to an Inn, leaves him there, and goes his way; and the Horse Eats up more than his price; by the custom of London, the Innkeeper may sell this Horse to pay himself, (but not if the Debt was for other Horses) as if one do bring many Horses into an Inn, and afterwards takes all of them away but one, the Innkeeper cannot sell this one Horse, for payment of that which was due to him for the other Horses, by the custom of London, notwithstanding the Debt doth amount to more than the price of this Horse; but every Horse is to be sold by the custom to satisfie the Debt due for his own meat only. In this principal case, Sir Robert Townsend went beyond Sea, and this was his Horse.

Note the custom in London to have a Horse praised and sold to pay for his meat, &c.

Ante. 170. 2 Cr. 1889. Mo. 876, 7. 3 Cr. 271. 2. Pop. 127, 179. 1 Ro.Rep. 149. 2 Ro.Rep. 438. 9.

Cox Plaintiff against *Gray* Defendant, Entred *Hill.* 5 *Jac.* *B. R. Rot.* 876.

IN a Writ of Error for to reverse a Judgment given against him in the Court of the Marshalsea, in an Action of Trepass upon the case, for a Trover and conversion of certain Goods, and upon not guilty there pleaded, a Verdict and Judgment was given for Gray against Cox, and for the reversing of this Judgment, a Writ of Error was brought by Cox, who died hanging this Writ of Error, and afterwards Error was assigned in the said Judgment, on the behalf of Mary Cox, the Wife and Executrix of Cox, against whom the Judgment was given, and the Error assigned was this, that in the first Action, none of the parties at the same time were of the Household of the King, and so for this cause, the Court of the Marshalsea had no jurisdiction of the cause, and so all their proceedings in this cause, and the Judgment there given was coram non judice, and so Erroneous and to be reversed. Croke Justice, This is a good Error, and for this Error the Judgment is Erroneous, and ought to be reversed. In this case neither for the Action, nor yet for the persons, the Court of Marshalsea had any jurisdiction, and more especially in regard of the persons. As to the dignity of this Court, it is to be agreed, that the same is of as great antiquity as any Court, as appears by L. 5 E. 4. fo. 129. where it is said that the Marshalsie was, and is one of the Antientest Courts within this Realm. This Court sequitur personam Regis, and by Britton, it is Curia Regis, & Hospitium Regis: and Fleta, this Court follows the person of the King, be he within the Realm, or out of the same, for there the King being in France, in alieno Regno, he notwithstanding did there do Justice upon an offender within the verge, so that

A Writ of Error to reverse a Judgment, &c.

The case of the Marshalsie.

that this Court is of a very high dignity, but yet not for to be compared with the Court of the King Bench: the difference between them, the one of them as before, sequitur personam Regis; but otherwise it is of the King Bench which is in persona regis & coram justiciariis domini Regis; and this coram domino rege, & coram ipso rege: upon the Statute of Articuli super chartas cap. 3. mention there made of things done, (inter guest de hostle Roy) this refers to the Marshalsie (& inter guest de people) this refers to the Kings Bench) and so the difference, &c. The second difference in the Statute is this; the Marshalsie is a peculiar and a private Liberty, the Kings Bench is a Court for the Common Law, and for general matters. Also the Court of Marshalsie is a Court, like unto a small River flowing from the Common Law as from the Fountain; and here they seem for to follow rivulas, when as they ought petere fontes. As touching the exposition of this Statute of Articuli super chartas cap. 3. touching the Jurisdiction of the Court of the Marshalsie; it appears by this Statute, the place cases and persons were before the Statute; this Statute was made ad emendationes status populi, &c. quod de cætero ordinatum est. Fourthly, mention is made in this Statute, that they shall not hold plea but only of Trespass; as in the Statute, the place, persons and Actions are there restrained, &c. and this for to shew the abuse that was before. Fifthly, their Encroachment is shewed, and for this it appears by 6 R. 2. Brook tit. Action upon the Statute placito 49. in Debt, sur Recovery de damages before the Marshal in an Action of Covenant; and it is a good plea, to say that none of the parties were at that time of the hostle of the King, and so the proceedings there coram non judice, and with this agrees 19 E. 4. fo. 8. b. in 20 E. 4. fo. 16. an Action was sued in the Court of the Marshalsie by one of the Hostle le Roy, against a stranger, and recovered against him; the stranger afterwards brought a Writ of Error and assigned this for Error, that he was a stranger who was there sued, and this was there held to be a good Error, for that the Marshalsie had no power to hold any plea, but there only, where both the parties were of the Houshould of the King; and it is there said, that it is in the election of the party, either to have his Writ of Error, and so to reverse the Judgment, or else for to avoid the same by Plea, which he may well do, and so is 22 E. 3. fo. 31. b. that a Judgment given in a Court, which hath no jurisdiction, may be voided by the party, against whom the judgment was given, and that by way of plea, for that this is coram non judice, as in the Court of Marshalsie, unless that both the parties sont dol hostle le Roy; and to this purpose see Fitz. Nat. Bra. fo. 241, 242. the Writ brought upon this Statute of Articuli super chartas cap. 3. many presidents there are in this kind for to Warrant this. So is Michelborns case, Coke 6. pa. fo. 20, & 21. and the case between Read and Purchase, which was Mich. 32 H. 6. Rott. 27. there cited in a Writ of Error, and no other Error assigned but only this, that none of the parties were del hostle le Roy, & for this Error the Judgment reversed. Michelborns case is terminis terminantibus, this very case, the same case, the same Action, and the same Error assigned and resolved to be reversed; but the reversal not entred on the Record. An Action of Trespass contra pacem, is usually to be determined there, but not other Trespass; as against a Smith for pricking of a Horse, and so both for the plea, the person and the thing; this case here now in question, was not within their jurisdiction, neither de debito, ne dauter chose, so is the Statute. An Ejectione firmæ is not determinable there, and yet this is sub modo a Trespass, and so this Judgment here for the Error assigned is Erroneous, and ought to be reversed. Williams Justice of the same opinion, that the Judgment here is Erroneous, and so to be reversed. As touching the Antiquity of this Court it is by prescription, and so it ought to be ancient, and this seems for to be grounded upon reason, that the King ought not for to be without means & Laws to govern his servants by, within his household, & this for their better attendance on him, before this Statute of 28 E. 1. Articuli super chartas cap. 3. it was doubtful how far the compass of the Virge ought for to be: they are not to hold plea, if they have not Cognisance, and in what place the

The difference between the Court of the Marshalsie and the Kings Bench.

6 R. 2. d. Brook tit. action upon the Statute pla. 49.

Coke 6. pa. fo. 21. in Michelborns case, Read and Purchase case there cited.

Statute 28 E. 1 Articuli super chartas cap. 3.

the extent of this to be, in what cases they are to hold Plea it appears by the Book of 4 H. 6. fo. 8. that such power and Authority, is not given to them, as to other Courts of Record; the case there was an Action of Trespass was there brought against one, Retornable at a day; and as the Defendant was coming for to answer the Plaintiff, he was arrested in the Court of the Marshalsey, and upon the prayer of the party, a Habeas Corpus was granted to the Marshal, for to have the Body in Court, and the Court did discharge him of the Execution: for by the Court there, this Court is Inferiour to all other Courts, as the Kings Bench, Common Pleas, and the Exchequer. Three things are necessary to be intended, as to the true construction of all Statutes. First, the mischief, that was before the making of it. Secondly, the true intent of the makers, in making of the Statute. And Thirdly, the scope and purview of the Statute it self. Now as to this Statute of Articuli super chartas cap. 3. upon the words of which Stat. an argument may be grounded, as to the words of the Statute, the same begins concerning the Estates, and Authority of Stewards and Marshals; and of such Pleas as they may hold, and in what manner, and how they are to hold; No Plea of Freehold, Debt, Covenant, nor Contract, made between the Kings people, but only of Trespass, done within the Kings House; (there the stop is to be made,) and not at the other clause, (g) & nul plea de Trespass, &c. and where their Bounds are not determined, this is then left unto the Common Law. The best exposition of this Statute is, for to take all the Statute into consideration. First, the first thing to be considered here is, the great mischief, that was before the making of this Statute, for they would there hold Plea of any matter; and to the very great oppression of the Kings people: by the Stat. of 13 R. 2. capite 3. their jurisdiction is limited; and the Statute of 15 H. 6. cap. 1. gives an Averment to the party, being named by the Marshal, to be of the Houshold where he was not to say, that he is not of the Houshold. As to the Authorities in point, it appears by 38 E. 3. fo. 7. that at the Common Law, a man may contain many Trespasses in one Writ; but otherwise it is in an Action upon the case, as to the case of 38 E. 3. fo. 18. objected at the Bar; this is not to any purpose at all, for it is not there confessed nor allowed, that any of the parties, were of the Houshold of the King, but he would have it intended, that one of the parties was of the Kings Houshold; here are three remedies given against them, if they exceed their limits. First, an Action of Trespass. Secondly, an Action upon the case upon the Statute of Articuli super chartas. And Thirdly, a Writ of Error, and so is 19 E. 4. fo. 8. 6 R. 2. Brook tit. Action upon the Statute placito 49. 7 H. 6. fo. 30. & 31. 10 H. 6. fo. 13. & 22 E. 4. fo. 31. and according to this are the Statutes before remembred, so that the Law in this is very clear and plain. But this Court is like unto a Hydra's head, that never will be quiet, Placita aulæ hospitii domini Regis tenentur in such a place certain, this was their stile formerly, but now they have altered the same; and made the same coram such a one Marshal; before the Statute of Articuli super chartas cap. 3. their limits were not known. As to the objection made of the Citizens of London, this was only to gain to themselves Freedom, and immunity, from the jurisdiction of the Marshalsey; as before they had, &c. but this was not to make a new Law. And as to the Statutes of 5 E. 3. cap. 2. and of 10 E. 3. cap. 2. this was for to give a Writ of Error, but by the Common Law, he might have a Writ of Error, and and so is——21 H. 7. fo. 13. a Writ of Error lies here at the Common Law, and the Statute explains the Common Law. As to the presidents 29 H. 6. Rott. 21. between White and Barton here Ruled in this Court, to be Erroneous and reversed, in which case one of them was of London, and the other of Southwark, in Trespass the stile, in aula hospitii Mich. 32 H. 6. Rot. 27 in Read and Purchases case, accordingly Mich. 1 E. 4 Rot. 47. in Trespass, by two Judgments given; a Writ of Error brought, Error assigned that none of them were of the Kings Houshold, and for this Error reversed. The Register fo. 27. which is a Book of very good Authority, the Old Book of Entries tit. Error upon a Judgment given in the Marshalsie. fo. 296. b. Error assigned that no

Three things are requisite to the true construction of all Statutes.

Statute of Articuli super chartas cap. 3.

Register fo. 1

party was of the hostel del Roy, and the president of Mich. 1 E. 4 Rot. 47. is remembred. Fitz. Nat. Bre. fo. 241. 242. & fo. 246. F. which Book was writ by him when he was a Judge; and so any matter determined in the Marshalsie, where none of the parties are of the Kings Houshold, this is Error clearly. 1 E. 6. in Trespass, for a Trespass done in vita testatoris in the Marshalsie; a Writ of Error brought here, there they altered their stile, Coke 6 pa. fo. 12. in Jentlemans case, where it is said, that in Court of Marshalsie, the Steward and Marshal del hostel le Roy are Judges, and if they meddle where they have no power, this is Error, and the proceedings there are coram non judice, Coke 6. 20, 21. in Michelborns case, this was there agreed for to be a good Error; but the Judgment was not entred, because that one of the parties died before. But Fenner Justice informed him, that in that case, that three of them were agreed, that the Judgment was Erroneous, and ought to be reversed. Now as touching Actions of Trespass, some of them are vi & armis, and some without it; Trespass by a Tenant against his Lord not vi & armis, by 9 H.6. fo. 30. An Action upon the Statute of 5 R. 2. cap. 7. forcible entry, not vi & armis. Nusans is a Trespass, but not vi & armis. As to presidents of their Court; that they use the contrary, if they have there millions of presidents, no account will be had of them, for that they ought to be ruled in their proceedings there, by the Rules of the Common Law; and their usages there, in their inferiour Courts shall not bind these our higher Courts, being the general Courts for doing of Justice; as appears by L. 5 E. 4. and that throughout the whole Realm the Court of Marshalsie is a bounded Court, and the limits to extend but within the Precinct of twelve Miles; and as to their presidents the Law will rule them, because an inferiour Court; but otherwise it is of the presidents of a superiour Court; they shall bind an inferiour, but not è converso, and so concluded, that be this a Trespass sur Trover & conversion vi & armis, or not, and this is Error; and for this Error the Judgment ought to be reversed, and did advise them not to swell, for if they did this Court would then soon pull them down, and keep them within their bounds—Yelverton Justice, The Judgment is Erroneous, and to be reversed, they have no Authority there to hold Plea of this. This case doth rest upon the Statute of 28 E. 1. Articuli super chartas cap. 3. by which their Authority, Actions and Persons, are limited, the Statute of 13 R. 2. cap. 3. limits the place, this is a very ancient Court as appers by L. 5 E. 4. the reason of this jurisdiction is as well, for the case of the Houshold, as for the service of the King, otherwise they should be drawn to the Courts of the Common Law; and so the King should be unprovided for of his service; by the Statute of Articuli super chartas cap. 3. they are not to hold Plea of Freehold, Debt, Covenant, nor Contract, but of Trespass——del hostel, &c. and of other Trespasses, done within the Verge; so that the Parliament doth here limit all their power, and makes the same certain, perceiving how they had exceeded their Authority, extending the same to all persons in general, and they have used to enter, that one of the parties was of the Houshold of the King, although in truth it was not so, and therefore for to meet with this was the Statute of 15 H. 6. cap. 1. made which was not remedied before, by which Statute it is provided that the party shall not be estopped from averring of this, and that this is a good, and a clear Error appears by many Authorities, as by 20 E.4. fo. 16. 22 E.4. fo. 31. & 4 H.6. fo. 8. and as to jurisdictions, the highest Courts have their limits, for we here in this Court, cannot meddle with Formedons, neither can the Judges in this Court of C. B. meddel with Appeals—Brook tit. Action upon the Stat. placito 38. out of the diversity of Courts, where it is said, that the Marshalsey shall not hold pleas of Contract, unless that both parties be del hostel le Roy, & if they do hold plea otherwise, the Defend. may plead this to the jurisdiction of the Court; also they are not for to hold plea there of matter of Freehold, nor of Trespass, but only of Trespass done within the Kings Houshold, and of other Trespass within the Verge, and of Contracts

Coke 6. pa. fo. 12. Jentlemans case.

Coke 6. pa. fo. 20, 21. Michelborns case.

The Court of Marshalsie a bounded Court.

Brook title Action upon the Stature pla. 38.

Contracts and Covenants, which any one of the Houshold, doth to another of the Houshold, and within the same and not otherwise, and if a Trespass be done there within the verge, of this an Action lieth between whomsoever the same is, though they be not of the Houshold; but contrary it is in case of Debt, and Covenant 6 R. 2. Brook Action upon the Stat. pla. 49. where it is held a good plea, and coram non judice: where none of the parties are of the Houshold, 10 H. 6. fo. 13. there the Justices did view the Stat. and there it is held, that in an Action of Trespass, for Trespass done within the Verge, one of the parties ought to be of the Houshold, Old Book of Entries title Marshalsie fo. 432, 433. a Prohibition upon a suit there in an Action of Debt; and neither party of the Houshold. It hath bæn said, that Fitzherbert in his Book had mistaken the Stat. this speech might very well have bæn spared, he being a learned and a Reverend Judge; he puts the case of Trespass, especially by way of instance, and that the only way to be quit from suit, is to bring an Action upon the Stat. of 28 E. 1. and to have a Prohibition where they proceed there contrary to the Law; and so upon the whole matter, he held the Judgment there given to be Erroneous, and so the same ought to be reversed. Flemming chief Justice, Notwithstanding my opinion be the same one way or the other, yet the Judgment ought to be reversed: as to the true Judgment of this case, it is first here to be considered, for what cause this Judgment there given is Erroneous. As to the question made concerning the Jurisdiction of this Court of the Marshalsie, these things are considerable. First, of what nature this is. Secondly, the Antiquity of this Court. Thirdly, their limits. Fourthly, between what persons they are to hold plea. Fifthly, with whom. And Sixthly, in what Actions. It is very true (as it hath been well observed) that the greatest Courts have their several Jurisdictions and limits; for the King is fons justitiæ, & jurisdictionis; and as to the jurisdictions and diversity of Courts, which are greater and which inferiour, see for this in the Book called the diversity of Courts. Now as to this Court of the Marshalsie. First, as touching the creation of it. Secondly, the jurisdiction of it before the Statute. Thirdly, the interpretation of the Statute of Articuli super chartas cap. 3. touching their Jurisdiction. Fourthly, to consider of the Book Authority, in affirmance of this, & all this is to be considered for the true construction of this case. First, as to the antiquity of this Court, whereas it hath been said that this hath been a Court time out of mind, and this is very clear. But that this is a Court by prescription, as it hath bæn said; this cannot be agreed unto, for that every prescription implies a grant, but this Court was not by grant instituted, but of common right, as all other Courts of Justice are; and this pro necessitate; and for this the definition of the Civilians, de jurisdictione, is to be agreed, and the same is thus defined to be, (g) Jurisdictio est potestas Jurisdicendi, in publico introduct. pro necessitate, so the Court of the C. B. & B. R. not by prescription nor patent, have they their commencement, but de communi jure, of common right, & so of the Court of the Marshalsie, for as long as there is a King, so long of absolute necessity there ought for to be a Court of Marshalsie, for it is very necessary for the King to be always attended by his Servants, and if they shall be drawn by suits into other Courts, the King then shall lose his Service during the time that they are to follow their suits: another reason may be upon the case of L. 5 E. 4. fo. 129. in the case of the Parson of Dover, a very notable case, upon which case every one may well judge of the nature and jurisdiction of this Court, and of the commencement of it, and this shall suffice for the Antiquity of this Court. As to that which hath bæn said, that this Stat. of Articuli super chartas, &c. was made in emendatione, &c. as to this, this Statute hath left their jurisdiction incertius, quam ante, more uncertain than before, the which Stat. is so doubtfully penned, as that the Books do very much differ in the reciting of it, and in this they are faulty; this Statute is as a Labyrinth within this Kingdom: there are many companies and societies, and therefore the Law creates a Court for every jurisdiction, and this appears to be so, in L. 5 E. 4. the case of the Castle of Dover, their Court not being by grant nor prescription, but for the people,

Old Book of Entries tit. Marshalsie fo. 432. 433. prohibition.

The diversity of Courts.

L. 5 E. 4. fo. 129. the Parson of Dovers case.

who in time of War ought to have jurisdiction for to govern them by, and to do them Justice. And so is the Court of Marshalsie, for in time past as the Marshalsie is now; so was the Court of Kings Beneh and C. B. they did attend the Person of the King; then comes the Stat. which ordains that Communia placita non sequantur curiam nostram, sed in loco certo, &c. but yet the Court of C. B. although the same now be in loco certo; yet this Court is itinerant, if the King so command, and the Court may put down all Commissions of Oyer and Terminer, but not the jurisdiction of the Court of Marshalsie; and this was the cause, that no Writ of Error at the Common Law, did lie here for to reverse a Judgment, given in the Court of Marshalsie, until that this was given by the Stat. of 5 E. 3. cap. 2. but at the Common Law, a Writ of Error lieth here for to reverse Judgments given in all other Courts; as in the Realm of Ireland and at Callice, but not to reverse a Judgment given in the Marshalsie, because that the same Court had no Court above it; and therefore this Writ of Error was given by Parliament 5 E. 3. cap. 2. The Court of Marshalsie follows the Person of the King; but this Court of the Kings Bench, represents the Person of the King. The Title of the Court of Marshalsie is Aula hospitii domini Regis, and not infra virgam; and Fleta hath been well remembred, who hath put a case in his Book; where the King being in France, one did steal a Jewel from one of his company, and it was there questioned between the two Kings, whether this matter should be tried in the Court of France, or in the Court of Marshalsie of the King of England; and it was there ruled, the Trial to be in the Court of Marshalsie, and so it was, for that this Court follows the Person of the King Ubicunq; as if the King grants to one a Fair, there presently as incident thereunto, ariseth a market Court, (s) Curia pedis pulverisati, a Court of Pypowders, so called for the speedy dispatch of matters, and differences there arising; (even while the dust is as it were on their feet) this being as much as to say presently, and so unto a Manor a Court Baron is incident, and for the redress of criminal causes, the Law hath erected the Sheriffs turn and the Hundred Court; and all these for the Execution of Justice: and in all Counties, Justice is brought home even to their very Doors, as the several Circuits of the Judges; and this use was first instituted, for the better and speedier execution of Justice; the which is very commendable, and upon this ground was the creation of the Court of Marshalsie, and that so long as there hath been a King, and this Court to be held in aula Regis, and this being so, it is very clear, and cannot be denied, That there is no jurisdiction, be it of Place, Persons, or Actions, but they will covet still to ad more and more to their Liberties, by way of Incroachment; even as a River will wear down the Banks in time, and so be enlarged. Now as to the Stat. of 28 E. 1. of Articuli super chartas cap. 3. the scope and purport of which Stat. is for to limit their jurisdictions, and therefore as it hath bæn well observed, there was a mischief before the making of this Stat. and for the redress of which this Stat. was made, but this Stat. is so doubtfully penned, as never was the like, and the whole construction of this Statute, doth chiefly rest upon the place where the true (comma) ought for to be; and upon the true relation of the words to couple all together, it must be held that in Trespass done within the Verge, both parties ought for to be of the Houshold. The Stat. is in the Negative. First, it sets down what matter. Secondly, between what persons. Not of Freehold nor of Debt, Covenant, nor Contract; if they had stayed there, they had not bæn stripped out of all jurisdiction. No Freehold there determinable, many Debts, Covenants, and Contracts are there: If an Action upon the case in this nature be there brought, they shall there hold Plea of this. Then as touching Actions upon the case upon promises for Debt, Covenant, or Contract, such actions upon the case for promises were first invented for to oust the party from ley gager, this is all the Negative part of the Statute. Now as to the affirmative part of it: But only of Trespass del hostel, and in this it is to be observed, what Trespasses then were done. And Thirdly, between what persons. First, no Trespass, but del hostel, & ultra, of Trespasses within the Verge, and of Contracts and Cove-

Fleta lib. 2. cap. 3.

Stat. of 28 E. 1. of Articuli super chartas cap. 3.

Covenants within the hostel. In cases of Trespass, there one of the parties ought for to be of the Houshold, but in cases of Debts, there both parties ought for to be of the Houshold. Also their Actions there ought for to be Attached, where the Court is resiant; A difference may be made here upon the difference of persons, as if an Action be brought betwen two of the Houshold, & hanging this Action the Plaint. is discharged from his service in the Houshold, by this his Action falls to the ground, but otherwise it is where the Defendant is discharged. But in cases of Trespass, the Law hath made a determination of this; if the same be between one of the Houshold and the other not, this is good. Fitz. Nat. Bre. fo. 241. hath there two cases upon this matter. In Trespass, the same ought to be Attached where the Court is sitting, and not otherwise, and for the Jury to try the same; if it be for a thing done within the Verge, the Jury shall then be of the County adjoyning, if it be of a matter done within the Houshold, then to be tried by a Jury of the Houshold; if it be in a matter where one is of the Houshold, and the other is not; this Trial shall be of two Counties, and for the proximity of the County, if one of the Houshold be sued for a Trespass done within the Verge, the Jury shall be of the Verge; but of those within the Houshold, and upon this Stat. since the making of it, it is their common and usual course there, for to say that one of the parties was of the Houshold whereas he was not; but the Law meets with this, and gives an Averment in this case, unto the party for to Aver the contrary, and this is given to him by the Stat. of 15 H. 6. cap. 1. and in such a case where one of them is not of the Houshold, and they proceed, all is coram non judice, and by the Stat. 15 H. 6. cap. 1. the parties shall not be stopped by their Allegations there, but may Aver the contrary, and so by that Stat. it clearly appears, that one of the parties ought for to be of the Houshold, in 6 R. 2. Brook tit. Action upon the Stat. placit 49. the last case, where it was pleaded, that neither of the parties was of the Houshold. In Trespass it is sufficient if one of the parties be of the Houshold. Now as to their usage there, they do ever seek to add what they may by way of Incroachment unto their jurisdiction, and are not content for to determin matters within the Verge; but they will far exceed their limits, and deal with Foreigners and with forein matters. As to the Book cases remembred, no hold is to be taken of them, being but opinions only; the Book only to be relied upon, is the Book of 10 H. 6. fo. 13. that being a case upon the Statute, and the Law is truly there taken, that if none of the parties be del hostel le Roy, the same is not there to be tried; for if he owes no attendance there, he shall not then be subject unto their jurisdiction. If one will have an Action upon the Stat. where none of the parties were of the Houshold, he well may, and so are the Books and presidents, and so is 32 H. 6. which hath been remembred, and is put Coke 6. pa. fo. 20. in Michelborns case, in Trespass for Cancelling of a Bond vi & armis, reversed because that none of the parties del hostel le Roy. In case of a Writ of Error to reverse the Judgment as this principal case is, there is no Book case in point to Warrant it, but many Actions upon the Stat. brought here is sufficient cause of Error in this case for to reverse the Judgment. In Debt, Covenant and Contract, both the parties ought to be of the Houshold, but in Trespass it is sufficient, if but one of them be of the Houshold; but here in this case none of them was of the Houshold. And so all the Judges did clearly agree upon Michelborns case, Coke 6. pa. fo. 20. and upon other Authorities, that this Judgment here given is Erroneous, and so therefore the same ought for to be reversed, and according to their resolutions, the Judgment was reversed, and the reversal pronounced by Yelverton Justice.

Nota, the difference where the Plaint. and where the Defendant is discharged, hanging the Suit.

6 R. 2. Brook tit. action upon the Stat. pla. 49.

Judgment reversed per curiam.

Nota, that in this case the three Judges, (s) Crok, Williams, & Yelverton did agree clearly, that in all Actions there both parties ought to be del hostel le Roy or else the matter is out of their jurisdiction. But in this point Flem. chief Justice did differ from them in opinion, for he agreed that in Debt, Covenant, and Con-

Contract, both parties ought to be del hostel le Roy, but in Trespass it is sufficient if one of the parties only be of the Houshold, and in such a case they have good jurisdiction of the cause, quod nota.

Suckfield Plaintiff against *Constable* Defendant, Entred *Mich.* 9 *Jac. B. R. Rot.* 330.

An Action of Trespass for Cancelling of a Deed. 1 Brni. 222. Yelvert. 223.

IN an Action of Trespass, Quare vi & armis brought against the Defendant, for cancelling of a Deed; the Plaintiff in his Declaration shewes, that the Defendant was seised in Fee of certain Land, and of this did Enfeoff I. S. and his Heirs with warranty, reserving to him a yearly Rent with a clause of distress for the same, if not paid; that afterwards the Defendant by his Deed did bargain and sell the said Rent to the Plaintiff; for the Cancelling of which Deed (the which the Plaintiff casualiter amisit) for this the Action brought, but doth not shew in this Declaration, that he was at any time before possessed of this Deed, but only by his implication argumentative. The Defendant doth Traverse the grant of the Rent, that no such bargain was made; Non barganizavit. The question was whether here was a good Traverse taken or not, whether this matter, to which the Traverse was taken, be Traversable or not; the same being only matter of Conveyance to the Title. Trist for the Plaintiff, that this Traverse is not good, and so the plea in Bar insufficient, and Judgment therefore to be given for the Plaintiff; here the Action is brought for Cancelling of his deed, by which the Plaintiff makes title to himself, and so this being only matter of Conveyance to his Action, and no matter of substance, this is no matter Traversable by him, and so his Traverse taken to this is not good, and so is 19 H. 6. fo. 29. & 30. Brook tit. Travers pla. 72. in a Writ of right of gard, such a Traverse there taken, and the same held not good. Henry Yelverton for the Defendant, that the Traverse here is well taken, neither could the Defendant here in this case have taken a better Traverse, for in regard that the Plaintiff in his own Declaration, hath set forth his title, by this he hath given unto the Defendant such an advantage for to Traverse this if he will, (the which otherwise without such expression of the Plaintiff) the Law would not have given this liberty unto him; here the Plaintiff might very well have brought his Action of Trespass, for the Cancelling of a Deed generally, and this had been good, and then such a Traverse taken by the Defendant had not been good; but as this case here is the Traverse is good and well taken; for here the Plaintiff himself by shewing of his title, gives to the Defendant advantage for to Traverse the same. Also the Declaration here is not good, for that the Plaintiff hath not shewed in his Declaration, that ever he was possessed of the Deed: and this he ought specially to have shewed in his Declaration, for which omission the Declaration is not good. Flem. chief Justice, the Plaintiff here ought to have shewed in his Declaration, that he was possessed of this Deed before, the which he hath not done, but only in this manner; and that argumentative, and so the Declaration is not good. But the whole Court was clear of opinion, that the grant here his not Traversable, and so the Traverse taken to it is not good, but by the whole Court the Plaintiff ought here in his Declaration to have shewed that he was possessed of the Deed before, which he hath not done, and so for this omission the Declaration is not good, and so the Rule of the Court was, quod querens nil capiat per billam.

What matter Traversable, and what not.

Judgment for the Defendant, &c.

Lutterel

Lutterel Plaintiff against *Weston*, or *Westorn* Defendant, Entred *Mich.* 8 *Jac. B. R. Rot.* 602.

NOta, that in a Trial at the Bar, as touching the Custom of a Copphold Mannor, the case appeared to be this, the custom of the Mannor was, That Coppholders for life may make a lease for one year only, such a Copphol- der made a lease for one year, Et sic de anno in annum, during the life of the Copp- holder, (excepting one day, at the end of every year, for the Coppholder to en- ter, and this only to avoid a forfeiture;) this was moved for a question upon the Trial here, whether this should be a forfeiture of his Copphold estate or not. Williams Justice, Clear this is a forfeiture of his Copphold Estate; and this his excepting of one day at the end of every year, is but a mer invention and a shift, which will not serve his turn, to avoid his forfeiture, but in this his so doing he hath deceived himself, and cannot by this avoid the forfeiture of his Copphold Estate. The whole Court did agree with him herein, that this was a clear forfeiture of his Copphold Estate: the Jury found a special Verdict, and the case for to be; that the Coppholder did covenant with the other, that he should have his Copphold Land during his life, excepting to him at the end of every year one day during his Life; the Jury found these Articles of Cove- nant, and his entry the 25 day of March, according to his exception, and so this left to the Judgment of the Court, whether this was a forfeiture or not at this time. This was adjourned over to be moved again, and afterwards Termin. Mich. 10 Jac. this was here moved again, and the Court was clear of Opinion, that this was a forfeiture. Williams Justice, If a lease be made de anno in annum, this must of necessity be a lease for 2 years, and so is Potkins case in 14 H.8. fo. 14. As to the reservation of one day, at the end of every year, to make this a lease but for one year, and so to be warrantable by the custom, and to avoid the forfeiture, this is not any ways at all material, for this shall be a forfeiture, this notwithstanding; here by this his invention he hath a purpose for to de- ceive the Lord; and here by and with his skill he hath by this deceived him- self. Flemming chief Justice, this is but a mer invented devise for to deceive the Lord of his Forfeiture. It is a plain case here, that he hath let his Copphold Land, from year to year during his life; and as to the exception by way of re- servation of one day, at the end of every year, this will nothing at all avail him; if he had excepted a month at the end of every year, this would have been to no purpose, for this is a lease by him made for a longer time, than the custom will warrant him for to do, and so this is a very plain case, and without any question at all, that by this lease in this manner by him made of his Copphold Estate, his Copphold Estate is clearly forfeited. Williams Justice, he hath here made a snare for another, and hath catched himself in the same; and so the whole Court clear of opinion, that this lease is a Forfeiture of his Copphold Estate, and that such a kind of Lease is not to be allowed of; for then by this means all such Coppholders may defeat the Lords of the benefit of their Forfeitures which the Law and custom hath given them. And so by the Rule the Court, Judgment was given for the Lord against the Coppholder, that by this his lease thus made, his Copphold Estate forfeited unto the Lord both by Law, and by the custom of the Mannor.

A Lease for one year by a Co- pyholder, &c.

Ante 190.

Judgment given by the Court for the Lord against the Co- pyholder.

Saxey

Saxey Plaintiff against *Whempson* Defendant, Entred *Mich.* 9 *Jac. B. R. Rot.* 359.

Error for to reverse a Judgment in Debt, &c.

IN a Writ of Error for to reverse a Judgment given in an Action of Debt in London against William Saxey, alias dictus Saxex, this variance was alledged for Error. Williams Justice, if he were named (Saxex) in the original, and Saxey in the alias dictus, this would be a clear variance, for that he ought to declare against him, by the name that he was at the time when he sealed the Bond, and as he is named in the condition, and that the alias dictus, is for no other purpose, but to make the name for to agree with the name in the Bond. Yelverton Justice, If the Action be brought against I. S. who at that time was an Esquire; and afterwards he is make a Knight, there he shall declare against I. S. Esquire; alias dictus I. S. Miles. The whole Court clear of opinion, that this is no Error, for that a y may easily be made an x. This Error was overruled by the Court. And by the Rule of the Court, Judgment was affirmed for the Defendant.

Judgment affirmed per curiam.

Waterson and his Wife Plaintiff against ——— Defendant.

A Writ of Error to reverse a Judgment.

IN a Writ of Error to reverse a Judgment, given in an Action of Debt upon a Bond, the Case appeared to be this; the Action of Debt was brought in the City of Coventry, where the Debt grew due upon a Bond, this cause was removed up hither, afterwards a Procedendo was granted for to proceed in the Court of Coventry, afterwards by assent of all parties, it was agreed for to be tried at the Guild-Hall London; and it was also agreed, that the Defendant should plead conditions performed at London (whereas the Obligation was entred into at Coventry) this was so tried accordingly; and Judgment given for the Plaintiff, a Writ of Error brought for to reverse this Judgment, this assigned for Error, for that upon Oier demanded, he ought to plead payment at Coventry, and this a clear Error, as it was urged by Thomas Crew, for the Plaintiff. But by the Rule of the whole Court, in regard that he assented for to plead conditions performed in London; and the Plaintiff assented unto it likewise, so that an assent being by all the parties, and a Trial had for the Plaintiff in the Action, and Judgment given for him, this now is not to be assigned for Error, by reason of their assent, and agreement to have it so, otherwise by the Rules of Law; this could not be so done, but it would be clearly Erroneous: but in this Principal case here, the consent, and mutual agreement of the parties doth well aid all, for that consensus tollit errorem, for without a consent, the condition could be tried at no place, but at Coventry. Williams Justice, the Trial here was only had for the benefit of the Defendant, and the same so had by the mutual consent of all parties, and therefore this Judgment is not to be avoided by him, by this Error now in this manner assigned, and therefore by the Rule of the whole Court, Judgment was affirmed for the Plaintiff in the Action.

Judgment affirmed per curiam.

Benson

Benton Plaintiff against *Aymes* Defendant.

IN an Action of Debt, the Plaintiff had Judgment quod recuperet 8 l. Ideo consideratum est per Curiam, quod querens recuperet 8 l. the Clerk enters this. In the entring of which Record, he writes, and enters it in this manner; Ideo consideratum est quod prædictus querens recuperet debitum suum prædictum de 3 l. and leaves out the v. the same being in the Record. Upon this meer mistake of the Clerk in his entry, the Court was moved to have this amended, and made to agree with the Record, which the Court did hold to be very fit, and reasonable so to be done; and accordingly, by the Rule of the Court, the same mistake was amended in the Court, quod nota.

A mistake of the Clerk in entring the Judgment amended in Court.

Fox Plaintiff against *Jux* Defendant.

NOta, By the whole Court as a Rule to be observed for the Discontinuance of Actions, That the Plaintiff cannot discontinue his Action, for to save his payment of Costs thereby, after a Demurrer, when the Cause is then by the Demurrer in the Judgment of the Court, and in their discretion, either for to continue, or discontinue the same, it is not then in the power of the Plaintiff for to discontinue his Suit without the assent of parties, and this assent he ought to make appear unto the Court.

A Rule observable touching the Discontinuance of Suits, &c.

Ingram Plaintiff against Sir *Edward Waterhouse* Defendant.

NOta, That in a Case of priviledge by Priority of Suit, the case appeared to be this: Sir Edward Waterhouse was here arrested by a Latitat upon a Bond of 2000 l. for the payment of 1000 l. the mony due before for Land sold unto him, the mony was brought here in Court after this Latitat here, and before the return of the Writ an Attachment issued in London against the said Sir Edward Waterhouse, by which he was arrested for divers debts due by him, and for others, in which he stood bound for Mr. David Waterhouse. Mountague Serjeant Recorder of London prays the priviledge of the Kings Bench, having the priority of the Suit, and to have the 1000 l. out of Court for Ingram. Hubberd moved the Court for the Creditors in the Attachment, and moved, That the mony being here in Court, may not be delivered out of Court, before the debt recovered in London against him, be paid and satisfied, or that the said Sir Edward Waterhouse have put in sufficient Sureties for to answer them their debts, recovered, in regard that Sir Edward Waterhouse hides himself, and cannot be found. Williams Justice, The Law and course of this Court is this, That if a Latitat do first issue, and an Attachment afterwards, that this Court ought to have, and always hath used for to have the priviledge, and are not to stay their proceedings here, by reason of such a subsequent Attachment; but as to the motion made by Hubberd, the same is very reasonable and just, and not to be denied; and therefore the Rule of the Court in this case was this, That if it be so, as the Court is informed, that Sir Edward Waterhouse stood indebted to others for other sums of mony borrowed before for him, and not paid, this 1000 l. they shall have to pay these debts before the other debts paid, for payment of which, he was bound as Surety with David Waterhouse, and for his debt, and not for his own, the Rule of the Court was to have this examined, and so to have the Court informed, whether this be so or not, as is informed, and if this be true,

Priority of Suit gives Jurisdiction to the Court, &c.

It is then in the power and discretion of the Court, to keep the money still here until the recovery in London had against him be satisfied, or else sufficient surety by him put in, and given for the same, and not for to make this Court a means for to strip others of their proper, just, and due debts, but it is most just and reasonable for him, first, to pay his own debts, before he pay the debts of another; and according to this former Rule for priviledge, by Williams Justice, in case of priority of suit, this Court hath always had the priviledge and jurisdiction, and so it hath been oftentimes here adjudged.

The Rule of the Court as touching priviledge and jurisdiction.

Baker Plaintiff against *Nichols* Defendant.

Aid prayed of the King where to be granted, and where not, &c.

NOta, As touching Aid prier of the King, the Case appeared to be this: That in a Writ of Error to reverse a Judgment, Aid was prayed of the King by the Defendant in the Writ of Error. Hen. Yelverton, No Aid ought here to be granted of the King; where Land in Fee-farm is in demand, there the party shall have Aid granted unto him of the King, but not here in a Writ of Error, where no Land is in demand. Williams Justice, Without all question no Aid ought here to be granted, and there is no Authority in all the Law to warrant the granting of Aid in such a case of the King; he may well alledge diminution for the King, but he shall not have Aid of him. Flemming chief Justice, as to Aid prier, it is very clear, That no Aid shall be granted of the King, where no Land is in demand, but only collaterally; but afterwards, when the land comes once in question, then Aid shall be granted, but never before; and so was the Resolution of the whole Court; and therefore in this principal Case in this Writ, Aid was denied to be granted by the whole Court.

Aid denied by the Court, &c.

The King against *Cole*.

Exception to an Indictment, &c. 2 Bulstr. 119. 2 Cr. 324.

NOta, That Cole was indicted upon the Statute of 8 H. 6. cap. 9. for a Forcible Entry. An Exception was taken for to quash the Indictment, because that in the same, the Statute was misrecited, alledging in the Indictment that the Fine mentioned in the Statute, was by the Statute given dicto Domino Regi, whereas the words in the Statute are Domino Regi; and without the word (dicto) the whole Court were clear of Opinion, That this was a good Exception, and so hath the same divers times before been here adjudged for to be a good Exception; and so for this misreciting of the Statute, the Exception ruled good, and for this cause the Indictment insufficient: And so by the Rule of the Court the party was discharged, and a Writ of Restitution to him granted.

Party discharged, and a Writ of Restitution granted.

Whiting Plaintiff against *Wilkins* Defendant, Entred *Hill.* 9 *Jac.* *B. R. Rot.* 1062.

IN an Action of Trespass and Ejectment, the Plaintiff declares of a lease for years made unto him by Rob. Simpson Lessee for three lives, of ten Acres of land; and upon Not guilty pleaded, the Jury found a special Verdict, and the point of the case in question, arising upon the construction of a Will, whereupon the Case appeared to be this, (s.) Thomas Whiting being seised in fee of the land in question, held in common Soccage, 1 Octobris 1 Jac. apud Downham, made his last Will and Testament in writing, and thereby did devise the said ten Acres unto Rob. Whiting his younger son imperpetuum; and after his decease the remainder to his heir male imperpetuum, with divers the like remainders in the same manner limited proximo filio seniori, & hæredi masculo imperpetuum. After this Will so made, Thomas Whiting the Testator dyed seised, Robert the younger by force of this Devise enters, and of this land makes a lease for three lives unto Robert Simpson, who made the lease for years to the Plaintiff, who by virtue of this lease entred, and being put out by the Defendant, brings his Action of Trespass and Ejectment. Denn for the Plaintiff: The sole question here is, whether Robert Whiting the Devisee here, hath by this devise an estate for life, or in tail; if but for life, then he hath forfeited his estate by the making of this lease here for three lives; otherwise it is if he have an Estate tail by this devise, then there is no forfeiture; he hath here a good estate tail by this devise. It appears by Littleton fo. 133. placito 586. and 15 H. 7. 12. if land be devised Habendum sibi imperpetuum, this is a Fee-simple in the Devisee; here in this case the Devise being filio suo imperpetuum, & hæredi masculo de corpore post ejus decessum, and all in the singular number, heir male here in this case, the first Devisee hath an estate tail, and this appears by the scope and purport of the Will, and by the so often iteration of the heir male in the singular number, 4 Eliz. in Bendlose Reports, Lands devised to one imperpetuum, and after his decease to the men children of his body, here imperpetuum is only for life; see for this also Wild's case, Coke 6 part, fo. 17. b. Also by the connexion of the words in the Will, this is to be an estate tail. It appears by the Will that he had only two Sons, and the words of the Will are, Item in like manner &c. his intent by this was, that the second Son named in the Will, should have as great an estate by his Will, as the former had. To this purpose is the Case put Coke 6 part, fo. 35. b. in the Bishop of Bathes Case, a man doth lease the Manor of Dale to I. S. for so many years as I. D. hath in the Manor of Sale, and he hath ten years in the same, this is a Lease for ten years by reference unto a former Lease, 20 H. 6. fo. 36. a Remainder limited in forma prædicta is good, and 5 H. 4. fo. 3. in case of a Will a Devise made in forma prædicta, and good; so here in this principal Case, here the second Son is to have as great an estate as the former hath; the word Heir is nomen Collectivum, 16 H. 7. fo. 15. the next Heir for to have an Appeal, the Heir of the Heir shall have it, 19 H. 8. fo. 10. a man doth devise that the Heir of I. S. shall sell his Land, the Heir of the Heir shall sell, 42 Eliz. B. R. in Purslow and Parker's Case, where an Annuity was devised to the younger Son, and by his Will declareth that his Heir shall pay this, it was ruled here, that the Heir of the Heir was bound to pay this Annuity, for that the word Heir est nomen collectivum, and doth comprehend every Heir, one after another. It was in this Case adjudged that the Heir of the Heir should pay the Annuity; if in the Devise here it had been to the Heirs, it would then be agreed for to be a good estate tail, 35 H. 8. Brook title Estates, pla. 73.

An Action of Trespass and Ejectment, a special Verdict was found upon construction of a Will.

4 Eliz. in Bendlose Reports.

Coke 6 part fo. 35. in the Bishop of Bathes Case.

42 Eliz. B. R. Purslow and Parkers Case.

73. Land given to Husband and Wife for their lives, & diutius eorum viventi, the remainder to the Heirs of their bodies; this is an estate tail executed, by reason of the immediate Remainder. Cheek and Dales Case in 36 Eliz. B. R. ruled accordingly that 'tis an estate tail executed. It hath been agreed, that if the devise had been to one, and to the Heir of his body lawfully begotten, that this had been a good estate tail, as well as if he had named Heirs. In this Case here, Robert the Devisee hath a good estate tail, and so no Forfeiture by his making of the Lease for three lives, and so the Plaintiff under this Lessee hath a good title, and judgment ought to be given for him. Briscoe for the Defendant, that Robert Whiting the first Devisee here hath no estate tail by the words of this Will, but only for his life, and that his Heir male shall be a Purchaser, and shall be in by purchase. The Cases which have been put of devises, may be all agreed in 38 Eliz. in Smiths Case in the C. B. a devise made to the Father for life, Remainder to his Heir male; it was there resolved, that the Son was in by purchase. Wildes Case Coke 5 part fo. 16, 17. in a manner doth confirm this. Also by this devise here to the Father imperpetuum, in judgment of Law, this is but an estate for life in him, and after his decease, to his Heir male, his Son is here a Purchasor by the true intent and meaning of this Will: The Father hath an Estate determinable by his death, mors dividit omnia, and this here is all one, as if he had said expressly, that he devised the same to his Father for life, Remainder to his Heir male: for by the intent of the Will it appears to be so, and is to have this construction by Law; and so the first Devisee having but an estate for life, and making of a lease for three lives, this is a Forfeiture of his Estate, and so the Plaintiff coming in under this Forfeiture, hath no good Title, and so judgment ought to be given against him for the Defendant, and so this Case was adjourned to be further argued. Afterwards (s.) Termin. Trin. 11 Jac. B.R. this Case was moved again, and then this question was moved, the Plaintiff claiming by Lease made unto him from a Lessee for three lives, whether the Plaintiff ought not in his Declaration to have averred the continuance of the three lives. Haughton Justice, He needs not to aver the same. Dodderidge Justice, This averment here the Plaintiff ought for to make, and for this omission the Declaration is not good, for that he ought not to recover, if it doth not appear here to the Court, that he hath a good title; upon this it was shewed for the Plaintiff, that Robert Simpson was seised for life, and did make a Lease for years to the Plaintiff. It was shewed for the Defendant, that Simpson was seised for three lives by a Lease made by one (s.) Robert Whiting, who had an estate but for his own life, and so by this there was a Forfeiture of his estate: So that the only Point and Question in Law was, whether by this Will the first Devisee had an estate tail, or only for his life: If an estate tail, then whether the continuance of the three lives ought not to be averred; for that if they are dead, the Plaintiffs Lease is determined, and therefore the lives are to be averred. Croke Justice, The Plaintiff here needs not to aver the Continuance of the three lives. Flemming chief Justice, The Lease here made by Simpson to the Plaintiff is a good Lease, and the same is to be avoyded two ways; the same is either to be determined in facto, or in Law; if it be determined in facto, that is, to be by the expiration of the time, as if the three lives be ended, then he ought for to say so, that the lives are ended: otherwise it is where the same is determined by act in Law, as by Forfeiture. In this Case here in the Bar, the other side hath not taken hold of this, as to say that this Lease is ended, and so to be avoided by effluxion of time, and so by this, they have admitted so much, that the lives have still continuance, and therefore no averment here is requisite to be made by the Plaintiff in his Declaration of the continuance of the three lives. But as this Case here is, in the bar, they only rely upon the determination of the Estate, by matter of Forfeiture: And this is the sole and only matter in Law. And as this Case here is, the bar is to be taken strongest against the Defendant who pleads it; and that is (s) that the lives are still in being, and so the same

Cheek and Dales Case, 36 Eliz B. R.

38 Eliz. C.B. Smiths Case, Coke 5 part, fo. 16, 17. Wildes Case.

Where an averment of lives is requisite, and where not.

same is to be here taken and intended, and that without prejudice to any party, and therefore we may now well proceed unto the discussing of the matter in Law, for that by the Defendants own pleading, it is supposed that the three lives are in being, and not dead, inasmuch as he doth not seek and endeavour to avoid the Lease made unto Robert Simpson, and so consequently the Estate and Title of the Plaintiff by effluxion of time, but only for the matter in Law: And the bar here doth not extend it self to any other matter, but only to the point of Forfeiture, and this is the chief point and matter now to be resolved, and the determination of this rests only upon the words of the Will of Thomas Whiting, and the construction thereof. And touching the Estate that did pass thereby unto Robert Whiting his Son, whether an Estate tail, or only an Estate for life, was thereby devised unto him by the words and meaning of the said Will, and so by Haughton, Croke, and Flemming, the Declaration here is good, without any averment of the continuance of the lives. Dodderidge Justice being of a contrary opinion, that the same ought to be averred by the Plaintiff in his Declaration, his Title depending thereon; but afterwards Dodderide Justice mutata opinione, did agree that the omission of the averment here is only helped by this which was urged by Flemming chief Justice, and by no other way; and herein he did agree with him, that the bar here is for to be taken strongest against the Defendant that pleaded it. And now as to the matter in law, he in the second Remainder enters, (and under whom the Defendant here claims) supposing the Lease for three lives made by Robert Whiting, the first Devise to be a forfeiture of his Estate, he having by the Will, as was conceived, an Estate but for his own life, and so the sole and only question rests upon the words and meaning of the Will, whether Robert Whiting the first Devisee had thereby an Estate in tail, or only for his life. It was urged for the Plaintiff, that by this Devise Robert Whiting had an Estate tail, and that Heir male in the singular number, is all one in a legal construction as Heirs males in the plural number. And to this purpose was cited the Case in the 39. Book of Assises placito 20. the last Case; and Perkins fo. 35. pla. 171. and Brook title Tail, pla. 23. where Land was given to a man and his wife, & uni hæredi de corpore suo legitime procreato, & uni hæredi ipsius hæredis tantum, this was held a good Estate tail, by the opinion of all the Justices, as Brook observeth in his abridging of it, for that this word Heir est nomen Collectivum, and shall run unto all the Heirs, Hill. Eliz. B. R. in Cheek and Dales Case, where there was the like limitation by one unto Rose his Daughter, and to her Heir male, and there agreed, that if the first limitation had been made to her for life, and after to the Heir male of her body, that this is a good Estate tail. For the Defendant it was urged, that Robert Whiting the first Devisee, had but an Estate for life only, and that he can take no benefit of the limitation made unto his Heir. It cannot be denied, but that the word Heir est nomen collectivum, and it is not to be denied, but that there is an Estate tail here in this Case, but the same is not in Robert Whiting the first Devisee, but in his Issue, Robert having only an Estate for his life, and after his decease to his Heir male for ever. Haughton Justice, The question here only is, whether Robert Whiting the first Devisee, by the words and meaning of this Will hath by the same an Estate for life only, or an Estate tail: By this Will he hath clearly an Estate tail, notwithstanding that wills ought to have favourable construction, yet the same ought so to be either by matter in the same expressed, or implyed. A Devise made of Land to one for ever, and by the intendment of Law, he ought by these words for to have such an Estate as ought to have continuance for ever, and by such a Devise, the Devisee shall have a Fee-simple. Now to examine the words of this will here in this case, the words of the will are to expound the same, and the will of the Testator thereby. It hath been objected that the word (Heir) in this will, should go unto the Heir of Robert Whiting the first Devisee, and not to Robert himself, this is not to be so, but they are meerly to be referred to himself, and to be applyed to him, and the rather, by reason of the first words in the will, being given

Hill. 36 Eliz. B.R. Cheek and Dales Case.

Archers Case Coke 1 part fo. 66, 67.

ven to him imperpetuum. And as for Archer's case Coke 1 part, fo. 66. & 67. that makes nothing at all against this; there it is expressed, the question there being executory, no doubt there arileth, or is made, as touching the inheritance, there the words (his Heir) applyed to the Son, but here in this case to the Father. The case in 27 H. 8. fo. 27. a. comes nearest to this case, where the Devise was of Land to a man, and to his heirs males; the Devisee here by these words hath an estate tail, and there it is said that the Law is favourable to all Devises, and will construe them according to the intent of the Devisor; and for this reason (as it is there expressed) the Devisee shall have an estate tail, but otherwise in case of a gift, as appears by Littleton fo. 6. pla. 31. Brook title Estates pla. 33. & 18. Assises pla. 5. here in this principal case the meaning of the party doth appear, and the same may be collected out of the words of the Will, upon the first Devise by him, to Robert his son imperpetuum, if he had stayed here, and said no more, then Robert his son, without all question had an estate in Fee-simple; and when he afterwards nominates Heir, by this it doth plainly appear, that he only intended to him an estate tail, and no greater nor lesser estate; and so then Robert having an estate tail, by this Devise his Lease for three lives made to Simpson the Lessor of the Plaintiff is a good Lease, and no Forfeiture, and so the Plaintiff hath a good Title under Simpson his Lessor, and judgment
2. ought to be given for him against the Defendant. Dodderidge Justice agreed in opinion that judgment ought in this case to be given for the Plaintiff as touching this Devise, the same being to Robert his Son for ever, and after his decease to his heir male for ever, and so the like remainders over. Touching the words of this Will, and the estate of Robert the son thereby, is the sole question, whether by the words, and by the meaning of this Will, Robert the son hath an estate in tail, or only for his life. If he hath an estate tail, then there is no Forfeiture in the case, that Robert the son, by the words true construction, and meaning of this Will, hath an estate tail in the Lands to him thereby devised. First, in Deeds for to make an estate tail, the Law will have a beneficial construction upon the Statute of Donis, &c. Quia voluntas donatoris de cætero in omnibus, &c. observetur, and this is to be so in cases of Deeds; and divers cases may be instanced to this purpose, as 5 H. 5. fo. 6. and Perkins fo. 35. placito 169. Brook title Tail placito 12. Land given by Deed, Reginaldo & K. uxori ejus, & hæredibus eorum, & aliis hæredibus dicti Reginaldi, & si dicti hæredes de dicto Reginaldo & K. obierent sine hæredibus de se procreat, &c. this a good estate tail. And to this purpose

Coke 7 part, fo. 40, 41. Berefords Case.

the like Cases are put Coke part 7. fo. 42. in Bereford's Case. By all which it plainly appeareth how beneficially the Judges have made construction of Deeds for estate tails, and this upon the Statute of Donis conditionalibus quod voluntas donatoris, &c. à multo fortiori; it shall be so in cases of Wills, and the construction of them. If the King grant an Estate to one, and to his heirs males, this is a good Grant by 18 H. 8. Brooks Case pla. 5. Sir Thomas Lovel's Case, because the King was deceived in his Grant; otherwise it were in case

Littleton pla. 586.

of a Subject, for there such a Grant would pass a Fee-simple. Littleton pla. 586. Land devised to one Habendum imperpetuum, this is a Fee-simple, 7 E. 6. Brooks Case, pla. 432. If Land be devised to a man, to give, sell, or to do with it at his will and pleasure, this is a Fee-simple, by reason of his intent to have it so: Now as to the intent of the Devisor in this his Will, First, if he had meant here to have given the absolute inheritance to him, and made no restraint but had stayed upon the first words of the Devise to him imperpetuum, this had been a Fee-simple. Secondly, it is to be considered, whether here he have made any restraint of this, or not; here he intends by his Will for to pass an estate of inheritance to him, and hath not made any restraint of this, but hath only expressed and expounded himself as touching his intent and meaning, what kind of estate of inheritance, he did by this his will, intend to pass unto him, not an absolute estate of inheritance for ever in Fee-simple, but to him, and to the heir male of his body for ever, which is an estate tail. 9 H. 6. Land is given to

one

one for ever, this is only for his life, and so for ever here, that is as to himself, but otherwise it is in case of a Will, 16 Eliz. Dyer pla. 330, 331. Clatches Case, Construction in case of a Will there made according to the intent of the Devisor here in this principal Case, the Limitation is to him, and to his heir male in the singular number, and heirs males in the plural number, are all one; as to the making of an Estate tail, in this case here it is good in point of limitation. Archers Case Coke 1 part, fo. 66. there the word (hæredi) is a word of purchase, but in this case here, being in the case of a Will, the word (hæredi) is used to an estate in point of Limitation; and so as the case here is, it is all one with hæredibus, in the eye and construction of Law: If he had here expressed but an Estate for life, as in 9 H. 6. the case had then been otherwise; but here he expresseth nothing certain, but only he expounds his meaning, and shews what estate he intended to pass to Robert his Son, who clearly hath by this Will a good Estate tail; and the Lease made by him to Simpson for three lives, is a good Lease, and the Plaintiff claiming under this Lease hath a good Title, and so Judgment ought to be given for the Plaintiff. Croke Justice, By the words and meaning of this Will, Robert the Son hath an Estate tail, and this is very clear and plain. A double help there is for this, the Statute of Donis conditionalibus, this case being within the Statute, and also the construction of the Will. An Estate tail, as Littleton well observeth, Est status limitatus, and it is all one to limit this to heir male, and to heirs males, quam diu aliquis hæres de corpore extiterit; by this word here (for ever) if he had said no more, it had been a Fee-simple in Robert the Son. A Will is Testatio mentis Testatoris; a man deviseth Land to one, and to his heirs males, this is a good Estate tail by 27 H. 8. fo. 27. If a man devise Land to one, and his heir for ever, the Remainder over, this is a void Remainder: But if a man deviseth Land to I.S. and his heirs, and if he dye without issue, the Remainder over, this is a good Remainder. If the King gives Land to one, and to his heirs males, this is a void Grant, as it hath been observed, because the King is deceived in his Grant; but in case of a Subject, by such a Grant a Fee-simple passeth. Frenchams Case 2 Eliz. Dyer pla. 171. where an implication in a Devise shall not controul an express Devise: By this Will here his intent doth plainly appear, and this word (Heir) is only the manner of Gradation and Distribution, heir male, and heirs males all one. Flemming chief Justice, Robert the Son by this Will hath an Estate tail, and so the whole Court agreed clearly in this, That by the words and meaning of the Testator, by this his Will, Robert his Son had a good Estate tail, and so the Lease by him made to Simpson for three Lives, is a good Lease, and no Forfeiture: And the Plaintiff being his under Lessee, and claiming under him, hath a good Title, and ought for to recover. And by the Rule of the Court Judgment was given, and so entred for the Plaintiff.

16 Eliz. Dyer pla. 330, 331. Clatches Case.

Coke 1 part fo. 66, 67. Archers Case.

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FINIS.

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Scire tuum nihil eſt, niſi te ſcire hoc ſciat alter.

Deo juvante aſſiſtente & auxliante hoc tandem perfeci opuſculum; Cui Laus, & Gloria in æternum.

FINIS.

THE SECOND PART OF THE REPORTS

OF

EDWARD BULSTRODE,

Of the INNER-TEMPLE Esquire;

Of divers Resolutions and Judgments, given with great Advice, and Mature deliberation, by the Grave and Learned Judges and Sages

OF THE

LAW.

Of Divers and Sundry Cases and matters in Law; with the Reasons and Causes of their said Resolutions and Judgment.

GIVEN IN THE

COURT of KINGS-BENCH,

In the time of the late Reign of

KING JAMES. I.

Lex est vitæ regula, præcipiens quæ sunt sequenda, & quæ fugienda; est ratio perfecta, rerum natura, ad rectè faciendum impellens, & à delicto avocans. Cicero de Legibus.

The Second Edition, with many References added to it.

LONDON,

Printed by the Assigns of *Richard* and *Edward Atkins* Esquires;

Anno Domini MDCLXXXVIII.

TO THE
RIGHT HONORABLE
Sir *BULSTRODE WHITLOCK*, KNIGHT.

SIR,

AS the Law of God is the guide, and conducter of all good men; and the Law of Nature, deduced from Gods eternal Law, the Rule of all his Creatures; So Humanes Laws, depending on both these, are the guards of Magistrates, and virtuous men; yea, the very Spirit, and sinewes of every State in the World. For all humane Laws have their dependency upon the Laws of God, who is the great Law-giver; from which fountain and origin, they all proceed: And the neerer our Copies draw to that original, the better they are, and the more likely to continue. And therefore divine *Plato* affirmeth, That no man, though the most excellent of wit, or the most prudent, and best practised in affairs of State, can be able without the inspiration and assistance of God, to make sufficient Laws, for establishment of a Commonwealth. But that as brute Beasts, cannot be well governed by Beasts, without the help of Man; so Man cannot be well and happily governed by Man, without the help of God. Plato *lib.* 4. *de Legibus.*

Saint *Augustine* says, That those Societies of men, wherein Law and Justice bear not sway, cannot properly be called Commonwealths, but *Magna Latrocinia*, great Confederacies of Thieves: And truly, if there were no Laws made, nor observation of those that are made, all Societies of Men, all happiness, and contentment in this life, would be taken away, and every State, and Commonwealth, would fall to the ground, and dissolve. For there can be neither foundation, building nor continuance of any Commonwealth, without the Rule, Level, and Square of Laws. Which therefore *Plato* calls the St. Aug. *lib. de Civitat. Dei.* Plato *lib.* 4. *de legibus.*

the Soul, that gives form and life to the common-wealth, and the anchor that stayeth and assureth it. There was a time, saith *Justin* of *Athens*, *Quando nullæ Civitati Leges erant, quia Libido Regum pro legibus habebatur.* When the City was without Laws, because the Wills of Kings were Laws. And therefore *Aristotle* arguing, whether it were better for a Common-wealth to be governed by good *Laws*, or by the will of the best man, prefers the government of Laws, alledging the Law to be a pure and clear understanding, whereas the understanding of the best man is joyned with passion, whereby it may be corrupted, and therefore concludes, where the Law governs, there God governs with the Law, but where man governs, (tho never so wise and prudent) there a cruel beast governs with him (to-wit Passion) which many times obscures his understanding, and perverts his will. And certainly this was the great reason, that when people saw to live by one mans will, would become the cause of all mens misery, that did necessitate them, to establish settled *Laws*, wherein men might see their duties, and to transmit those *Laws* to posterity, that they which should come after, might not alter those foundations, on which the State was first laid; but that as Magistrates did govern the people, so the Law should direct and govern the Magistrate, according to that of *Tully*, *ut Magistratus præsunt populo, sic leges magistratibus præsunt.*

Justin. *Hist. lib.* 2.

Aristot. *polit. lib.* 3. *cap.* 12.

Cicero *de legibus lib.* 3.

The Ancients, saith Sir *Walter Rawleigh* (tho' barbarous) esteemed so highly the benefit of *Laws*, that amongst them, those that were the first founders of *Laws* were honoured as Gods, and the rest that made either additions, or corrections, were commended to all posterity for men of no less virtue, and no less liberally beneficial to their Country, than the the greatest and most prosperous Conquerors that ever governed them. And if so honourable a Testimony was given even by the Heathens, of those that promoted their *Laws*; what black character does that generation of men deserve, who think themselves wiser than the Law, and do not only oppugn and caluminate our *Laws* and its professors, and think it a burden to be circumscribed within the bounds thereof, but under colour of advancing liberty, would abrogate

History of the World, lib. 2. *sect.* 3.

gate all our *Laws*, and think them worthy of no better entertainment amongst us, than *Jehoiakim* gave to *Jeremiah's* Prophesies, who cut the Roll in pieces and threw it into the fire. These mens pretences being like *Caligula's*, (when he intended the burning all *Law*-books that were extant) That equity would run clearer, and Justice be quicker, when the niceties and perplexities of the *Law* were gone. But the History says, *non fuit tam diuturnum ejus imperium, ut efficere potuerit, quod meditabatur.* His Reign did not last so long to execute what he did intend. And what is true in the History, hath likewise proved true in the parallel. For if these great Oppugners of our *Law* had not been stopt in their Carere, by the wisdom and fore-sight of the supream Magistrate, they would have proved not unlike to *Lycurgus*, who being cast into a frenzy by *Dionysius*, in that distemper, thinking to have cut down a Vine, with the same Hatchet slew his own Son; so these when they held up their swords to cut down (as they pretended) some superfluous branches of our *Law*, would have cut down the *Law* it self, both root and branch. But this good success hath always attended the *Law*, that those persons that have most endeavoured the subversion of it, have very seldom escaped their doom by it. And none have been more eminent, nor will be to future ages, than those worthy Patriots (in the first rank of which, your *Lord*ship may be justly placed) who have been vigilant and industrious, for the preservation of our *Laws*; well knowing that the true Interest of every State lies in maintaining the *Laws* and Government, without which, all things must needs run hastily into disorder and confusion: For the end for which men enter into Society, is not barely to live, but to live happily, and a life answerable to the dignity of mankind, which end we cannot possibly accomplish, but by our submission to the *Laws*, there being nothing under the Sun, more conducing to the prosperity and peace of a Nation, than fitting and well composed *Laws*, and a quiet subjection thereunto. And in framing the Laws of this Nation, Parliaments have been very careful, to make our Laws proportionable to so happy and blessed an end. In so much, that if all the Laws and customs of other Nations were laid,

Jeremiah, chap. 36. vers. 23.

Appollido. de Origine deor. lib. 3. pag. 57.

 together

together, they would come far short of ours, both for wisdom, equity, weight and fulness. They being the most advantagious for defence of property, for safeguard of the people, for incouragement of labour, for determining Controversies, for promoting Trade, and for the publick welfare of any Laws in the world. And indeed, when Laws have not the common good for their end, they are but *leges iniquæ*, or *violentiæ, magis quam leges*, rather Compulsions than Laws; *Iniqua hominum constituta, quæ nec jura dicenda, nec putanda sunt.* The unjust constitutions of men, which are neither to be termed, nor thought Laws. For saith *Aristotle, legalia sunt justa factiva, & conservativa felicitatis.* Just Laws are the workers and preservers of happiness, because by them the Innocent are defended, and every man enjoys the fruits of his own labour; by them Right is done, from all men to all men, and 'tis by them we live the lives of reasonable men, and not of beasts, of free and civil men, and not of Savages. And therefore Sir *Walter Rawleigh* resembles the Law to a Heart without affection, to an eye without lust, and to a mind without passion, it being a Treasurer, which keepeth for every man what he hath, and distributeth to every man what he ought to have. And certainly the grounds of the common Law, (if rightly considered) are the best of any Laws in the World, either civil or municipal, and the fittest for this people, being beyond the memory or register of any beginning, and probably as old as *England* it self: For the Laws which *William* the Conqueror swore to observe, were *bonæ & approbatæ, antiquæ leges regni*: And if in his time they were approved good and ancient, then without doubt, no Laws in the World can be son apt and profitable for the Government of this Nation, having been so many years a fitting and refining for the good of the people; neither is it only the antiquity of our Laws that commends them, but their certainty, their equality, and their quick execution: And what ever objections are made against them, they are *vitium hominis, non professionis*, for it is only prepostorous reading, over-soon practice, and the too hasty preferment of the young Professors, that are the causes of uncertainty and diversities of Opinions, whereby

Arist. *Eth. leb.* 5. *cap.* 1.

History of the World, lib. 2. *cap.* 4. *sect.* 3.

whereby Clyents causes are oftentimes miscarried or delayed, and the multiplicity of *Law*-Suits cherished; whereas if many of our young Practitioners, had like *Pythagoras* his Scholars, kept silence for some years, and consulted with their Books, they would be the better inabled to give the reason of the Law in their Judgments to others; for it must not be Sophistry, or strains of Wit, that must interpret *Law*, but it must be clear and solid Reason. And tho the *Law* may seem obscure and perplexed in some cases, yet are the reasons thereof perspicuous in the eyes of Judicious and right discerning men: For the Decisions thereof, are not the suddain fancies, or raw conceits of a few men, but they are grounded upon the clear Evidence of Reason, and upon the prudent advisements, and mature deliberations of learned men, excelling in Wisdom, and famous in the Law.

And herein principally consists the happiness of this Nation, that the greatest bulk of our *Laws* are *Acts* of Parliament, *Laws* propounded and approved by the three Estates, and confirmed by the King; to the due Obedience of which, all men are therefore bound, because they are acts of choice and selfdesire: *Leges nulla alia causa nos tenent, quam quod judicio Populi receptæ sunt*, says *Ulpian*: The *Laws* do therefore bind the Subject, because they are received by the Judgment of the Subject: *Tum demum humanæ leges habent vim suam, cum fuerint non modo institutæ, sed etiam firmatæ approbatione communitatis*: It is then that human *Laws* have their strength, when they shall not only be devised, but by the approbation of the People be confirmed: *And* therefore *Parliaments* have still been very careful of mending and polishing our *Laws*, and ingrafting some and pruning others, and taking care for the due Execution of all; the Execution of good Laws being far more profitable in a Common-Wealth, than to burthen mens memory with the making too many; for in *pessima republica, leges plurimæ*; and therefore a learned Civilian expounds that *Curse* of the *Prophet*, *Pluet super eos laqueos*, of multitude of penal Laws; which are worse than showers of Hail and Tempest upon *Cattle*, for they fall upon Men.

Ulpian de Legibus.

There is likewise another part of our *Laws*, which is chiefly grounded upon Customs, which we may call, Laws written in living Tables, *Consuetudines vetustate approbatæ*, the particular Customs of every Nation, being the most usual binding and assured Laws. And there are likewise the Judicial Resolutions of Judges duely Entred and Reported, which we may call *Responsa Prudentum*, and are certainly an excellent way of Declaring and Authorizing Laws; for though the *Law* be the Rule, yet the Explanation thereof belongs to the Judges, who are *Leges loquentes*: and truly, without the Reports of those learned Judges, that have formerly sate at the Helm, the Law by this time had been almost like a Ship without Ballast, for that the Cases of Modern *Experience*, are fled from those that were adjudged and ruled in former Times. But of late, we have found so many wandring and masterless *REPORTS* (like the Soldiers of *Cadmus*) daily rising up, and justling each other, that our learned Judges have been forced to provide against their multiplicity, by disallowing of some Posthumous Reports; well considering, That as *Laws* are the Anchors of the Republique, so the Reports are as the Anchors of *Laws*, and therefore ought well to be weighed before put out.

And indeed, these now presented to your Lordship, had never seen the light, had not your Lordships kind reception of my first Part, (being accompanied with fresh desires, both from your Lordship, and likewise from those Grave and Learned Judges that had the Perusal of them) incouraged me to go on in this Work, with a resolution (if God lends me life to proceed further herein) having long since Collected the Materials in French, which I have not undertaken, out of any vain Glory or presumption of my own knowledge, but meerly to perform that Duty which I owe to my Profession, and the Obligations which I owe to your Lordship: Neither do these *REPORTS* seem so properly to be presented, as paid unto your Lordship; since the *LAW* says, The *Tree* belongs to the *Field*, and that the *Fruits* thereof depend not only on the *Tree*, but on the *Soil* also: The *Field* therefore being your learned Fathers, under the Feet of which *Gamaliel*, I took many of my *REPORTS*, and

and unto whose Favour and Care of me, I owe much of my Being, and Knowledge in the *LAW*: The *Tree* and the *Fruits* are likewise your Lordships; and if the *Fruit* be not well relished or distasteful, yet being under your Lordships shelter, and receiving its watering from your Lordships hands, I hope it will fructifie, and not wither, though it be transplanted in the declining *A*ge of,

My Lord,

Your Lordships most

obedient, and devoted Servant,

Edward Bulstrode.

To

To the Reader:

Courteous Reader,

Considering how profitable the publishing of former Reports have been to the Professors of the Law, and likewise considering how uncertain an Account we should have had of judicial Proceedings in former Times; had they not been committed to Writing, (which is the Witness of Times and the Light of Truth) and finding that our latter Age hath been very fruitful, in bringing forth men Learned in the Profession of the Law, who have been great Masters in Justice and Judicature: By these Considerations, I have been induced to proceed in this Work, which I had many years since perfected in French, in which Language, I did desire it might have seen the Light, being most proper for it, and most convenient for the Professors of the Law, who indeed are the only competent Judges thereof: For the Laws of England, *do best commend themselves to them that understand them, and therefore I shall not wander any further, than I have done already, in their Commendations, which hath been the Subject of so many Learned Pens; the defence whereof hath always been very plausible, as appears by* Mr. Fortescue, *that notable Bulwark of our Law; and likewise by that Leviathan of our Law, the learned Lord Chief Justice* Coke, *who in his Writings hath magnified them, not without a cause.*

I must confess, though I have always been conscious of mine own inabilities, and very fearful to have any of my Collections, come under a publique view and censure. yet when I considered the sad Fate which hath befel many Posthumous Reports, through their unskilful Translating, being very much corrupted and altered, from what those learned Persons left them, whose Names they now bear; I resolved with my self, either to commit parricide, and (as the Lamiæ*) to smother mine own Creatures in their Cradle, or else to give Being and Life to them my self, whereby I might in some measure prevent the deformities, which usually happen to* Posthumous *issues. However, though herein my care hath not been little, yet many defects will appear, which I hope the understanding Reader will easily pardon, there being none I presume, that are fatal, but such as may easily be rectified in the Reading. And I heartily wish, the Reader may receive as much profit by the perusal of these Cases, as I have gained in the observing them. Wherein though my pains have not been small, yet I may truly say with the son of* Syrach, *Ecclesiasticus, chapter* 24. *verse* 34. videtis me, non mihi soli laborasse, sed omnibus quærentibus eruditionem. *Behold, I have not laboured for my self only, but for all them that seek knowledge.*

Bene Vale.

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Roger Hill

MICHAELMAS TERM.

10. Jac. B. R.

Rice Plaintiff, against *Harris* Defendant.
Entred Trinit. 10. *Jac.* B. R.
Rott. 767.

IN an Action of Trespass, and Ejectment, the Defendant shews that King James was seised, ut in jure coronæ, of the Mannor of D. within which Mannor there were divers Copyholds, demisable in fee, in tail, for life, or for years, and that the Coppholders, by the custome of the said Mannor, may make Leases for 3. years, without any License: that the King, 5 Jac. did grant the Copphold Land in question unto A. who was admitted into the said Copphold estate, and under whom, and in whose right, the Defendant claims, deriving a Title under the Coppholder: The Plaintiff by Replication sets forth, that long time before, Queen Elizabeth was seised of the said Mannor of D. whereof the land in question is parcel, ut in jure coronæ, and that the Queen 22 Eliz. did grant the said Copphold in fee, to one Butts, who was admitted thereinto, and dyed seised, and that B. his Son, and Heir, was also admitted, and did lease the said Copphold estate to the Plaintiff, that afterwards, by the death of Q. Elizabeth, the said Mannor did descend, and come unto King James; who as before made the second grant, and so concludes, and demands Judgment: upon this Replication, the Defendant demurred in law: and for cause shewed, that the Plaintiff (as he ought to have done) had not traversed the second grant alledged. It was urged for the Plaintiff, that the Replication is good without any travers, as this case is, for that the Plaintiff by his Replication, hath confessed, and avoided, the title made by the Defendant, the which is sufficient, without any travers, but this ought to have come on the Defendants part, by way of Rejoynder, and this appears to be so, by Helyars case, Cook 6. part. fol 24, 25. where the reason of this is there delivered by Popham Chief Justice, the same being, for that a lease for years cannot be gained, but by a lawful grant, and therefore, when one claims by a lease for years, and the other claims by a former grant for years, he shall not need to travers the last grant but the other is to travers the former grant, or to shew, how he came to the same again to enable him to make the second grant, with the difference there put between a Feoffment and a lease for years; and with this agrees 2. E. 6. Brook title confesse

Trespass and Ejectment. 2 Cr. 2. 299. fol. 221. 1 Benl. 221.

Coke 6. part. fol. 24, 25. Helyars case.

2. E. 6. *Brook* title confess and avoid. placito. 66.

& avoide, placito 69. in a Replevin, the Defendant said that B. was seized in fee, and made a lease to E for forty years, and that E. 38 H. 8. did grant his interest unto him, by force whereof he was possessed, and so did distrain the Plaintiffs cattel there damage fesant: The Plaintiff replies and saith, that E. did grant his interest unto him, 32 H. 8. he needs not to traverse the grant made 38 H. 8. for that he hath confessed, and avoided the same, by a former grant. Williams Justice. In the pleading of the descent from Queen Eliz. unto King James, it ought to be on this manner pleaded (S.) ut consanguineo & Hæredi, as appears in the Lord Barkleys Case in Plowdens Commentaries, fol. 226. but never to shew here in pleading, Comment Cousin, as it is to be shewed in the Case of a common person, and so is 6 & 7 E. 6. Dyer fol. 79. placito 47. & 15 E. 4. Man Secundary informed the Court, that the Presidents are both ways, and good, either to say ut consanguineo & Hæredi, or without it. Williams Justice: The Replication here is good without any traverse; for how can the Defendant have this, when as the Plaintiff had it before, as by his Replication appears, for that his lease being first in time, avoids the Defendants lease being the latter, and therefore the Defendant here in this case ought to have Rejoyned, and so to have traversed the first lease, but by his Demurrer to the Replication, he hath by this confessed the Lease, under which the Plaintiff claims. Yelverton Justice, The Replication here is good, and the Plaintiff is not here to traverse the second Lease, under which the Defendant claims, for that the Law saith, there being a former Lease made, the second is void. Croke Justice, the Plaintiff here by his Replication, hath confessed, and sufficiently avoided the Lease set forth by the Defendant, and under which he claims, and therefore in this case, a traverse to be taken by the Plaintiff, were idle, and so the Defendant had no cause to demurre for want of a travers. Williams Justice, The Defendant here ought to maintain his Title, for admitting he have a Lease, yet there is a former Lease made, under which the Plaintiff claims: which avoids the latter Lease to the Defendant, and it was one Alexanders case, adjudged here in point, that in such a case, the Plaintiff ought not to take any traverse, and that was likewise in case of a Copyhold, and so is Helyars case, and 2. E. 6. before remembred; and so the whole Court agreed, that the Defendant had no cause to demur, that the Plaintiffs Replication was good, without any travers, and so by the Rule of the Court, Judgment was given for the Plaintiff.

The Lord *Barkleys* case in the Commentaries. fol. 226.

6 & 7 E. 6. Dyer. fol. 79 placito 47. 15. *E.* 4. fol. 4.

Alexanders case.

Helyars case, 2. *E.* 6. Judgement given for the Plaintiff

Stevenson Plaintiff, against *Wood* Defendant

Entred, Trinity 10 *Jac.* B. R.

Rott. 1491.

An Appeal from a sentence at *York* touching a Will unto the Count of Delegates.

TOuching the Jurisdiction of the Court of Delegates, The case was this, upon an Appeal, from the Court at York, unto the Court of Delegates, in the Chancery, in the Court at York, the suggestion there was, that such a one dyed intestate, without making of any Will, and therefore prayed Letters of Administration, to be granted to him: Notwithstanding which Allegation they there gave sentence against him, that there was a Will, from which sentence there was an Appeal to the Court of Delegates, who did repeal the former sentence at York, and did adjudge that the party made no Will, but died intestate and granted Letters of Administration to the party, which appealed to them (and prayed Letters of Administration) The Archbishop of Canterbury granted Letters of Administration,

tion, to a second person, and the Archbishop of York did grant Letters of Administration to a third Person, who made a release unto a debtor of the intestate, upon which release in an action of debt brought by the first Administrator, being the Plaintiff, for this debt against this Defendant, who pleaded the release made unto him, and upon this his plea, all the whole matter came in question; and the great question in this case was, whether this grant of Letters of administration made by the Judges Delegates were good or not. It was in this case urged for the Plaintiff by Henry Yelverton, that this grant of Letters of Administration unto Stevenson the Plaintiff by the Judges Delegates (he appealing unto them) is good, and then consequently, the release made by him (who had subsequent Letters of administration granted by the Archbishop) to the Defendant (being a debtor to the intestate) is not good to discharge the said debt, but is a meer void release. In this case here the Plaintiff appealing to the Court of delegates, who upon hearing of the cause did give their judgment against the former Sentence, given at York, and did by their sentence pronounce the same to be void, and upon praper did grant Letters of administration unto the Plaintiff, this sentence thus given by the Judges delegates shall not be remanded to the Court at York: for if there where any nullity or iniquity in the sentence at York, by this they have there lost their Jurisdiction, and the Bishop hath in this offended his superior Ordinary, (which is the King) who is represented in the person of the Delegates; the Letters of administration, here granted by the King, by his Judges, Delegates, are well granted, and the subsequent grant made by the Ordinary, is not good, and his sentence there is iniqua sententia: and many Presidents there are in point in such a case, to warrant the granting of Letters of administration by the Judges delegates; and that they well may, and have granted Letters of admiuistration, and the same warranted by 1566 Presidents, and more. It was urged against this for the Defendant by George Croke, that the granting of these Letters of administration by the Judges delegates, was not good; He hath been here shewed, that the intestate had goods in both Diocesses, and therefore the Archbishop of Canterbury ought to grant Letters of administration, and the administration here granted by the King, by his Judges delegates is not good, and as the same is here pleaded, it is much the worse, for that it is not here set forth in pleading quomodo this grant was made, nor yet is it shewed under what seal the same was granted, and there is no just cause shewed in this case here in question, to take away the power of the Archbishop, from granting Letters of administration, and since 1 Eliz. no President ever stood upon, as to this point now in question, but the same was avoided & always agreed, that in such a case, the Archbishop was to grant Letters of administration: the reason of the Law in this case is, and for which cause Letters of administration are to be granted by the Ordinary and not by the King (who is the supream Ordinary) the reason is this, that when any man dies having land, by the Common Law such person is to have his land to whom of right, by law the same doth belong, and if he have goods and dies intestate, the Ordinary is to have them in his disposition, who, as he is in his life time, to have care of his soul, so also after his death, he is to have care of his Goods, to distribute them in pios usus as appears in Greysbrook, and Foxes Case in Plowdens Commentaries, fol. 275. where it is said, that such an Ordinary is not by the Law compellable to pay the debts of the dead: the Law reposeth a great trust in him, and this appears likewise by the book of 18 H. 6. fol. 23. that the Ordinary is not to be charged with payment of debts, but only to distribute them in pious uses, and this continued so, untill the Statute of Westminster 2. capite 21. by which it is ordained, that the Ordinary shall answer for the debts of the intestate; so far, as the goods shall amount unto, in the same manner as executors were to answer, in case of a Will made, neither the Ordinary nor the administrator could have any action of debt, to recover a debt due to the intestate, before the Statute of 31 E 3. capite 11. which gave the same to them, in the same manner, as Exe-

1 Eliz.

Plowdens Commentaries. fol. 275 *Greysbrook* and *Foxes* Case.

18 H. 6. fol. 23.

Westm. 2. cap, 21.

Stat. of 4 *E.* 3. cap. 11.

cutors might have, they were only before to have the goods of which the intestate died possessed, and so by this means, the taking of Letters of administration became to be chargeable to them, and with this agrees F. N. B. and by the Statute of 4 E. 3. cap. 7. an Administrator may have an Action of detinue, for goods taken away in the life time of the intestate; the Ordinary is an Officer in case of necessity, and no Law will transfer this upon the King, for he his the supream Ordinary, and hath jurisdiction over all Ordinaries; and altho the King may present unto a Church yet he shall not collate, admit, nor institute, for he cannot exercise the spiritual function, neither can he grant Letters of administration; the Ordinary is but an Officer under the King, for the King shall not be appointed an Officer by the Law, to have the custody of any goods. It appears by the Book of 11 H. 7. fol. 12. if a man dies, having goods in several Diocesses, here it belongs to the Archbishop to grant Letters of administration; but if he have goods in several Provinces, there it belongeth to both the Archbishops, to grant several Letters of administration. In Cawdries case Coke 5 part. fol. 34 it is there agreed, that the King may take a Resignation of a Benefice, for that he hath the authority of the supream Ordinary, but he is not to meddle with admission and institution, this being but matter of trust reposed in the Ordinary, and matter of charge, not of any profit, and the King may also by the Law bestow Offices, but he himself cannot be an Officer; as appears by 1 H. 7. fol. 31. a common person must demand his rent before he can take any advantage for the non-payment of it, but it is not so in case of the King. As to the sentence in this case given at York, there was no fault at all in this; the question there controverted was, whether a Will or no Will, and there being no Will, it belonged to them to grant Letters of administration: the King is not bound to make letters, ad colligendum bona defuncti, (as the Ordinary is) neither is the King bound to dispose of the goods of the dead in pios usus. If the King brings a Quare Impedit against the Bishop, and recovers, he ought not himself to make an admittance, but must send his writ to the Bishop to do it: here in this case the administration granted by the King is not good, in regard that he cannot take care of the goods of the dead. As to Presidents there are 100 Presidents in point, that in such a case the Archbishop ought to grant Letters of Administration. Williams Justice, if a man dies intestate, having goods in both Provinces the one Archbishop shall grant Letters of administration of the goods within his Province, and the other Archbishop shall likewise grant Letters of administration of the goods within his Province, both of the Archbishops here having particular jurisdiction, and power to grant several Letters of administration: and altho the King be the supreamest Ordinary, yet in such a case he cannot do this thing; as the supream Ordinary the King may grant Letters of administration, but he cannot be an Administrator; the Court of Delegates cannot pronounce any sentence of Excommunication; and this point we have here adjudged against the Court of Delegates, that they cannot do this, neither have they power, before them, to prove Wills; also the power of the Judges Delegates, est potestas delegata, corrigere, non exequi, they have power there to examine but not to reject. It was one Brackenburies case here in this Court, where this matter came in question concerning the Court of Delegates, and the chief point in that case insisted upon, was this, whether the Judges Delegates might grant Letters of administration or not, and adjudged, that they could not grant Letters of administration, they having no power so to do: this being a new case, and the Doctors of the Civil Law differing in opinion amongst themselves the Court pronounced no absolute judgment in this case; but upon the Arguments; the better opinion of the Court was that the Judges Delegates could not grant Letters of administration, and then consequently the Plaintiff no ways intituled to have this Action, tho divers Presidents were produced and shewed to the contrary (S) that they had granted Letters of administration, and so without any further opinion delivered in this case, the same was adjourned, and not spoken unto again.

Stat. of 4 E. 3. cap. 7.

11 H. 7. fol. 12. and 9 E. 4. fol. 33.

Coke 5 part. fol. 34. in *Cawdries* case.

1 H. 7. fol. 31.

Brackenburies case.

The

The Lady *Billingsly* Plaintiff, against *Hersey* Defendant.

Entred, Trinity 9 *Jac.* B. R. Rott. 916.

IN an action of Trespass, for cutting down, and carrying away of certain trees, upon Not guilty pleaded, the Jury found a special Verdict, upon which the case appeared to be this, That one Roger Leake 39 Eliz. did make a Lease and grant of his Manor, Farm, and Capital Messuage, unto one Stafferton, with all the emoluments, profits, and appurtenances together with all the Woods and Underwoods there growing, and all the trees (excepting 6 of the great trees) Habendum for forty years, rendring rent, with free liberty to fell and cut down, at any time during the term, with a Covenant, on the part of the Lessee, to leave Wood on the Land at the end of the term, to the value of 10 l. the Lessee assigns this over, and by mean assignments, the same came to the Plaintiff, who assigns it over unto Hersey the Defendant (with an exception of the liberty of felling and cutting down) the Defendant, the Assignee, takes away timber trees, for which taking, the Action of Trespass was brought, and this appeared to be the Case upon the special Verdict. It was urged for the Plaintiff, by Walter and George Croke, that the Action of Trespass well lieth, wherein the question considerable is whether the first Lessee here, hath a special and absolute Interest in the trees, or not, or but only as a Lessee; in this Case, the Lease by mean assignment came to the Lady Billingsly and her husband, who had the same, as in right of his Wife, and they assigned this to Sir John Hersey, excepting all the Woods and Underwoods whatsoever, standing, growing, and being, in and upon the Premisses, together with free liberty egress and regress to fell, cut down, and carry away the same at all times during the said term. In this Case the Lessee hath by this Lease an absolute grant of the trees, and not to be as a demise of the Woods with the Land: the question here ariseth out of the words of the Lease; and therefore the effect and true meaning of these words, is to be considered; the words being, and all the Woods and Under woods, and that it shall be lawful for him, to fell and cut down the same, at any time during the continuance of the term (excepting 6 of the best Oaks) and all this is put in another clause in the Lease by it self: whether he hath here an absolute interest and property in them, either to sell, or to make any other disposition of them at his will and pleasure, or only a special interest, (S) as a Lessee only, and so to have only by this clause, his necessary boots, as house-boot, hay-boot, and fire-boot. As to this, by the words and the true sense, meaning, and construction of the Lease, the Lessee hath an absolute property in the Woods and trees, and that the verbs in the Lease, of dimisi, dedi, and to Farm Let, notwithstanding they are joyntly expressed in the Lease, yet they shall be taken and construed distributivè, and so to refer to the words of Demise, to demise, and the words of grant, unto grant; by these words in the Lease there is a full and express grant of the Woods, and trees to the Lessee. If this had been made to a stranger, or to the Lessee himself at another time, after the Lease, none would deny, but that these words would well carry a property with them, and being here in the Lease it is the same, his intent being here apparent to pass an absolute property and interest in them: and to infore this here are words of grant, and also to have free liberty, to cut the trees down, and this doth very plainly shew his intent to be so; the exception also here, doth shew the same, this not being according

Trespass for cutting down and carrying away trees. *Mo.* 831.

11 *Co.* 48.

ding to the usual exception in all Leases; to except all: but here the exception is only of 6 of the best Trees; also the next Covenant in the Lease doth plainly shew this to be so, for the Lessee by this, doth covenant to leave upon the land, at the end of his lease, as much wood as shall be worth 10 l. so that lay all these parts of the lease together, it appears in some clearness, that the Lessee was to have an absolute property, and interest in the wood and trees. As to the Objection made, that here the Lessee hath liberty given to him, to fell and to cut down, but not to carry away, and therefore he hath no property. It was urged in answer to this, that if there had been such a clause added, for to carry away, this had been a very idle clause, for by the lease thus made, the Lessee hath the possession, the which possession gives him this liberty, of carrying away being cut down; otherwise, it were, if he had not the possession. As to another objection made out of the (Habendum) the same being to have the Manor & Farm, and all other the premises before specified for 40 years; that this doth shew his intent to be, that the Lessee was to have this only as a lease. It was alledged in answer to this, that the Habendum refers only to the land, but not to the wood in which he had a property, and which was not demised unto him, he having the same, by the words of grant; here in this case, the Lessee hath a particular interest, granted by the words of the lease, being demise and grant, and so he shall be said to be a Lessee of the land, and a grantee of the trees, and so shall have them as a distinct interest in him; he hath a special and a distinct interest in the trees not as a Lessee but as a Grantee (so that he sever them) but not before severance. As to the case urged for the Defendant, of 23 El. Dyer fol. 374 placito 18. where a lease was made of a Farm and of divers closes to the same belonging, by the words of demise, grant, and to farm let, together with all, and all manner of timber, wood, under-wood, and hedge-rows, thereunto appertaining (excepting the great Oaks, growing in one of the closes, and about the Farm house) there it is questioned whether the Lessee may cut down and sell the timber trees, not excepted, there adjudged that he could not. As to this the case there differs from this case now in question in this, there is the clause, that it shall be lawful for the Lessee to cut down, and to fell, at any time during the term; but there is no such clause in the case of 23 Eliz. Dyer. It was urged by Davenport and Yelverton for the Defendant, that by the words and meaning of the Lessor, nothing doth pass unto the Lessee, by way of property, but only as a Lessee; but if this clause had come after the Habendum, it might then have altered the case; It is then to be considered whether the clause for cutting down shall make any alteration in the case. It was urged that it should not; that this doth not at all inlarge the former words, being only by way of discharge of the party, as to the action of wast, to be brought against him. But admitting the Lessee here had a special interest, then the question will be, when he cuts them, whether he may take them away without special words. Dodderidg Justice, demanded whether the Jury had found, that the Lessor had taken the 6 trees by him excepted. It was answered, that this was not so found, Dodderidge then demanded in whom the election should be? as to this the Lessor here ought to make his election of the 6 trees excepted, and before he hath so done the Lessee hath no interest at all in the rest, and here the difference will be, where the exception is, of so many trees upon the ground to be cut down and taken, within a certain time, and where not, within which time the Lessor hath his election, but not after the time determined without any election made after the time passed, the Lessee may then elect and cut down, leaving the number of the trees excepted, standing for the Lessor. In Foster and Spencers Case, cited in Sanders Case, Coke 5 Parts fol. 12. where Lessee for years, assigns over his term, excepting the timber trees, and afterwards the trees were cut down, the action of wast held maintainable against the Assignee: for that this exception was void. Croke Justice. By the exception here of the trees, he hath excepted such things by this, as he might except, and have, by reason of the trees, as the profits of the

1 Objection.

Resp.

23 *Eliz. Dyer* fol. 374. placito 18.

Note the difference as to election of trees by the Lessor excepted.

Foster. and *Spencers* case, cited in *Sanders* case, *Coke* 5. part. fol. 12.

the Trees, and Acorns. Flemming chief Justice. The sole, and chief point in this case rests upon the true construction of these words in the grant, and how far they shall be extended, in point of interest, and whether by these words there be only a liberty, or an interest given: whether these words in the lease, shall amount unto a grant of the trees, or only a liberty thereby given to the lessee, to cut them down, without being impeached for the same. As to this, No interest, by these words do pass unto the Lessee, he hath only a liberty to fell, during the term; and if he do not fell them during that time, they then remain annexed, and united unto the inheritance; by these words there is only a liberty given to him to fell, which words do amount unto no more than this, to make him dispunishable in an action of waste, for this his so doing. If a man do bargain and sell to another so many trees, to be by him cut down within 6 years after, if he doth not cut them down, and so sever them, within the time limited, the bargain is then at an end, and they shall be in Judgment of Law, reannexed unto the inheritance, in 44 E. 3. the Lessor excepts certain trees, to be cut down within two years; the Lessee there came unto him and did request him, to make his election, which he did refuse to do; it is there held, that the other may cut down leaving the number of trees excepted, in this case here, he ought so to have done; and where the election is made of trees excepted, if the other cut down, he is to shew that they are none of the trees excepted: which here he hath not so done. Dodderidge Justice, as to the case now in question, the lease here is with these words, of demise, give and grant the land, and trees, with liberty to cut, and fell, &c. the first point considerable, in this case is, whether the trees, by these words, shall pass unto the Lessee, severally, as by way of grant, and whether by these words, the Lessee hath a several, and distinct property in the trees; the lessee, by these words hath no distinct interest in the trees: the word (grant) in the lease, is the only word, that should do this: but this word cannot do it here, the same being coupled, and conjoyned with the word, demise, and so is the case before remembred in 23 Eliz. Dyer fol. 374. placito 18. that case doth only differ from this in the exception there, and here, in this case; but there it is ruled, that nothing doth pass, by the word (grant) by it self, because the same is joyned with the word (demise) If a man doth demise, give, and grant to, another, and to farm let a house, and a stock of cattel, and the housholdstuff, these words shall not enure to make the same a grant of the housholdstuff; he shall only have, and enjoy the same by way of demise, and not otherwise, and this Case I have seen in a manuscript of my Lord Dyers Book, where it was so held, but not in the printed Book; 35 H. 8. Dyer fol. 56. placito. 15. there is such a lease made in point, where a man doth make a lease of Land, and of a stock of sheep, as to the words here, in this principal case (with liberty, to cut, &c.) these words do not give unto the Lessee, any property or interest in the trees. If a man be seised of lands in the right of his wife, and he sells certain trees growing upon the land, before severance of them, the husband dies, the grantee or vendee shall not now have them, which proves, that by the sale there was no distinct interest in him, to whom they were sold and granted, before severance of them, but when the husband dies before severance the vendee hath lost the benefit he was to have had, by the sale, or grant; For that they were not as personal chattels, in him, before severance, and so is the Book of 18 E. 4. fol. 6. and fol. 21. and Perkins in his Chapter of Grants. fol. 13. placito. 58. if tenant in taile, do give, or fell trees, growing upon the Land, and dies before severance of them, and his issue enters, the donee or vendee shall not have them against the issue: and if he cut them down, an action of trespass lyeth against him; so that no property by the gift, or sale, is in the party to whom the gift, or sale is made before actual severance of them. If a man doth grant, or sell trees growing upon his land (excepting to himself, a certain number of them,) he which doth except the trees, is to have his election, and if there be a time limited for to do this, during this time he hath, he is to make his election but if he let this time slip, without making of his election, then the other shall have the election but where there is no time certain limited for the election to be made, and he doth

44 E. 3.

23 *Eliz.* 2. *Dyer* fol. 374. placito 18.

35 H. 8. *Dyer* fol. 56. placito 15.

18 E. 4. fol. 6. & 21. *Perkins* Chapter Grants fol 13. placito 58.

but

doth not elect, which of them he will have to be left standing; it is doubtful in this case whether the other may elect, but it is a clear case, that if the Lessee doth request the Lessor to make his election, which trees he will have and he doth refuse to elect, there the Lessee or Grantee shall have the Election, leaving the number of Trees excepted for the Lessor: but where no such request is made, nor time limited for the Lessor to elect, there it is doubtful whether the Lessee or Grantee may elect and cut, leaving the number excepted. If Lessee for years assigns over his term, excepting the Trees, this is a void exception, as it was adjudged in Foster and Spencers Case, before remembred; otherwise all Lessees would have the benefit of the Trees, by such an exception in their assignments; for preventing of which, this was there adjudged, to be a void exception. Crook Justice. There are many difficulties in this Case; First, the lease made unto Stafferton, with the liberty, in manner as is before expressed: The Trees here, by the words in the lease clearly, do not pass dis-joyned, but conjoyned with the land. If a man doth demise and grant a house, and his Utensils there, this is only a demise of all; but if such a grant had been, by a subsequent clause, there the same should pass dis-joyned from the thing leased, but not as this principal case is, the same being all in one and the same clause: If a man makes a lease of certain land to one for years, and afterwards he grants or sells the Trees on the land to the Lessee, with liberty to cut them down at any time during the term, and afterwards he doth surrender up his lease unto the Lessor; notwithstanding this his surrender, he may well cut down and take these Trees during the said years; and herein the difference will be, where the Trees are conjoyned and where dis-joyned from the term in point of Interest. In the first, if he surrenders before taken, the benefit is lost; otherwise where they are dis-joyned, there the reference shall be to the effluction of the Term, in the number of years: As where a man doth grant unto another, Trees growing upon his leased land with a power to cut, in this case he may well cut and take them, after a surrender by him made. As to the point of election, the Lessor is to have the election of the Trees by him excepted, and he ought to make his election of them in time convenient; otherwise the law will impute a Laches to be in him, his fore-slowing of this, shall not be any impediment to hinder the other of his profit, so that the Lessor here, is to make his election in time convenient, and if he do not so, the Lessee may well cut, and leave for the Lessor six Trees growing upon the land according to his exception: If a man grants unto another Common, in his ground, after that his Corn sown be cut and carried away, if he will not cut his Corn, yet the other shall have his Common. As to the exception of the Lessee, upon this assignment of all the Trees, this exception is void (but yet not void to all purposes) it is void as to the working of any prejudice unto the inheritance, but yet in this respect the same is good, for by force of this, he may well take the annual profits, as Acorns, and the like profits, the Lessee may well accept to himself; but by this his exception he cannot sever and cut down the Trees, but he may except solum & fundum, where the House and Trees are, because this belongs to the Lessor. If a man doth demise, grant, and to farm let a Close, and a House upon it, with liberty to him given to take the Tiles and Lead off the same, omni modo quo legitime poterit, he may take here and pull down, but otherwise it will be in the case of a Wood; if the Timber and Tiles of the house are granted to him, he may well pull down and sell the Timber; and if he grants the Close over to another (excepting the House) this is a good exception because the lessee hath in this a dis-joyned interest: If in this principal case he had excepted such or such a Tree this had been a good exception; but this general exception of all Trees, is clearly naught, and that Judgment ought to be given for the Defendant, and against the Plaintiff. Flemming chief Justice. The Lessee here hath no several interest in the Trees, by the words of the lease; this word Grant, is a usual word in all leases: If a man do bargain, sell, and grant his Manor with an Advowson to the same Appendant, the Church becomes void, before the Enrolment the bargainee shal not have this Presentment, as a grant of the same

Foster and Spencers Case.

same, by the word (Grant) but he is to have all by the bargain and sale, and then he can have no right to this Presentment, before the Inrolment of the Deed, and so it hath been adjudged: If in this principal case, the same was by grant only for so many years, this would nothing at all aid him; what then should help him is to be considered, whether (as it hath been urged) the clause in the lease, by which liberty is given unto him to cut down, whether this shall aid him or not; this clause here as it is, can no ways at all aid him, for notwithstanding this clause, they become not Chattels until they are cut down: If a man doth lease his Manor to another, with a stock of Sheep, these are Personals: If a man doth demise, grant and to farm let these Personals, he shall here have them no otherwise than as a lessee; but here in this case, (as it was urged) he hath full liberty given him to sell them, at any time during the term; yet these are not so in him, as any distinct and settled interest presently, before they be cut down here, they are as Chattels reals, annexed unto the Inheritance, and they are not, nor can be, in Judgment of Law, Personals, before severance: In the next place, the time is considerable when the Lessee may cut them down, and this rests upon the point of election, by reason of the Lessors exception of six Oaks: If a man gives to another the best Horse in his stable, the Donor here shall have the election; in case of a Heriot, the same is to be the best beast, here he who is to have the benefit of the same, is to have the election, and that shall be said to be the best, which he thinks to be the best; and a crooked Tree may be the best for some uses: The next matter here considerable is, the time within which the Lessor is to make his election of the six Oaks, by him excepted, and this ought to be made in convenient time, so that his slackness do not prejudice and hinder the other from making of his benefit. If a man be bound by Bond to grant an Advowson to another, he now hath liberty all his life to do it; but if the Church becomes void, then he is to do it presently, his liberty being gone and determined: If the Lessee do come to the Lessor and requests him to make his election, and he refuseth so to do, his election, by this his refusal, is clearly gone and determined; and this is the best and surest way in such a case, for the lessee to come and desire the lessor to make his election, and if he then refuse, his election is then at an end, and the other may elect and cut down, leaving the number standing according to the exception; by this lease, and the words in the same, nothing doth here pass severed from the land; as to the Assignments here, this liberty of cutting is not assignable over, the Assignment here is of all, and the exception of the Trees in this Assignment is clearly void, and by this exception, he could not sever them which were conjoyned before; he had here at the first only a liberty of cutting, and therefore after such Assignment made of the whole, he could not make any such exception of the Trees, as in this case was made; but if he had assigned over his whole term but one year, with such an exception, there the same exception might be good, in regard that here there is a privity remaining between them, and not wholly destroyed; but otherwise it is, where the assignment is made of the whole term, for there no privity remains; and so as this case here is, the exception of the Trees, upon this assignment, is a meer void exception, and this liberty now shall go with the privity of the land; but these remained as a Chattel-real at the beginning, and so continue till the end, and until severance; and so Judgment ought to be given for the Defendant, and against the Plaintiff: But it is very apparent, and that by the agreement of the parties themselves, that the Lady Billingsley was to have had the Trees; and this which is here done by the Defendant in cutting of them, contrary to their express agreement, was not well done by him, neither had he shewed any good conscience in this his so doing; but now the matter in Court debated, is upon point in Law, and as this case here is, the Law is with him: And so by the rule of the Court, Judgment was entred for the Defendant, Et quod querens nil capiat Billam: And this Judgment, upon the Arguments of the Judges, was given and entred Termino Hillarii, 10 Jac. B. R. Judgment for the Defendant &c.

Scriven Plaintiff, against *Wright* Defendant.

Habeas Corpus & Audita querela.

SCriven had a Judgment against Wright in an Action of Debt, and for this had him in Execution in the Kings Bench; afterwards he removed himself by a Habeas Corpus into the Chancery, and so upon this he was committed to the Prison of the Fleet: Afterwards he procured a Release to be forged, whereby Scriven had released unto him the said Execution: This Release was shewed and examined by the Masters of the Chancery, there he procured an Audita querela, and a Scire facias against Scriven returnable at such a day in the Chancery, to shew cause why he should not be discharged of and from the said Execution, and so he was Bailed by some Knights of the Post, and set at liberty; and the Court of the Kings Bench being informed of this: Williams Justice, there is no Book in the Law to warrant such Proceedings, that upon a Judgment given in any of the Kings Courts, an Audita querela should lie, and a Scire facias upon this returnable in the Chancery, but only in the same Court where the Judgment was given, for that they have the best knowledge of all the Proceedings in the same Case, the matter being hanging before them; but if the Judgment had been upon a Recognizance, upon a Statute-staple, or Statute-merchant, there in such a case the same might have been returnable in the Chancery, to shew cause why he should not be discharged of the said Judgment and Execution, because the Recognisance was there before them, and they may there Judge of this: And this is the difference in such Cases to be observed, and herein all the Judges did clearly agree with him: And the Case between Ross and Pope in Plowdens Commentaries, fol. 72. was cited to this purpose. Afterwards, the truth of the matter being made known in Chancery, unto the Lord Chancellor, and also the fraudulent dealings and proceedings of the said Wright, in obtaining the said Release, and so thereby endeavouring to avoid the Execution upon the said Judgment, which Scriven had against him: All this undue practice appearing to the Lord Chancellor, he did hereupon cast him and his Cause out of the Court of Chancery, and left him to the Common law; and upon this, he being before in Execution in the Marshalsie: Yelverton moved for Scriven, to have Wright again in Execution upon the first Judgment, and upon this the Rule of the Court was, Quod remaneat hic in Executione, ut prius fuit, according unto the former Judgment.

Mo. 850. 851.

Plowdens Commentaries, *&c.*

Miller Plaintiff, against *Buckdon* Defendant.

Action Case for words.

IN an Action upon the Case, for words spoken by the Defendant of the Plaintiff, the case appeared to be this: The Defendant and another, having some speech about the death of a child of one Dowland (which was lately dead) the Defendant said unto him, that such a one (naming of the Plaintiff) was the cause of the death of Dowlands child, and I will swear it upon a Book: Upon Not guilty pleaded, a Verdict was given for the Plaintiff: It was moved, in arrest of Judgment, that these words are not Actionable, being no ways scandalous unto the Plaintiff. Williams Justice. If the discourse between the Defendant and the other, to whom the words were spoken of the Plaintiff, that the party dead had been poysoned, murthered, or had come to some other untimely death, by violence, and then he had used these words (S) that the Plaintiff was the cause of the death, that then the speaking of such words would have been very scandalous, and so well Actionable, But in this Case here, the words are too general, there being no

no unjust cause shewed of the death of the child, and so these words no ways scandalous unto the Plaintiff, and so by consequence not Actionable. Yelverton Justice, and Flemming Chief Justice. These words clearly are not actionable, they being too general; but otherwise it had been, if an untimely death, with violence, had been shewed when the words were spoken: This Case was lately here, two Prisoners being in Execution in the Marshalsie, and there dyed; The Coroners sat upon them, and for a long time they would not find it otherwise, but that they were starved to death; and so that the party, who had them in Execution, was the cause of their death; but afterwards they were better advised, there being no unjust cause of their death. And though he was the cause of their Imprisonment, being in execution, at his Suit, this was a good and a just cause, and they could not find that they came to any unjust death by violence: so in this Case, these words are not actionable, because it is not shewed that the party dead came to any unjust and violent death, and so the whole Court agreed clearly, that as this Case is, the words are no ways scandalous, and so not Actionable, and so the Judgment of the Court was for the Defendant, and Rule entred, Quod querens Nil capiat per Billam.

Judgement for the Defendant.

Et quod querens Nil capiat per Billam.

Chamberlain Plaintiff, against *Ewer* Defendant.

Entred, Trinity 10 *Jac.* B. R. Rot. 931.

IN an action of Covenant; The case appeared to be this, Tenant for three lives (his own life being one of them) makes a Lease to Ewer the Defendant for six years, who made a Lease at will unto two men: Francis, who was Tenant for three lives dies, the two Tenants at will, being then in possession of the Land, the Tenant for years, for and in consideration of 400 l. to him paid by the Plaintiff sells all his Estate unto the Plaintiff, shewing the whole matter unto him, and how that the two Tenants at will did claim only at will, and to his use, and then sets forth the death of Francis, who was the Tenant for three lives, and that he, virtute cujus, was seised of the Free-hold for term of the other lives, as an occupant: And he being so seised, did assign, set over, bargain, and sell to the Plaintiff all his Estate, Right, Title, and interest in the Land; to have and to hold this unto him, for the lives then in being, and did further Covenant, that he had such an Estate in the land, as would well warrant the sale so by him made, and that he had full power, and good authority to do this: And did further Covenant, to make him afterwards such further and better assurance, as his Counsel should advise, de termino prædicto: The matter in Law was, Whether upon the death of Tenant for three lives, Ewer the Defendant had any greater Estate in him, than for years; this being adjudged against him, that he had only an Estate for years, and that the Tenant at will should be the Occupant, and upon this the Plaintiff brought his action of Covenant against the Defendant, for not performing with him, in making of his Bargain good, according to his Covenant: In this case, the whole Court were clear of opinion, that notwithstanding the two Lessees at will, did enter, and claimed the land only at the will of their Lessor (who was the Tenant for years) yet upon the death of the Tenant for three lives, the law shall now make such a present change and alteration in their estate, that the law shall now adjudge them to be in possession of the land, as Occupants; for where the actual possession is, at the time of the death of the Tenant for three lives, there the Free-hold shall settle and remain to be. As touching another Point which was moved, Whether the lease for six years, be here by this quite gone and determined,

An Action of Covenant. 2 Sid. 347.

2 Ro. 2. 123.

2 Cr. 200. 554

Where a Tenant claiming no greater an Estate, than at will, shall be adjudged to be in as an Occupant, though it be contrary it his claim, and this by operation of Law.

or not. As to this, the Court were clear opinion that the lease for years did still remain in force; and that the Lessees at will shall have this Estate by Occupancy, in the nature of a Reversion, expectant upon the Lease for years; but the Judges all agreed in this, that if the Free-hold had come to the Tenant for years, and so had been both in one and the same person, there the term should have been drowned by the accession of the Free-hold to the same, both which cannot stand, and be together, in one and the same person, but the lesser must needs be drowned in the greater. Croke Justice. If the Lessee for years be ousted, and afterwards the Tenant for three lives dies, here the Disseisor shall be the Occupant, and the Law will now turn his wrongful estate which he had by the disseisin, into a rightful Estate, as an Occupant. Williams Justice. If a Tenant for the life of another makes a Lease for years, the remainder for years, Tenant for years enters; then the Tenant for the others life dies, here the Tenant for years shall be an occupant, and yet his term for years not drowned, by reason of the mean remainder for years, for in some cases a term for years, and a Free-hold may well stand together in one and the same person: For if the Lessee for twenty years, makes a Lease to his Lessor for five years both are in him (S.) the term and the Free-hold, and this by reason of the remainder for years, which is in the first Lessee, so that both of them shall here be well in him, simul & semel, without any drawing of the one in the other: If Tenant for anothers life be disseised, and dies, the Fee-simple here which he had gained by disseisin is converted and changed into a rightful Free-hold, and that
38 H. 6. f. 38. by operation of Law, settling now the Free-hold in him as an Occupant; and this is warranted by the Book of 38 H. 6. fol. 28. In the principal case here, by the opinion of all the Judges the Tenant for years may enter, and shall have and enjoy his term which is not drowned nor extinct, by reason that the term and the Freehold, gained by Occupancy, are in several hands and that the Lessees at will here in this case shall be the Occupants against their own claim, and the Free-hold by operation of Law shall be said and adjudged to be in them, volens nolens. At another time, Dyer moved the Court for the Defendant, that notwithstanding the law be so, that the Tenants at will be adjudged in law to be the Occupants yet the Covenant of the Defendant is not here broken, and so the Plaintiff hath no cause of Action, and that the Traverse here taken to the Plaintiffs Title, is well taken and good. And as to this, if it doth appear in and by any Record, that the Plaintiff hath no good Title to recover, then he shall be barred; and so it is here in this case, for he had but a term for years, and he grants only all his Estate and Interest. Williams Justice. If a man will grant to another his Manor of Dale, in the which he had nothing, and Covenants that he had good right to grant this whereas he had no right at all, this clearly is a breach of the Covenant. The case now in question is, in an action of Covenant, and it is here expressed, Quod assignavit, & concessit, totum statum suum. And this further, to have and to hold, for and during the term of the other lives; and did also Covenant, that the Plaintiff should have and enjoy this Estate, in this manner to him granted: (whereas he himself had but a Lease for six years) The words are Barganisavit, concessit, & assignavit totum statum, & clameum suum, de & in: The said lands, Habendum, &c. during the term and the natural lives of, &c. and the words of the Covenant are, Quod tunc habuit bonam auctoritatem, for to do so, and to pass over the said land, and the words of the Assignment are very strong, being of all the Estate which, habui, habeo, vel habere potero: And this Estate so by the Defendant assigned in this manner to the Plaintiff, was after the death of the Tenant for three lives. Flemming Chief Justice. In this case here, clearly the Lease for years doth remain, and is not extinct. Williams Justice. If in this case he had only rested upon the lease for years, and gone no further, this had been then good, and no breach of Covenant. Flemming Chief Justice. This is as plain a case as can be, all this being only a Covenant, and a Covenant that he had good power to grant the Land, and to make further assurance for the said term for the other lives, declaring unto the Plaintiff, before the grant, that he had the

Estate

Estate in him for the said lives, which was not so, and so a clear breach of Covenant. Williams Justice. If a man doth bargain, and sell to another, all his Estate in such Lands, to have and to hold to him for three lives: Here he doth fully demonstrate unto him the Estate he should have, and which, by his Covenant, he should enjoy: If this Estate cannot be so enjoyed, this must needs be a breach of Covenant. Flemming Chief Justice. The Defendant here hath affirmed to the Plaintiff, that he had an Estate for three lives, the which he passed to the Plaintiff, and Covenanted, that he should enjoy it, which now he cannot do, and so the Covenant broken; but otherwise it would have been, if he had only said that he had had but a Lease for years, and that this Estate he had assigned over to the Plaintiff. Williams Justice. If a man have a lease for years, and an Estate by Occupancy comes unto him, in this case he may have and enjoy the one or the other, as best pleaseth him. Flemming Chief Justice. If Tenant for another mans life, makes a lease for years, which Lessee for years makes a Lease at will: the Tenant for the others life dies, the Tenant at will here, shall be the Occupant; the Freehold by operation of Law is cast upon him, but this he shall hold and enjoy, subject unto the Lease for years, for that he cannot have and enjoy this estate of Freehold; but in the same manner as the Tenant for the others life held and enjoyed the same, and he held the same, subject to the Lease for years; but if there had been no lease at will made, then by the estate of Occupancy falling upon the Termor for years, the Free-hold is presently in him, by operation of Law, and so by this the term for years is drowned, extinct and gone. Williams Justice. The Traverse here taken is not good. Diat urged for the Defendant, that there is no breach of Covenant here mentioned in the Declaration, and so the same not good: It is here said, that they were the first which did enter, and so were seised, Ut primi occupatores: And this is no good pleading, but it ought to have been shewed that they did enter. Et occupaverunt. The whole Court against him clearly in this, that this is good, notwithstanding this Objection: It is here said, that they, after the death of the Tenant for the other lives, Primo intraverunt, & tunc, & extunc fuerunt seisiti, in their Demesn, ut primi occupatores: The whole Court agreed the pleading to be good, and that the Covenant of the Defendant was broken, and so the Plaintiff had no cause of action, and so by the rule of the whole Court, Judgment was entred for the Plaintiff.

Judgment given for the Plaintiff.

Nota, Upon a Tryal at the Bar, in an Action of Trespass and Ejectment, upon a Lease made by Husbands and their Wives, for tryal of a Title, and the same executed by Letter of Attorney, who by force thereof was to enter into the Land in question, and there to deliver the Lease; The Lease and Letter of Attorney being produced to be proved, it appeared to the Court, that the Lease, and Letter of Attorney were only sealed by the Husbands, but not by their Wives, and that the Attorney did enter in the name of the Husbands only, and not in the name of them, and of their wives: By the opinion of the whole Court this was not legally done, for that the Wives ought also to have sealed the Lease and the Letter of Attorney, and that the Entry by the Attorney ought to have been in all their names, and for this omission the Plaintiff perceiving the opinion of the Court to be against him, became Non-suit, and by all the Judges the authority given by the Husbands shall not bind the Wives; and that the Wives here, not sealing the Lease and Letter of Attorney, the same being to deliver a Lease made by them all, both by the Husbands and Wives, whereas there was no such Lease produced, sealed by them all, and so the authority given by the letter of Attorney is meerly void, by reason that the Wives did not seal the Lease and Letter of Attorney with their Husbands; and in all this the whole Court clearly agreed, and so the Tryal proceeded no further, the Plaintiff being Non-suit.

Nota, The manner of sealing a Lease and Letter of Attorney, by Husbands and their Wives, for tryal of a Title.

Baker

Baker Plaintiff, against--------- Defendant

An Action upon the case for interruption in common. Where the Husband claiming in right of his Wife shall have an Action without joyning his Wife.

IN a special Action upon the Case, for being interrupted in the injoyment of Common: The Case appeared to be this, A woman sole had right to have Common, for term of her life; she takes the Plaintiff to Husband, who being hindred in taking the Common, brought an Action upon the Case in his own name, without naming of his Wife; whether this action was well brought, was the question: By the opinion of the whole Court, the action is well brought by the Husband alone, without naming of his Wife, being only to recover damages; and so in all cases where damages are only to be recovered, as in a Quare impedit, and Ejectione firmæ, he needs not to joyn his Wife.

Erle Plaintiff, against *Mullineux* Defendant.

Entred, Hillary 9 *Jac.* B. R. Rott. 513.

An *Audita querela* by a Feoffee of a Feoffee, whether it will lie or not. The Case. 2 Cr. 227.

IN an Audita querela, the Case appeared to be this: A man did acknowledge a Recognizance and afterwards made a Feoffment in Fee, Execution is sued against the Feoffee, who makes a Feoffment in Fee over to another, the second Feoffee brings an Audita querela, to have Contribution: The question was, whether he only may maintain this. But more particularly the Case was this: A man having Land in two Counties, did acknowledge a Statute with which his Land was chargable; afterwards of these Lands he makes two several Feoffments to Mullineux, and to one Laicon: An extent upon this Statute is sued out against Laicon, and his Land, who afterwards levies a Fine of this Land unto Erle, who brings this Audita querela against Mullineux, the other Feoffee, who pleads all this matter, and sets forth the extent against Laicon, and the Fine afterwards levied by him: Upon this the Defendant demurred in Law, and so the question here only was Whether the Plaintiff as this Case is, may have this Audita querela, or not. Yelverton for the Plaintiff, that the Audita querela is well brought up by the Plaintiff alone, the extent here was had, and the same returned: The question is, Whether he now may have an Audita querela to remove the extent; this he may well have: In this Case; the nature of this Writ of Audita querela, is in the first place to be examined: As to this, this Writ in it self, demands nothing, the same being but as a Commission to the Justices to examine the matter: And it is a ground in Law, that a Purchasor, who comes in for a valuable consideration, shall not be charged alone, but every one shall be equally charged, pro-rata, according to his due proportion, and not otherwise. First, It is plain by Fitz. Nat. Bre. in his Chapter of Audita querela, fol. 104. G. N. & fol. 105. C. That the Feoffee himself shall have an Audita querela, and so by the same reason the Feoffee of a Feoffee shall have the same, and so may the twentieth Feoffee have it, 29 H. 8. Dyer fol. 35. placito 27. An Audita querela by the Feoffee of the Consisor. and with this agrees Mich. 2 & 3 Eliz. Dyer fol. 193. placito 30. and 31. and Hillar. 16 Eliz. Dyer fol. 331. 332, placito 23 & 24. It appears by 18 E. 3. fol. 25. Fitz. title Error placito, 71. And 17 Book of Assises, placito 24. That a Feoffee shall have a Writ of Error, to reverse an Execution

Fitz. Nat. Brev. &c. 29 *H.* 8. *Dyer fol.* 35. *placito* 27. 2 *&* 3 *Eliz. Dyer fol.* 193, &c. 18 *E* 3. *fol* 25. &c.

Execution where the same was not lawfully done; the same Law for the Audita querela: The Law delights in Equality, as appears Coke 3. pars in Sir William Herberts Case, fol. 12, & 13. and in 25 H. 8. Brooks Case, fol. 15. placito 71. If a man be seised of twenty Acres, is bound in a Statute Merchant, and makes a Feoffment of fifteen Acres to several persons, an Execution is sued out against one of the Feoffees, he shall have an Audita querela against the other Feoffees to have Contribution; the Feoffee of a Feoffee may have an Assise of Nusans, and that for a Nusans which was before his time, for that this runs with the Land: But as touching some things done, the Feoffee of a Feoffee shall not avoid them; and therefore if there be Lord and Tenant, and the Lord doth improve, as by Law he may do, and then the Tenant makes a Feoffment in Fee, the Feoffee shall not avoid this improvement, 7 R. 2. Fitz. tit. Admeasurement placito 4. Guardian in fait shall not have an Admeasurement, for that which was before his time, for this is a voluntary act done by the Lord, so the Feoffee of the Tenant shall not avoid an incroachment by the Lord against him, Fitz. Nat. Brev. fol. 22. B. If an erroneous execution be sued out against the Recognisor, his Feoffee may have a Writ of Error to reverse, and so to avoid the same, although he be no party to it: This Writ of Audita querela, doth not call the Judgment in question, but affirms the same; for by this Writ, he only sues to have contribution towards the satisfying of the Execution, and the Judgment still remains in its full force. And this Case doth differ from the Cases of deceit, error, and attaint: For he that will maintain any of these Actions, ought to be a party to the first Judgment, Brooks Cases, 35 H. 8. fol. 61. placito 275. If a man holds three several Mannors of three several Lords in Chivalry, and each of them of equal value he cannot by his will devise two of the Mannors, leaving the third Mannor to descend unto the Heir, by the Statute of 32 H. 8. cap. 1. But he is to devise two parts of each Mannor: The Case of Tenant by Statute, differs from this Case, and from the Case of Lessee for years, who shall be compelled to attourn: but otherwise it is of a Tenant by Statute or Recognizance: For the Law here creates a privity, and an Avowry shall be made upon him without any Attornment, and so upon the whole matter the Audita querela is here well brought and so prayed Judgment for the Plaintiff. Serjeant Nichols for the Defendant, that the Audita querela here, as this case is, doth not lie. The question here is, Whether this Feoffee alone shall have this Audita querela, to have contribution or not: As this Case here is, he shall not, Coke 3. pars fol. 12. Sir William Herberts Case, that the Heir shall not have Contribution against a Purchasor, because he comes to the Land without any consideration, and he sits in the seat of his Ancestor; the Feoffee here shall not have this Audita querela, as it appears by Trin. 17 E. 3. fol 43. placito 32. That the Feoffee himself shall have an Audita querela to have Contribution; This is meant the first Feoffee, 18 E. 3. fol. 25. before cited, the Feoffee shall have a Writ of Error, where he is the party grieved by the Execution; but here in this principal Case, the Feoffee of the Feoffee is not the party grieved by the Execution which was had in the time of the first Feoffee, and so by this his Feoffment, transit terra cum onere, and so shall have and enjoy the Land in the same manner and plight as he found the same, and that was to be subject to the said Execution, and not otherwise, for here by this Feoffment thus made unto him, transit terra cum onere: But he in Remainder or Reversion, shall not have a Writ of Error till after the death of the particular Termer for life, at the Common Law, upon a feigned recovery had, because the possession was not taken away from him, being not the party grieved: And for the remedy of this, was the Statute of 9 R. 2. cap. 3. made; and for this see 4 H. 8. Dyer and Coke 3. pars. the Marquess of Winchesters Case, fol. 4. Perkins chap. Grants, fol. 20. placito 95. The Grantee of the Reversion shall not have an Action of Waste, to punish Wastes done in the life time of the Grantor; neither shall he enter for a Forfeiture in the life time of the Grantor, nor yet for breach of a Condition broken in the life time of the Grantor: It cannot be denied, but if a Nusans

Cook 3 pars. &c.
25 H. 8. Brooks Cases, &c.
7 R. 2. Fitz. tit. &c.
F. N. B. f. 22. B.
35 H. 8. Brooks Cases, &c.
Coke 3. pars, &c.
Trin. 17 E. 3. &c.
18 E. 3. f. 25
Statute of 9 R. 2. cap. 30, Coke 3. pars fol. 4. &c.

sans be erected in the time of the Father, by him, and so afterwards continued by the son, that the Feoffee shall have an Assise of Nusans, and so is the 4. Book of Assises, plac. 3. & 4. E. 3. fol. 36. & Cook 5. pa. fol. 101. in Penruddocks Case. The Feoffee here in this Case shall not have his Audita querela, the same not being transferred unto him by the Livery, the same being a collateral thing; neither shall such a Feoffee have a Writ of deceit, but a Scire facias ad computandum he may have, and to be relieved this way, and by no other means: There was a Case in the Court of Wards, upon a false office there found, and there it was held, that the Feoffee could not have a Bill of Traverse, and yet his Feoffor might have had the same: So here in this Case the Feoffor might have had an Audita querela, but not his Feoffee, and so prayed Judgment for the Defendant. Flemming Chief Justice, and the rest of the Judges did all of them incline to be of Opinion, that this Audita querela did not lie for this Feoffee, for that he is not the person grieved by the Execution, because that the Land was clogged with this Execution, and he bought the Land with the clog, Et transit terra cum onere, and that for this cause the Audita querela here, doth not lie by this Feoffee, and so without any further Argument, this Case was adjourned to another time. Afterwards, Termin. Trin. 11. Jac. B. R. This Case was moved again, the Question being, Whether the Comisee of the Feoffee, after the extent executed, may have his Audita querela, or not: It was urged by George Croke, that he cannot have his Audita querela: After the Extent Executed, the Feoffor himself hath good cause to have an Audita querela; but where the Feoffee suffered an Extent to be had, and afterwards levies a Fine, Whether this Audita querela may be transferred over to another, or not: That it cannot be transferred over, for that, transit terra cum onere. Also if one have cause to have a Writ of Error to reverse a Judgment, he may well do this; but if he afterwards makes a Feoffment, his Feoffee shall not have any such benefit by a Writ of Error, as appears by 12 Assisar. placito ultimo, & 20 Assisar. placito 2. Where it appears, that after a Feoffment, the Feoffee hath no remedy, 37 Eliz. B. R. Sir Richard Shuttleworths Case, where it was held, that a Writ of Error doth rest, and run in privity, and that by a Feoffment over, after this accrued, the same is not transferred over to the Feoffee, and there adjudged, that the Feoffee should not have a Writ of Error: the Feoffee shall not have an Attaint, nor a Writ of Error: The reason of this may be proved by other Cases, as by 33 E. 3. Fitz. tit. Avowry placito 255. & 18 E. 2. Fitz. Avowry, placito 217. The same Case, where there was Lord and Tenant, the Lord encroaches Services from his Tenant, the Tenant, after the encroachment, makes a Feoffment in Fee; The Feoffee shall not have a Writ of Ne injuste vexes; and so is F. N. B. fol. 11. C. D. and 10 E. 3. there cited; And so if the Lord grants over his Seignory, and the Tenant attorns, he shall now have a Ne injuste vexes against the Grantee of the Seignory. 7 R. 2. Fitz. tit. Admeasurement, placito 4. comes full to the reason of the principal Case here; and so is also Fitz. N. B. fol. 148. I. & 149. A. Where the Guardian assigns for Dower, more than ought to be, and afterwards grants over his Estate, the Assignee shall not have a Writ of Admeasurement; and so if the Heir within age, assigns Dower more than he ought. A Guardian in right shall have this Writ, but if he grants over his Estate, his assignee, who is Guardian en fait, shall not have the same Writ, because this was a thing in Action given, 4 E. 3. 35. A good case to this purpose, Where one hath a Common, and is disseised of it, and afterwards makes a Feoffment in Fee, the Feoffee shall have no remedy; but if he brings an Assise, and is barred, he may have a quod permittat, but if he makes a Feoffment, his Feoffee shall not have a quod permittat; and this gives full answer to the reason given Coke 5. pars, fol. 100. in Penruddocks Case, why a Feoffee shall have a quod permittat for the continuance of a Nusans: As to the cases that have been objected by the other side, of 17 Assisar. placito 24 & 18. E. 3. 25. being truly examined, do make against the Plaintiff here: There it is held, that the Feoffee shall have a Writ of Error

4 Assisarum, placito 3. 4. E 3. f. 36. &c.

Termin. Trin. 11 Jac. B. R.

12 Assisarum placito ultimo, &c.

37 Eliz. B. R. Sir *Richard Shuttleworths* Case.

33 E. 3. Fit. Avowry placito, 255.

F. N. B. f. 11: C. D. & 10 E. 3.

7 R. 2. Fitz. Admeasurement, placito 4.

Coke 5. pars f. 100. *Penruddocks* Case.

Error for an Erroneous Execution done in his time, because there the wrong is done unto him, and so for the Feoffee of a Feoffee; and so is Coke 3 pars, fol. 13. in Sir William Herberts Case, and so the reason of this Case is well opened: The Conusor may have an Audita querela before Execution, but the Feoffee not till after Execution: Here there was no cause of grief to the Conusee, but that which was done, was done before to the Conusor, and the Conusee is to take the Land as he finds it: Also in the Writ of Audita querela, he ought to say, Ad grave damnum of the Plaintiff; but here he cannot so say, for that the Execution was had long time before: Another reason may also be drawn out of the Writ of Audita querela, it appears by 23 E. 3. Fitz. tit. Execution placito 127. The Judgment in this Writ shall be, that the party shall be restored to all the mean Issues: After Execution, this he cannot have here in this Case, for that the extent was here sued out two years before the Fine of this was levied to the Plaintiff; and the feoffor cannot have these Issues, because he hath departed withall the profits of this Land to the Conusee, and so for all these Reasons, the Feoffee of the Feoffee here cannot have this Audita querela, and so consequently Judgment ought to be given for the Defendant. Yelverton urged for the Plaintiff, that he may well have this Audita querela agreed, the Cases cited by the other side, Writs of Error are given away by the feoffment, for the same rests in privity as to the Record, and so of the Writ of Ne injuste vexes. But otherwise it is in this Case of Audita querela; for this demands nothing, this Writ being only in the nature of a complaint, to have an examination of the matter complained of, and therefore Outlary is no Plea in an Audita querela, because the same demands nothing; and Fitz. Nat. Bre. fol. 22. B. hath upon the matter this very Case: If one sues out an erroneous Execution against the Recognisor, the feoffee of the Recognisor shall have a Writ of Error; and this is grounded upon the Book of 18 E. 3. Where this is called an Audita querela, and so meant to be: It is agreed, that Laicon the first feoffee, and the feoffor himself cannot, now after his feoffment, have an Audita querela: This Writ is in the nature of a Commission, to examine the matter complained of, and matter of deceit is the matter of this Writ: it is to be agreed, that feoffee of a feoffee shall not have an Audita querela, till he be grieved with the extent, 17 E. 3. 32. The feoffee of a feoffee brought an Audita querela, and ruled good, and here the second feoffee is grieved by this extent as well as the first, he therefore may as well have an Audita querela as the first feoffee. Doddridge Justice. The Plaintiff here ought not to have this Audita querela. Nota, That the Judges did not argue this case, nor delivered any positive Opinion therein, inasmuch as the parties had agreed the matter in difference between themselves; and so this Case was cast out of the Court, and went sine die: But by Haughton Justice, and the rest of the Judges, agreeing with him, the feoffee here did take the Land with the charge thereon, and therefore he cannot have this Audita querela, unless the first Extent had been had against him, then he might well have had this Audita querela for his remedy herein, and so to have Contribution: But here in this principal case it is not so, because the first Extent was had against the Conusor before, and therefore the Cognisee not to have this Audita querela; and so though the Opinion of the Court was against the Plaintiff, yet no Judgment was given herein, because the matter was ended by agreement between the parties; quod nota.

Coke 3 pars, fol. 13. &c.

23 E. 3. Fitz tit. &c.

F.N.B. f 22. B.

17 E. 3. f. 32.

Mo. 661. 662. Benl. 161.

The matter ended by Agreement between the parties.

I. S. Plaintiff, against *Martin* and *Gunnystone* Defendant.

An Information upon the Statute of 21 H. 8. &c.

Coke 6, part fol. 21. &c.

Stat. 18 Eliz. cap. 5.

AN Information by him exhibited against the Defendants, being two Parsons, upon the Statute of 21 H. 8. cap. 13. against one of them for Non-residency, and against the other, for taking of a Farm; the one of them pleaded sickness, and that by the advice of his Physitians, he removed into better air for recovery of his health; and this is justifiable by the whole Court; see more for this, Cook 6 part fol. 21. in Butler and Goodales Case: The other pleaded, that he took the Farm only for the maintainance of his House and Family: and this is also justifiable by the opinion of the whole Caurt. George Croke moved the Court for the Defendants: that the Plaintiff was a common Informer, and that he did prefer this Information against them, only for their vexation, and so to draw them to compound with him, as formerly he hath so done by others, for which they prosecuted an Indictment against him in the Country, upon the Statute of 18. Eliz. cap. 5. made to punish common Informers for their Abuses. The whole Court did advise them to prosecute this Indictment against him. George Croke moved for the Defendants; That in regard the Informer is a man of no means, that the Court would order him to put in sufficient Sureties to answer Costs if the matter went against him, and that then the Defendants would presently answer the Information. Williams Justice, nullam habemus talem legem, this is not to be done, but the Rule of the Court was, that the Defendants should not answer the Information, before the Informer appeared in person.

Gray Plaintiff, against *Gray* Defendant.

Entred Hillar. 9 *Jac*, B. R. Rot. 513.

Action upon the Case for a Promise.

IN an Action upon the Case, for a Promise, the case appeared to be this; the Father in consideration that the Plaintiff his Son would pay such a debt for him, he did assume and promise that he would suffer his Land to descend upon him; In an Action brought for breach of this promise, he sets forth in his Declaration, the mony paid by him in satisfaction and discharge of the debt, and for breach of Promise, by way of pleading, he sets forth, that he did not suffer his Land to descend unto him; upon this they were at issue, and upon this issue a demurrer was joyned, that this was no good issue. Williams Justice, the difference will be where the case arising upon the Assumpsit is in the Affirmative, and where in the Negative; where the same is in the Affirmative, there it ought to be averred in facto, that the Land did descend, but otherwise it will be, where it is in the Negative, for there it is good and sufficient to say, as here in this case, quod non permisit, that he did not suffer the Land to descend; and herein the whole Court agreed, that a good issue may be taken upon this plea of non permisit, that he did not suffer the Land

land to descend; and so by the opinion of the whole Court, the Action here is well brought, and by the rule of the Court, Judgment was given for the Plaintiff. Judgment given for the Plaintiff.

Dowty Plaintiff, against *Fawne* Defendant.

IN an Action of Debt, upon a bond conditioned for the saving of the Plaintiff harmless, from payment of all Legacies, and shews for his grievance, by way of breach, that there was a suit commenced against him in the Chancery, for a Legacy. It was moved, that this Declaration was not good, because he doth not therein set forth any Legacy at all given, neither doth shew any place where the Chancery was. Williams Justice, in all cases where a man pleads any thing out of the Chancery, or any thing to be done in Chancery, he ought in pleading to shew the same certainly, and to say, in Cancellaria apud Westmonasterium, and this is very clear. Flemming Chief Justice, when an Order is alledged to be made in the Court of Chancery, no Venue can be for the trial of this, unless a place certain be shewed, and fully expressed, where this place is, from whence the Venue is to be, in case the other pleads, that no such Order was made, and upon this at issue, the Plaintiff in his Declaration, ought certainly to shew the place where the Chancery is. Also the Plaintiff hath here set forth, that he was charged with the payment of a Legacy, but doth not shew, as he ought to have done in facto, that such a Legacy was devised, and that he was charged with the payment of it: for his bare allegation, as here it is, is not traversable, neither can any issue be taken upon this allegation of the Plaintiff, as here it is, the gift of the Legacy ought to be traversed, and therefore this ought to have been certainly expressed by him, that such a Legacy was given. Croke Justice, the Plaintiff here ought to have reduced his general allegation in a more special, and particular manner, and to have set forth in facto, that such a particular Legacy was given and devised; and also he ought certainly to have shewed the place where the Chancery was: the whole Court clearly agreed in all this, and over-ruled the same against the Plaintiff, that the Declaration was not good, and so the Rule of the Court was for the Defendant, Et quod querens Nil capiat per Billam. Yelv. 226. 1 Ro.Rep.430. 1 Brownl. 117. Debt upon a Bond. Judgment quod querens Nil capiat per Billam.

Childe Plaintiff, against Defendant

IN an appeal of Murder. Nota per Curiam, that in an Appeal, the appellant ought to be ready at the Bar, in proper person, or by his Attorney: and this was so held in Child's Appeal, where the Counsel for the Appellee did demand Oyer of the Writ, and of the return of the same, and there was no Writ returned by the Sheriff, yet the Court at the praper of the Counsel for the Defendant, the Appellee, would not suffer the Plaintiff, the Appellant, to be Non-suit, but the Court did order the Appellee not to go from the Bar, and did order the Sheriff to return his Writ presently upon pain of 20 l. In an Appeal.

Austin Plaintiff, against *Clifton* and others Defendants.

Entred, Pasch. 10 *Jac.* B. R. Rott. 172.

A Prohibition to the Spiritual Court.

IN a Prohibition against the Church wardens of the Parish of Dale, to stay proceedings in a Suit by them in the Ecclesiastical Court: the Suit there was for the surplusage of profits: the Plaintiff shews, that his Fee-simple Land, and other Land was charged with the payment of fifteens and 5. s. yearly to the poor, and that the residue of the profits he was to have for his own use, the others do maintain their Libel and aver, that the surplusage was to go for reparations of the Church, and the residue to be disposed of for Charitable uses, and takes a Travers absque hoc that the surplusage of the profits, was to be to the use of the Plaintiff himself: to this Plea and Travers the Plaintiff demurs in Law The only question was, whether this Travers be well taken, or not. Williams Justice, demanded, whether one may not give his Land, charged with 5. s. to the poor with payment of fifteens, and reparation of the Church; clearly he may well so do: The Court all clear of Opinion, that the Travers is good, and well taken; and no other matter here is to be traversed. George Croke moved the Court for the Plaintiff, that this Travers is not good, and that so the Plaintiff had good cause of Demurrer: for if a man pleads in bar, and takes a Travers, by this he waves his Plea in bar; this which is traversed, is but an inducement to the Plea, and not a Plea in it self. And no Travers is to be taken, neither to Inducement, nor yet to the conclusion of a Plea, as appears in Knightleys Case, cited Coke, 2 part fol. 48. in the Arch-Bishop of Canterburies Case. Also no Travers is to be taken upon a (mes) nor yet upon any name of the party, and so the Travers here not good, and prayed Judgment for the Plaintiff. Yelverton for the Defendant, that the Travers is well taken; for the point of the suggestion is always traversable, so here in this Case; the Plaintiff here suggests, that he is to have the surplusage of the profits to his own use: the Defendant doth travers this, the taking of the profits is always traversable; for this makes him Tenant or not Tenant, this therefore is traversable, and so here the taking of the profits to his own use. Williams Justice, the Travers here is well taken: and there is no other matter in this Case traversable. Flemming Chief Justice, agreed that this Traverse is good and well taken, for this is the sole Negative and the point of the Libel, and no other issue could be taken, the whole Court agreed the Travers to be well taken, and so Judgment was given against the Plaintiff.

Judgment against the Plaintiff.

Goodson

Goodson Plaintiff against *Duffill* Defendant.
Entred Hillar. 9. *Jac.* B. R.
Rott. 231.

IN a Writ of Error, to reverse a Judgment given in the Court of Pypowders, at Rochester; upon a Bond of 300 l. The Plaintiff there declared upon a Bond of three hundred pound, long before entred into, and sets forth, that the Court was there held, secundum Consuetudinem, and by Charter, before the Major, calling unto him two Citizens, which Bond was conditioned for the payment of money to the Plaintiff, at his House in Rochester. The Defendant there pleaded payment of money, at the Plaintiffs house, situate and being in Rochester; the Plaintiff there replied, that the money was not paid, hereupon issue was joyned, and upon this a venire facias was awarded, returnable before the Major, or his Deputy, calling to him two Citizens upon the Tryal; Verdict and Judgment was given for the Plaintiff, for the reversing of which Judgment, a Writ of Error is brought. Whether the Judgment thus there given be erroneous or not, is the Question John Moor for the Plaintiff that the Judgment there given is erroneous, and so ought to be reversed, That the Process, and all the Proceedings there are erroneous; because that this Plaint there was in a Court of Pipowders, and therefore erroneous, for the proceedings there, ought to have been upon present contracts in the Fair arising, and during the time of the Fair, and not upon an obligation entred into before, as this Case here was: This Court of Pipowders is a special Court, set up and ordained, for the sudden and speedy dispatch of matters, and differences there arising, and for the speedy doing of Justice, and this in case of necessity, for the sole benefit of Tradesmen and Merchants, and for the present determination of all doubts and questions there then arising, and that only upon sales and contracts, had in the Fair and Market, and during the time thereof, but not for matters acted and done before or at any time after the Fair or Market held; but for matters happning and arising in pleno mercato, or in plena feria. 8 H. 7. fol. 4. to a Fair a Court of Pypowders is incident, and by the Grant of the Fair this doth pass, and with this agrees 19 H. 8. Brookes Cases fol. 2. placito 7. and Brook Title Incidents placito 34. and not to be severed from them, neither by grant nor by reservation. 2 & 3 Phil. & Mar. Dyer fol. 133. pla. 80. the Plaintiff in a Court of Pypowders doth count of a contract, made in the last Fair before, where no Plaint was then begun, nor any Judgment of Amerciament of the Defendant then given, and this was held a good error in both, by all the Justices of both Benches, Mich. 42 & 43 Eliz. B R. cited Cook 10. parts fol. 73 in the Case of the Marshallsea, where Hall brought a Writ of Error against Jones, to reverse a Judgment given against him in the Court of Pypowders, of the Market, in the City of Glocester, for that, that Hall had published slanderous words of him (S) Mr. Jones and his Clerks have by colour of his Office, extorted and gotten 300 l. per annum by unlawful means, for many years together, above their ordinary fees, for proving of Testaments, and granting of Administrations, the which Judgment was reversed for two Errors. 1. Because the words did not concern any matter touching the Market, therefore the Court had no Jurisdiction of it; (but if one slanders any which trades in the Market, in any thing which concerns his trade, there an action for this well lieth.) 2. It appeared in the Court, that the words were spoken before the Market, and not during the time of the Market: for as this Court had no Jurisdiction, but in matters concerning the Market, so the same Court hath no Jurisdiction, for matters concerning the Market, unless they were acted and done during the time of the Market. Bracton. libro 5. fol. 334. a. De Brevi de Recto. 1. De diversitate, & divisione summonitionis. It is there said, per quindecim dies, ante diem quo comparere debeat, summonitio ought to be, Et talis summonitio dici debeat legitima

A Writ of Error to reverse a Judgment in a Court of *Pypowders at Rochester.*

2 *Cro.* 313. *Mo.* 830. 4 *Inst.* 272. 1 *Ro. Ab.*

8 H. 7. fol. 4. b.

19 *H* 8. *Brooks* Cases. fol. 2 pl. 7

2 & 3 *Phil.* & *Mar. Dyer* fol. 133. *placito* 18.

Mich. 42 & 43 *Eliz.* B. R. &c.

Jones was Register to the Bishop of *Gloucester.*

2. Error.

Bract. lib. 5. fol. 334. a.

legitime. Si minus ſpatium contineat poſſit illigitimam judicari, niſi ob cauſam legitimam, minus tempus ſtatuatur, ut propter perſonas, qui celerem habere debeant juſtitiam, ſicut ſunt mercatores, quibus exhibetur juſtitiam pepoudrous, by the Statute of 17 E. 4. capite 2. No Steward or other Miniſter of a Court of Pipowders, ſhall hold plea upon any action, at the ſuit of any perſon unleſs the Plaintiff or his Attorney, in the preſence of the Defendant, do ſwear that the contract in the Declaration, &c. was had, and made, during the time of the Fair and within the Juriſdiction of the Fair (but this Oath ſo taken) ſhall not conclude the Defendant, from pleading in abatement of the Action, and to the Juriſdiction of the Court, this Statute by the Statute of 1 R. 3. cap. 6. is made perpetual: In this principal caſe here, the Defendant in the Court at Rocheſter, was condemned in an action of debt, for 300 l. upon a Bond, and contract formerly made; and entred into, and ſo for this cauſe the Judgment is erroneous: A ſecond error in the ſtile of the Court; they being (as is ſet forth) to hold plea of this, by preſcription, and alſo by grant, and this is impoſſible, it cannot ſo be, and to this purpoſe was Collins and Holemans caſe cited, 43 Eliz. B. R. where a Court was laid to be held by the Major and Aldermen of D. &c. by preſcription and by the Charter of the Queen; this was aſſigned for error, and for this cauſe the Judgment was reverſed; and ſo here in this Caſe, the Court could not be held by both (S) by cuſtom, and alſo by Charter, but it ought to have been expreſſed, that the Court was held by the one, or by the other, and to have ſet forth by which; as the caſe here is, it doth not appear, by what authority they held this Court, and for this cauſe alſo the Judgment is erroneous. 3. The Judgment is erroneous, for that the trial here was not good; the Defendant here pleads payment of the mony, at the houſe of the Plaintiff, and doth not ſhew that this houſe was within the Juriſdiction of the Court. Alſo 4. the venire facias is not good; the ſame being made returnable coram me, vel ſufficientem deputatum meum: and he cannot here make a Deputy, being in a Court of Pipowders, and ſo for this cauſe the Judgment is erroneous: It was urged alſo by Barker Serjeant, and by Finch of Grayes-Inn, that the Judgment here is erroneous, and Williamſons caſe cited, to be 38 & 39 Eliz. where it was held that a Court of Pipowders, hath no Juriſdiction at all, but for ſmall matters, and for ſuch as do happen to ariſe ſitting the Court, and during the time of the Fair, but not before; and it is againſt the nature of a Court of Pipowders, to hold plea of matters not happening, and ariſing in the Fair, and during the time of the ſame, and in no caſe of matters done before, and out of the Fair: it appears by 22 E. 4. fol. 33. b. that a Court of Pipowders ought to be held on that day, on which the ſame was granted to be held, otherwiſe the proceedings there will be erroneous: The Court of Pipowders is defined to be curia parvi ponderis, and this is to be Curia pedis pulverizati, and ſo the Lord chief Juſtice Anderſon did uſe for to define it. George Crook for the Defendant, that the Judgment was well given, and is not erroneous, but ought to be affirmed. As touching the firſt error inſiſted upon, becauſe the proceedings there, was for a matter ariſing out of the Fair, theſe proceedings were good, and it may well be ſo: This Court is called, Curia pedis pulverizati, for the ſpeed there uſed, in the preſent diſpatch of matters. But in caſe of a preſcription, ſuch a Court may very well be without a Fair, and this may ſo be from time to time, and from day to day, in caſe of a preſcription: And in 13 E. 4. fol. 8. b. it is ſo adjudged in point of a Writ of Error, where the Error aſſigned to reverſe a Judgment given in Curia pedis pulverizati, there alledged to be held, ſecundum conſuetudinem ejuſdem civitatis, the Error inſiſted on was, becauſe he did not ſhew, that the matter whereupon the Action was brought, was in pleno mercato vel in plena feria, it is there adjudged expreſſly, that this was no Error, becauſe the ſame was laid to be held, ſecundum conſuetudinem civitatis, and that ſo in this manner, ſuch a Court may be held, without a fair, or market, and that the King may well grant ſuch a Court to be held from day to day, and ſuch a Court

Stat. of 17. E. 4. cap. 6.

Stat. of 1 R. 3. cap. 6.

Collins & Holmans caſe 43. *Eliz.* B. R. Mo 422. 1 Cr. 489.

3 Error.

4 Error.

38 & 39 *Eliz. Williamſons* caſe.

22 E. 4. fol. 33. b.

Pedis pulverizati.

1 Error.

Pulverizati.

31 E. 4. fol. 8. b.

may

may well be held by Custom, without any Fair or Market: And this Court hath its name properly from the speedy dispatch of businesses there, and so are all the Presidents likewise. 2. Admitting that the Proceedings there ought for to be upon Contracts there presently arising, and not for matter past, according to 4 Mariæ, Dyer, f. 133. But where the same is held by Prescription, as in this case here, this doth alter the case; for by Prescription such a Court may be held, and the Jurisdiction of this may well be extended unto all Contracts and Bonds, to Actions of Trespass and Actions upon the Case, and to this purpose was the Case between Chambers Plaintiff, against Pert Defendant, Hill. 33 Eliz. Where an Action of Trespass, for an Assault and Battery was brought in a Court of Pipowders, for an Assault done long before, and well maintainable, as in that case it was held, As to the naming of the Court, this is only the Stile of the Court for speed, Et pedum pulverisantium, 8 Jac. White Plaintiff against How: A Gloucestershire Case. An Action upon the case for slanderous words, brought in a Court of Pipowders, for words spoken long before the Court was held, adjudged there for the Plaintiff, and affirmed here in a Writ of Error, because the Court was there laid to be held by Prescription; and so it is here laid in this principal case, and to such a Court so held by Prescription, such a Jurisdiction, in case of proceedings there, is given; and such a Court thus held by Prescription doth very much differ from the ordinary Court of Pipowders, and that by many circumstances: This Court may be thus used and held, either by way of Grant or by way of confirmation, and being thus held, it differs from the ordinary Court of Pipowders, which is incident unto every Fair, as appeareth by 12 H. 7. f. 16. B. & 13 H. 7. f. 19. And the same Court is thus incident to a Fair, and that of common Right, as it there appeareth: As to the venire facias returnable coram me, vel sufficientem deputatem meum, this is well and sufficient: As to the case remembred of Plimouth, there the case was that such a Court of Pipowders was laid to be held by Prescription or by Charter, not shewing by which it was, therefore adjudged naught, because it was laid in the disjunctive, to be held by Prescription or by Charter; and for this cause held not to be good (and this was then affirmed by Henry Yelverton at the Bar, to be so adjudged, he being then of Counsel in the same case (and so this case now in question, he was of Counsel with the Defendant for affirmance of the Judgment) and prayed affirmance of the same. Williams Justice. This Court is here laid to be held secundum consuetudinem; and also by Charter before the Major of Rochester, calling to his assistance two of the Citizens, where a Tryal was had in an action of Debt upon a Bond, before entred into, and a Judgment there given for the Plaintiff; Whether this Judgment, thus there given in this Suit be erroneous or not, is the only question here considerable. First, It is very clear, and not to be denyed, that by Prescription a man may well have and hold a Court of Pipowders, without a Fair or a Market; and unto this Court may well have such a Jurisdiction, as to hear and determine Contracts made long time before, and so it is expressly resolved in the Book of 13 E. 4. f. 8. B. and the Book of Entries f. 168. tit. Detre en Gailor, placito 1. and f. 18. tit. Account in execution placito 3. If one will declare upon a matter in a Court of Pipowders in a Fair, there, in such a case of necessity he ought to set forth in Pleading, that the same was done in plena feria or in pleno mercatu, or his Pleading will not be good; but it is not so to be done, in case where a man hath and holdeth a Court of Pipowders by Prescription, in which Court they may hear and determine Actions upon the case for words, but not so in the ordinary Court of Pipowders, held in a Fair, the which Court is only to have continuance during the time of the Fair and no longer; and this Court is to be held, de hora in horam: And this is a Court of Record, and the Major and the Steward are Judges of it: And by 6 E. 4. f. 3. B. If a man in his Fair, hath a Court of Pipowders, in this Case the Steward is Judge, and no other, for there are no Suitors; and for a Judgment given in a Court of Pipowders a Writ of Faux Judgment doth not lie, but a Writ of Error,

4 Mariæ, Dyer f. 133.

Hil. 23 Eliz. *Chambers* Plaintiff against *Pert* Rott. 124.

8 Jac *White* Plaintiff against *How* Defendant.

Judgment affirmed in a Writ of Error.

12 H. 7. f. 16 B

13 H. 7. f. 19. B

13 E. 4. fol. 8 B. *&c.*

6 E. 4. f. 3. B

7 E. 4. f. 23. A. Error, and with this agrees. 7 E. 4. f. 23. And where one claims to hold a Court of Pipowders by Prescription, and also by Charter; if the Charter be not contrary to the Prescription, this shall be good, by way of confirmation: As touching the Stile of the Court, as it is here expressed, this is good, and sufficiently set forth (calling to him two Citizens) by this they two are Judges also: And this is clear, as where the Lord Chancellor having power to call unto him the two Chief Justices, by this they are made Judges also: It appeareth by 12 H. 7. f. 16. & 13 H. 7. f. 19 That this Court of Pipowders is of common right incident unto a Fair. with this agrees 19 H. 8. Brooks Cases, placito 7. & Brook tit Incidents placito 34. As to the manner of the tryal had in this Case, clearly this trial was not good: The Defendant here pleaded payment at the Plaintiffs house this was no good Issue, no place being named from whence the venire facias should come; for no venire facias can be from his house; but if he had here pleaded payment at Rochester, this had been good, and a good Trial might have been had upon this Issue of solvit or non solvit at Rochester, here being a good place from whence the venire facias may be awarded: And so if payment was laid to be at the New Hall of the Middle-Temple, he ought also to say, in parochia de St. Dunstans, for the place of the venire, or not good: So here in this principal Case, he ought to have laid the payment to have been apud Rochester, at the Plaintiffs house there, and this had been good; but here the Trial was not good, because the payment was laid to be at the Plaintiffs house: The return also of the venire facias here, was not good, the same being to be coram me, vel sufficientem deputatem meum; this is not good, for there is no such Court, for him to have a Deputy, as if it had been in such a case, Nisi, such a Justice of Assize, prius venerit per se vel per sufficientem deputatem, this is not good: So here in this case, the Tryal was not good, and so for this cause the Judgment is erroneous, and for this the same, ought to be reversed. Crook Justice. This Court of Pipowders is of two kinds either by Prescription, and this an absolute Jurisdiction: The second to be in a Fair or Market, and to this a Court of Pipowders is incident: And here two things are requisite. First, This Court to be for matters arising in the Fair or Market: And secondly, The matters to be determined there, within, and during the continuance of the Fair or Market; and this appeareth to be so by the Statutes of 17 E. 4. cap. 2. & 1 R. 3. cap. 6. and this for a Court of Pipowders, annexed unto a Fair or a Market: But in a Court of Pipowders, which one hath by Prescription, there they may well hear and determine of matters done before; and as to the name of the Court, this is only the stile of it, so called, for the speedy dispatch of matters there used. Error here in the Proceedings: The stile of the Court, the same to be coram Majori & concivibus, this not good, there being no such Court: As to the venire facias, some doubt may be made of this, for the house is said to be in Rochester, and so from thence the venire facias may be awarded: As to the holding of the Court by Prescription, and by Charter this may be good, if the same be only by way of confirmation: Here the Court is laid to be held by Prescription, & virtute concessionis domini Regis: If this go by way of confirmation, and so to be used, and not otherwise, to destroy the Prescription, this may be good but not otherwise. Flemming Chief Justice. A Court of Pipowders is raised, as an incident unto a Fair, and hath its certain limitation, to be ended with the Market; and also the Suits there, to be only for matters and for controversies happening and there arising in the Fair or Market, and during the time of the same; there are also determinable, Contracts; Batteries; and Assaults, but not actions upon the Case for words, for that these do not disturb the Market; and this Court is not to last any longer than the continuance of the Market: Here in this place was a Mart for twenty days, and the like at Winchester, and the same was called Palms Court, during all which time, Justice was there to be done: This Court of Pipowders hath its rising, as an incident to a Fair or Market, primarily and originally: But when you come once to the case of a custom, and do claim to have a Court, and there to hold Plea on every Market day, this is good,

12 H. 7. f. 15.
13 H. 7. f. 19.
19 H. 8. Brooks Cases, &c.
Statutes of 17 E. 4. &c.

good, and may well so be: But if it be to hold a Plea every day, this Court then is not only a Court of Pipowders; between Strangers this Court is to be held, de hora, in horam; but for Citizens, the same may be divers days, for to urge one to answer to Issue, and to go to Tryal in one day, and so to proceed, de hora, in horam, secundum consuetudinem Civitatis such a speedy Tryal is much to be misliked of: If it be a Court of Pipowders, by Custom and Prescription claimed, in such a Court they may hold and determine Pleas of Contracts made out of the Court, and long before, and good; and many Judgments have been given, and the same affirmed in Writs of Error, to warrant such Proceedings: As to the Charter, it is clear, that they could not hold Plea solely, nor by Deputy, if there be not in the Charter sufficient words to warrant the making of a Deputy, and when to sit, then to call two Citizens: These are Judges also by this, as the Lord Chancellor, sitting in the Exchequer, had power to call the Judges to sit with him, and so in the Star-chamber, he being not to sit alone; and these Judges being so called, are all of them Judges there: If it had been here coupled together with o (vel) by Prescription or by Charter, this had been clearly void; but here it is in the copulative, with an (&) by Prescription and by Charter: This is good, and according to such Grants, the Prescription and the Charter may well stand together, without any confounding: Upon every change of a King all Corporations have new Charters, a new Charter to confirm their ancient Charters and Liberties, Concessa & confirmata omnia Privilegia: This Prescription here is not altered, nor yet changed by this Grant and confirmation by Charter, and so they may well stand together; but if the Charter be contrary to the Prescription, or any ways alter the same, otherwise it is; And in this the difference will be, where the Charter doth destroy the Custom, and where the same is contrary to the Custom; where the Charter is in Augmentation of the Custom, by way of addition, this is good, and may well be as a Grant and Confirmation, a good Grant to hold as before, with an addition thereunto, as in the Charter is expressed; and in this manner the Charter, Custom, and Prescription may well stand together as it is here in this principal Case, the Charter and Prescription being the same, and not contrary the one to the other: As to the Issue here, and Tryal thereupon, the payment here is pleaded to be at the Plaintiffs house, being in the City of Rochester; this cannot be made good any ways, but he should have said that this money was paid to the Plaintiff, viz. At the City of Rochester, at the Plaintiffs house in the City of Rochester, but this is not suddenly to be over-ruled: As to the venire facias, and awarding of the same; this ought to be done by the Major alone, for he alone is the sole Judge here, and the two other Citizens, that are to sit with him, are not Judges until they be called to sit with him: As to the return of the venire facias coram me vel deputatum meum: This is clearly naught and cannot be made good, unless it appear and be proved by special words in the Charter, that he may hold the Court by his Deputy. Nota, That the parties perceiving the Opinion of the Court to be against the former Tryal, and so the Judgment to be erroneous, they agreed by their mutual assent to go unto a new Tryal of the matter again, and so to rectifie the former mistakes, and so the Court delivered no Judgment in this case, for that the parties agreed to go to a new Tryal.

The parties agreed to go to a new trial, and so no Judgment given.

Nota per Curiam, In a Tryal at the Bar by a Buckinghamshire Jury, concerning the Title of Sir John Packington, That if one of the parties doth give any private instruction to one of the Jury, after that they are empanelled, this is punishable in the Star-chamber.

Private instruction given to a Juror punishable in the Star-Chamber.

Powel Plaintiff, against *Stuff* and *Timewell* Defendants.

Entred Trin. 10 *Jac. B. R.* Rott. 61.

An Action of Debt upon the Statute of Bankrupts. Statutes of 13 Eliz. &c.

IN an Action of Debt, brought upon the Statute of Bankrupts, the Plaintiff lays in his Declaration, the Debt due unto him, Et quod vigore Statuti prædicti actio accrevit: It was urged by John Harris, That the Declaration was not good; for there being two Statutes of Bankrupts, the Statute of 13 Eliz. cap. 7. and 1 Jac. cap. 15. and other Statutes before; and the Statute of 1 Jac. cap. 15. gives the Action, and so the Declaration is uncertain, and for this cause the same is bad and insufficient. Flemming Chief Justice, The Plaintiff ought not in his Declaration to mention his several Creditors, but this ought to come on the other side, to set forth that there were no other Goods, but those which are named; and that there were other Creditors, but the Plaintiff is not to set this forth in his Declaration, it being sufficient for him, only to set forth his own debt due unto him, and that virtute cujus actio accrevit: The Commissioners upon this Statute, may assign money to one Creditor for his debt, and Corn unto another, and this is good. As to the Exception taken to the incertainty of the Declaration, because it is not therein expressed upon which Statute the Action was brought, there being several Statutes; the Declaration is clearly good, notwithstanding the exception taken at it; for it is plain that these words in the Declaration (vigore Statuti prædicti actio accrevit) shall be referred unto the Statute which gives the Action unto the Creditor, upon the Assignment by the Commissioners, and this is the only Statute of 1 Jac. cap. 15. These are general Statutes, and so notice to be taken of them; and so the Declaration here is good, notwithstanding this Exception, and in this the whole Court agreed: If the Plaintiff had been in Debt, in as great a sum as the Bankrupt was indebted unto him, and yet his Debt assigned, this Assignment had not been good, but this Debt was here assigned inter alia, and so other Debts to be intended; and this may be good. Crook Justice, agreed with him herein. Flemming Chief Justice, The Defendants here ought to have demanded Oyer of the Indenture, and of the Schedule to the same annexed, in which the several Debts are contained: If there be more in this than his proper Debt, then the Assignment is not good, but the same being here with an (inter alia) this is good and sufficient and we are not to search for this; and so the whole Court agreed clearly, that the Declaration is good and sufficient, and so by the Rule of the whole Court, Judgment was given, and so entred for the Plaintiff.

Statute of 10 Jac. c. 15.

Judgment given for the Plaintiff.

Baskervile Plaintiff, against *Henskam*, & *Al.* Defendants.

In a Writ of Error.

IN a Writ of Error to reverse a Judgment given for three, the Error assigned, That one of them was dead, tempore judicii redditi; the other answers, That he was in full life, tempore judicii (Scilicet at such a day (S) 18 Augusti. The whole Court clear of opinion, that this Scilicet is idle, and the other Issue good, that he was in full life; the sole and material Issue here, being the time of the Judgment. Williams Justice, There is no Book wherein mention is made

made of such an Issue joyned upon a Scilicet, and so by the Rule of the Court, the Scilicet here is void, and the other issue to stand, being only, whether the party were living at the time of the Judgment given, or not.

Renoulds Plaintiff, against *Green* Defendant.

NOte that in a trial at the Bar in an Action of Trespass the Question arising between the Parson and the Vicar, as touching Tithe-wood, and to whom the same belonged: As to this, by the opinion of the whole Court clearly, the Parson, de mero jure, ought to have the Tithe-wood, if the Vicar be not Endowed of the same, or claims to have it by Prescription; but without such a Donation or prescription, the same belongs to the Parson. Another Question was propounded for the Vicar, who entitled himself unto the Tithe wood, by these words (Alteragium) and minutæ decimæ, whether these words will carry the Tithe-wood unto him, or not: As to this, The exposition and true definition of this word (Alteragium) is considerable, and to whom this is due. (Alteragium) as was observed, is that which is due to be served at the Altar. Williams Justice. Alteragium; is that only and properly which is offered at the Altar, and minutæ decimæ are the small Tithes; also the word (Alteragium) will not carry Tithe-wood: And this is the Question here, whether the Vicar, by this word (Alteragium) hath title to the Tithe-wood. Crook Justice. This word Alteragium, doth not carry the Tithe-wood, which are great Tithes, but minutæ decimæ, are petit small Tithes, minutæ decimæ & alteragia, the Vicar, as was urged, is to have them by his composition, and that by these words he is to have the Tithe-wood. Flemming Chief Justice. There is a Usage here laid in the Vicar to have the Tithe-wood, by reason of these words, Alteragia, & minutæ decimæ, the which the Vicar can no ways have, but by Prescription, or by such a Usage; and so the same may pass by these words, Alteragia, & minutæ decimæ, and the Usage had accordingly: Also sheaves of Corn have passed by Usage to the Vicar, by the words, Alteragia & minutæ decimæ, and so it was adjudged in the Court of Exchequer: The Judges all agreed in this, that by the words Alteragia & minutæ decimæ, by Usage, Tithe-wood may well pass, and so hath the opinion of all the Civilians been. Flemming Chief Justice, and the rest of the Judges agreed in this, that by Usage, the word Alteragia shall be accounted inter minutas decimas. Williams Justice. By the word Alteragia Tithe-wood doth not pass, but if the Vicar have used to have the same time out of mind, this is good, and shall pass under the words of minutæ decimæ. Flemming Chief Justice. Though the Law be against it, that Tithe-wood doth not pass by these words, yet by Usage it hath been allowed good, to carry Tithe-wood, by these words, being but of a small value; and by such Usage Tithe-wood may pass, though the Law be against it.

In an Action of Trespass to whom Tithe-wood properly belongs.

Alteragium quid.

And upon this opinion of the Court, a verdict passed for the Vicar the Defendant, &c.

Retherick Plaintiff, against *Chappel* Defendant.

Entred Hillar. 9 *Jac.* B. R. Rot. 660.

In an Action of Trespass and Ejectment.

IN an Action of Trespass and Ejectment for a House, and the moiety of a Tenement, upon Not-guilty pleaded, a special Verdict was given, and upon the special Verdict, the Case appeared to be this, That one being possessed of a Lease for 69 years, made his last Will and Testament; and by this his Will, he did devise in this manner, That his Wife should have the Occupation, Manurance and Profits of the House and Land to him Leased, if she should live so long unmarried and inhabit in the said House; and if she married or died within the term, that then Robert his eldest Son should have the Occupation of the same, for so long time as he should live, and should have Issue of his Body; and during the same time repairing the same: And if he died without Issue, during the said term, that then Jasper, another of his Sons, to have this for so long time as he shall live, and have Issue of his body: This matter came in question, between the Executors of Jasper the third in remainder, and a Devisee, which of them should have it: The sole question was, whether such a Remainder, in this manner limited, were good or not. Williams Justice. Matthew Mannings Case, Coke 8. pars fol. 94. is a stronger Case than this is; this Remainder is clearly good, if no interruption was made to hinder the same, by those who had the particular and present Estates, and so was it adjudged in Price and Atmores Case, here in this Court, Trin. 10. Jac. Where a sale was made by one of those who had the particular Estate in possession, the which Act had destroyed the particular Estate in remainder; and according to this is Welkdens Case in Plowdens Commentaries, and so in this Case Judgment ought to be given for the Plaintiff, claiming under the Title of the Remainder: The Remainder being good, no interruption being made before to hinder the same, the whole Court agreed herein, that Judgment was to be given for the Plaintiff, if cause were not shewed to the contrary: Afterwards this matter was moved again, for the opinion of the Court, touching the manner of entring the Judgment to avoid Error; the Ejectione firmæ being brought of a House, and of the moiety of a Tenement, whereas the same lieth not for a moiety, a Verdict found for the Plaintiff, and entire damages given. Dodderidge Justice. A man may be ejected of a Tenement, but an Ejectione firmæ lyeth not of a Tenement, in 22 Eliz. Dyer, fol. 370. placito 56. Cliffords Case, where a Writ was brought by him De Ejectione custodiæ terræ & hæredis: A Verdict given for the Plaintiff and damages given accordingly; it was moved in arrest of Judgment, that the Action lyeth not pro Custodia hæredis, sed pro Custodia terræ tantum: And because Damages and Costs were entirely Assessed, the Plaintiff there relinquished his Damages and Costs, and prayed his Judgment for the Ejectment of the Land; and so had his Judgment accordingly, and so in this Case the Verdict was given for the Plaintiff, and Damages entire Assessed: And because the Ejectione firmæ lyeth not for the Tenement, the Court was moved, in what manner the Judgment should be entred; and to avoid Error for the future, the Plaintiff offered to release his damages, and to take his Judgment for the residue: But the Court would be further advised, touching the manner of the entring of the Judgment: Afterwards, Termin. Hillar. 10 Jac. B. R. the Court was moved again in this Case, for the manner of entring the Judgment. Yelverton, For the Plaintiff moved the Court, that he might release his damages, and take his Judgment for the house only,

Coke 8. pars fol. 49. &c.

Price and *Atmores* case, &c.

Plowdens Commentaries. *Welkdens* case.

22 Eliz. Dyer, &c.

Termin. Hill. 10 Jac. B. R. This Case moved again, &c.

only. Lodderidge Justice. The Plaintiff here may well release his damages, and take his Judgment for the house: According to Cliffords Case, 22 Eliz. Dyer 370. and so the Plaintiff may do here in this Case. Flemming Chief Justice, & Croke Justice, agreed herein, That the Plaintiff, relinquishing of his damages, may take his Judgment for the residue for which the Ejectione firmæ lyeth; and so the Plaintiff releasing of his damages, and praying Judgment for the residue, an Entry of this was made accordingly, and by the Rule of the Court, the Plaintiff had his Judgment entred only for the house.

22 Eliz. Dyer. &c. The Plaintiff releases his damages, and had his Judgment for the House.

Mirrill Plaintiff against *Smith* Defendant.

Entred Trin. 10 *Jac.* B. R. Rott. 828.

IN a Writ of Error, to reverse a Judgment given in the C. B. in an Ejectione firmæ: The Error assigned was, because in the first Declaration, there wanted the day of the Ejectment (they having there two Declarations) but the second Declaration was perfect. Moyl and Ewers Case was cited for the Plaintiff, that the Declaration was good: The which was an Oxfordshire Case in an Action of Trespass and Ejectment, 6 Jac. the Lease was made, and laid in the Declaration, That postea (S) anno 5 Jac. he did Eject him, adjudged postea to be good, and (S) to be void for the Ejectment. Williams Justice. This is no Error, for the postea here implies this, and so makes all to be good; and the Entry to be before the Action brought. Croke Justice. This postea here in the Declaration, shall well guide all, and so make all good; and the Action to be brought after the Entry and Ejectment. Flemming Chief Justice, The postea here shall well guide the incertain day of the Lease and Ejectment, being omitted, postea (S.) anno sexto ejecit, anno septimo: The Action not brought before, this of necessity must be after the Lease here, the plea was, Non culp. The Jury find, that the Defendant did eject him, and that the Action was brought for this, and the postea here affirms this to be so: The whole Court agreed in this, That the Declaration was good, and so the Judgment well given; and therefore, by the Rule of the Court, the Judgment was affirmed.

2 Cr. 311. A Writ of Error to reverse a Judgment in the C. B. *Moyl* and *Ewers* Case.

Judgment affirmed *per curiam.*

Horewood Plaintiff against *Holman* Defendant.

Entred Trin. 9. *Jac.* B. R. Rott. 923.

IN an Action of Trespass, and Ejectment upon Non culp. pleaded, the Jury found a special Verdict, and upon the special Verdict, the Case appeared to be this: Land was given to the use of a man and his wife, and to the Heirs of the Body of the Husband: and for default of such Issue, the Remainder to the right Heirs of the Husband: The Husband makes a Feoffment in Fee, with warranty, and

An Action of Trespass and Ejectment.

and takes back again an Estate to him and his Wife for their lives, the Remainder unto A. and B. his two Daughters, and to their Heirs: The Husband dies, having issue four Daughters, the Wife enters and dies; the Question was, Whether by this Feoffment, there is a Discontinuance wrought or not, and then whether the Entry of the Wife, after the Death of the Husband, shall so far operate, as to make a remitter unto the Estate Tail. Flemming Chief Justice, demanded if this Feoffment hath wrought a discontinuance, what is it then which hath brought home again the Estate Tail. Hitcham the Queens Attorny made answer, That the Wife, by her Entry, hath done it. Flemming Chief Justice. The Wife, by her Entry, can only reduce and bring back her own Estate again, and no more; by this Feoffment there is clearly wrought a discontinuance. Williams Justice, agreed in this, That by this Feoffment there is a clear Discontinuance wrought: And Littleton in his Chapters of Discontinuance Remitter and Garranty, hath determined this very Case; but yet a day was given for the Argument. Afterwards Sir Robert Hitcham argued for the Plaintiff; the great Question in this Case, doth rest upon the Warranty; and if the Warranty was made and not attached, nothing is wrought by this: If there be no discontinuance wrought by this Feoffment, but a Remitter, then the Warranty being removed, the Discontinuance is gone. First the Land was here given to the use of the Husband and Wife, and to the Heirs of the Husband; the Husband makes a Feoffment in Fee with Warranty, this (as was urged) is no Discontinuance: Here the Husband and Wife are Joynt-Tenants for life, with an Estate Tail expectant: As to the point of Discontinuance none can discontinue the Tail, if he was not seised of the Tail; here the Husband was not seised of the Tail, at the time of the Feoffment, but the Husband and Wife were Joynt-Tenants for Life, and so there was no Discontinuance wrought by the Feoffment in present, but here is a discontinuance of the Reversion. As to the Repurchase, whether this shall make any Remitter, ex debili fundamento fallit opus: If the Estate, to which the Warranty is annexed be gone, the Warranty is at an end and determined. Littletons Case in Remitters, where the Husband retakes an Estate, this shall work a Remitter; the Law will adjudge one in his Remitter, in respect of his ancient Right: In case of Remitters, the Law doth more respect an Estate which a man hath by right, though the lesser Estate, than an Estate in Fee-simple gained by wrong; whether in this case, there be any Remitter at the Common Law; the Statute of 27 H. 8. of Uses, will make no Remitter: If a Feoffment be made to the use of a man and his wife where their Entry is lawful this is a Remitter, not by the Statute Law but by the Common Law; Whether here be a Remitter as to the Estate Tail: It is agreed, that as to the Estate of the Wife, here is a Remitter: Here is also a Remitter unto the Estate Tail, and that for these Reasons. 1. An intire Estate cannot receive any division 2. Here is no discontinuance in the case, and in such a case, Tenant in Tail can grant no more than only for his own life: If there be no discontinuance here in this Case, then there is no remnant of an Estate, unto which the Warranty may be annexed; & sublata causa tollitur effectus: If there be only a possibility of an Estate, the Warranty cannot be annexed unto this; but admitting tht Warranty here is not gone, nor yet any Remitter by the re-purchase, yet there is a Remitter afterwards, for by the death of the Husband, the Wife entring, she is remitted unto her former possession, for the Law shall then adjudge her to be in her ancient Right and Title; and the Jury hath found, as to the Wife, that she held her self in, and so remitted: As to the last point of the Warranty attached, admit that the Wife be not remitted by the re-purchase, but at the time of the death of the Husband; and at the same instance of time, the Warranty descends, and the Remitter also happens: It is to be considered which of these two the Law will prefer; as to this, the Remitter here shall be preferred before the Warranty, and that by the Rules and Grounds of Law: for the Law will prefer right before wrong. Hen. Yelverton for the Defendant. It cannot be denied, but that the Husband and Wife here have a joynt Estate for their Lives, and here is no Estate

Statute of 27 H. 8. Uses.

Tail

Tail executed but in Remainder; by the Feoffment and Livery here, without Warranty, no discontinuance was wrought by the Feoffment alone: The next matter considerable is, Whether there be any Remitter in this Case either by the Common Law, or by the Statute Law; no Remitter by the Statute Law, the Statute of 27 H. 8. cap. 10. of uses shall make no Remitter: As it is resolved in Amy Townsends Case, Plowdens Commentaries, f. 111. then to make a Remitter upon a limitation, by way of use, there ought to be an Entry to make this, until the Husband dies no Remitter could be, for no Entry by the Wife before this be found by the Jury: The Jury do find, that the Husband was seised pro ut lex postulat, but no Entry by them found; after the death of the Husband, they find that the Wife continued her self in possession, here is no Remitter at the Common Law in this Case: Here are two Estates, and the second is more beneficial for the Wife than the former: the Question now is, Whether the Court shall adjudge this to be a Remitter in the Wife, without any election by her made, or not; the Court is not in this Case to adjudge her to be in her Remitter. Littleton in his Chapter of Remitter. f. 151. placito 672. An Estate Tail limitted to Husband and Wife, the Husband discontinues the Estate, and retakes an Estate to him and to his wife for their lives, this is a Remitter to the Wife and to the Husband (maugre le Baron) and this shall be so for the benefit of the Wife; but otherwise it is where they are several Estates, the Wife cannot controul the Livery of the Husband, but the same shall remain in its full force, but the Wife may be remitted to the Free-hold; if the Husband do alien the Land of the Wife, and retakes an Estate, the Wife is remitted, but not the Husband, for the Law will not operate a Remitter unto him against his own Livery; but in an Action of Waste, brought against the Husband, his remedy is to make default, and his Wife to be received, and so to plead her Remitter, and hereby to bar the Plaintiff of his Action as appeareth by Littleton in his Chapter of Remitter, fol. 150. placito 668. But where they are seised by entireties only, there the Husband shall be remitted against his own Livery, and that for the benefit of his Wife; but here in this principal Case, they have several Estates. If the Husband be seized, in right of his Wife, discontinues the Estate, and retakes an Estate to him and to his Wife, upon condition, the Wife is here remitted, but not the Husband; here the Remitter is to the Estate of the Wife, but not to the Estate of the Husband, for the Wife cannot controul the Livery of her Husband, but his Livery shall be taken strongest against himself; and this appears by Littleton Remitter, fol. 152. placito 679. And if the Remitter do not operate at the beginning; it shall never work afterwards, as appeareth by the Book of 19 H. 6. f. 61. where it is said that a Remitter ought to be effectual at the time that the right doth descend or it shall never after be a Remitter: It must be agreed, that a Remitter to the Wife, is a Remitter to all superior Estates, 11 R. 2. Fitz. Tit. Remitter placito 12. If a man Enfeoff Husband and Wife in Fee, the Husband makes a Feoffment in Fee by Fine, and retakes an Estate to him and his Wife, and to the Heires of the Body of the Husband begotten, the remainder to another in Fee, adjudged, that by this re-taking of the Estate, the Wife is remitted and seised in Fee; a personal Priviledge is here given to the Wife, for she shall have her own Estate, because she cannot here controul the Livery of her Husband, nor aid any others but her self only: As to the Warranty, remove the Estate to which the same is annexed, and the Warranty is gone also; but here in this Case, the Estate to which the Warranty was annexed is not removed; no Estate, but only the Estate for life is removed, and the remainder doth still remain, and so here is a Warranty descended; and before an Entry there can be no Remitter; and tht Warranty was attached before the Entry, and so the point of things happening at an instant, is out of doors, and so prayed Judgment for the Defendant. Flemming chief Justice. It is a good point here to be considered, how far this doth trench upon remainders; here is no Entry found in this Case, and therefore Cases happening upon instances of time, are here out of doors: Nothing doth here vest before an Entry, and before this comes

Statute of 27 H. 8 C. 10: *Plowdens Commentaries*, &c.

Littleton chap. Remitter, fol. 151. placito 672.

Littleton, cap Remitter, &c.

Littleton, cap Remitter, &c

19 H. 6. f. 61.

11 R. 2. Fitz. Tit. &c.

comes the Warranty is here attached, and takes hold before Entry: If the first Livery be overthrown, then the Entry of him which hath right, will bring back again all Estates given by wrong; the Entry will defeat the Livery as to tortious Estates. Williams Justice. In pleading of a Feoffment to uses, he ought to plead the same in this manner, Virtute cujus, intravit, & seisitus fuit in dominico suo, ut de feodo. And as to the pleading of Estates in the Husband and Wife the pleading ought to be, Quod insimul seisiti fuerunt. Flemming Chief Justice, & Williams Justice. There is no Feoffment at all here found in this Verdict, and therefore the same is not good. Williams Justice. No Remitter can be before an Entry, Hitcham for the Plaintiff urged, that here he made the Feoffment, being upon the Land, and was never out of possession, and so this to be a Remitter. The whole Court clear against him in this, that no Remitter can be without an Entry, and therefore the Court advised him to go to a new Tryal, and so to amend the special Verdict in omnibus, and to find the Entry of the Husband and Wife: And as to the point of discontinuance, the Court was clear of opinion, That here was a Discontinuance; and said further to the Counsel, That they might argue this again if they would, for their pleasure only, as Williams Justice said to them, for that it was not worth an Argument. Afterwards Termino Hillar. 10 Jac. B. R. this matter was moved again touching the special Verdict, there being no new Entry found to be by the Husband, but only a continuance of the Possession by him: Hitcham for the Plaintiff moved the Court, Whether it were of necessity to find a new Entry by the Husband, after the Feoffment, he being at that time in possession, and so continued: And further urged, that if it had been to the use of another, there a new Entry ought to have been found in the special Verdict; but here the Husband being then in possession, and in a manner never out of possession, and so not of necessity to have his new Entry found. Flemming Chief Justice. By the Livery here he is out of possession; but in this the Court would give no direction at all, but left the same to the Counsel, to do herein what they thought best; as to the suing out of a Venire facias de novo, for the new Tryal of the matter, it behoved them to consider well of this, for in vain it will be to argue the matter in Law, if there be any defect in the special Verdict, and for the supplying of all defects in a new special Verdict, a Venire facias de novo was sued forth for a new Tryal.

Termino Hil. 10 Jac. B. R.

A *venire facias de novo*, for a new Tryal.

Allen Plaintiff, against *Abraham* Defendant.

An Action of Trespass and Ejectment.

Upon a Tryal at the Bar by an Essex Jury, in an Action of Trespass, and Ejectment, upon Non culp. pleaded, the matter arising upon the Issue, which was as touching the Custom of a Copy hold Manor, whether the Copy-holders, upon their admittances, have used to pay Fines uncertain at the will of the Lord, or Fines certain (S.) the value of two years Rent, and no more: To prove the Fines for to be uncertain, the Plaintiff did shew forth divers Court Rolls, of admittances upon surrenders, and that the Fines taken by the Lord were not certain, but sometimes such a sum, and sometimes another sum, but always under the value of two years Rent, and none above this. Williams Justice, and the whole Court (absent Flemming Chief Justice) to prove a Custom for uncertainty of Fines, and not to be certain two years Rent, there ought to be shewed Court Rolls, and that in Cases of descents, & that upon such admittances they have used to pay for Fines above two years Rent; but Rolls to prove uncertainty of Fines (tho' in Cases of descents) if the Fines be under the value of two years Rent, these are no proof at all, for the Fines ought to be above two years Rent, for it is a good custom, to

pay

pay for Fines upon admittances, the value of two years Rent, or under; and the proofs ought to be in Cases of descent, for in case of a surrender, or a Purchase of a Copy-hold, the Lord may take what Fine he will, but such Fines are no proof to prove the taking of uncertain Fines by the Custom, but the same ought to be in Cases of descent; and as to the Case alledged to prove Fines uncertain, upon a descent where a Copy-holder surrendred to the use of a Widow for her life, the remainder to the use of his Son in Tail, and dies, the Son was admitted, and paid for his Fine above the value of two years Rent; in this Case the Son is not in as by descent, but by Purchase, and so was the Opinion of the whole Court; and so the Plaintiff perceiving the Opinion of the Court to be against him, became non-suit. Plaintiff non-suited.

The Master and Governours of the Queens Free-School of St. *Olives* in *Southwark*, Plaintiffs, against—— Defendant.

Upon a Tryal at the Bar, in an Action of Trespass and Ejectment, upon Non culp. pleaded, the Case upon the Evidence appeared to be this: The Title in Question being for a House, the Question did arise upon the Construction of the last Will of Fredrick Coleman, who being seized of the House in the Parish of St. Olaves Southwark, 22 Eliz. made his last Will and Testament in writing, and thereby devised the same House unto his Wife for her life, the remainder unto A. who was an Alien (if he should then be a Denizen,. and a person capable to take the same) if not, then to the Heirs of his body lawfully begotten, and dies, the Wife dies, A. in the remainder who was the Alien, enters and enjoys the same divers years, afterwards he doth bargain and sell the same unto B. the which Deed was inrolled; afterwards he levies a Fine thereof to the same Bargainee, with Proclamations which were all had, and five years past (the Will having this further Clause in it) and for default of such Issue, the remainder to the Masters and Governors of the Queens Free-School of St. Olaves in Southwark, who brought this Ejectione firmæ for tryal of the Title unto this House against the Bargainee, supposing that A. was an Alien, who made the Bargain and Sale, that he died without Issue living, and that so the Title did accrew and come unto them by the last remainder. Against this for the Defendants Title it was first shewed, that A. was a Denizen the proof of this was upon these probabilities, (S) that in the Deed of Bargain and Sale, he calls himself a Free-man, and so likewise in the Fine: and also in regard that the Statute of 22 H. 8. cap. 8 Rastal Tit. Aliens, f. 10. doth prohibit Aliens from being of any Trade, upon pain of forfeiture of all their goods; and therefore (as was urged, and much enforced) he would not have incurred this penalty (he exercising of a Trade here) without being first made a Denizen: It was also further urged, that if he were not a Denizen; yet here is a Fine levied by him with Proclamations, and five years past, and this should be a Bar to the Plaintiffs Title: It was also further urged for the Defendants Title, that the name of the Corporation is not right, in the devise limited unto them, and so they can take nothing thereby; they were incorporated by the name of the Governours of the Possessions, Revenues, and Estates of the Queens Free-School of St. Olaves in Southwark. and the devise here was only unto the Governors of the said Free-School: It was also further urged, that the Corporation could not take any thing by the said devise, for that the Statute of 34 H. 8. cap. 5. of Wills, hath this Exception in it (S) (Except Bodies Politique

An Action of Trespass and Ejectment.

Statute of 22 H. 8. cap. 8, &c.

Statute of 34 H. 8. cap. 4.

and

and Corporate) so that by this they are excepted from taking by the Will. To this it was answered on part of the Plaintiff, that notwithstanding this Clause and Exception in the Statute of 34 H. 8. It is resolved, Coke 1. pars, fol. 25. in Porters Case, that such a devise is good: And as to the name of the Corporation, by the devise the same is well and sufficiently limited unto them. Williams Justice. A Denizen cannot be made, but by Letters Patents of the King, or by act of Parliament; and such an Issue cannot be sufficiently proved without matter of Record: And if he hath lost his Letters of indenization, he may have a Constat, as appeareth, Coke 5 pars, fol 54. in Pages Case; and proof by Appellation only, is no proof at all. As to the descent, it was answered for the Plaintiffs, that a descent shall bind a Corporation: Admitting here A. to be a Denizen, then the Case is, Tenant in tail, the Remainder in Fee; Tenant in tail bargains and sells the Land, by Deed Inrolled, and afterwards levies a Fine of this to the same Bargainee with Proclamations, Whether by this any alteration is made, as to the Estate in Remainder: It was urged for the Plaintiffs, that no alteration by this was made to the Estate in Remainder, for that the party takes by the Bargain and Sale, and the Fine subsequent enures only by way of confirmation, and the Proclamations do only bar the Issues, but not strangers. Williams Justice. It is very clear, that by this Bargain and Sale inrolled, and by the subsequent Fine, with Proclamations, no alteration at all is made, as to the Estate in Remainder, and so was it here adjudged in the Lady Arabella's Case; but otherwise it had been clearly, if the Fine had been first levied before the Inrollment, for there he should take by the Fine as it is judged, Coke 4. p. f. 70, 71. in Hindes Case; and according to this it was likewise so adjudged in the very point, in one Wilmur and Knowls Case: And where a man doth make a Deed of Bargain and Sale to one, and before Inrollment of the Deed, he levies a Fine thereof unto another afterwards the Deed of Bargain and Sale is Inrolled: this shall now avoid the Fine. Hen. Yelverton, where he takes by the Bargain and Sale, this is no discontinuance; otherwise it is where he takes by the Fine; but here he takes by the Bargain and Sale, and so no discontinuance thereby: The Court were all clear of Opinion for the Title of the Plaintiffs, that they had a good Title, and so much they expressed to the Jury, that the Corporation had a good Title and the Plaintiff claiming under them, and the Jury being ready at the Bar to give up their Verdict, the Defendant offered a Composition, and so the matter was ended by agreement between the parties, and no Verdict given; but a Juror withdrawn, and so the Jury were discharged.

Coke 1. part fol. 25. &c.

Coke 5. part, f. 54. &c.

Coke 4. part, f. 70, 71. &c.

Wilmur and *Knowls* Case

This matter ended by agreement between the parties.

Stanton Plaintiff, against *Barton* Defendant.

An Action of Debt upon a Bond. Statute of 13 Eliz. &c.

IN an Action of Debt upon a Bond, made at S. the Defendant pleaded, that the the same was made upon a corrupt Contract made at another place, and so to avoid payment of the Mony due by the said Bond upon the Statute of 13 Eliz. cap. 8. the Plaintiff replyed, that it was made bona fide, and takes a Travers absque hoc, that the same was entred into upon a corrupt Contract; hereupon they were at Issue; the venire facias for a Jury to try the same, awarded from the place where the corrupt Contract was said to be; upon the tryal a Verdict was found for the Plaintiff. It was moved for the Defendant in arrest of Judgment, that the venire facias was not well awarded, for that the Tryal should have been by a Jury from both places, where the Bond was sealed, and from the place where the corrupt Agreement was laid to be: But by the opinion of the whole Court, clearly the

the Tryal being by a Jury from that place only where the corrupt agreement is laid to be, is a good tryal, and as the same ought to be, and the same not to be from both places: and so the venire facias well awarded. Williams Justice. If two men are bound to one jointly and severally, if he sues one of them upon this Obligation laid to be made at one place, and sues the other also upon the same Bond supposed to be made at another place; this is good, and he may so declare against them severally: And in this principal Case it is clear, that the Tryal ought to be as here it is, by a Jury from that place where the usurious contract is laid and supposed to be. Also if one declares upon a Bond made at Westminster, the Defendant alledged that the same was made by dures at another place, the Tryal here shall be by a Jury from that place where the dures is laid to be; and so in this principal Case: The Court was clear of Opinion, that the Tryal ought to be by a Jury from that place only where the corrupt agreement was laid to be, and the Tryal being had in this manner was good, and the venire facias well awarded: And so by the Rule of Court, according to the Verdict, Judgment was entred for the Plaintiff.

Judgment given for the Plaintiff.

Odington Plaintiff, against *Darby*, & *Al.* Defendants.

IN a Writ of Error, to reverse a Judgment given in an Action of Trespass and Ejectment, the Case appeared to be this: An Ejectione firmæ was brought against two, the Entry in the Declaration was laid to be in the plural number, Intraverunt. But the expulsion and Ejectment laid to be in the singular number, (S) Expulit & Ejecit, this was moved for Error, and whether this were now amendable or not, was the only question. Yelverton Justice. Two years since, two were indicted before me at the Assizes for Felony, in case of life, and found guilty, and this Indictment was in the singular number; and this appearing so unto me, I doubted whether the Indictment was good or not, and so for this cause I made stay thereof, this afterwards I moved at the Table to the Judges, eight or nine of them being then present, to have their opinions herein, and by all of them clearly the Indictment was good, this notwithstanding, and well amendable, and so the same was accordingly amended, and the parties afterwards were hanged for the Felony. Williams Justice. I do very much rely upon this Judgment, but there is a Book Case upon the matter in the very point. 11 H. 6. f. 2. & f. 14. in a Writ De Forger de faux faits, upon the Statute of 1 H. 5. cap. 3. the Writ was imaginavit for imaginatus fuit, and the same was there amended by the award of the Court: There was another Case also adjudged, in an Action of Trespass and Ejectment (which is to be quare vi & armis) vi & armis was omitted Judgment was given for the Plaintiff, and upon this a Writ of Error brought; and by the whole Court the Judgment was affirmed. Man Secundary, shewed forth a President in point, where two Executors brought an Action of Debt, and had Judgment to recover, and this was laid in the plural number; and also they recovered such a sum, pro damnis quæ sustinuit, pro sustinuerunt: Upon this a Writ of Error brought, and the same was amended, and this Case was in 2 or 3 Jac. B. R. And so in this principal Case, by Yelverton, Williams, and Croke, Justices, absent Flemming Chief Justice. The Declaration ought clearly to be amended, and by the Rule of the Court the same was amended accordingly. Nota, That Man Secundary, did then say and affirm, that as the Case before remembred, where the vi & armis was omitted, and Judgment per given here, upon which a Writ of Error was brought in the Exchequer Chamber; and the same reversed for this only Error, and not suffered to be amended.

A Writ of Error to reverse a Judgment in Trespass and Ejectment. Yelv. 224. 1 Brownl. 149. 2 Cr. 306.

An Indictment amended after the parties found guilty of Felony.

11 H. 6. f. 2. & 14. Statute of 1 H. 5. cap. 3.

Declaration amended *per Curiam.* 1 Bulst. 205.

Nota, Priviledge of the Exchequer period.

Nota, In a Case of Priviledge, A. an Accomptant unto the King in his Exchequer, was sued here in this Court, and for this cause, Mr. Baron Southerton came into the Court, and shewed forth his Book of Accompts to the King, and affirms this to be so in Court, and so prayed the Priviledge of the Court for him, and that the Suit here in this Court might be stayed. Yelverton Justice, demanded of Man Secundary, what the course of the Court was in such a Case, and how the Presidents were, and whether the Court hath used in such a Case to grant the Priviledge upon such a bare Averment of the Baron only; or upon pleading of this, and Prayer of the same by the party: Man made answer to the Court, that by all the Presidents, upon the Prayer and Averment of the Baron only, and without any Plea by the party, the Court hath used to grant the Priviledge; and so the same was granted in this case, by the Rule of the Court without any Plea or Prayer of the party according to the Presidents in the like case. Williams Justice, was strongly against this, that the same ought not to be granted upon the bare Averment only of the Baron, but the same ought to be upon the Plea and Prayer of the party himself; and so there are many Books adjudged in point to warrant this, that without pleading of this by the party himself, and Prayer of the same by him; for without this, the Court cannot know certainly whether he be the same party or not, for whom the Priviledge is Prayed.

Jones Plaintiff, against *Smith* Defendant.

In Trespass Case of the Marshalsie. 2 Cr. 314.

Upon an Arrest, the Case appeared to be this: A man was arrested upon a Process to appear in placito transgressionis, at the Court of the Marshalsie, ad proximam Curiam, there held, George Croke demurred upon the body of their Prescription, which is not good, as the same is laid: They shew that the Court of the Marshalsie is an ancient Court, and that they ought to hold Plea, and to have Jurisdiction of all manner of Actions of Trespass, infra virgam; this is too general and so not good, being against the Statute made which limits their Jurisdiction. Also their Prescription goes further, that they have (Tipstaves) which have used to serve the Processes of the Court there: The Body of their Prescription here is not good, being against the Statute of 28 E. 1. which makes a distinction of their Jurisdiction: In 30. Ass. placito 38. An Action there brought upon the Statute of Marlbridge, for driving of a Distress out of the County, and makes no mention of the Statute as he ought to do, and therefore not good, Coke 5 pars fol. 108. a. Sir Henry Constables Case. A man may prescribe against a Statute which is in the Affirmative, but not which is in the Negative, as by the Statute of 17 E. 2. cap. 11. De prærogativa Regis, by which it is provided, Quod Rex habebit Wreccum maris per totum Regnum, this is a Declaration, and affirmance of the Common Law; and notwithstanding this Statute, a man may prescribe to have a Wreck, as appears 11 H. 4. f. 16. Stamford. f. 38. and Fitz. N. Brev. f. 91. A. in the Book of 30. Ass. pl. 38. The Prescription there being to carry a distress out of the County, being a Negative Statute, and therefore void: It is also here further shewed in their Prescription, that they have used to have Tipstaves ore tenus, to execute the Process of the Court, upon command to do this, and doth not here shew that the party which did make the arrest, was portator virgæ, at the time of the Arrest made; for if they command one which is not portator virgæ, for to arrest one, and afterwards, and before the arrest, he is made portator virgæ, and afterwards he doth Arrest the party by force of the command, this Arrest

3 Assis. placito 38. *&c.* Coke 3 pars, fol. 108. *&c.* Statute of 17 E. 2. c. 11.

11 H. 4. f. 16. *&c.*

30 Assis. placito 38.

Arrest is no ways to be justified by him: Also it is further set forth here, that he did arrest him for to appear at their Court, ad proximam Curiam, without shewing of the day certain when the next Court was to be held; for to say at the next Court, this is too general, and so he may be detained forty years before any Court may be held, but it ought to have been shewed, that he was to appear, ad proximam Curiam, to be held such a day, and for this omission the same is not good: And as touching this in very point of exception, is the Case in 9 Eliz. Dyer fol. 262. placito 33. le Case of Godmanchester, where the same exception is taken, where no day was prefixed to the Tenant in the Summons, but only ad proximam Curiam, and for this cause Judgment was reversed: On the other side it was urged for the Marshalsie, that proxima Curia here doth well appear by their Jurisdiction, which is to hold the Court de die in diem, and so the same hath been always used for these forty years, without shewing the day certain when the Court was to be held. As touching a comparison made between this Court, and the Court of B. R. Williams Justice. The Court of Kings Bench is greater than any Court in Eire, for that all Courts in Eire do cease, when the Court of Kings Bench sits. Yelverton Justice. They ought to have shewed here the certain day when the next Court shall be held. Williams Justice agreed in this clearly that it ought to appear, when the same Court should be held; and for this omission, the Plea here is vitious, and this was the clear opinion of the whole Court, that the Plea, by way of Justification of the Arrest, was not good, and so by the Rule of the Court, the party arrested was discharged.

9 Eliz. 2. Dyer, f. 262. placito 337.

The Plea not good, the party discharged.

Succomb Plaintiff, against *Wardner* Defendant.

NOta, The Court was moved for to have a Repleader after a Demurrer, and this without the assent of the parties: To this it was answered, that the same cannot be without the assent of the partits, according to the Resolution in point, Coke 3. pars fol. 52. B. in Rigeways Case, against the opinion in 9 H. 6. fol. 35. But by the Opinion of the whole Court here, in this principal case, no Repleader can be granted here, being after a Demurrer, without the assent of the parties hereunto.

A Repleader after Demurrer cannot be without the assent of the parties. Coke 3 pars, fol. 52. &c. 9 H. 6. f. 35. Mo. 461, 867. 1 Cr. 318. Hob. 113. 2 Cr. 127, 270. Pop. 42. 1 Ro. R. 271.

Coveney Plaintiff, against *Wood* Defendant.

IN an Action upon the Case for a promise, upon Non assumpsit pleaded, a Verdict was found for the Plaintiff, and damages given: Upon motion for the Defendant in arrest of Judgment, the case appeared to be this; the Defendant holding of a House by a Lease for years of the Plaintiff, the Lease being expired, and the Defendant being still in possession, in consideration that the Plaintiff would suffer him to enjoy the possession of the House, until Michaelmas then next ensuing, he did assume and promise to save him harmless; and also for every farthing, which he should be damnified in the interim, by reason of his possession continued in the same, he did assume and promise to pay him two pence: The Plaintiff sets

Action upon the Case for a Promise. Yel. 220.

sets all this forth in his Declaration, and further shews, That within the same time the house was burnt by the negligence of the Defendant, and that so by this he hath sustained the damage of 40. l. the which he did demand of the Defendant to be paid unto him, and that he to pay the same did refuse, and still doth refuse, unde actio accrevit: It was urged for the Defendant, that the Declaration was not good, for that he hath not shewn therein (as he ought to have done) the number of the farthings in which he was damnified, and so for every farthing to have two pence, and to have cast up the same with a Quæ in toto se attingunt, to such a sum, and to have demanded the same. Hen. Yelverton. That the Declaration is good, and that the Plaintiff ought not to shew this in his Declaration, for the promise here was generally to save the Plaintiff harmless: And he hath declared, that he was damnified unto forty pounds in his default; and this is sufficient, as to the two pence promised to be paid for every farthing of damage which he sustained, this is only by way of addition to the former and principal promise, which was to save him harmless, which he hath not done, and so a breach of promise, and the Plaintiff for this had good cause of Action: But if he had here demanded the two pennies proportionably, 2 pence for every farthing, there he ought certainly to have expressed in his Declaration, the certain number of the farthings, but here he only demands the damages, in which he was damnified by reason of the burning of his house, occasioned by the Defendants default and neglect, and so the Declaration is good, and the Plaintiff to have his Judgment. Williams Justice, The Plaintiff here in this case ought in his Declaration to have numbred the farthings, for that by the promise here as it is laid, he is to have two pence for every farthing damage by him sustained, cum inde requisitus fuit, so that the Plaintiff here ought to have expressed a request by him made, and the certain number of the farthings, and so to have demanded two pence for every farthing, Quæ in toto se attingunt to so much, and to have demanded the same sum; for these omissions in the Declaration, the same is not good. Yelverton Justice agreed herein, that the Declaration here is not good, for the Action is framed upon two points (8) upon the promise to save him harmless generally: And secondly, Upon the promise to give him two pence for every farthing damage sustained: If the Plaintiff here had brought his Action upon the first promise to save him harmless this had been good, without numbring of the farthings. Williams Justice agreed clearly with him herein. Croke Justice, the damages here to be given by the Jury ought to be for every farthing, and therefore the farthings ought to have been numbred by the Plaintiff in his Declaration, and for every farthing, two pence damages to have been demanded: The whole Court clear of this Opinion, that the Plaintiff ought to have numbred the farthings, and the two pences, and so to have demanded his damage according to the promise; and for this omission in the Declaration, the same is not good: accordingly the Rule of the Court was, quod querens Nil capiat per Billam.

Judgment *Quod querens Nil capiat per Billam.*

Lindsey Plaintiff against *Astey* or *Aston* Defendant.

Debt upon a Bond for not performance of an award. 1 Ro. R. 5, 6. Godb. 225. 1 Ro. Abr. 242. 7. 9.

IN an Action of Debt upon a Bond, conditioned for the performance of an Award, for non performance thereof, the Action brought; the Case appeared to be this: Two submitted themselves to the award of others, as touching all matters and controversies both Temporal and Spiritual between them; accordingly the Arbitrators made their Award, and for not performance of the same, the Action brought: The Defendant in Bar to the Action, pleads that the Award was,

that

that he should release all Suits unto the Plaintiff, the which he had done, and so demands Judgment, Si, &c. The Plaintiff to this replies, that true it is, Quod tale fecerunt Arbitrium: But they did further arbitrate, that the Defendant should also pay unto him fifteen pound, at the House of I. S. a stranger, at such a time, Absque hoc quod fecerunt arbitrium tantummodo, as the Defendant hath alledged: The Defendant rejoyns, that true it is, that they did arbitrate, that he should pay unto the Plaintiff such a sum; but they did further award, that the Plaintiff should release all Actions unto the Defendant, the which he hath not done; upon this Rejoynder, the Plaintiff demurred in Law. Hen. Finch for the Defendant, that the Bar is good, but the Plaintiffs Replication and Traverse is not good, for the Plaintiff ought not to have taken this Travers, as here he hath done with an absque hoc, that the Arbitrators tantummodo, did make such an Award, this being only matter by way of Implication, which is not to be traversed, as appeareth by 11 H. 6. f. 50. As to the Award it self, it was urged, that this Award, as it was thus made, is not good; for here as the Case was, two did submit themselves to the Award of others, who did award that the Defendant should pay unto the Plaintiff fifteen pound such a day, at the house of a stranger; this was a void; award; they may award matter of inconveniency, as to pay one hundred pound, and the same to be paid presently; or to take notice without any notice given: But to award matter of impossibility, or matter against the Law, such an award is void so here, by their award to make the Defendant to pay mony to the Plaintiff at the house of a stranger, this is void, the same being to make him a Trespasser, and to do that which is against the Law, and so void. Hen. Yelverton for the Plaintiff, That this Rejoynder by the Defendant is not good, the same being a clear departure from the first matter, and so is 5 H. 7. f. 19. & 20. that where a man pleads that last which he should plead at the first, this is a departure: As to the payment here limited by the award to be at the house of a stranger, this is a good award, the Plaintiffs Replication here is good, and cannot be better; the Defendant in performance of the award pleads that he had surceased all Suits against the Plaintiff, according to the award; the Plaintiff replies, that true it is, that such an award was made; but they did further award that the Defendant should pay unto the Plaintiff so much mony; the Defendant at the first in his Bar did plead this as a compleat award, which was not so, and the Travers here is good and well taken. Flemming Chief Justice. This is an idle Travers here taken, he ought to have pleaded the whole award as it was made, and the Travers ought to have come on the other side: also by this Rejoynder of the Defendant, there is a clear departure from that at the first pleaded by him in Bar, and so the Court at this time all inclined to be of Opinion, that the Traverse here taken was not good but the same ought to have come on the other side: The Court also seemed to be clear of opinion, that the Rejoynder of the Defendant, as here it is, is a plain departure, for that he might (and so ought) to have shewed all this at the first: The Court at this time did not over-rule this, but would be better advised, and so without any further opinion herein given at this time, the same was by the Court adjourned to another time. Nota, That afterwards, Termin. Pasch. 12. Jac. B. R. This matter was moved again, and Basepoles Case cited, Coke 8. pars, fol. 97. the Defendant here pleads but part of the award, and omits the other part; he should have set forth the whole award, as it was urged. Cook Chief Justice. The parts of the award here were the Cesser of Suits, the payment of Mony, and release of Actions; the Defendant here in his Bar, meddles only with the Cesser of Suits: This is not sufficient, there was also payment of Mony to be made by him and in consideration of this, he was to have a release made unto him. It was urged again by Henry Finch for the Defendant, in maintainance of his Plea in Bar that he had surceased all Suits, but mentions no more of the award in his Plea, supposing the residue of the award to be void; the submission here was, of all Suits depending: The Plaintiff replies, that they did further award that the

11 H. 6. f. 50

5 H. 7. f. 19, 20

Termin. Pasch 12 Jac. B. R. &c.

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Defendant should pay unto him fifteen pound at the house of another, with a Travers Absque hoc quod tantummodo they awarded, that he should cease Suits; the Defendant Rejoyns, that in consideration of the payment of this mony they did award the Plaintiff to release all Actions Real and Personal unto him. Cook Chief Justice. All this ought to have been set forth in the Bar; It was urged for the Defendant, that the Traverse here taken for the Plaintiff is not good, and that the latter part of the award, as to the payment of the mony, is a void award. Cook Chief Justice, This is a very plain case, that the award here is good; four parts there are in this award, if any part is good, the same is to be performed; and as to the Travers here taken, the same is clearly good both ways. Haughton Justice. The Defendant doth here excuse the non payment of the Mony according to the award, by reason the Release awarded to be made unto him, was not made, the same being demanded. Dodderidge Justice, The pleading here is not good, the award is here pleaded but in part, the Defendant in his Bar intends this to be the whole award; the Replication here is good and so is the Travers. Cook Chief Justice. If an award be made which contains a Feoffment to be made of the Manor of Dale, and also the other to provide one hundred pound to be paid for the same, and some other matter awarded to be done in consideration of the payment, if any part of the award be good the mony is to be paid: Also if a breach of the award be laid to be in a matter out of the submission, this is not good, as to the payment, of the Mony here awarded to be paid in the house of a stranger, this is a good award, and he is to get leave to pay it there, but here in this Case he is to pay it, by the award apud domum of a stranger, so that if he pay it here at the door of the house, this is sufficient: As to the Rejoynder here by the Defendant this is a clear departure from his former Plea, where the submission is to the award of, and with a Bond of performance, and this submission is with an ita quod, they do arbitrate, de & super premissis, there they are to make their award of all matters, or the award will be void for all; for by the ita quod, it is intended by them, to have a final end by this award of all matters; so the difference is, where the submission is in such a special manner, with Bonds to perform the same: and where the Bonds are only to perform, quoddam arbitrium: As in this Case, first the Defendant here pleads an Arbitrament but of one part, of that which was here arbitrated: The Plaintiff replies, that they did arbitrate this, and did further award the payment of mony to him, absque hoc, that the award was made tantummodo, as the Defendant had set forth: the Defendant rejoyns, that they did further Arbitrate the Plaintiff to release unto him, this is not good clearly, but he ought to have joyned with the absque hoc. Dodderidge Justice. There are two faults here in this pleading: First, the Defendant here pleads but parcel of the award and so this is not good. Secondly, he pleads this to be per quoddam scriptum, and doth not say here prædictum scriptum, this is not good pleading. Cook Chief Justice. The Bar is naught, the Replication good, the Rejoynder bad; the whole Court agreed clearly, that the Defendants pleading is altogether vitious, that the Plaintiffs Replication is good, and so by the Rule of Court, Judgment was entred for the Plaintiff.

10 Co. 131. 2.

Judgment for the Plaintiff.

Glasse

Glasse Plaintiff, against *Gill* Defendant.

In a Writ of Error.
2 Cro. 312.
Yel. 227.

IN a Writ of Error, to reverse a Judgment given in the Court of C. B. in an Action of Covenant there brought for not making of a Lease, and shews Quod nihil habuit, of which he should make a Lease, according to his Covenant; the Defendant there pleaded, Quod habuit unde; upon this matter they were at Issue, and the Jury find that he had Land, whereof he might have made the Lease; they find what Estate he had therein, and so Judgment there given for the Plaintiff: The Error assigned was, that there was no good Issue joyned, for that the Plea was bad, and so the Issue upon it bad; the question, Whether the Verdict shall make the Plea good, the Court was clear of opinion, that the Plea was not good, because he doth not therein shew what Estate he had in the Land; for the Plea of habuit of it self is no good and sufficient Plea, without shewing in special matter the Estate he hath: But yet the whole Court was clear of opinion, that the Verdict here hath made the Plea good, and so the Judgment well given, and therefore the Rule was, Quod affirmetur judicium.

Judgment affirmed *per Curiam.*

Sir *John Pooly* Plaintiff against the Lady *Gilberd* Defendant.

Action upon the Case for a Promise Marriage.

IN an Action upon the Case for a promise, upon Non assumpsit pleaded; the Case appeared to be this: The Plaintiff had preferred a Bill in Chancery against the Defendant for Marriage mony by her received; the Defendant upon this, in consideration, that the Plaintiff would stay the Suit there, by him commenced, she did assume to pay unto him 100 l. and also to deliver up a Bond of 40 l. which she had; upon this promise the Plaintiff made stay of his Suit; but the Defendant not performing the promise, upon this the Action was brought, and a Verdict found for the Plaintiff: It was moved for the Defendant, in arrest of Judgment that the Declaration was not good, for that there was no good ground for to raise the promise, there being no sufficient consideration for the same; for it doth not appear in the Declaration, that the Suit in Chancery was a lawful Suit to be there determined, and so if the Suit was not lawful, the consideration to forbear such a Suit, was no good consideration to raise a promise. Williams Justice. This was an apt and proper suit for the Chancery: If mony comes into the hands of the Defendant, being part of a marriage portion, and the Defendant refuseth to pay it, this is a very fit and proper Suit for the Chancery, to sue the Defendant there to execute the Trust reposed in her, the mony being in her hands, and this is in it self but a Trust; if the Plaintiff had only a Subpœna out of the Chancery against the Defendant, and did not make the cause thereof known unto him; if he, in consideration that he would not prosecute any further against him, did assume to pay him so much, this clearly is a good consideration to raise a promise. Croke Justice. The consideration here is good, and this was a fit Suit for the Chancery, being for a Marriage portion with which the party was trusted, and did not perform this trust; here the promise is mutual and reciprocal, and so the Plain-

tiff had good cause of Action, and ought to have his Judgment. Flemming Chief Justice. This is a very plain and clear Case, here the promise is mutual, the Plaintiff promised to stay and surcease his Suit, and the Defendant promised to pay the 100 l. As to the Suit in Chancery, the consideration to stay proceedings in this Suit is a good consideration to raise a promise to pay mony: The Court of Chancery is a mixt Court, the Defendant here had the Mony only in Trust, but performed not the Trust; and for breach of this Trust the Bill was fitly there preferred to have performance of the Trust; the mony with which the Defendant was trusted was 1000 l. part for Legacies, and part for Marriage portions, 300 l. of which was in the Defendants hands for Marriage portions; this was matter of trust, and a fit Suit for the Chancery to have this performed; The forbearance and stay of this Suit is a great ease to the Defendant, in regard of Travers and expences; and this is a good consideration, and so the whole Court agreed clearly, the consideration as it is laid to be good, that the Plaintiff had good cause of Suit, that the Declaration is good, and by the Rule of the Court, Judgement was entred for the Plaintiff.

Judgment given for the Plaintiff.

Billing Plaintiff, against *Knight* Defendant.

An Action upon the Case for words.

IN an action upon the case for words, which, as appeared by the Declaration, were laid to be these, & spoken in this manner by the Defendant, to some others, of the Plaintiff (S) That he came to such a House where one lay sick in his Bed, and the Plaintiff got upon the Bed, and with his knee did break his Blood-bulk, and that thereby he had killed him: For these words an Action was brought, and upon Not guilty pleaded, a Verdict was given for the Plaintiff: It was moved, in arrest of Judgment, that the words were not actionable, the Declaration not good, having not therein averred especially that the party was dead: The whole Court agreed in this, that the Declaration is good, and that if it doth not appear in the Declaration that he was living it shall be intended that he was dead. Coke Justice. If one saith of another, that he hath murthered such a one (who is living) these words are actionable. Flemming Chief Justice denied this to be so; but if he had said that he had poysoned him, otherwise it were: In this principal Case the whole Court agreed clearly the words to be scandalous, and well actionable, the Declaration to be good, without any averment that the party was dead; and so by the Rule of the Court Judgment was given, and so entred for the Plaintiff.

Judgment given for the Plaintiff.

Erington Plaintiff, against *Erington* Defendant.

In an Action of Trespass and Ejectment.

IN an Action of Trespass and Ejectment, upon Not guilty pleaded, the Jury found a special Verdict, and upon this Verdict, the Case appeared to be this: Roger Erington, and Katherine his wife, were seised of the Land in question, as Tenants in especial Tail, the Reversion in Fee in Roger, Roger dies, Anthony the Reversioner, and the Issue in Tail, by his Deed indented, and in the lifetime of Katherine the mother, makes a Lease for forty years to Robert Erington, and this to begin after the death of Katherine, rendring for the same a certain yearly Rent, and dies, the Reversion descends and comes unto Jane Erington, who

who in the life time of Katherine levies a Fine, Sur Conusance de droit come ceo, with Proclamations with her Husband of this Land unto J. S. the Proclamations are had, afterwards Katherine the Mother dies, the Conusee of Jane enters, the Lessee of Anthony the Son re-enters, and being ousted by the Conusee brings the Action by his Lessee of Trespass and Ejectment: The only question in this Case was, Whether the Conusee by Fine with Proclamation, shall now avoid this Lease for years, formerly made by the Heir in Reversion, who then was inheritable unto both the Estates, (S) the Estate tail, and the Estate in Fee-simple: It was argued by Davenport, and by Sir Robert Hitcham, for the Plaintiff, that the Conusee shall not avoid this Lease, but that the Lease remains in its force, as issuing out of the Reversion; and as to this, the point is no other but this; the Wife and Mother was Tenant in tail, in possession, the Son and Issue inheritable unto the Estate tail, and having then also in him the Fee, in the life of the Mother makes a Lease for years, to begin after her death: It is in this Case first to be considered how this Conusor shall be said to be in, whether he shall be said to be in by force of the tail, and so this to precede the Lease, or not: As to this he shall not be said to be in by force of the tail. In this Case it is to be considered, 1. The validity of this Lease against the Lessor himself. 2. Of what force and effect the same is against Jane the Reversioner. And 3. Of what force the same shall be, as against the Conusee of Jane. As to the first these things are to be considered: 1. What Right and Estate he had which made the Lease; As to this, First he was Heir in tail, and not only Heir apparent, but he was actually seised of the Fee-simple; also the Deed indented, by him made, doth operate by way of conclusion: He had a good Estate to charge the possession, whensoever the same should come unto him, and by this he doth charge the Interest, and the right of the Reversion, so that this was a good Lease by way of Estoppel against the Lessor himself, and a good Lease by way of Estate and Interest, out of the Reversion; and to warrant this, was cited Smith and Stapletons Case, in Plowdens Commentaries, fol. 427. Where it is resolved, that such a Lease made by a Remainder man in Tail, with Fine and Proclamations, to be good, and the Fine with Proclamations to be a sufficient Bar, to make good the Term against the Estate tail. 2. Of what force and effect this Lease was against Jane, the Heir special; as to her this Lease was not void but voidable by reason of the Rent reserved on the same; and it may be more beneficial to the Issue, to have the Rent than the Land, by the Statute of Westmin. 2. Tenant in tail; neque per factum, neque per Feoffamentum ought to prejudice the Issue in Tail; yet by the Book of 44 E. 3. fol. 21, 22. in Octavian Lumbards Case, that Tenant in tail may charge the Land with a Rent charge for a Release of right; and this is good, the same being for the benefit of the Issue; and so by 46 E. 3. f. 4. a Tenant in Tail may alien for the benefit of his Issue, and this is good; and in these Cases the Issue in tail is bound, and so in this Case here, this Lease being with a reservation of Rent, the rent may be as beneficial to the Issue as the Land; and so this Lease here not absolutely void, but only good at the will and election of the Issue in tail: But the Issue in tail shall not be estopped by the act of his Father. But as touching Estoppels and their differences, Syms case. Coke 8 pars. fol. 54. B. cited between Estoppels or Conclusions which are with recompence, and others which are upon affirmance or admittance of any matter, by matter of Record; in the first by the acceptance of the recompence he and his Heirs shall be estopped, in the other not, as there appears. 3. As touching the validity of the Lease against the Conusee, and herein it is to be considered what Estate she had which levyed the Fine; she had the Reversion in Fee-simple, and was Heir in tail: Then as touching the Conveyance by Fine with Proclamations, this doth pass the Reversion by way of Estate, and the Interest in the Tail extinct: It appears by Sir George Browns Case, Coke 3. pars, fol. 51. That Fines by conclusion shall bind the Issue in tail, upon the Statute of 32 H. 8. cap. 36. It is next to be considered, how the Conusor, after the death of the Wife

Points to be considered.

Plowdens Comment. fol. 427.

44 E. 3. fol. 21, 22. &c.

46 E. 3. f. 4.

Coke 8. pars. f. 54. B. *Syms* Case.

Coke 3 pars, fol. 51. &c.

Statute of 32 H. 8. c. 36.

Wife, the Mother shall be said to be seised, whether of a Fee by Fiction or Imagination, or of an absolute Fee simple: He shall be said to be seised, Ut de feodo simplici; and so is Walsinghams Case, Plowdens Commentaries, fol. 553. If the Conusee was here seised of the Estate tail, yet he should not avoid this Lease, but the Issue in Tail (if any one) ought to avoid the same; but this power is not here given to the Conusee by the Fine; but here the Issue could not avoid this Lease, because he had only a possibility, which possibility he could not transfer over to the Conusee, in 33 H. 8. Dyer fol. 51. placito 17. If Tenant in tail, before the Statute of 27 H. 8. cap. 10. of Uses, makes a Feoffment in Fee to the use of himself and his Heirs, afterwards he and his Feoffees makes a Lease for years, rendring rent, after the Statute of Uses. Tenant in tail dies seised, his Issue alienes the Land by Fine, before any Entry made upon the Termor or acceptance of rent: There it is held, that this Conusee shall not avoid the Lease made by Tenant in tail, rendring rent, but that this Lease shall continue good; no more shall the Conusee here in this principal case avoid this lease for years, but is to hold the Land subject unto this Lease, and so prayed Judgment for the Plaintiff. John Moor, & George Croke, argued for the Defendant: The question here only is, Whether this Fine, thus levied by Jane the Daughter and Heir, shall make the Lease for years, before made by Anthony, to be good or not, and whether the Purchaser by Fine shall be concluded by this, or not: It was urged for the Defendant, that he shall not be concluded by this, but may very well avoid this Lease, and shall hold the Land discharged of this Lease, as long as the Estate tail hath continuance, any Issue in being is inheritable to the Estate tail: The point considerable here, is, when this Lease shall begin, if not during the Estate tail, then no Title hath the Lessee to have this, until the Estate tail be spent. Admit this be so, then the Issue in tail doth levy a Fine, whether the Estate be barred, or be by this extinguished: This is the great and sole question in this Case, if the Estate tail be only barred, then the Conusee is not to be charged with the Lease, as long as the Estate tail hath any continuance, as long as there is any Issue living as might have the Estate tail (if it were not for the Fine) which did bar him: It is here to be first considered, how this Lease doth charge the Estate at the beginning, as to this, the Lease is merly void as against the Issue, because it takes not hold of the Estate tail, the same by limitation being not to begin till the Estate tail be spent and not before; whereas it hath been urged, that both the Estates are charged with this Lease (S) the reversion by way of Interest, and the Estate tail by way of an Estoppel; this cannot be so, for the Estate tail is not at all bound by this, for where a thing leased may enure, by way of Interest, the same shall not be taken or construed to enure also by way of conclusion, being one and the same thing, and this is proved by Treports Case, Coke 6 pars. fol. 15. where Tenant for life, and the remainder in Fee, by Deed indented join in a Lease, this there resolved to be the Lease of Tenant for life, during his life, and the confirmation of him in remainder, after the death of Tenant for life, then it shall be said to be the Lease of him in remainder, and the confirmation of the other; and so is 6 & 7 Eliz. Dyer f. 234, 235. plac. 18. And though the Lease was by Deed indented, yet this should be no conclusion, for when the Lease enures by way of passing of an Interest, the same shall not be taken for any conclusion, for the Law doth abhor conclusions: Here in this principal case the Lease doth arise out of the Reversion, and not out of the Estate tail; the Reversion is only charged with this, but not the Estate tail, the Heir in tail here having also the reversion in Fee, makes a Lease for years, to begin after the death of his Mother; the Issue in tail cannot make this Lease good by any acceptance of the rent reserved, the Heir in tail is not here charged as Heir in tail, but as the Heir in reversion, and Capels Case, Coke 1 pars fol. 62. opens the reason of this Case very plainly: It is there said, that there is no Land but may be charged one way or another; it is there said, that Tenant in tail may charge the Estate tail, and he in reversion, the reversion; the reason of this is, because that every Estate may be charged,

Plowdens Commentaries f. 553. &c.

33 H. 8. Dyer fol. 51. &c.

Statute of 27 H. 8 c. 10. of Uses.

Coke 6 pars, f. 15. &c.

6 & 7 Eliz. Dyer fol. 234, 235. plac. 18.

Coke 1 pars, fol. 62. &c.

charged, he in possession may charge the possession, and he in the reversion the reversion; here in this principal Case the reversion is charged not the Estate Tail; by this Fine here leived, the Estate tail is not extinct, but only barred, and so is it in Sir George Browns Case, Coke 3. pars fol. 51. Yet the Conusee hath the priviledge of the Estate tail: If the Tenant in tail grants a Rent charge, or makes a Lease for years, and afterwards levies a Fine, the Lease or Rent charge shall have continuance as long as the Issue should inherit; but it is clear, if the Estate tail be extinct by the Fine, the Lease and Rent charge is then gone and at an end, Coke 9 pars fol. 141. Beamonts Case: There it is questioned, whether the Estate tail be extinguished or not, there held, that the Fine is but a Bar to the Estate tail, to bar the Issues from claiming by force of the Entail, but no extinguishment of the Estate tail, and so the Conusee here shall hold the Land discharged of this Lease, and so concluded, and prayed Judgment for the Defendant. Williams Justice. Admit that Jane had acknowledged a Statute in the life time of the Mother, and after levies a Fine with Proclamations, the Mother dies; whether shall this Statute be now extended or not, clearly it shall. Flemming Chief Justice agreed with him herein: And put the Case further, if the son in the life time of the Mother, had acknowledged a Statute and dies, and the daughter levies a Fine in the life time of the Mother, the Mother dies, shall this Statute be now executed or not? such a Statute thus acknowledged may well be extended. Williams Justice, The question in this principal Case is, Whether the Estate tail hath continuance or not, in the eye and judgment of the Law; in this Case clearly there is no continuance of the Estate tail, but the Lease for years shall now be good presently, and shall now have its essence and beginning. Flemming Chief Justice. This Lease is clearly good, and shall have its beginning and continuance presently, and is not to be avoided by the Conusee of the Fine. At another time this matter was moved again. Williams Justice. By this Fine thus levied, the Estate tail is gone and extinguished, and so is Sir George Browns Case expressly, that by the Fine the Estate tail is quite gone, barred and extinct, Coke 3 pars, fol. 51. B. Here by the Fine with Proclamations; he passed the Estate tail extinguished, to the Conusee who cannot avoid this Lease for years thus made. Flemming Chief Justice. When the Conusee comes to have the Land, this is a Fee simple absolute in him, and the Estate tail is clearly now extinguished; as to the Priviledge of the Estate tail, it is a plain case that the Issue only is inheritable: If a Lease be made by Husband and Wife of the Wives Lands, the Wife dies, the Husband shall not avoid this Lease by him made: If Tenant in tail enfeoffs his Issue, who at his full age makes a Lease for years, the Father dies, the Son is remitted, yet he shall not avoid this his Lease; and so is 33 H. 8. Dyer placito 51. and Littleton fol. 147. Williams Justice said unto Yelverton, who argued for the Defendant the Conusee, you may argue this Case as long as you will for your pleasure, but it is a very plain and clear Case against you. Croke Justice. The Conusor shall not avoid this Lease. Flemming Chief Justice. A Conusee by Fine shall not aver the continuance of the Estate tail. Williams Justice. If Tenant in tail, the Reversion to him in Fee, do acknowledge a Statute, and afterwards levies a Fine, this Statute is good, neither shall the same, nor an Elegit upon it, be avoided by the Conusee. Flemming Chief Justice. The Conusee shall not have the benefit of an averment, as to say and aver that the Estate tail (after this Fine so levied) hath any continuance. Croke Justice. If the Son being Issue in tail, makes a Lease for years to begin after the death of his Mother, tenant in tail, and dies, and then the Daughter, Issue in tail makes another Lease for years to begin after the Mother and afterwards levies a Fine, then the Mother dies, he demanded which of these two Leases shall now first begin? Williams Justice, clearly that which was first made. Croke Justice. Nunquam in æternum, they were both Issues in tail, the tail extinct, they were never seized by force of the tail; the Mother only had the Estate tail, and the Daughter only Heir to the Estate tail, but where being in

Coke 3 part fol. 51. &c.

Coke 3 part, f. 51. &c. B.

33 H. 8. Dyer Placit. 51. &c.

in possession of the Estate tail, and then levies a Fine, this is a Bar by the Statute of 32 H. 8. cap. 36. Williams Justice. This is a plain Case that the Conusee cannot avoid this Lease for years, the rest of the Judges agreed herein with him but no Judgment at this time given, but the same was by the Court adjourned unto another time to be further debated on; afterwards some of the Judges being dead, and new made in their places, Termin. Mich. 11 Jac. B. R. This Case was moved again, and argued by Counsel on both sides. Coke Chief Justice. If the Mother had died in the life time of the Son, the Lease should then have been good presently; it shall be good against him by way of Estoppel. Dodderidge Justice. If Tenant for life grants a Rent-charge, and he in Reversion also grants a Rent-charge, the Tenant surrenders to the Reversioner, the Land shall now be presently charged with two Rents. Coke Chief Justice agreed the same to be so, but yet the charge of the Lessee shall have the priority to divide the case, and so to single out the points; allow the Reversion to be here in the Donor, he in the Reversion grants a Rent-charge, this doth charge his Reversion in point of Interest: The Issue in tail levies a Fine in the life time of the Mother she dies; The Question now is, Who shall have this Land, clearly the Conusee shall have the Land; the Estate tail here by this Fine is not extinct, but barred, and the Donor in whom the Reversion was, shall not have this; the Fine levied in the life time of the Ancestor doth bind in point of Estate, and so it hath been adjudged here, that the tail is barred: But the charge is not here to begin, as long as the Estate tail hath any continuance, the Conusee is to have a Fee determinable, upon the death of the Issue in tail: The Court was now clear of Opinion, that the Estate tail here is not extinguished by this Fine, but only barred. Coke Chief Justice. If the Issue in tail, in the life time of his Ancestor, makes a Lease by Indenture, this is good against him by conclusion; if afterwards the Estate tail comes unto the Sister, this Lease shall not bind her, because this conclusion doth not bind the Estate tail: A stranger shall take advantage of all void things, but not of voidable, this only is for privies to do, but here this Grant or Lease is meerly void, as to bind the Estate tail. Dodderidge Justice. The Conusee here hath not two Fee-simples, he hath only one Fee-simple, and no more, and this will be the point in this Case. Coke Chief Justice. All charges here shall stand and remain, until the death of the Mother; the pinch of the Case here will be, to see and to examine how and in what manner the Conusee here shall be said to be in Dodderidge Justice. Tenant in tail, the Reversion in Fee to the Issue, who levies a Fine, by this he doth pass away the Reversion depending upon the Estate tail; but if the Tenant in tail dies the Conusee here hath not two, but one Fee simple. Coke Chief Justice. But he hath here such a Fee-simple, as shall be discharged of the Lease, during the continuance of the Estate tail. Dodderidge Justice. He shall be discharged of all charges which do not come under the Donee in tail; if the Reversioner grants a Rent-charged, and the Tenant for life surrenders to him, he shall hold the Land charged presently. Coke Chief Justice. The Conusee here shall have a Fee-simple determinable with the Estate tail, and subject to no charge as long as the Estate tail doth continue, if he have no Reversion in Fee, yet he shall have a Fee-simple, usque, until the Estate tail be determined; and this is clear by Archers Case, when they meet together the one shall not determine the other, the same shall have continuance as against all strangers. Dodderidge Justice. True it is that as against all strangers which do not claime under him, it shall have continuance but not against others. Coke Chief Justice. Clearly if the Mother dies, leaving the Son the Lessor living, this shall operate against him by way of conclusion; it hath its operation in point of Interest only out of the Reversion, the Son hath only a possibility to have the Estate tail: If after the Lease made, he himself had levied the Fine to the Conusee, this Lease should then have been good against this Conusee; but here he dies, and the Daughter the next Issue is not bound by this, and the Conusee here is disabled for to say, that the Conusor had not a Fee simple at

Statute of 32 H. 8. c. 36.

Termin. Mich. 11 Jac. B. R. &c.

at the time of the Fine levied. Dodderidge Justice. If a Parson or a Prebend makes a Lease rendring Rent, and the Successor accepts the Rent, this acceptance is void, and shall not make the Lease good; otherwise it is in case of an Abbot, and so is 24 H. 8. Brooks Cases, fol, 10. placito 54. & 11 E. 3. Fitz. Tit. Abbe pla. 9. & Fitz. Tit. Juris utrum placito 3. The difference between a Lease for years, and a Lease for life: If no Fine had been in this case, but the Daughter had entred and received the Rent, whether should this acceptance make the Lease good. Cook Chief Justice, clearly it shall not: And so without any further Argument, this case was adjourned, and no Judgment given in it the one way or the other, nor was it ever moved again, but the same ended by agreement between the parties, as I was informed.

24 H. 8. *Brooks* Cases, *&c.*

Ended by Agreement.

Creswick Plaintiff, against *Rooksby* and three other Justices of the Peace, Defendants.

Entred Trin. 10 *Jac.* B. R. Rott. 1647.

IN an Action for false Imprisonment against four Defendants, being Justices of the Peace, for assaulting, beating, wounding, and Imprisonment, and this laid to be done 7 Augusti 9 Jac. The Defendants, as to all (but the Imprisonment) plead Non culp. and as to the Imprisonment, they do justifie, and for the maintainance of their Justification, do relie upon the Statute In anno primo Mariæ, capite 3, made against the disturbing of Preachers in the Church in their Sermons, and by way of application of the Statute, and the effect thereof to the present occasion: after recital of the Statute, they in their Plea set forth, and shew, that the said 7 August 9 Jac. one Robert Thompson, a licensed Minister came into Shervild Church in the County of York, for to preach there, and that then and there the Plaintiff, with another with him (being Church wardens) laid hands on the Minister violently, and so hindred his preaching, volenter, & de industria, & sic, maliciose, & contemptuose, they did against the form of the Statute; and the Defendant Rooksby shews, that upon the apprehension of the Plaintiff for this, he was brought before him, being a Justice of the Peace, and he being convicted of the Offence by good and sufficient Witnesses before him, and three other Justices of the Peace; they for this Offence the said 7 day of Aug. 9 Jac. mandaverunt eum ad prisonam, according to the said Statute, and so do justifie the same; upon this Justification the Plaintiff demurred in Law: This Case being a new Case was long argued several times in this and other Terms following, by, Davenport and George Croke for the Plaintiff, and John Moor and Henry Yelverton for the Defendants, and afterwards argued at large by all the Judges: It was urged for the Plaintiff, that this Plea was not good, the Justification here being grounded upon the Statute of 1 Mariæ only, the which ought to be truly recited; as it is in the Justification, the recital is, That if any one shall maliciously and contemptuously, &c. and the Statute is, or contemptuously, in the dis-junctive, and not in the copulative; and so no such Law made; upon which they justifie; and so the Plea vitious, and the Justification not good: A second variance urged in the recital of the Statute, the recital being, That if any one, apertis prædicationibus, &c. in the plural number; if not in the plural, but in the singular number, then it is not within the Law: Another variance urged in the Justification, in the conclusion thereof, the commitment ought to

An Action for a false Imprisonment, and a Justification thereof.

Statute of 1 Mar. cap. 3.

7 Aug. 9 Jac.

to have been, per majorem partem, and here it is per meliorem partem, this urged to the form of the Plea. It was urged also that the matter of the Plea was not good, for that nothing is shewed herein to be done by the Plaintiff, malitiose vel contemptuose against the Statute, and so not good: It was also urged, that the conclusion of the Plea is not good, the same being with an (sic) so that no issue can be taken upon this: It was urged also that the Statute doth express, that within six days next and immediately after the said accusation so had and made to the said Justice, with one other Justice of the Peace in the said Shire; And if they the said two Justices of the Peace, upon their examination, find the party accused guilty, that then the said two Justices shall commit the person to the Goal. Here the Conviction and Commitment is laid to be before four, and that they four did commit him to prison; Whether this be within the Statute, and according to the rule of Omne majus continet in se minus; It was urged further, that he was diligently examined, and found guilty by two sufficient witnesses, and doth not shew who they were, and that he was found guilty of the Offences aforesaid, and doth not shew nor express what they were; these exceptions were taken to the form and matter of the Plea, by way of Justification, to all which the Judges at several times delivered their Opinions. Flemming Chief Justice. The Church wardens by their Canons, are prohibited from suffering any stranger to preach in any of their Parish Churches, without shewing of their License, but it appears here, that he was a Licensed Minister, and so known to be to the Justices of the Peace, and that they have done very discreetly, in their examination of the matter complained of before them: And it plainly appeareth, that all which was done by the Plaintiff was done out of malice: As to the Exception taken for the omitting of these words, (malitiose & contemptuose) in the allegation of the fact, this is not bad, if it were, yet the same is well remedied, and made good by the conclusion, by which it was laid to be, contra formam Statuti; also the very act it self here includes it, malice apparent, without any such averment at all; in as much as he hath here in his Justification recited all the Statute as it is, the omission afterwards of the word (malitiose) will not be much material; but otherwise it would have been, if he had recited the Statute before, and did say unto the Counsel, that in their Exceptions, they did stand too much upon chips. Dodderidge Justice. There are two material matters urged and relied on by the Counsel for the Plaintiff. First, The recital of the Statute. And secondly in the body of the matter; the conclusion here is good, for that the fact appears to us judicially to be maliciously done; that which is here in the conclusion is implyed in the fact, and therefore good: As to the recital in the copulative, where the Statute is in the disjunctive: As to this, there is a plain difference, between an Action grounded meerly upon a Statute, and an Indictment upon a Statute, and in a Justification by reason of a Statute: In the two former, the Statute ought to be very strictly recited, as the same is, and according to the very words of the same; but otherwise it is in the third, for there it is sufficient to recite as much of the Statute only, as will serve the turn of the party reciting the same, and to omit the residue, and so this Exception is not material: These two words (S) malitiose, & contemptuose, are Synonyma's, and the one of them cannot be done without the other also, for malice cannot be without contempt. As to the body of the pleading here, the same is good, and he is not to shew how in every particular, as the Exceptions are taken: If a man be bound to shew a sufficient discharge of a Rent-charge granted, he ought there in pleading to shew the same certainly what discharge it is that so the Court may adjudge of the sufficiency of it, but as this Case here is the Statute hath made the Justices of Peace Judges of the cause, of the sufficiency of the Witnesses, and of their testimony, and therefore the same is not to be particularly shewed, they have here admitted of them to be sufficient witnesses, and if they were not sufficient we ought not for to examine this here; and Specots Case, Coke 5. pars, f. 51. comes not unto this Case, for there he is a Minister of the Court, and so as a Minister, he is to certifie the certainty

Nota, The difference.

Coke 3 pars, *Specots* Case, fol. 51.

certainty of all their proceedings to another Court, notwithstanding that he there is a Judge of the insufficiency. Croke Justice. This Case is a Case of very great moment and importance, and many eyes are upon it; he agreed the difference taken before by Dodderidge; for where the action is not grounded upon a Statute, but where the Justification is by reason of a Statute, here the Statute is but as an Inducement unto the Justification: As to the exception, that this was here done by four Justices of the Peace, whereas the Statute names but two; this exception is of no force at all, for if two may do it, à multo fortiori, four may so do. Flemming Chief Justice. If this were in a Declaration, upon the Statute of 8 H. 6. cap. 9. for a forceable Entry, it would differ from this Case; agreed the difference taken by Dodderidge, malitiose & contemptuose, are Synonyma's, and only set down for aggravation of the Fact; as to the exception taken, that the proceedings here were before four Justices of the Peace, and the Statute names but two; the true meaning of the Law-makers is here to be considered, which only was, to have the matter to be duly examined, and that the same was not to be done by one alone, le addition here of four, meets just with the true reason of the Law; for if twenty Justices of the Peace were then and there present, this doth nothing at all hinder the operation of the Law, but that which is done by them shall be good and effectual; and so every ways considered, this Statute upon which this Justification of the Defendants is grounded, ought not to have and receive so strict a construction and exposition; this is a leading Case of this nature, and being upon this Statute, ought to be very well considered of before any Judgment given herein, and so a further day was given for the Court to be better advised in this Case. Afterwards, Termin. Pasch. 11 Jac. Reg. B.R. this Case was moved and argued again. Flemming Chief Justice, by this Statute clearly the Justices of the Peace are made the Judges of the Cause. Dodderidge Justice. This is the first Case that I ever heard of to be brought upon this Statute, and a Justification to be made: The chief point here, upon which the doubt is in this part of the Plea where it is expressed to be done (per meliorem partem for majorem) much difference there is between them: The answer to this hath been made, that the Justification doth not go so far, the Justification here goes only to the day; but if he had pleaded a continuance of the Imprisonment, the Justification then, as it is here, would not have been good. Croke Justice. The difference will be, where the variance is in the aggravation of the offence and where the same is in the recital of the Statute; much difference may be in this, malitiose & contemptuose, these are all one. Dodderidge Justice. Malitia, est malus animi effectus, wickedness: these are all one, they are Synonama's, and if either of them be expressed, it is good. Flemming Chief Justice. The Exceptions taken to the Justification, have been very well answered, the matter not justifiable, meliorem partem for majorem; in the Justification here they relie upon the Law whether the same be good by Law, or not, malitiose & proditore, these are Adverbs, and are only expressed to demonstrate the act: A thing cannot be acted and done contemptuously, but the same will be done maliciously, and so must be construed to be, for the one of them cannot constare without the other: The Case here is very tender on both sides; the Church Wardens on the one side, who by their Canons, are not to suffer any one to preach in their Church, without shewing of his License to them: It is only here expressed in this manner (S) (Et conabatur avellere) and then imposuit manus upon him, dato opere, vel destinato consilio, agitur & violenter, and so for this time this Case was adjourned for the Court to be better advised, before they delivered their full Judgment in this Case, the same being a Case of so much, and so great concernment. Afterwards, Termin. Trin. 11 Jac. R.B.R. This Case was moved again, and then Geo. Croke for the Plaintiff, cited 33 H. 8. B. Brook tit. Parlament & Statutes placito 87. That if one in any action or pleading, doth alledge a Statute, and doth misrecite it in matter, or in the year, day, or place, the other may demur generally, for there is no such Statute, and then there is no such

Statute of 8 H. 6. c. 9.

Termin. Pasch. 11 Jac.

Termin. Trin. 11 Jac. R.B.R. &c.

33 H. 8. Brook Tit. &c.

Case between *Gosnal* and *Kindlemas*. 32 Eliz.

Law; for that every one which meddles with this, ought to shew the Law veraciter: And it was here in this Court resolved, in 32 Eliz. in a Case between Gosnall and Kindlemas, that if one in his Declaration doth recite a Statute, which he needs not do, and misrecites the same this misrecital shall make his Declaration bad. Flemming Chief Justice. The omission of a Law will not be helped by any means. Dodderidge Justice. It is very absurd for one to recite a Statute, and to misrecite it, as (or) for (&) (better part) for (the greater part.) In an Action of Debt, brought for non performance of an Award, the Defendant pleads no such Award made; the Plaintiff avers the Award made, and recites but part of it, and relies upon this: It was here adjudged, that there was no such Award made, because he did not recite the whole Award. Flemming Chief Justice. In the recital of a Statute, we are all of us to take notice of it; the Court did advise the parties to plead to an Issue, and so to have it tryed in the Country; otherwise, whensoever they demanded the Opinion of the Court, they should have it, and so without saying any more at this time, the same was adjourned over, for the further advice of the Court, before any Judgment given. Afterwards (S) Termin. Hiliar. 11. Jac. B R. This Case was moved again and argued by all the Judges, and Judgment given against the Plaintiff. Haughton Justice. Exceptions have been taken to the manner of this Justification, as it is pleaded; for the matter of form, five Exceptions have been taken, and notwithstanding four of them, Judgment here ought to be given against the Plaintiff, but for one of the Exceptions only, Judgment ought to be given for the Plaintiff, and against the Defendants: As to the first Exception taken, being (&) for (or) this is only a misprision, and the pleading good for all this; if it be laid so that the Statute upon which the Justification here is grounded, warrants this in substance, this is sufficient, notwithstanding there be some variance in matter, if so be the same be no material variance, and so in any Action grounded upon a Writ or upon a Statute, if the matter be good it is sufficient, as upon the Statute 8 H. 6. cap. 9. of Forcible Entry, if disseised one with force, or put out with force, if there be matter sufficient, it is good: The intention of the Law-makers, was, to punish the entry and detainer with force: A second Exception, and for this Exception the Plea is not good, the Plea here is grounded upon a Statute, and there ought to be such a Statute upon which the Plea is grounded, or the Plea not good; as to the variance, the Justices, or the most part, this is but matter of surplusage; but having made this part of the Statute, the Statute ought to warrant this, or the Plea not good; the Statute here saith no more, but that the Justices of Peace shall commit him to the Goal: As to the variance, meliorem partem, & majorem partem, these do differ in themselves; if the Statute had said per meliorem partem, and the party in pleading saith, per majorem partem, here is no difference; but otherwise it is here, when the Statute saith per majorem partem, and the party in his Plea saith per meliorem partem: If the party do go further than he needs to do in a point of Surplusage, upon a proviso in a Statute, and mistakes the same, there is then no such Statute to warrant this; and tho the recital be of a thing, which ex necessitate, needed not be alledged, and a variance and misrecital herein, this shall make the Plea bad, for now by this recital, he hath made this also parcel of the Statute: As to the other Exceptions, the Plea of Justification is good, notwithstanding those exceptions. Et sic malitiose. This is good and sufficient, and the Plea is good, though he do not shew how he was licensed, the Plea is good, and it is sufficient to say generally, that he was a licensed Minister; the other may say, that he was not licensed, and so issue may be joyned upon this, but for the single Exception before the Plea is not good, and so Judgment for this cause is to be given for the Plaintiff against the Defendants. Dodderidge Justice. The sole question in this Case is, whether this Justification here be good, or not: No Exception hath been taken to the matter, but to the manner of the Justification. The matter of the Exceptions may be reduced unto two heads: First, That there is

Termin Hill. 11 Jac. B. R. &c.

Statute of 8 H. 6. c. 9.

is no such Law as is mentioned. 2. If there be any such Law, yet he hath not pursued the same. As to the first that there is no such Law; for that he hath misrecited the same, and that in these two points. 1. In naming of (and) for (or) the second in the act of Justice, the Statute saith the greater part, the Defendant here in his Plea, saith the better part, Et aliquando major pars vincit meliorem; but yet for all this Judgment ought to be given against the Plaintiff; and if by his Plea, it appears that there were such a Law, this is sufficient for us, and we are to take notice thereof. The question now is, Whether he have in his Plea pursued the Statute, or not. As to the first, these words conjunctive & disjunctive, are to be taken promiscuè, and when the sense is the same, they are all one; also malitiose & contemptuose, they are all one, the one cannot be done without the other, malitiose agit, saith one, qui dato opere, male agit; so that the same is all one in sense, and the one includes the other, so that there is a variance only in Letter, but not in sense: Another reason may be drawn from the penning of this Law, in which Law these words (and) and (or) are used promiscuously, as sometimes (and) when it should be (or) and sometimes again (or) when it should be (and) as in the beginning of the Statute, willingly and of set purpose all one overt and publique word, fact, act or deed, (or) there ought to be (&) molest, vex, let or trouble, there is (or) for (&) a Preacher licensed, allowed, or authorised, (or) there for (&) so that the same is all one, and this is no material variance here, having recited the same true in sense. Another reason upon another Branch, which the Statute hath, or by any other unlawful way or means: If he had recited this only, this had been good, and well pursuing the Statute; this later clause makes it very plain, so that notwithstanding this exception, (&) and (or) be all one: And so in the Plea there is recited a true Statute in sense and meaning unto us, the difference being only in the Letter, not in the meaning, so the Plea good; and so to this purpose is the Case in 17 E. 3. f. 10. in an Action of Debt upon a Bond, where in the Bond the party was named Canonicus, and in the Writ Prebendarius, this is held to be here all one in sense and so no matter of variance, but to be good and sufficient; and so to the same purpose is 28 H. 6. fol. 8. in a Præcipe Priori Prioratus, being specially bound, the Writ was domus, and there held good, being all one in sense; and so the Case in 3 H. 6. Quæ fuit uxor, & quando fuit uxor: This is all one in sense, though the variance be in a Letter, yet if the sense be all one it will be good, and in such cases we are not to grate too much upon the Letter, and so clearly this is no material variance, but the Statute is well recited, yet it must be confessed, that if a man by way of action or plea grounds himself upon a Statute and misrecites it in a part, whereas ex necessitate, he ought not to recite this at all, this is not good, and this appears to be so in Plowdens Commentaries, fol. 79, 80. in Partridge and Stranges Case: If one doth misrecite a Statute, only in the day of it, whereas he ought not to recite it; by this he hath failed, and this is bad, so held there by all the Judges, although the same was in a matter not material, for then there is no such Law, and so he hath grounded his Action upon a Law, where there is no such Law; and with this agrees the Earl of Leicesters Case in Plowdens Commentaries, fol. 390. so where the difference is in matter, as in Freemans Case, Coke 5 pars fol. 45. In an Action of Waste, upon the Statute of Gloucester, Quod nullus faciat, vastum, venditionem, & destrictionem: where it should be destructionem; resolved there to be matter of substance, and not amendable: in our Case here the variance is only in words, and not in matter, and therefore in Judgment of Law the same is no variance for to vitiate the Plea; also every contempt includes in it malice. As to the second variance, being the great matter and material variance, and this is plain: It is to be now considered how this shall be helped, the same shall be aided and helped this way, that this is out of the force and frame of the Statute, and that upon this ground, grounded upon the Statute it self; the which Statute, part of it is abrogated, and for part of it stands still in force, part of it is quite gone, as that part of it being for saying of Mals, this is joyned with the other part; this part of it

17 E. 3. f. 10.

28 H. 6. f. 8.

3 H. 6.

Plowdens Commentaries, f. 79, 80. *&c.*

Plowdens Commentaries, *Leicesters* Case, fol. 390. Coke 5 pars, f. 14. *&c.*

it which is gone and abrogated, ought not to be recited: The Plea here is by way of Bar, and a Bar being good to a common intent, is in Judgment of Law good and sufficient; it is sufficient for him here, to shew and set forth that only which makes for him, the first offence, if disturb, &c. and to be for this arrested, brought before a Justice of Peace to be examined and committed, this Law makes them Judges, gives them a judicial power, and makes them Judges of the Witnesses, so that he might commit a third offence after six months, if he doth not conform himself, then to be committed usque he reconcile himself: This misrecital here is in the third offence, with which we are not now here to meddle, the Action here is brought upon the first offence (S) that 7 Augusti he was committed to the Goal at York: As to the misrecital, which is in a matter meerly superfluous: As to the Plea and Justification, he misrecites the Statute in another matter, which ought not to come in question; he is impeached for the Imprisoment, 7 Augusti, and in the Plea, the recital of the Statute, as to this, is good, and well recited: It hath been urged, that he hath not concluded his Plea right, being with a (sic) he did disturb him; as to this, the conclusion will not help if there be not sufficient premises: But here in this Case it is expressed, 1. That he laid hands on him, 2. That he indeavoured to pull him out. 3. He did prohibit him further to proceed, Et sic, per hujusmodi facta & diversa opprobriosa verba, and doth not shew what they were; this is not material whether he used any words or not, the deed is here apparent which was done by him, the form of the words is not material, and so the (sic) here is idle, there being matter sufficient laid down in the premises, and so the Plea good: As to the other Exception taken, he ought to be a Licensed Preacher, it is shewed, that he did disturb Thompson, a licensed Preacher, by Matthew late Archbishop of York, and doth not shew where he was licensed; and this, as it was urged, is traversable: This Plea is good notwithstanding this Exception, the same being in Bar, and if any Traverse be requisite, the same ought to come on the other side; and then in the Rejoynder, to shew the time and the place; if in Trespass the Defendant pleads, that Locus in quo was the Free-hold of I.S. and he by his command did enter, which was the same Trespass, and doth not shew where this was, the other may Travers this, and then the Defendant in his Rejoynder may well shew this, so here in this Case this Plea in Bar is good: Other Exceptions taken at that they did as Judges, They did fine him, they did judge him; touching this, see Specots Case, Coke 5 pars, fol. 51. that which they have pleaded here, is pursuing the Law: Two sufficient Witnesses, this is good, they need not shew them, for they by the Law are made the Judges of the Witnesses, and are not to shew what nor who the Witnesses were; we are not to look into this, and so clearly the Plea here is good, and Judgment ought to be given for the Defendants, and against the Plaintiff. Croke Justice. The Plea here by way of Justification, is good and sufficient both in matter and form: Two Exceptions have been here materially taken, if they had proved to be material Exceptions, which they are not, being not in a material point; and being in another matter, they are not so material as to vitiate the Plea: This is a general Law, made in Odium maleficiæ, and of which we ought to take notice, as to the Exception at (&) for (or) at the first he doth not undertake to recite all the Statute, but only with an inter alia, to take benefit of this only which belongs to him; and here Gradations are to be observed in the Statute, (&) for (or) this is but accumulatio verborum, qui negat quod magis est, negat quod minus est: This is no material misrecital of the Statute: As touching the second Exception, if the Justification had been upon this Branch of the Statute, I should then have agreed this to have been a material variance, but quid hoc ad te, this is an impertinent, and immaterial Allegation, Quid verba audiam, cum facta video? As to the conclusion this is well and sufficient, he needs not here to shew where he was licensed; if the other do Travers it, as he may do, then he is to shew it, and this shall be then sufficient; the Justification here is good, and so Judgment ought to be given against the Plaintiff.

Coke 5 part, f. 51. *&c.* B.

Cook

Cook Chief Justice. Divers things are to be favoured in this Case: Summa ratio, quæ pro Religione facit: This Statute of 1 Mariæ cap. 3. upon which the Justification here is grounded, was made to advance Religion, Deus loquitur in Templo, to disturb a Preacher is to disturb God; but we are now Judges of the Law, this Justification here clearly is good, and so Judgment to be given against the Plaintiff: The Plaintiff here is to take no advantage of this Bar, as the Case is: This is a general Law, and therefore they may here justifie this generally, per formam Statuti, in this Case provided, and this without any special recital of the same, and this had been the closer and the surer way; a man cannot plead, Nul tiel Record against a general Law, because the Court ought to take notice of it, and of so much thereof as is sufficient for the matter in question: As to the Judgment given in Plowdens Commentaries, in Partridge and Crokers Case fol. 78. which hath been urged, that Judgment was then good, and well given; but if the same matter were now at this day to come in question again, we might well give our Judgment according to the verity of the matter: As to the variance urged, &) for (or) this is no material variance, they being all one in sense and meaning, these are Synonyma's, & parum differunt, quæ re concordant, & cum adsunt testimonia rerum, quid opus est verbis, saith the Orator: So here this is good, because the premises do warrant the same; where the question is upon a general Law, there the Court is to judge according to the verity of the matter; yet it must be agreed, that form in pleading is not to be omitted, for that would be a way to bring in confusion; but as this Case here is, the Plea and Justification is good, and the Plaintiff had no cause to demur, and so upon the whole matter Judgment ought to be given for the Defendants, and against the Plaintiff, and therefore the Rule of the Court was, Quod querens Nil capiat per Billam.

Statute of 1 Mar. cap. 3.

Judgment quod querens Nil capiat per Billam.

Nota, In an Ejectione firmæ brought against two Defendants, the one of them confesseth the Action, and the other of them pleads in Bar, Non culp. It was moved by John Moor for the Plaintiff that he might release his Action as against him which had confessed the same, and proceed against the other who had pleaded Non culp. Dodderidge Justice. In an Action of Trespass against two, the one makes default, the other confesseth the Action; here he may well relinquish his Suit against him who makes default, and proceed against the other which confesseth, or which pleads in Bar; the reason in this Case is, because this Suit is only in point of damages, but it is not so in the Case of an Ejectione firmæ; if this should be so here, any man may by this be tricked, and much practice may be used in this: And so the opinion of the whole Court in this Case clearly was, that the Plaintiff could not release, nor relinquish his Suit against one of the Defendants, and proceed against the other.

An *Ejectione firmæ* against two, the one confesseth, the other pleadeth, *Non culp.* &c.

Gilling Plaintiff, against *Baker* Defendant.

IN a Writ of Error, to reverse a Judgment given in an Action of Debt for arrearages due upon account; the Clerk of the Errors refused to enter this without two sufficient Sureties by him first found and given, according to the Statute of 3 Jac. cap. 8. to prosecute the Writ of Error with effect, and to satisfie and pay to the party, if Judgment be affirmed, all such Debts, Damages, and costs upon the first Judgment, and all costs and damages to be awarded for delay of Execution. It was moved by Harris, that this Case now here in question, is out

A Writ of Error to reverse a Judgment, &c. Yel. 227. where a Writ of Error shall be allowed, without good Sureties, and where not:

out of the Statute, which speaks only of a Debt that grows due by these four means (S) By Bill, Bond upon condition for payment of money only, Rent reserved upon a Lease, or by reason of a Contract: In the Case here in question it is originally no debt, but the same grows to be a debt only by reason of the accompt, and the Statute makes no mention at all of any such kind of Debt, but only of original Debts; and so this Case here is out of the Statute, being none of the Debts there mentioned, this being a Debt not growing due of any contract. Flemming Chief Justice demanded, whether a Debt upon an Obligation, conditioned for performance of Covenants, were within or out of this Statute. Dodderidge Justice, clearly this is out of the Statute, the whole Court agreed in this that this was out of the Statute, where it was to perform Covenants. Flemming Chief Justice demanded again, if an action of Debt upon an arbitrament, was within or out of the Statute; the whole Court clear of opinion, that this was out of the Statute. Flemming Chief Justice. As to the principal Case now in question, Debts which are to be within this Law are to be such Debts as are original and true Debts, and in such Cases after Judgment given, a Writ of Error shall not be allowed, nor any Supersedeas granted, without first putting in of good Sureties, according to the Statute: But the Debt here in this principal Case, is not a Debt originally, but the same grows and becomes to be a Debt, only upon the accompt, and not before; and this is not like unto a Debt due upon a Contract, as is mentioned in the Statute, so that this Case is clearly out of the Statute, and so is a Debt which grows to be due upon an Arbitrament. Dodderidge Justice accorded herein, that this is clearly out of the Statute, this is a Debt which grows due and to be so upon the accompt, and this is matter which rests between the parties themselves, and allowance upon this is to be made, and this is not as a Contract, nor yet to be taken as in the nature of a Contract: Debt, for arrearages of an accompt before Auditors, is clearly out of this Statute, for this is a Debt grounded upon a Record: In Debt upon a Contract, there is quid pro quo, but it is not so here, and so is out of the Statute. Croke Justice. This Case here is out of the Statute, which doth only set down and makes mention of such Debts which are certain Debts; but this Case here, and Debts upon a Bond to perform Covenants, or for arrearges upon an account, these are all of them uncertain Debts, and so out of the Statute; and so the whole Court agreed clearly, that this principal Case is out of the Statute, and the Court did rule this Writ of Error to be entred and allowed of without finding any Sureties, and according to this Judgment it hath been formerly so here adjudged, as was affirmed by the Council at the Bar.

The Writ of Error allowed without finding of Sureties, *per Curiam*.

Hall Plaintiff, against *Rotherom* Defendant.

Where Process shall go into *Wales*, and where not. Vaug. 395. 6, 7. Godb. 214. 2 Cr. 484. 3 Cr. 332. Benl. 192. 1 Ro. 395, Po. 156.

The Case was this: A man taken by a Latitat puts in his Bail, and they were Welshmen, afterwards a Judgment passed against him; upon this the question moved to the Court, was this, Whether a Process upon a Capias ad satisfaciendum, shall go into Wales against the Bail, or not. Man Secondary informed the Court, that in the like Case they had so done divers times. Williams Justice. Coke 5 pars, fol. 49. in Vaughans Case, it is resolved, that all the Statute of Jeofails do extend into Wales, the reason is, because the Statute of 27 H. cap. 7. hath made Wales parcel of England: It was shewed to the Court, that Brownlow, chief Prothonotary of the Common Pleas, affirmed, that they do not there use

use to send such process into Wales, but only Process of Utlagary. Man Secundary. informed the Court, that it hath been used otherwise here in this Court; and upon this, the Court being fully satisfied herein, by the direction and Rule of the Court, Process was granted into Wales against the Bail; and the Court said further, that if the parties found themselves agrieved, they might have a Writ of Error, and so by the Rule of Court, the Process well allowed of for to issue into Wales against the Bail.

Hut. 117. 118.

Process into *Wales* against the Bail *per Curiam.*

Richardson Plaintiff, against *Pistel* Defendant.

In an Action of Trespass brought, the Defendant as a Copy-holder, claims to have in the land of his Lord common by Prescription: the Plaintiff pleads a release of this made unto him by the Defendant; the Defendant as to this makes, answer, and pleads Ne relessa pas, and upon this Plea the Plaintiff demurs in Law, the Defendant joyned in demurrer; the Question only being, Whether this Plea be good, or not: It was urged, that this Plea was not good, in regard that he made the release, and so is party and privy unto it, and therefore he ought to plead directly, Non est factum, and not to this Plea: It was urged for the Defendant, that this Plea of Ne relessa pas, is as good a Plea as Non est factum; and upon trial of Deeds, where one shall plead Nient son fait, and where Ne granta pas, these books were cited, 2 H. 7. 1. 3 H. 6. fol. 18. and 26. Rhichardson for the Plaintiff, moved the Court, that the Plea was not good: the only question here is, Whether the party himself, to this Deed of release shall plead, Ne relessa pas, he cannot so plead: the difference will be, where he is party to the Deed, and where he is a stranger to the same; a stranger may plead Ne relessa pas, but not the party himself, but he ought to plead Nient son fait, and this difference is warranted by divers Books, as by 3 H. 6. f. 18, 26 and 28. 2 H. 4. 21. 43 E. 3. f. 10. placito 32. 37. Ass. placito 17. where he is party to the Deed, there he cannot plead, Ne relessa Pas: Also the reason of the Law makes against this, for by the Law when one is party to a Deed, and questioned upon the same, he ought to answer directly, whether it be his Deed or not; but if he be a stranger to the Deed, then he may well plead to this Ne relessa pas, and so by this plea it may come in question, and to be tried, whether this was his Deed, or not; but otherwise it is, where he is a party to the Deed. Dodderidge Justice The difference is true which hath been taking, where he is party to the Deed, there he ought directly to answer in this manner (S) Quod non est factum. And if upon trial it be found to be his Deed, then for his falshood in pleading, he shall be Fined to the King for this his deceit, and therefore if he shall plead here Ne relessa has, ou riens passa per le fait, and this is found against him, the King shall not here have his Fine, and therefore he is to plead Non est factum, being party to the Deed; otherwise it is if he were stranger to the Deed, there he may well plead Ne relessa pas, ou riens passa per le fait, and so by this way the validity of the Deed will come in question: There are in Law but two Issues to answer unto a Deed, the one Nient son fait, the second, Ne relessa pas: And here we have the party himself who made this Deed of release, and unto this he ought directly to make answer, and that by an issuable Plea, whether this be his Deed or not; and if his Plea be found to be false, the Judgment is then to be Quod capiatur, and so he shall be Imprisoned until he have paid his Fine unto the King: This Plea as here it is, is not good, for he being the party himself, ought to plead Non est factum. Croke Justice. If he hath nothing here to plead to avoid his Deed, he ought then to plead Nient son fait; but where he hath matter sufficient to avoid his

In Trespass a release pleaded in Bar of Common, *Ne relessa* pleaded whether good or not.

2 H. 7. 1. 3 H. 6. 18. 26.

3 H. 6. 18. 26. *&c.*

Nota, the difference where a man is to plead *Non est factum. &c.*

his Deed, there he may well plead Ne relessa pas. Dodderidge Justice, agreed in this that where he hath special matter to plead to avoid his Deed, there he ought to plead this matter specially to avoid the same, and so to conclude Nient son fait or Ne relessa pas, and upon this difference are all the Books; and so the Court was clear of opinion that this Plea was not good, that the Plaintiff had good cause of Demurrer, and so by the Rule of this Court Judgment was given for the Plaintiff.

Judgment given for the Plaintiff.

James Plaintiff, against *Harris* Defendant.

An Action upon the Case for words.

IN an Action upon the Case brought for slanderous words, spoken by the Defendant of the Plaintiff, upon Non culp. pleaded, the Jury found the words laid in the Declaration to be spoken by the Defendant of the Plaintiff: The words were these, Thou art a Thief, and I will prove thee so: the Jury find that he spake the words, De querent' not in his presence, but they were spoken in his absence, and so they found this specially in this manner for the Plaintiff. Harris urged for the Defendant, that for these words, as they are thus found by the Jury the Plaintiff cannot have his Judgment: The Plaintiff declares here, Quod dixit de præfat' querent' Thou art a Thief; the Jury find, that he did speak the words but that he spake them, De eodem querent' & ulterius dicunt, that he spake the words in the absence of the Plaintiff. Henden. The Plaintiff here ought to have his Judgment: These words with an Innuendo, (Thou) are a good and sufficient denotation of the party of whom they were spoken: If he had said, He is a Thief, and I will prove thee, ipsum præfat' querent' innuendo to be so, and this so found, this had been good: The Jury here do find that he spake Hæc falsa, scandalosa, & opprobriosa verba of the Plaintiff; they find the words, Quod dixit in præsentia & anditu, of others de præfat' querent' Thou art a Thief, and I will prove it, Et ulterius dicunt, quod non dixit, these words, in presentia querentis but in his absence; this is good, and the Plaintiff to have his Judgment. Dodderidge Justice. The Action is here brought by the Plaintiff, for words spoken of himself: The later part of the Verdict here hath no sense in it, he spake the words in the absence of the party (thou art.) Croke Justice. If the Jury find Quod dixit de præfato querent. de eodem, this is good and sufficient, if he said, Thou art a Thief, and I will prove thee so; if he himself did not hear him, but others there present did inform him of it, that he called him Thief, and he said he did not hear him, non in auditu, because it might be he was not so quick of hearing, and might be busie in talk: The principal matter considerable and inquirable here is, Whether he spake the words as they are laid in the Declaration: The Jury here have well found the words as they are laid, and their finding is good, Dodderidge Justice. The Jury here have found the words according to the Issue, but the later part of their finding here, is altogether senseless: If the first part of their finding be full to the Issue, either expressly or by implication: If the later part of their finding do any ways contradict this, then the first part of their finding shall be good, and the later part void, and this is very clear: The Jury here do find, Quod dixit de eodem, and by a necessary Implication, dixit eidem, the words being (Thou art) which words do imply thus much, that they were spoken to one being then present: The Jury do find that he did speak the same words, de eodem querent. and the words do impor thus much, that he was present, being (Thou) if the Jury find the words

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that he said, (He) innuendo, the Plaintiff, is a Thief; and the Plaintiff declares for these words (S) Thou art a Thief clearly this had not been good, by reason of the variance; if the words spoken were these (S.) Thou art a Thief, and it is not mentioned of whom the words were spoken. The Jury here may well find the intention of the party speaking (S) Quod dixit de querent: Here in this principal case the Jury have found a good verdict for the Plaintiff, and so he ought to have Judgment. Flemming Chief Justice. The words, as they are laid in the Declaration, were spoken eidem querent, and this imports that spoken to the party being present; for the word (Thou) implies that he was present, it being very improper to say so of one being absent; by the verdict here it is not found, Quod dixit eidem, sed de eodem querent. And this is sufficient if the same agrees with the Declaration, for the words, and for the party of whom they were spoken: It is here found by the Jury, Quod dixit de præfato querent, this is good and sufficient, and the words may be spoken in his presence, or his absence: It is a very improper speech to say, (Thou) to one that is absent; when the Jury do find, Quod dixit de præfato querent, there is then no repugnancy in the latter part of their finding, be he present or be he absent, they find the words, and these are actionable, and this is sufficient, & ulterius, they find this by way of explanation; that he spake the words, sed non eidem querent. so that in this latter part of their verdict, they have nothing contrary to the former part of their verdict; they have only found this further, that the Plaintiff was absent when the words were spoken: And these words, Thou art, &c. do not enforce his presence of necessity; if he did speak these words, he being absent at the time, yet these words are a Slander to him; here it is innuendo de præfato querent. This is sufficient and certain: Here are two several Slanders, and he may have several Actions for these, there is no contrariety here in this verdict, for when the Jury do find, Quod dixit de eodem querent. this may well be either in his presence or absence, & ulterius, &c. (Thou) we cannot intend that he was present, when the Jury do find directly that he was not then present: They find the words, as they are laid in the Declaration, and no contrariety in their finding, but that their finding is good. Crook Justice. The Truth of the Case was, that he did speak these words in the third Person, and therefore there was great fault found in the Counsel, that they would have the words found in the second, and not in the third Person, and accordingly as they were spoken. Dodderidge Justice. The Jury do find, Quod dixit de eodem querent. If so, then they were not spoken eidem querent. Croke Justice. The words might be spoken, eidem querent, and yet he might not hear them. Flemming Chief Justice. As this Case here is, the Plaintiff cannot have his Judgment, for that it now appears by the finding of the Jury, that he hath a double cause of Action. Dodderidge and Croke Justices. That the Plaintiff here ought to have his Judgment, here being a good verdict for him; and the words laid in the Declaration; found to be spoken by the Defendant, & de eodem querent, and this is sufficiently found, so that the Court in this did not fully agree, some difference being between them.

Nota, That afterwards this Case was ended between the parties by Composition and agreement, and so no Judgment was given by the Court in this Case. Ended by agreement between the parties.

Sir *Thomas Mead* Plaintiff, against Sir *George Reynel* Defendant.

Trial for the forfeiture of an Office.

NOte, That in a trial at the Bar, prosecuted by Sir Thomas Mead, against Sir George Reynel, Marshal de B. R. for the forfeiture of his Office; by his negligent suffering of one Sir James Creiton, there in Execution, for to Escape, the only question and Issue between them was, whether there was any Escape, or not, whether Sir James Creiton did remain still in his Custody in Execution, or not; the Case appeared to be this: The number of Prisoners increasing, and he wanting room for them in the Prison of the Marshalsie, he caused a new building to be erected, and the same adjoyning to the Prison, and within the compass and precinct of the same, and thither he removed Sir James Creiton, and kept him there, being in Execution; The Question was, Whether this was an Escape in Law, or not, in regard that this new erected Building was no part of the ancient Prison: This matter was prosecuted against him by Sir Thomas Mead, who had a grant of this Office: And note, that the matters of misdemeanor were examined in the Chancery, and afterwards the same directed to be tried here in this Court; of which manner of proceeding, the Court did very much dislike, he being their Officer. Dodderidge Justice. In 39 H. 6. fol. 32, 33, 34. The manner there expressed of proceedings against the Marshal, upon a supposed forfeiture of his Office, by reason of an Escape, this appears there at large, and very well debated, in the Duke of Norfolks Case, for the removing of John Brandon his Marshal; and there by the opinion of all the Judges, a negligent Escape by a Marshal, is no cause of Forfeiture of his Office: There it is held, that this is but a matter fineable, in manner as the Court shall think fitting to impose the same; but otherwise it is of a voluntary Escape, and for such an Escape he is to lose his Office, as there appears, fol. 33. B. It appears also by a Record in the time of King E. 1. and also by other Records of latter times, that the misdemeanors in Cases of Escapes by the Officers of this Court, ought here to be examined by this Court; and notwithstanding all which hath been said to the Jury, we will our selves examine this Cause, before any Judgment shall be herein given by us. Flemming Chief Justice. We have not been well dealt withal by the Prosecutors of this Cause, for that the examination of all abuses, of Nonusers, misusers, and other misdemeanors in our Officers, belongs most properly unto this Court, to be here examined by us; and we are to judge of the sufficiency, or non-sufficiency of our Officers here, and no other Court is to intermeddle with them in such a manner as in this Case hath been done; and against this which I have now said there is no president, nor yet any Book to be shewed: But on the contrary, all the presidents and Books of Law do confirm this which I have now said: That such examinations, in such Cases as this, belongs only and most properly to the Jurisdiction of this Court, for to examine, determine, and to adjudge thereof, and to no other Court whatsoever; and we are all of us clearly and unanimously agreed in this to maintain, and always to preserve and uphold the power, dignity, and Jurisdiction of this Court, in us, and only to us, (if good Presidents cannot be shewed to us that the contrary hath been used.) Dodderidge Justice. It appears plainly and fully by the Book of 39 H. 6. fol. 32, 33. as before remembred that it belongs only unto this Court, to examine the Nonusers and abuses in our Officers and according unto this, I have seen an express president, in a Record of it, in the time of King E. 1. And I have also seen other express presidents, of later times, to

9 Co. 95.
3 Cr. 587.
1 Jo. 462.
2 Ro. 189.

39 H. 6. f. 32, 33, 34.

Record E. 1.

39 H. 6. f. 32, 33.

Record King E. 1.

to this purpose. Nota, that in this Case, all the matter of misdemeaner was at large examined in the Chancery, and upon the Issues there agreed on, a Tryal appointed to be had here at the Bar upon the same Issues: the whole Court agreed in this, that all this which was so done there, was only so there done ad nos informandum, and not in any other manner, to foreclose and to foreclude us of that Jurisdiction and Prerogative, which properly belongs to us as Judges of this Court, as to have the Examination of our peculiar Officers in all matters, and more principally in such matters as do trench to make a Forfeiture of their Offices, the same being so penal unto them. Nota, That in this Case, the Jury having received their charge, and directions from the Court, by opening and explaining of the Evidence unto them, they gave in their verdict to the Court, and found Sir George Reynel not guilty of any Escape, for to cause a Forfeiture of his Office, which verdict was received by the Court, and so the same by the Rule and direction of the Court was entred accordingly.

A verdict given for the Defendant.

TERMINO PASCH.
11 *Jac. B. R.*

Gedge Plaintiff, against *Minne* Defendant.

Entred Trin. 10 *Jac.* B. R.
Rott. 1034.

In Trespass for breaking and digging his ground, Justifies the digging for a *Badger*. 2 Cr. 321.

IN an Action of Trespass, pedibus ambulando, &c. and for breaking and digging the Land of the Plaintiff; the Defendant pleads in Bar, by way of Justification, and sets forth, that the common voice, and Fame was, quod quædam melis, a noysom vermine, called a Badger, was there, and had done very much hurt, and that therefore he came with his Dogs, and did hunt him, and in pursuit thereof, & ad melem prædictam interficiendam, he did follow him with his Dogs, and did earth him in the Plaintiffs ground, and there he came, and digged him out of the ground, and killed him, and this he pleaded by way of Justification, quoad se trespass, fractionem, & loci prædicti fossionem, & fossam, cum terra prædicta implevit, to this Plea in Bar, the Plaintiff demurred in Law. It was urged for the Plaintiff, that this Justification was not good, though it be here alledged, that the common report was, that there was a hurtful Badger, and that he came ad interficiendam. and that he did thereby, as little hurt as he could possibly; yet this is not sufficient to justifie this Act of digging by him: At the common Law, a man was to be punished for hunting, as appears by the Book of 12 H. 8. fol. 10. a. these Statutes were made in allowance of hunting; the first Statute was 13 R. 2. cap. 13. for the allowing of hunting, not to hunt unless he have Lands to the value of 40 s. per annum, or be otherwise especially licensed to keep Dogs; another Statute made 8 Eliz. cap. 15. for destruction of vermine, of Foxes, Grey, or Badger, and a reward given to those that shall destroy such vermine, if he might enter on the ground, for to kill the Badger, yet he cannot justifie the digging, for that he might use other means to kill him, and then not to dig the ground for him, and here he hath not averred, that he could not otherwise kill him: against this it was urged for the Defendant, that this Justification is good in regard, that all which is here done, is for the good of the Commonwealth; here it is laid, that the common fame was, that there was a Badger, a nop-

12 H. 8. fol. 10. Statute of 13 R. 2. c. 13. Statute of 8 Eliz. cap. 15.

noysome beast, that he did hunt him, and earthed him in the Plaintiffs ground, and did dig him out, and so killed him, quæ est eadem transgressio unde, &c. the Badger is a Beast naturally inclined to do mischeif, this differs from the other cases of hunting for pleasure; here it is said the common voice or fame was so; This is sufficient without shewing any hurt done, 2 Hen. 7. fol. 15. in an Action brought for a false Imprisonment he ought there to shew, that there was a felony done, and that the party taken, was of an ill name, in many cases matter of necessity make a good justification. 6 E. 4. f. 7. a man cuts down trees, and they fall in anothers ground, he may enter and take them, this being a case of necessity. 3 E. 6. Dyer, and 7 Eliz. Dyer, in time of war, the enemies break a prison, let the prisoners out, this is no escape in the Goaler; for this was not to be avoided: to make Bulwarks in time of war, to keep the Country in quiet, this is lawful; and so to prevent mischief if the house be on fire to pull down the next; these and such like things may be done in cases of necessity as appeareth by 12 H. 8. f. 2. 13 H. 8. f. 17. 21 H. 7. f. 27. 29 H. 8. Dyer 37. Maleverets Case, &c. 8 E. 4. f. 25 and Coke 5. pa. 92. in Seymaynes Case, for the taking of Felons, for the good of the Commen wealth, it is lawful to break the house of another, and all which was done here, was for the general good of the Contry, and so is 2 H. 4. fol. 12. such a justification for breaking a house held good, and so it is 1 H. 7. fol. 6. if a man sell to another his Timber trees in such a Wood, the Law gives him leave to come with his carts, and cut them down, and to carry them away; the difference will be, where a man hath other means to effect what was done, and where not, as in 5 E. 3. title Trespass placito 3. trespass brought for breaking of a Gutter, pleads that he did this, to come to repair the house, and this held a good Plea: here this Badger was a hurtful vermine, and he came to kill him, and so did by digging him out of the earth. 12 H. 8. fol. 10. express in point, that for hunting of vermine offensive and hurtful to the Common wealth, no Action of Trespass lieth, and that for this reason, the same being for the good of the Common wealth; and here he had no means to get the Badger out, and so to kill him but by digging him out; the Statute of 8 Eliz. cap. 15. makes provision for destroying of hurtful Birds and Fowls, and gives a reward for the same, and so for Foxes and Badgers, the Law finding them to be offensive and hurtful, and the Law did never intend otherwise, but to give, and allow of the means to take them, otherwise it were but invain to give a reward to the takers of them, if by Law they should be punished as Trespassers for using the means to take and kill them, as was only so done in this Case, as to the Statute of 13 R. 2. cap. 13. this was for hunting: the Plaintiff doth not here charge the Defendant for hunting upon the Statute but for walking and digging: all that here was done by the Defendant, was for the good of the Common wealth, and so the Justification good. Haughton Justice, demanded, whether in the putting of the Case they pleaded a continuance of the Trespass or not: Not guilty pleaded to all but digging, and that is justified, the Justification here is not good. Dodderidge Justice. It is not lawful by the Common Law, for any one to hunt for pleasure, or for profit, but otherwise, where it is for the good of the Commonwealth: It is observed by Bracton, that a man out-lawed caput lupinum gerit, all to pursue him, and he may by hunted through the Country, 8 E. 4. fol. 18. a. Justification to dig the ground, and to fasten stakes by ashers to dry their nets, and this is a good Justification, because the same was for the good of the Common wealth, to use fishing. As to this Case here in question, one may well pursue such a beast or vermin, when once he is up, and that into another mans ground, but a man cannot justifie his entring into another mans ground, to find, and so to hunt such a vermin without his consent first had for the same, but he will be a trespasser for so doing, 38 E. 3. fol. 10. b. a man may follow his hawk or his hound, in pursuit of the game, into another mans land, being found in his own, and by 12 H. 8. fol. 10. if a man flies his Faulcon in his own land at a Fesant, and he kills the Fesant in anothers ground he may follow his hawk and take the Fesant, and is not to be punished but only for his entry into

2 H. 7. fol. 15.
6 E. 4. f. 7.
3 E. 6. Dyer.
& 7 Eliz. Dyer
12 H. 8. fol. 2.
13. &c.
2 H. 4. f. 12.
1 H. 7. f. 6.
5 E. 3. Fitz. &c.
12 H. 8. fol. 10.
Statute of 8 Eliz. cap. 15.
Statute of 13 R. 2. cap. 13
Bracton.
8 E. 4. fol. 18.
38 E. 3. fol. 10.
12 H. 8. fol 10.

to

to the others ground: the digging here in this, or the like Case may be lawful, if it be in pursuit of such a vermin, lawfully begun, and so doth earth him in another mans ground, as here it was, in the Plaintiffs ground, he may well justifie the digging of him out (if by no other means he could come to take him) and this ought to have been shewed in pleading, and especially to have alledged that he could not by any other way or means come by him, and get him out (but by digging for him) but this he hath not so set forth, to make good his Justification, for he might have got him out either by smoking him out, or by using of Tarriers to get him out, and so as the Case here is, the Justification is not good; and so is 13 H. 8. fol. 16. expressly in point, that if a man cuts down his Oak, which falls in anothers ground, if he justifies in trespass he ought to alledge especially that he could not otherwise do; and agreeing with this is the Book of 6 E. 4. fol. 8. and so the Defendant ought to have done here in this principal Case, to have made his Justification good, which he hath not so done, and so for this cause the Plea and Justification is not good, and Judgment ought to be given for the Plaintiff. Croke Justice agreed the difference before taken by Dodderidge, and demanded, whether it was lawful for any one, to come into anothers Orchard, for to kill a Bull-finch there, being a hurtful bird, for picking the blossoms off from the trees; and this may be alledged to be for the publick good, but yet this is not lawful for one so to do; the Court in this case did agree, that upon a pursuit, he might well follow and kill, but not otherwise, without the assent of the owner of the ground, and that the Case of 12 H. 8. ought to be intended taken in the Case of a pursuit. Dodderidge Justice. as this case here is he needs not to aver, that he he had land of 40. s. per annum, Le purview of the Statute of 13 R. 2. cap. 12. aiming at hunting only for pleasure. And so the Court all agreed the former difference, where a man enters first into anothers ground, to find such beasts and vermin, and where such entry is by way of pursuit, in the first, the assent of the owner of the land is first requisite to be had, or else he will be a Trespasser; in the second, not so, but well justifiable: And so all the Judges agreed clearly in this Case, that the Plea and justification of the Defendant was not good, but that Judgment ought to be given for the Plaintiff, and so by the Rule of the Court, Judgment was entred for the Plaintiff.

13 H. 8. fol. 16.
6 E. 4. fol. 8.
12 H. 8. fol. 10.
Statute of R. 2. cap. 13.
Judgment given for the Plaintiff.

Weaver Plaintiff, against *Clifford* Defendant.

Entred, Pasch. 44 Eliz. Rott. 453.

An Action of Debt against the Sheriff for an escape.
2 Cr. 3.
Yel. 42.
1 Ro. 897.

IN an Action of Debt against the Sheriff for an escape, the Case appeared to be this. A. did acknowledge a Recognizance in the Chancery, he had 2 Scire facias, and 2 Nihils returned, afterwards he had a Judgment, quod recuperet debitum, and a Levari facias came to the Sheriff, to levy the same, who returned Nulla bona, afterwards he obtained a Capias ad satisfaciendum, to the Sheriff, who by force of this, did take the party in execution, and did afterwards suffer him to escape; and upon this escape, the Plaintiff brought his Action of Debt; and Note, that it was found, that the Court did not grant this Capias ad satisfaciendum, whereupon the taking here by the Sheriff was. It was urged by Davenport for the Defendant, that this Action for this escape did not lie by the Plaintiff against the Defendant, wherein the point insisted on was, whether a Capias doth lie upon

upon a Recognizance acknowledged in the Chancery, or not, that it doth not, and the Capias here, was not well awarded. It appears, Coke 3 part, fol. 12. in Sir William Herberts Case, that at the Common Law, upon a Recognizance, or a Judgment for Debt, or Damages, he shall not have the body, nor the Land of the party in Execution (unless it be in some special case) but only to have execution of his Goods and Chattels, of his Corn, and such like present profit, which doth grow upon the Land: and this by a Levari facias, thereby commanding the Sheriff, quod de terris, & catallis ipsius, levari faciat, or a Fieri Facias only de bonis, & Catallis, (both of them to be sued within a year after the Judgment, or Recognizance acknowledged) and if he fails, in doing of this, then he is driven to his Writ of Debt, and by the Statute of Westminst. 2. capite 45. Scire facias is given, and by the Statute of Westminst. 2. cap. 18. cum debitum fuit recuperatum, an Elegit is given, for the moiety of the Land, (which was the first Statute that did subject the Land to an Execution, upon a Judgment, or a Recognisance which is in the nature of a Judgment. But a Capias lieth not upon a Recognisance in the Chancery. In 13 & 14 E. Dyer, fol. 306. Placito 62. in Puttenhams case, by Harper, Weston and Dyer Justices, the Court of Chancery, hath no authority, to commit the body of one (condemned in a Scire facias upon a Recognisance) to prison, in execution; for that his body is not liable, but his goods, lands, and chattels only, and this by a Fieri facias, or an Elegit, by the Statute of Westminster. 2. cap. 18. and as the tenor of the Recognisance doth express to be levied, de bonis & catallis, terris, & tenementis: and then no Capias ad satisfaciendum lieth in the case, for that no Process of utlary did lie upon the Original Process. Coke 3. part in Sir William Herberts case, 12, 13; by the Statute of Marlebridge, cap. 23. & Westminster. 2. cap. 11. A Capias given in an account, the Process in this at the Common Law, being a distress infinite, by the Statute of 25 E. 3. cap. 17. the like Process given in Debt, as in account: before this Statute, the body of the Defendant was not liable to an Execution for Debt, at the Common Law, as appears by 13 H. 4. fol. 1. but a Scire facias, upon a Recognisance is not within the Statute of 25 E. 3. cap. 17. if the party in his own Declaration doth shew that he had no cause of Action, in such a case if the Sheriff by force of a Capias to him directed, do take the party in execution, and afterwards suffers him to escape, no Action of Debt lieth against him for this escape by the party, who had no cause of action: so in this principal case, the action of Debt lieth not against the Sheriff for this escape. Noy for the Plaintiff urged, that this Action well lieth against the Sheriff for this escape: first the Capias here is well awarded out of the Chancery. It is to be agreed, that at the Common Law, as appears Coke 3 part, in Sir William Herberts Case, no Capias lay by the Statute of West. 2. cap. 11. a Capias was given in Account. And by the Statute of 25 E. 3. cap. 17. the like Process was given in Debt, as in Account, and by the equity of the Stat. of 25 E. 3. a Capias lies in case of a Scire facias upon a Recognisance, and the use in the Chancery hath always been, in such a manner to grant a Capias; and to this purpose there are many Presidents there to be seen and produced: after the Recognisance is acknowledged it is a Judgment presently, and so this is a Debt upon Record, and by 25 E. 3. cap. 17. Where one hath a Debt, which is a debt of Record; there by this Statute he may have a Capias, the Statute of 1 H. 7. cap. 1. which gives a Formedon against the pernor of the Profits, in 14 H. 7. fol. 17. & 15 H. 7. fol. 8. a Scire facias upon a Fine, to have execution of a remainder tailed unto the demandant, and to the Heirs of his body begotten: the Tenant pleads Non tenure, the demander averrs him to be pernor of the profits, and so Tenant by the equity of the Statute of 1 H. 7. and it is there held clearly by all the Justices, that this shall be taken to be within the equity of the Statute, although the Statute doth speak only of a Formedon in the remainder, and descender. For when the Action is given for the advantage of Tenant in tail, and is given in the Original Writ; the equity doth give this also in the Writ of execution; and as to the commencement of the suit, if it begin by Summons, Capias, Attachment, or by Scire facias, all is one; The Presidents in this and

Coke 3 part, fol. 12. Sir *Will. Herberts* Case.

Statute of *West.* 2. c. 45. 2 cap. & 18.

13 & 14 *Eliz. Dyer*, fol. 306. *&c.*

Coke 3. pars in Sir *William Herberts* Case, fol. 12, 13, *&c.*

Statute of 25 Eliz. 3. cap. 17.

13 H. 4. f. 1.

Coke 3. pars. in Sir *William Herberts* case, *&c.*

Statute of 1 H 7. fol. 1.

14 H. 7. fol. 17

15 H. 7. fol. 8

and the like case, are usual, and very frequent in the Chancery; and so is the course there to award a Capias, and this also agreeable unto the course of Law, and of treason. But admitting this to be erroneous; Yet Prosecutus fuit quoddam breve, and this was directed to the Sheriff, and the party by him taken upon it, and suffered to escape; Whether he shall now be chargeable for this escape to the party; prosecutus fuit quoddam breve, this is the act of the Court; if the Original cause be within the Jurisdiction of the Court and they award an erroneous Process to the Sheriff, or do misaward a Capias to him, by force of which he takes the party in Execution, this is a lawful taking and execution, and the Sheriff is chargeable for the escape, and he is not to examine the error of the Court, otherwise it is, where the Court of Chancery had no Jurisdiction at all of the cause; in the first case the Sheriff is not to take any benefit of the misawarding of the Process, it lieth not in his mouth to plead any thing in discharge for himself; as touching the escape. 13 E. 3. Fitz. title Barre placito 253. the Abbot of Westminsters case proves this expressly. An Action of Debt brought against a Goaler for an escape, who said that the Sheriff did not deliver him lawfully to him; it is there ruled, that he shall not take benefit, nor any notice, whether he was lawfully delivered to him, in execution or not; but he being once in his custody, he ought to keep him safely, sub pœna, and in this case, the Court is to judge of the cause being before them. 31 Eliz. Ognell against Clement Paston, in an action of Debt upon an escape, directly as this principal case is, prosecutus fuit quoddam breve, and in this case it was agreed, in both points that the first Capias was erroneous, yet the party being in execution, by force of this, the Sheriff is chargeable, if he suffer him to escape, and shall take no advantage of the errour in the Process, and Judgment was there given for Ognell, and so in this principal case, Judgment ought to be given for the Plaintiff, for the Sheriff shall not take any advantage of the error of the Court in their Proceedings there against the Defendant, but he shall be charged for the escape, notwithstanding the record be erroneous: and this appears to be so, Coke 8 part, f. 142. a. in Docter Druries case, where Ognells case is cited to be adjudged accordingly in Trinity 31 Eliz. in the Exchequer, being this very case now in question, and with this agrees 21 E. 4. fol. 23. b. that if an Action be brought against a Goaler, for suffering one which was condemned to go at large, it is no plea for him to say, that the Process was discontinued before the Judgment given, for that he is a Stranger to it. Croke Justice, the Sheriff is not to take advantage of any error in the Proceedings, but otherwise it is where he can alledge a Nullit, in the record and this will be the difference: Flemming Chief Justice. If we award a Capias where it lieth not, to the Sheriff, by force of which he takes the party, and hath him in his custody if he suffer him to escape, he shall be charged for it, for he is not to argue, or dispute the authority of the Court. Doddridge Justice agreed herein, and the difference will be where the Court hath Jurisdiction of the cause, and where not: if the Court hath Jurisdiction of the Cause, and do misaward the Process, this is but error; but where the Court hath no Jurisdiction of the cause, and do misaward the Process, there all is meerly void, and the Sheriff may shew this in discharge of himself, as if a Formedon do commence Originally in the Kings Bench, where it ought properly to be in the C. B. or an Appeal in the C. B. where it ought to be in B. R. all here is void, and so is the difference. Flemming Chief Justice agreed the difference to be so. Note that in this principal case the Court did not award this Capias, but the party himself procured the same, so that the Court did here incline to be of opinion, first that the Capias did well lie. 2. That the Sheriff is chargeable with this escape, and so without further Argument, this case was by the Court adjourned over to another time. Note that afterwards (S) Termin. Mich. 11. Jac. B. R. the Court was moved again in this case, the point being, Whether a Capias did lie upon a Recognizance acknowledged in the Chancery, and being taken by force thereof, and in execution, whether the Sheriff be liable to an Action of Debt for this escape, or not? Cook chief Justice., This hath been adjudged, in the very point, that this was an escape

13 E. 3. *Fitz.* tit. Barre. placito 253.

31 *Eliz.* &c.

1 Cr. 164. Mo. 274. Coke 8 pars, fol. 142. *&c.*

21 E. 4. f. 23.

Term *Mich.* 11 Jac. B. R. *&c.*

escape, and for this escape the Sheriff is liable to an Action, and so was it adjudged in Ognells Case, cited in Doctor Druries Case, 8 Co. fol. 142. If a Capias ad satisfaciendum be issued out against a noble man (where it ought not so to be,) and he is taken by force of this, and afterwards suffered to escape and go at large; an Action of Debt for the escape well lieth, for though de jure, he ought not to be taken, yet he being once taken, he ought not to suffer him to escape; this Capias was not to have issued out of the Chancery, but when the party is taken by this erroneous Process, he ought not at his peril to suffer him to escape; and of this erroneous Process the Sheriff shall never take any benefit or advantage, thereby to free, and discharge himself from the said escape, notwithstanding the proceeding here was averso ordine, for this Capias is clearly erroneous; but yet this shall not aid the Sheriff for suffering of the escape, when he hath once taken him; for he being an Officer to the Court, ought not to examine the Power, and Jurisdiction of the Court, and so it was adjudged in Ognells Case, in debt for an escape against Clement Paston Sheriff of Norfolk, and he was enforced to pay all the mony, in which the party, which escaped, was condemned in: The Court in this case were all clear of opinion, That Judgment in this case ought to be given for the Plaintiff, there being, as all the Judges held, no question at all in the case. Cook chief Justice. Recognisance is but a pocket Record, and therefore Judicial recoveries are always in Law to be preferred before pocket Records: By the Rule of the Court in this principal Case, Judgment was entered for the Plaintiff.

Ognells case put in Dr. *Druries* case, 8 Co. fol. 142.

Judgment for the Plaintiff.

Arnold Plaintiff, against *Bridgood* Defendant.

Entred, Hillar. 10 *Jac.* B. R. Rott. 166.

IN an Action of Debt, upon the Statute of 2 E. 6. cap. 13. for not setting out of tithes, a verdict was given for the Plaintiff. It was moved in Arrest of Judgment, that the Declaration was not good, that the Plaintiff in his Declaration had set forth no good title to enable him to have the tithes: And for this the Case appeared to be, that A. being possessed of a Lease for Tithes, in the right of his Wife, as Executrix to her former Husband, makes a grant (under which the Plaintiff claims) in this manner (S) he grants, totum jus, titulum, & interesse sua de, & in decimis prædictis; Whereas he had no right, but in the right of his Wife, who had the same as Executrix of her former Husband, and so it was urged that this Lease, by the words of this grant, did not pass, upon the Book of 10 E. 4. fol. 1. If an Executor do grant to another omnia bona sua, those goods which he hath as Executor, do not pass, and by 19 H. 6. fol. 40. If a man grants to another omnia bona sua, those which he hath in his own right, joyntly, with another, or severally in himself, do pass, but not those which he hath as Executor to another; so here in this principal Case, he had this in right of his Wife, and she as Executrix, and so by these words bona sua, the same did not pass: It was also urged, that this Action is grounded upon the Statute, and therefore he ought strictly to pursue the Statute, and so ought in his Declaration, to have shewed, how he came to be proprietor, and possessor of the Tythes, and this he ought to have set forth in the fore-front of his Declaration, which he hath not done, and for this omission, the Declaration is not good. It was answered for the Plaintiff, that the Declaration is good, and a good Title set forth to the Plaintiff; if a man be possessed of a term, in right of his Wife, as Executrix, and he grants totum jus, titulum, & interesse sua, in the term, by the word (sua) the Lease doth pass. If he grants hoc individuum, which he hath as Exe-

3 Cr. 318.

An Action of Debt upon the Statute of 2 E. 6. cap. 13. for Tythes.

10 E. 4. f. 1.

19 H. 6. fol 40.

cutor, as this horse, this cow, or the like; the same doth well pass for the same belongs to him in property and interest, and he hath good power to make a disposition of the same, and here he names the things which he grants, (S) all his interest in the term which he hath in the right of his Wife, and this shall well pass; and the Book of 10 E. 4. fol. 1. doth warrant this, that if he grants hoc individuum and names it, this is good. And as to the Objection made, that the Abbot of Milton was seised simul & semel, of the Farm and tithes, and so the same discharged; and by the dissolution, came unto the Crown discharged; to this was answered that this was not so; for the Abbot had before made a Lease, and so not in his hands; and it is expressly found, that virtute dimissionis prædictæ, the Lessee did enter, and so not to be intended (as was also Objected, that he entred before the Lease began, and so not to be in as a Termer, but as a disseisor upon the Book of 7 E. 6. Dyer. fol. 89. Cliffords case) it being here found, that he did enter virtute dimissionis, which must be after the Lease began, and so the Abbot not seized simul & semel of the farm and tithes. As to another Objection out of the Proviso, in the Statute for Dissolutions, that all Leases made by the Abbot within a year of the Dissolution, should be void, and this Lease pretended to be so, and so void; as to this, the same is no Objection to hurt the Plaintiffs title here: For the issue here only was, whether he were discharged of tithes or not? And the Jury have given their verdict directly, that there was no discharge of tithes of this at the time of the Dissolution, and this Lease is but as an inducement to the title of the Plaintiff; and if there be here any mispleading, or misreyal, now after a verdict, all is helped and aided by the Statutes of 32 H. 8. cap. 30. and 18 Eliz. cap. 14. and so the Plaintiffs title holds good. Haughton Justice. If there be matter shewed afterwards to the Court, that he is the proprietor, this is sufficient. Dodderidge Justice agreed herein, that if after it appear that he was the proprietor, this is sufficient, without making to himself any other title. Hereupon Man Secundary informed the Court, that it had been divers times so here adjudged. Dodderidge Justice, If one be to recover any thing as an Executor there he ought at the first to name himself Executor, but this is not so here in this principal case: here he grants totum jus, titulum, & interesse sua in decimis prædictis, and this is all one, as if he had named the same, specially in his grant, and so the grant good, and the same doth well pass. Haughton Justice agreed herein. Croke Justice. The grant is good, where he specifies the thing in his grant, as that he being possessed of the term in the right of his wife, as executrix, and grants totum jus, & interesse, in this, this grant is good, for he hath jus disponendi in the same, which he holds in the right of his wife, and when he grants his interest therein this is good. Haughton Justice agreed herein, he grants here, totum jus in decimis prædictis, this is good and sufficient to carry the same. Dodderidge Justice, this word (Suum) doth import a property which doth consist in possession and in disposition, the husband hath all chattels realls, as in right of his wife but he hath jus disponendi, of these; if he release to one all actions, which he hath or may have; all actions, which he hath as Executor are by this gone and released also. Haughton Justice. Here in this case he hath in his grant specified, all his title and interest in decimis prædictis, this is as full as can be, and could not be more certainly named, and expressed, and so the whole Court all agreed clearly in this, that the grant was good, and that by this grant, the Lease he had of the tithes in the right of his wife did pass, but no judgment given at this time herein, but the same was adjourned unto another time, Afterwards Termino Mich. 11 Jac. B. R. this matter was moved again, and the Book of 24 E. 3. fol. 35. placito. 38. cited where the Writ was, Recordare fac loquelam, in Com. tuo inter R. executorem testamenti. A. & B. Defend. de quodam bove ipsius R. cap. The same exception taken, that there was a repugnancy in the Writ, for by the naming of executor, the property of the Beef is supposed to be to the Testator, and by other words after in the Writ (de quodam bove ipsius R.) the property is supposed to be in R. and so Judgment demanded of the Writ; this there held to be no exception,

10 E. 4. fol. 1.

7 E. 6. Dyer. fol. 89. in Cliffords case.

Statute of 32 H. 8. cap. 30. 18. Eliz. cap. 14.

Termin. *Mich.* 11 Jac. B. R. this case was moved again 24 H. 3. fol. 35. placito. 38.

ception, but the Writ awarded to be good: So in this case here, where the Husband was possessed of a Lease of Tithes, in right of his Wife, and grants totum statum suum in the same, this shall pass the right, which he hath in the right of his Wife, and this was so agreed, by the whole Court. Dodderidge Justice. There is express authority in point, that where a man is possest of a Lease in right of his Wife, and grants totum statum suum, this is good, and will well pass the same; and the Judges were all clear of opinion, that by these words in the grant, the right and interest he had in right of his Wife, did pass; and as to the exception taken that an imperfect issue was joyned, and so void; but ruled by the whole Court, that all mis-trials are aided by the statutes of 32 H. 8. cap. 30. and 18 Eliz. cap. 14. and not to be quashed after verdict. Note, that this matter, on another day, was moved again, and by Coke Chief Justice, The Law by the intermarriage gives all Chattels personals, to the Husband, which his Wife had in her own right: otherwise it is of Chattels reals, if he did not actually dispose of them, as he may well do. If tenant for life makes a Lease for years, in pleading saith, virtute cujus he was possessed, this is good pleading, without any averment of the life of tenant for life. For the Law here saith, That he is living, when it is pleaded, quod possessionatus fuit, and this is very clear. Dodderidge Justice, if a Rector be leased for years, he may well say, possessionatus, but yet he can take no profits before harvest. As to the Exception taken, that he doth not here shew, that he was Proprietor: As to this the Lease was seen, and it is pleaded, that by force of which he was possessed, and so continued; this is clearly good, and the whole Court agreed with him herein. Also it hath been objected, that there was a discharge of Tythes, by a supposed unity of possession, in the hands of the Abbot, before the dissolution, and at the time of the dissolution, and for this the point was, that the Abbot, a year before the dissolution, did make the Lease for years, and the whole Court agreed clearly in this, that this should be no discharge of the Tithes, notwithstanding that the Lease was made void by the Statute: The words from henceforth, and no Unity of possession, being in the Abbot, no discharge shall be of the Tithes; and this by the whole Court: otherwise it would have been, if there had been an absolute Nullity of the Lease, ab initio, but it is not so here. Croke chief Justice. We ought to favour Tithes, and suits for them, as much as we may: And the Plaintiff here hath a good Title; and so by the Rule of the whole Court, Judgment was given, and so entred for the Plaintiff. Judgment for the Plaintiff.

Lord Plaintiff, against *Thornton* Defendant.

IN an Ejectione firmæ, to be tried at the Bar by a Yorkshire Jury; for to delay, and put off the Trial, Infancy was assigned and pleaded; but it was found by sufficient proof, by oath, and by examination of the Church Book, that he was of the age of 63 years, and so it appeared to the Court, that he was of full age, and this was but a shift, therefore an Attachment was granted against him by the Court. Man Secundary, in this case did advise the Counsel to see, if any continuance were entred in this case, and if not, then a Discontinuance may be entred, and he may recover costs in this case, being in an Ejectione firmæ. Ejectione firmæ.

Higgens Plaintiff, against *Sommerland* Defendant.

In a *Scire facias.* 2 Cr. 320, 549. 1 Ro. 897

IN a Scire facias the case appeared to be this. A Judgment was had in an Action of Debt against Sommerland, and Montgomery his bail taken in execution, the Debt being 200l. the Bail pays part of the Debt 65 l. being unable to satisfie the whole Judgment. Upon payment of this 65 l. the Dettee, Higgins, makes a release unto him of the whole Debt, Judgment and Execution and acknowledges full satisfaction unto him, of the whole Judgment, and this to be in full satisfaction and discharge of the whole 200 l. Afterwards the Bail dies, Higgens sues Execution again upon the first Judgment against Sommerland the principal Debter, and sues out a Scire Facias against him upon the first Judgment after the death of the Bail and after the release and acquittance, and satisfaction by him acknowledged unto the Bail of the 200 l. being all the whole Debt, and so had the principal in execution again: the Court being made acquainted with this, and with these proceedings said, That in this case the Principal had no remedy by the law to help himself, but by an Audita querela, the release thus made to the Bail, being no ways at all available unto him; yet the Court, in their discretion, in this case of so very great extremity, would not put the party to his Audita querela, but in favour of him and for his speedier remedy in this his Case, being so full of equity, they granted an Attachment against Higgens the Dettee, and so upon his appearance to know the certainty of the whole matter; afterwards on another day this matter was moved again, and the Court then left Higgens the Dettee, either to appear in Court (gratis) if he would, or the Attachment to issue out against him; he afterwards did appear gratis, and yet notwithstanding, that his Release was under his hand and seal, and he a man Literate, yet he did not stick to say that he was very greatly deceived in this, and said that he did never intend this release to be a full discharge of the whole Judgment, but only of 65 l. which he had received. Henry Yelverton for Sommerland, urged against Higgens, that when he had once taken the Bail in Execution, he could never after this have execution against the principal, for any insufficiency of the Bail, being thus taken in execution. Dodderidge Justice. He cannot have execution for a moiety against the Bail, & resort to the principal for the other moiety, for if he take the Bail once Execution, by this, by the Law the Principal is for ever discharged; for it is at the first in his own election, to have execution against which of them he pleaseth. George Croke, if there be two Bails, he hath execution for the moiety, against one of them, he may here afterwards resort to the other, and have execution against him, for the other moiety: Hen. Yelverton. agreed this to be so, and so it is likewise, if there be two Principals, for here they are in one and the same course and degree, The whole Court agreed in this, that if the Bail be once taken in execution, he shall never after this have execution for any part against the principal; and so if he once have the principal in execution, he shall never after resort gain unto the Bail, if the principal be insufficient to discharge the Debt; in this case here, he sued out a Scire facias against the principal, after the death of the Bail, and after his release to him, and satisfaction by him acknowledged to the Bail of the 200 l. being the whole Debt, and so by this means hath taken the principal again in execution: The whole Court were clear of opinion, That these proceedings were very bad and undue, and so done in contempt of the Court. But Higgens the party, upon the motion to him by the Court, did assent to release unto Sommerland the principal; all the whole Judgment, and wholly to discharge

discharge him of, and from this Execution. Note, that upon the plea of Higgens, that the release was written, but not read unto him. The Court then demanded, Whether he was a man illiterate, to plead this? But it appeared, that he was not. Note, that upon this. Man Secundary did say, that as this case was, the Law is so clearly, and the common practise here hath been always so, that if a man hath a Judgment against one in debt, and takes the Bail in execution for it, that he by this, hath now lost his first election, which he had, of taking out execution, against the one or the other, and that he cannot afterwards resort unto the principal by a Scire Facias, to be sued out against him for the insufficiency of the Bail, he cannot resort from the one to the other, to have a plenary satisfaction of his Judgment, quod nota.

Kirton Plaintiff, against *Eliott* Defendant.

Entred Hillar. 10 *Jac.* B. R Rot. 422.

In an Action of Debt for rent behind, the Plaintiff declares upon a Lease made by him to the Defendant, being an Infant, rendring a certain yearly Rent, and for rent behind, the Action brought; the Defendant demurred to this Declaration, and afterwards waved his demurrer, and pleaded to issue. Dodderidge Justice. An Infant may wave his demurrer at another day, after he hath demurred, and plead to Issue, but this ought to be in the same term, but not in another term; the whole Court agreed in this: the case then appeared to be, a Lease was made to an Infant, rendring rent, whether he shall be charged with the payment of this rent, or not, was the question? It was urged, that he shall be chargeable with the payment of it; because by this Lease so made unto him, he is now by this, become as a Purchaser, and so to be in the Judgment of Law, as a man of full age. Haughton Justice. If a Lease be made of an Acre of Land, to an Infant, rendring a 100 l. rent by the year, and he doth occupy and enjoy this, he shall be charged with the rent, he being here to be taken as a purchaser. Dodderidge Justice. If a greater Rent be reserved, than the Land is worth, there peradventure, the Infant shall not be charged with it, If an Infant executor, makes a Lease without any consideration, he may well avoid this, because he was herein circumvented: If a Lease be made to Husband and Wife, rendring Rent, the Husband dies, the Wife may wave this, and so avoid payment of the rent; but if she continue the possession, she shall be charged with the rent. In the principal Case, the Court were all clear of opinion, that the Infant Lessee was liable to pay the rent; and the Action was well brought, and so Judgment given for the Plaintiff.

2 Cr. 320. An Action of Debt against an Infant for Rent behind; upon a Lease made to him.

Judgment given for the Plaintiff.

Han-

Hankinson Plaintiff, against *Sandilaus* Defendant.

Entred Mich. 10 *Jac.* B. R.
Rott. 461.

Action of Debt upon a Bond. 2 Cr. 322.

IN an action of Debt upon an Obligation, for 40 l. upon Oyer demanded by the Defendant, of the Bond and of the Condition thereof, the Case appeared to be this, That two did bind themselves or any of them, their Heirs, Executors, or either of their Heirs, &c. The Action was brought against the Defendant alone, the other Obligor being living; upon this Declaration the Defendant did demur in Law, the only Question was, Whether this Bond be joynt and several, or only a joynt Bond to be sued against them both: It was urged for the Plaintiff by Hen. Yelverton, that this Bond is either joynt or several, at the Election of the Plaintiff. 28 H. 8. Dyer fol. 19. placito 114. 3. were bound in an Obligation in this manner, (S) Obligamus nos, & utrumque nostrum, per se pro toto & in solido; this is several also as well as joynt, as if the same had been Quemlibet nostrum, and so it is there held per Curiam; according to this is 39 H. 6. fol. 9. that uterque is as good as quilibet, 21 R. 2. Fitz. tit. Brief, placito 934. An Action of Debt brought against two by several Precipes, and counts against them severally, the Obligation being, Noverint universi nos, A. & B. teneri, &c. ad quam quidem solutionem obligamus nos, & singulos, &c. and without any other words in the Obligation proving them to be bound each of them in the whole, the Writ awarded good against them severally, 29 H. 8. Brooks cases, fol. 21. placito 102. It is there held per Curiam: If two be bound, Conjunctim & divisim, this is joynt and several, 7 H. 4. fol. 6. this very Case, his terminis; two did bind themselves, vel alter eorum, and there adjudged in point of this Bond to be joynt and several. Geo. Croke urged for the Defendant, that the Obligation was sealed and delivered by them both joyntly: This is a joynt Bond, and these subsequent words, or either of us are void, like unto the Case in Perkins, in his Chapter of Grants, fol. 13. placito 56. 8 H. 7. fol. 1. 11 H. 7. fol. 13. If a Grant be made to I. S. or to I. D. this is void for the incertainty of it: So in this Case here, for one of the Obligors is to be discharged by this, but it is uncertain which of them, and therefore void: He to whom the Bond is made ought to have Election to sue which of them he will; the Case in 28 H. 8. Dyer, the Bond there is joynt and several there both of them are so bound at the beginning; but otherwise it is here: For first, here both of them are so bound, and afterwards follows these Words (or either of us) the Obligee here hath this as a joynt Deed, and so he ought to pursue the same. Flemming Chief Justice. The Plaintiff here hath the Election which he hath in respect of the Action, the Bond being sealed unto him: And here in this case in these Words (&) and (vel) are Synonima's, and all one here in signification. Croke Justice agreed herein. Dodderidge Justice. As to the Exception for the Defendant, the same may be taken to every Bond: The acceptance here, makes no matter at all as to the Election, but this doth afterwards still so remain at the pleasure of the Obligee, to sue one, both of them, or either of them; and here (&) and (vel) are all one, here in this Case, the election of the Obligee is implyed, and joynt Delivery of the Bond here in this Case; shall not make

28 H. 8. Dyer. fol. 19. &c.

39 H. 6. fol. 9. 21 R. 2. &c.

29 H. 8. &c.

7 H. 4. f. 6.

Perkins Grants, &c.

make this to be a joynt Bond, and not several, the same being joynt and several by the Law. Haughton Justice. This is several, in respect of the Suit, and this doth rest altogether in the Election of the party, the Obligee, to sue them joyntly or severally; and so all the Judges did clearly agree, that as this principal Case was, the Bond so entred into by the Defendant and another, the same was both joynt and several; and the Plaintiff suing the Defendant alone, being one of the Obligors, this he might well do by the Law, they being both bound joyntly and severally; and so the Plaintiff had good cause of Action; and his Action well brought, the Defendant had no good cause to demur, and so the same over-ruled by the Court, and by the Rule of the Court Judgment was given, and so entred for the Plaintiff. Judgment given for the Plaintiff.

Hanly Plaintiff, against *Alport* Defendant.

IN a Writ of Error, to reverse a Judgment given against him in the C. B. in an Action of Debt upon a Bond, conditioned for performance of Covenants, being for the enjoying of the possession of Land without disturbance; and being disturbed therein, for this breach of Covenant the Action brought, and a Judgment had upon a Nihil dicit, for the Reversal of which Judgment, a Writ of Error was brought, and after Errors assigned, and in nullo est erratum pleaded, a Certiorari was prayed for the Record, to prove one of the Errors upon the point of Adjournment and discontinuance, Whether this should be granted or not, was the question: It was urged, that Error upon a Judgment in the C. B. is not to be here assigned, unless the Record be here in Court: It was likewise urged, That after in nullo est erratum pleaded, the Record is not to be removed: It was urged, that the granting of a Certiorari in such a Case, is not to be in dis-affirmance, but in affirmance of the former Judgment: The disturbance here, was supposed to be done by the Testator; the party against whom the Action was brought, and the Judgment given, was the Executor, and the Judgment had against him by a Nihil dicit, Coke 5 part. fol. 37. B. in Bishops Case, it was moved, that after in nullo est erratum pleaded, No Writ of Diminution or Certiorari shall be awarded; and so is 7 E. 4. fol. 25. and 28 H. 6. fol. 10. And if any should be awarded by the discretion of the Court, the same should be only to ascertain them of the verity of the matter; and for the amending of the Record in things amendable, or to salve the former Judgment, according to the verity of the Case, but never to reverse the Judgment; and that a Certiorari may issue, as well after such a Plea pleaded, as before. Dodderidge Justice. The granting of a Certiorai in such a Case, is only ad informandum conscientiam, and this doth rest in the discretion of the Court, to grant this or not. Haughton Justice. The same hath been here before this time granted after such a Plea of in nullo est erratum pleaded, and the difference will be, where the same is to be in affirmance or in dis-affirmance of the Judgment; and when the same is returned, the Court is not bound to receive the same, but this Writ is well grantable. Dodderidge Justice. In rigore juris a Certiorari is not to be awarded after this Plea of in nullo est erratum pleaded, and the granting of this Writ, is only to inform our Consciences: We may this do, and to do it in this Case here, there is great reason, and by the granting of this, no prejudice shall thereby happen to any person, this being only ad informandum, and for no other end, and therefore the greater reason to grant the same here in this Case, in regard that the Judgment given was upon a Nihil dicit, and not otherwise: And so by the Rule of the Court in this case, after the Plea of in nullo est erratum pleaded a Certiorari was granted.

A Writ of Error to reverse a Judgment in the C. B.

Coke 5 pars, fol. 37. in *Bishops* Case

7 E. 4. f. 25.

28. H. 6. f. 10

Pet

Pit Plaintiff, against *Webly* Defendant.

A Prohibition on Statute of 23 H. 8. cap. 9. 2 Cr. 321.

IN a prohibition prayed upon the Statute of 23 H. 8. cap. 9. for being cited out of the Diocess, contrary to the Statute. Dodderidge Justice. There are divers Exceptions in this Statute: The verity of the Case appeared to be this, One was Arrested by the Serjeant of the Mace as he was coming from Church from the Sermon, upon this he libels against him in the High Commission Court; they there allowed the cause of the Arrest, but for the contempt, they did give him 6 l. Costs (Note, that this was not upon the Sunday) Hen. Yelverton moved the Court for a Prohibition as to the Costs there assessed. Croke Justice. Eundo, & redeundo, to and from the Church a man is not to be Arrested, the Statute of 1 R. 2. cap. 15. provides against arresting in time of Divine Service: One was arrested coming from Church, the party which did this was Excommunicated for the same, Hen. Yelverton. If a Constable, an Officer of the King, do Arrest one upon a Process to him directed, and this for the King, and the Arrest after Evening Prayer; and for this he prefers a Libe in the Spiritual Court against him, and they will there Excommunicate him for this, this is very hard, and not sufferable: A Prohibition was prayed in this Case, upon the Statute of 23 H. cap. 9. The Court demanded, whether they had known any Prohibition formerly granted upon a Suggestion grounded on this Statute. Man Secundary made answer, That he never knew of any. Hen. Yelverton then made answer, that they would not rely upon the Statute, but would ground their surmise upon the Fact it self, being the Excommunication for this; hereupon the Court advised him to do so being their best way. Croke Justice. The Statute of 1 R. 2. cap. 15. prohibits Arresting in time of Divine Service, not to be eundo, nec redeundo on the Sunday. Hen. Yelverton. This Statute prohibits Arrests to be between party and party, but this Case here, was between the King and the party, he was Arrested for the King. Croke Justice. Matters of necessity may be done on the Sunday: There formerly happened to be this Case; A man was Arrested on the Sunday for Debt, in London, a Rescous was made and in this Rescous a Serjeant was killed: This matter came afterward to be questioned, and resolved this Arrest to be lawful, and the Fact in killing of the Serjeant, to be murder: Afterwards the Counsel for the Plaintiff in the prohibition, did relinquish their surmise, upon the Statute of 23 H. 8. cap. 9. of his habitation within a peculiar Diocess, and being sued out of this, and did frame the suggestion in this manner, That Pit had a Warrant from a Justice of Peace and serving this after Divine Service ended upon Webly, without any tumult at all; he only shewed this unto him, and for this he libelled against him before the High Commissioners, and for this he was convented before them, and upon this a prohibition prayed: This being in a Case concerning the King, the party is not to be punished for this; the Statutes of 50 E. 3. cap. 5. and 1 R 2. cap. 15. prohibiting Arrests in time of Divine Service: These Statutes are where the matter is between one common person and another, but not where the same concerns the King and a common person, as in this Case here it did: Here he had a Warrant from a Justice of the Peace, and this form the King, this concerns the Crown; he came to serve this, and so did: This Arrest thus made, was at the Suit of the King, and for the Peace, and this is a temporal thing; the Court seemed to be clear of opinion, that here, as this Case is, there is just cause to grant a prohibition, but gave

Statute of 1 R. 2. cap. 15.

23 H. 8. cap. 9.

gave a further time to be again moved herein for their Judgment; in the mean time the parties agreed between themselves, and the Court not moved again herein.

Ended by Agreement.

Jones Plaintiff, against *Clarke* Defendant.

In an Action upon the Case, grounded upon a promise, the case appeared to be this: Jones Plaintiff, being possessed of a shop in London, for five years and a quarter, did demise this unto the Defendant, in this manner, and upon this agreement; he did agree to demise this to the Defendant, paying to him 40 s. by the year, and 10 s. for the last quarter, this was their agreement, and for the perfecting of which, each of them did give unto the other 1 s. Et postea, in the Declaration it is mentioned, that in consideratione præmissorum, the Defendant did promise to give unto the Plaintiff 30 l. and did assume to pay this afterwards; in consideration of all this, and in performance of the contract, he made the Lease to the Defendant accordingly, and upon the Defendants refusal to pay the 30 l. being demanded the same, the Action was brought; upon Non assumpsit pleaded, a verdict was given for the Plaintiff. Harris moved for the Defendant, in Arrest of Judgment, that the Declaration was not good, there being no good consideration therein expressed, to raise the promise, for payment of this 30 l. the same being grounded upon a consideration, which was past, perfect and executed, and so the same no good consideration to raise this promise; and to this purpose there was a case here in this Court; between Feak and Cotton, in an Action upon the case for a promise, where there was an exchange made between two, of so much French mony, for so much of English, in consideration of which (this being an exchange executed) and after this, the promise was to pay to him so much mony, in an Action brought for this mony, upon this promise this was here ruled, to be a good consideration; but this Judgment was afterwards reversed by a Writ of error in the Exchecquer Chamber, and that for this reason, because the exchange was past, and executed, and so this could be no good consideration, to raise the promise to pay the mony, according to the case in 10 Eliz. Dyer 272. where the Servant of A. was arrested in London, upon an Action of Trespass, and two persons who did know A. the master, became bail for him; afterwards A. did promise them, for their friendship in bailing of his servant to bear them harmless from all costs and damages they should sustain thereby, if they are afterwards charged, an Action upon the case doth not lie by them against A. the master for this promise, there being no consideration to raise the same, for that the bailing of him here, was of their own heads, and executed before the promise made, otherwise if the master had before requested them to do this; and according to this it was resolved, 42 Eliz. B. R. between Dogge and Bowels, that a promise grounded upon a consideration that is past, is not good, and so in this principal case, the consideration was past; and the agreement executed, and so the promise not good, nor the Action maintainable. It was urged for the Plaintiff, that here was a good consideration and a good promise, and the Action well brought. Dodderidge Justice. First, here is a perfect contract made for the demise of the shop or house for so many years, at 40 s. rent per annum, for the same and each of them gives to the other 1 s. to perfect this agreement, and by this to bind each other to perform the same; and afterwards (S) the same day, in consideratione præmissorum, the Defendant did promise to pay unto the Plaintiff 30 l. upon this promise, for non payment, of the same, the Action was brought; it appears, that all this was done, and concluded upon one and the same day, and this 30 l. premised, was but for a

Action upon the Case for a Promise.

Feak against *Cotton. B. R.*

10 Eliz. Dyer, 272.

42 Eliz. B. R. *Dogge* against *Bowles.*

Fine to be paid, and it further appears (to make this the more clear) that after all this, and after the promise made to perform all this, he made the Lease to the Defendant, and not before, which Lease in it self, being thus afterwards made, is a sufficient consideration also, and in consideration of this Lease, and that he should enjoy the same quietly and without disturbance he made the subsequent promise to pay the 30 l. which was to be a Fine for the same Lease, the rent being small, but 40 s. a year, and this is a good promise, and a good consideration for the same. Crook Justice. The Lease here is made after the promise; the agreement is in performance of all, not of part; the agreement here was on the Plaintiffs part, to make the Lease to the Defendant; and on his part to pay the rent of 40 s. and the 30 l. in consideration of his quiet enjoying of the same, and this is a good promise grounded upon a good and a sufficient consideration. Dodderidge Justice, this being so, the Plaintiff he agrees to make the Lease, the Defendant agrees to pay the 40 s. rent which the Plaintiff formerly paid; and further it was agreed, that the Defendant should pay the Plaintiff 30 l. more for a Fine, this is a good agreement, a good promise, and a good consideration to raise the same, and when the 1 s. was received on either side to bind the bargain between them the Plaintiff then further said, but I will have 30 l. before I will make the Lease for a Fine: Hereupon the Defendant promised to pay the 30 l. to the Plaintiff accordingly; and in pursuance of all this, the Lease was afterwards made by the Plaintiff to the Defendant, and this was one intire agreement, and the promise goes to the whole, to the payment of the 40 s. rent and the 30 l. fine and all grounded upon the same consideration being the making of the Lease by the Plaintiff, to the Defendant, which was clearly a good and sufficient consideration to raise the promise for payment of the 30 l. for non payment of which the Plaintiff here had just cause of action, the verdict well given for him, the Declaration good, and so by the rule of the Court, Judgment was given, and so entred for the Plaintiff.

Judgment given for the Plaintiff.

Craske Plaintiff, against *Johnson* Defendant.

Action upon the Case for a Promise.

IN an Action upon the case, for a promise, upon Non assumpsit pleaded, a verdict was found for the Plaintiff. It was moved in Arrest of Judgment that the Declaration was not good, and the case appeared to be this; that certain Wares being sold and delivered by Craske the Plaintiff unto I. S. and this so done by him, ad requisitionem of Johnson the Defendant; the Defendant, in consideration that the Plaintiff would give trust and credit unto the said I. S. for the Wares so as the same did not exceed 100 l. he promised to pay him for the same cum inde requisitus esset, the Plaintiff dicit in facto quod superinde fiduciam dedit to the said I. S. and had delivered unto him such Wares, for which, the money agreed to be paid for them, did not exceed 100 l. the payment of which sum he had requested of the Defendant, according to his promise, the which to pay he refused, and hereupon the Action brought, and all this so set forth in the Declaration. It was urged by George Croke, for the Defendant, that the Declaration was not good; the same being altogether uncertain, being idem dedit superinde, and doth not shew in all the Declaration whether this was before, or after the promise, and the same may be taken by intendment, to be as well the one as the other: Quas emisset, & habuisset, & superinde postea, such a day, deliberasset, quas emisset, and doth not say super fidem; afterwards he saith that the Defendant hath not paid the same, and doth not shew whether I. S. himself had paid for them, or not:

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for he might pay him for them himself: neither is it expressed that he delivered the Wares, super fiduciam; he ought also to have laid the trust, to be after the promise: otherwise, non constat Curiæ, quando, when he did trust him; and so for this cause the Declaration is uncertain and not good. It was urged for the Plaintiff, that the Declaration was good and certain, and that it shall not be taken by any intendment, that the trust was before the promise made unto him for repayment. Dodderidge Justice. There is no time here mentioned in this Declaration, when these goods were bought. Haughton Justice, when he lays the promise after fiduciam dedit, & super hoc, vendidit, & deliberavit. This is altogether uncertain, but the same ought to have been superinde (S) such a day, which was the promise (fidem dedit) & superinde, and so he couples altogether, which is not good. Dodderidge Justice. Declarations ought to contain in them certainty and verity, and if either of these do fail, the Declaration is not good; there ought to be certainty, ut certum sit fundamentum unde Judicium may be given, here it is said, fiduciam dedit but shews not when, nor yet, for what this was, and so not good; and that Declarations ought to have such certainty and verity, it appeareth fully in 3 E. 4. fol. 21. put in Plowdens Commentaries, fol. 84, a. In Partridge and Crokers Case, and fol. 202. b. in Stradling and Morgans case: Where the case was, a man reteined in husbandry, brought an Action of Debt against a Prioress, for his Salary, and declares, that he was reteined with the Predecessor in the Office of Baily of his husbandry, for 40 s. a year, and doth not shew in certain, who it was that reteined him; and for this cause, by the better opinion, the Court abated for incertainty; For it might be, he was reteined by one, who had no warrant so to do; and as there ought to be certainty, so the Law also requires verity to be conjoyned with certainty in Declarations, and if the contrary appears to the Court, the Declaration will not be good; and this so appears, by 9 H. 7. fol. 3. 6 E. 4. fol. 7. cited in Commentaries, fol. 84. in Partridges case, as if one do bring an Action of debt for two payments, at two several days, one of the days not being then come, and this appears to be so, by the Plaintiffs own shewing; he hath by this abated his own Writ, because he hath shewed falsity therein; Declarations ought to be certain to all intents, and not to be taken by intendments; so here in this principal case, it is said, fiduciam dedit, but whereof non con constat, & superinde, this will not make it good, the Declaration being so general before: For non constat Curiæ, for what things he had given him credit & this shall not be supplied by any intendment. Croke Justice. It is very true that no incertainty ought to be in a Declaration; but in this case here in question, the matter contained in this Declaration, is certain enough; for ex precedentibus & consequentibus we are to frame and ground our Judgment: it is here said, fiduciam dedit, & superinde, this fidem dedit, by a necessary intendment must be taken, to be consequent to the promise, and as a consequent upon the promise and so the Declaration is certain and good. Flemming Chief Justice. Declarations ought to be certain, because they are to contain in them the demand of the party, they ought to be certain in every particular in the time and place, and in matters material, in the same alledged: And whether it be so here in this Declaration, is the sole and only question: And this we are to see, and to consider of, the ground of the promise here made is, if he did credit him with the goods upon trust, he did promise to pay him for them, modo the same Sum did not exceed 100 l. but when to be paid? when he delivers these goods upon trust, when he sels and delivers these Wares unto him upon trust, and not before, so that this is the substance, that the Plaintiff ought to sell & deliver Wares unto I. S. and this to be upon trust, this is the substantial matter, which gives the cause of Action to the Plaintiff: Upon this promise he hath not here laid in his Declaration a certain delivery of these Wares; he only saith in this, fidem dedit; but whereof this was, nothing is said so that this Declaration is too general, for he ought to have expressed, that he had delivered those Wares, super fiduciam, if he had set forth, that he had sold him such Wares upon trust, this had

3 E. 4. f. 21. cited in *Plowdens* Commentaries, *&c.*

9 H. 7. f. 3. 6. E. 4. fol. 7. *&c.*

been good and sufficient, but he saying superinde vendidit, & deliberavit, this is not good; and to have this taken by intendment, should be a very forein intendment, for nothing is here shewed by the Plaintiff, to couple the delivery of the Wares with a trust throughout the whole Declaration, and so the same is uncertain and not good. First there is mention here made of a trust, but for what, non constat, as it is here expressed, this is an individuum vagum, and this is the material and substantial matter to charge the Defendant with an assumpsit, the which ought by the Plaintiff to have been certainly alledged in every particular, but herein he hath failed; for the declaration doth not contain in it any certainty in this point, in the matter of the trust for the Wares delivered to him, according to the promise. Dodderidge Justice, the matter of trust here is issuable; if the Plaintiff saith fiduciam dedit; the Defendant must say non dedit fiduciam; this is no good issue: For it doth not appear for what thing this was & this is issuable, and therefore this ought to have been certainly shewed by the Plaintiff for what this was, the which he hath not done, and so for this defect, the Declaration is not good. Haughton Justice. If he had not here expressed in his declaration, that superinde he delivered to him the Wares, this had been then clearly uncertain, & so the declaration would have been bad; but here it is fully expressed, and so set down, that superinde, he did deliver them, and this is as much in substance & by a necessary intendment as if he said expressly, that super fiduciam, he had delivered all the Wares to him; this being all one in sense and substance: The superinde here goes unto two things (S) to the time of the delivery, and the same to be after the promise, or else to the thing delivered, and the same to be after the promise, and all this is made good to be so by this significant word (superinde) and so the declaration here is certain and good. Dodderidge Justice, and Flemming Chief Justice did agree in opinion, that the trust with the delivery, ought to be coupled, as well to the time of the delivery, as to the thing delivered, and to have this word (superinde) to be taken, by intendment, opus est, there is need of an Interpreter for this. Haughton Justice. It cannot be here super fiduciam, if the delivery was not superinde, for that this word (superinde) doth well supply this: And so for this time this matter was adjourned to be moved again. Afterwards at another time, the Court was moved again herein for their opinions. It was urged again that the Declaration was altogether uncertain, and so not good; the Plaintiff, dicit in facto, fiduciam dedit, but doth not say, quando nec ubi, nor that the Defendant postea did promise to pay, if the Plaintiff would give him trust; the Wares might be delivered, one or two years before the promise, and then the assumpsit lyeth not for this; also the promise was, that if the Plaintiff would give trust unto I. S. for Wares not exceeding a 100 l. the Defendant promised to pay him for the same, the Plaintiff hath not here shewed, that the mony was unpaid to him by I. S. who might have paid the same. Croke Justice. If these words had been in the promise, that if I. S. did not pay him, then he would; if this promise had been so made, then the Plaintiff in his Declaration ought to have averred that I. S. had not paid him, but he needs not say so, as this case here is, the Defendants promise being absolute to pay the same. Flemming Chief Justice agreed with him herein: The promise being generally, that for such Goods as he delivered to I. S. on trust, not exceeding 100 l. he would pay the same. Croke and Haughton Justices, fiduciam dedit, this too general, but superinde vendidit, & deliberavit: This sufficiently proves the sale, the trust and the delivery of the Wares to be all after the promise made. Crook Justice, and Flemming Chief Justice. The Plaintiff here needs not shew in his Declaration that I. S. had not paid him the mony, fiduciam dedit, by this it doth appear, that the Plaintiff did trust him. Dodderidge Justice. In the Declaration it is expressed, that fiduciam dedit, but it doth not appear that he then delivered any Wares but superinde vendidit, This is not the Trust, the promise was this, and in this manner made, that what Wares you deliver up to I. S. on trust, if they exceed

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not 100 l. he would pay him for the same: The Plaintiff in his Declaration ought to have set down in certain all which was any ways material to intitle him to have this Action: the Defendant promised that he would pay for them but with this (S.) if J. S. did not pay him for the same. Haughton Justice. Clearly this word (superinde) supplies all that hath been urged against this Declaration. Dodderidge Justice. If I agree with one in manner as before, to pay unto him for Wares, by him delivered to another; if the other have paid him for the same, I shall not pay him again, for he is not to be paid twice for one and the same thing and the certainty of this ought to appear in the Plaintiffs Declaration: The whole Court in this point were clearly against him. Flemming Chief Justice. The promise here by the Defendant to the Plaintiff is this, If you sell and deliver such Wares to J. S, I will pay you for them. Dodderidge Justice. The Plaintiff here ought to shew and express in his Declaration, that he had sold and delivered the Wares, and that J. S. had not paid him for the same, unde actio accrevit; the whole Court against him in this, that the Plaintiff needs not to shew this: But if this were so, it ought then to come on the Defendants part, to say and aver that J. S. had paid unto him this mony before, and so upon this they might have gone to Issue: But there was nothing urged in this kind, or any truth of any such payment, this being meerly a bare surmise and supposition of a poet esse; and so without any further debate at this time, this Case was adjourned over to another time, for the Court to be better advised herein. Afterwards, Termin. Mich. 11 Jac. B.R. This Case was moved again, for the Opinion of the Judges herein. Haughton Justice. The Declaration here is certain and good, and the Action upon the Case here is grounded upon a Consideration, which is Executory, and therefore he ought to say the performance of this in his Declaration or the same will not be good; and all this the Plaintiff hath here laid, and sufficiently set forth in this his Declaration: Here the consideration being That he was to trust J. S. for such Wares not exceeding 100 l. Hereupon the Defendant promised to pay the mony to the Plaintiff, for the same cum inde requisitus esset: The Plaintiff here says in his Declaration accordingly: Quod fiduciam dedit, Anglice trusted the said J. S. the residue of the words (being for which he did trust him) are very well here supplied: The Declaration is further, & superinde (S.) such a day he sold unto him such Wares; the superinde here is to be taken upon the sale of the Wares, and the superinde here doth well contain the whole matter in the Declaration: A great difference will be between this, and an uncertainty in the Declaration; for if a Declaration be uncertain, in the thing therein contained, or in the person, as the Case in 3 E. 4. fol. 21, 22. is where one is retained by the Abbot, without shewing a certainty of the person who retained him, being in an Action of Debt brought for his Salary, this was not good: But it is not so here in this Case, for all the matter here laid and set forth, is allowed of, and if the same be not in terminis iisdem, which the Law requires, yet the same is good and sufficient: For if the Declaration be sufficient in matter, as here it is, this shall be good and sufficient in Law; If one doth license another to enjoy his Land for a certain time; he pleads this as a Lease, and this is good without any words of demise; and so is 10 E. 4. fol. 4. so here in this Declaration the Plaintiff hath well hit the matter, but he hath somewhat failed in the words, yet the Declaration is good and sufficient, and so the Plaintiff here had just cause of Action, a Verdict well given for him, the Declaration good notwithstanding any of the Exceptions taken against it, and Judgment ought to be given for the Plaintiff. Dodderidge Justice. As this Case is, Judgment ought to be given for the Defendant, the Declaration here being not good. It is to be observed for a Rule in Law, that all Declarations ought to contain in them sufficient certainty, and that in all respects; to this purpose much good matter doth appear, Coke 5 pars, fol. 121. in Longs Case, where mention is made of a threefold certainty. 1. To a common intent, the which shall be good in a Bar. 2. To general intents, the which shall be good in-

Term Mich. 11 Jac. B.R. &c.

3 E. 4. f. 21. 22.

Coke 5 pars, fol. 121. &c.

Indict-

Indictments, Pleints, Counts, and Replications. 3. Certainty to all particular intents: Bracton observeth thus much, that in a Declaration there ought to be. 1. Intentio petentis. 2. Petitio certa, ut res certa deducatur in judicio, so that a Declaration ought always to contain in it, certainty and verity; A certain Answer for the Defendant. so that the Court upon this may give a certain Judgment; and so without all question, a Declaration ought to contain in it, certainty sufficient, or the same shall not be good: And now by these Rules, to examine the Declaration here, Whether the same hath in it such a certainty as the Law doth require; as to this, it hath not so: Here the Defendant assumes to pay the Plaintiff, for all Wares which shall by the Plaintiff be delivered upon Trust to J. S. his Friend, so as they exceed not 100 l. The Plaintiff says here in his Declaration, Quod fiduciam adhibuit, but of what this was, non constat. Here we ought to believe, that he spake truly, and delivered the Wares upon credit; but here he says, Quod superinde, he delivered the Wares, but they were those which he had sold unto him before; this word (superinde) here, will not make that thing which is uncertain to be certain; this word (superinde) Aliquando determinat causam, & aliquando tempus, but here it doth determine causam; the Case in 3 E. 4. fol. 21. is adjudged against the Plaintiff, that his Declaration was not good, because it wanted certainty, because he did not certainly shew therein by whom he was retained, for that he might be retained by one who had no right power nor authority to retain him, and for this cause the Declaration there ruled not to be good, 9 Eliz. Dyer, 258. Lessee for life, the remainder in Fee, Lessee for life makes a Lease for years, and dies, the Lessee brings an Action of Covenant against the Executors of the Lessor, upon the demise there adjudged, that it lieth not, unless the Covenant were broken in the life time of the Testator: Exception there is taken to the Declaration, beause he did not set down therein the precise time when the Lease was made, yet there the expulsion presupposes, that he was in possession, but notwithstanding all this, the Declaration for this omission was adjudged to be bad. Also in Plowdens Commentaries, in Partridge and Crokers Case, Exception is there taken to the Declaration, because he did not therein shew when the waste was done for otherwise, unless this were shewed, it could not be to his dis-inheritance: In this principal Case here. I may as well intend the same to be one way as you another way: and so for this cause the Declaration here is not good, for the incertainty in it: The Rule of Law being, that a Declaration ought to be sufficiently certain, and that we ought to ground our Judgments upon a certainty, which we cannot do here in this Case, and therefore as this Case is, Judgment ought to be given against the Plaintiff. Croke Justice. Judgment here ought to be given for the Plaintiff, the Declaration here being certain and good, the ground before laid must be agreed, being, that Declarations ought to contain in them certainties, and the division of certainties must likewise be agreed, but the inference hereupon must be denied: If a Declaration contains in it certainty, in communi & vulgari sensu, this is sufficient: Here the Defendant assumes to pay if the Plaintiff do trust J. S. with Wares not exceeding 100 l. It is laid by the Plaintiff, and so expressed in his Declaration, that he had delivered unto him such Wares upon trust. Two things are here expressed in this Declaration. 1. That he did trust him for such Wares as he would, habere & emere. 2. He says Quod vendidit, & deliberavit: It appeaes here, Quod vendidit: The Objection here is, that it may so be, that principalis debitor hath paid this mony to the Plaintiff, for these Wares before; if this revera were so, it ought then to come on the other side to shew this, but no such matter is shewed, nor doth any ways appear to be so; Here in this Declaration it is expressed, Quod fidem adhibens, he delivered the Wares, so that throughout, the Declaration here is certain and good, and so Judgment ought to be given for the Plaintiff. Cook Chief Justice. The Declaration here is certain and good: all the grounds before laid are to be agreed, and that an Action upon the Case ought to comprehend in it all the whole

3 E. 4. fol. 21.

9 Eliz. Dyer, 258.

Plowdens Commentaries, *Partridge* and *Crokers* Case.

the same ought also to be certain, or not good: Fleta calls this Action Breve Magistrale & Cursitorium, because there is no set form of it; but the same is so called, because the Cursitors in such a Case make Writs of course; it appears by 39 H. 6. in the Bishop of Salisburies Case, that this Action ought to contain certainty in it: The Point here considerable in this Case is, Whether here be sufficient certainty expressed in this Declaration, or not; here is sufficient certainty in this Declaration, and the rather, because the consideration here is Executory, and so well traversable; otherwise where the same is executed; in this Declaration here dicit in facto, that he hath delivered, superinde fiduciam adhibens deliberavit: The Defendant might well have traversed this, if he so would, and have said that he had not delivered them: Here the Declaration is good, certain, and sufficient, and he hath here well hit the very words of the Issue, the same being, as before in consideration, that he should deliver, he did assume to pay the Plaintiff; here he saith, that superinde dedit fiduciam, and delivered to him the Wares upon trust. It hath been objected, that this is an individuum vagum. Adverbium determinat verbum, both in Grammar and Law: I agree, as it hath been urged, if he had said, super fiduciam illam deliberavit, this had been good clearly; here superinde is as much as super fidem illam: This is all one in effect with it, superinde this determines the time postea, this ought determinare causam & tempus, Declarations ought to be certain, this must be agreed to be so. A Court shall not be abated for matter of form, if it hath sufficient matter of substance in it: Dyer was wont usually to say, that a good pleader deserves the best commendation, 14 Eliz. Dyer 304. The Lessee of a Parson brought an Ejectione firmæ: It was there objected, that he ought to have averred the life of the Parson, it is there said and adjudged; that certainty by Argument is sufficient, by taking of Issue, there this was averred by implication (being) fuit & adhuc seisitus est, and still so is, in dominico, of which case, if it had not been there adjudged: some doubt might well have been made of it, Mic. 10 Jac. The Dean and Chapter of Norwiches Case, where a Lease being in esse, the Dean and Chapter made a new Lease, resolved this new Lease to be a good Lease, as long as the Dean was living: In an Action brought to avoid this Lease, after the death of the Dean, it was not said expressly that the Dean was dead (but in this manner) expressing that the Lease was made by such an one (Nuper Decanum) and this was held a good and sufficient Argument that he was dead: here in this Declaration, when he saith, fiduciam dedit, & superinde deliberavit, this in Judgment of Law is all one as if he had said, super fiduciam illam deliberavit, and this here is good and sufficient, the same being also after a Verdict. Dodderidge Justice. I agree, if he had said here, super fiduciam illam deliberavit, that this had been good, Adverbium temporis determinat tam tempus, quam causam, but Participium determinat causam. Coke chief Justice. This also determinat tempus, there being no time before and superinde is as much as fidem dedit, when no time is mentioned before: We all here agree in the Principles, but we differ in the Application; and applicatio est vita regulæ, 39 H. 6. is a famous Case to this purpose; but we will be better advised of this Case, and so without saying any more at this time herein, the same was adjourned.

39 H. 6. &c.

14 Eliz. Dyer. 304.

Mich. 10 Jac. &c.

39 H. 6.

Nota, That upon another day, the Court was moved again for their Judgments herein, and at this time by the whole Court, nullo contradicente, Judgment in this Case was given, and by the Rule of the Court so entred for the Plaintiff.

Judgment for the Plaintiff.

Doiley

Doiley Plaintiff, against *White* Defendant.

Entred, Hillar. 6 *Jac.* B. R. Rott. 853.

2 Cr. 323. An Action for false Imprisonment.

IN an Action brought for a false Imprisonment, the Case appeared to be this A Warrant was directed to take Julian Doiley Widow unto White the Defendant, who by force thereof did take Julian Doiley the Plaintiff, being the Wife of, &c. and yet in verity she was the same person that was to be taken by the said Warrant, and upon a special Justification made by the Defendant, and setting forth the whole matter, the Judgment was Quod caperet Julianam prædict. per nomen, of Julian Goddard, ad satisfaciendum prædict. Leonardum pro damnis, &c. the truth was, that at the time of the Warrant issuing out against her, she was then Julian Goddard Widow, but at the time when she was arrested, taken, and imprisoned, she was then Julian Doiley, the Wife of Doiley; upon this special Justification, the Plaintiff demurred in Law: It was urged for the Plaintiff, that the Sheriff had no warrant to take Julian Doiley, the Action was first brought, being Trespass against Julian Goddard Widow; hanging this Suit, she takes Doiley to Husband: Judgment was given for Julian Goddard, against Leonard the Plaintiff in the Action, who reversed this Judgment by a Writ of Error, and so had the Warrant to the Sheriff, ut supra, by force of which he did take the said Julian Doiley, Wife of the Plaintiff, having no warrant so to do, and for this was cited 10 El. 4. fol. 12, &c. 5 E. 4. fol. 84. Brook title Faux Imprisonment, plac. 19. 10 Eliz. 4. f. 12. &c. If a Capias do issue out against J. B. of Dale, Gentleman, and there are two of the same name and mystery, within the same Ville, the Sheriff at his peril ought to take upon him the knowledge who it was that was sued; for if he takes the other, who was not sued, he shall have an Action of false Imprisonment against the Sheriff, and he shall not excuse himself by Equity of their names. Haughton Justice. Prædictam Julianam, this extends it self to the person; the Judgment given, was for Julian Goddard, the Error to reverse the Judgment, this was against Julian Goddard, and so the Process; she was sued and pleaded as a feme sole, and so was the Capias, and so she is bound by conclusion; she is taken now, and brings a false Imprisonment. Dodderidge Justice. She pleaded in the C. B. as a Widow, and Judgment was there given for her, as a Widow, a Writ of Error brought here in this Court against her as a Widow to reverse the Judgment, and it appeared that at that time she took another Husband, Doiley. Hen. Yelverton. It appears by the Justification, that before the Scire facias ad audiendum errores, she took her Husband Doiley. Dodderidge Justice. The false Imprisonment is here brought by Doiley, against White, for making an assault in & super uxorem ipsius Doiley, and Imprisoning of her: He sues the Suit in Leonard Loves name, before the Marriage, versus prædictam Julianam, in the C. B. and that after Issue there joyned, duxit in uxorem prædictam Julianam, Judgment given there for her, the same reversed here by a Writ of Error, & quod prædict. Julian. caperetur, so that here was a certain denotation of the person that was to be taken, and she was so taken accordingly. Croke Justice. The Action shall not here be changed, by reason of the

the inter-marriage. Dodderidge Justice and Flemming Chief Justice. The Books before cited, of 10 E. 4, and l. 5 E 4. make nothing at all to this Case here now in question, there was no manner of Inducement within the Record, as here there is in this Case; for here, throughout the whole Record, there is a sufficient and a good inducement for the taking of her, and the subsequent Marriage here by her with Doiley, is but as an addition, and in the per; if this Process here had not sufficiently denoted out the person, who ought to be Arrested, as if the same was to take a feme sole, and before she be taken, she becomes to be a feme covert, and is so taken by this Process; here in this Case without all doubt, an Action of false Imprisonment well lieth; but it is not so here in this principal Case, for here is a good and sufficient designation of the party nominatim, that was to be taken, and the Capias here also well awarded, and if it should be demanded who should pay the Costs here, the Answer hereunto clearly should be, that the said Julian Widow, was to pay the same; the Capias here issued out against her, but not against her Husband, as taking no notice at all of him, being not once so much as named in any part of the Record; If upon this Capias, the Sheriff had returned that she was not married, or had returned a Non est inventus, without all doubt this had been an ill return, either to have returned that she was married, or a Non est inventus, for by this he would have falsified all the Proceedings: And so clearly by the whole Court it was agreed that the taking and Imprisoning her was lawful and justifiable; and the Action of false Imprisonment thus brought here by the Husband is no ways maintainable: And by the whole Court if an Action be brought against one being a Widow, and she is found guilty, and before Judgment she takes a Husband, yet the Capias shall be here against her, and not against her Husband, and so the whole Court agreed in this; that upon the whole Record here it doth sufficiently Constare de persona, to be arrested, that the Defendant herein had well pursued his Warrant; and that the Action of false Imprisonment here brought by the Plaintiff, not maintainable, and so the Rule of the Court was, Quod querens Nil capiat per Billam. Judgment against the Plaintiff.

Lisard Plaintiff, against *Stamp* Defendant.

Entred, Hillar. 10 *Jac.* B. R. Rott. 1358.

IN an Action upon the Case for slanderous words, upon Not guilty pleaded, a Verdict was found for the Plaintiff: It was moved for the Defendant in arrest of Judgment, that the words were not actionable: The words appeared to be these, & in this manner spoken; the Defendant came unto the Wife of Clynton, and said to her, thy Husband and his Master (innuendo) the Plaintiff hath stolen my Wood, and I mean to have an Action of Felony for the same. It was urged for the Defendant, that these words are not Actionable, and that for the incertainty of them, and that the averment in the Record will not aid the same, as if the words were, he hath stolen my tiles, and my apples, and doth not shew that they were severed, not Actionable. It was urged for the Plaintiff, that for these words, He hath stolen my Corn or my Wood, these words have been here adjudged to be well actionable, & here it shall be intended that the same was cut down before (because An Action upon the Case for words.

he saith) that for the same I will have an Action of Felony. Dodderidge Justice If one saith these words of another, that he hath stolen my Lead from my House or my Tiles, or my Trees, no Action lieth for these words. Croke Justice. If one saith of another, he hath stolen my Corn, or my Apples, no Action lieth for these words. Hen. Yelverton urged Higgs Case, an Action brought for these words (S) He hath stolen my Wood, and adjudged here to be Actionable, and that for this reason; Arbor, dum crescit, lignum dum crescere nescit: It was further urged, that these words were thus spoken to the Wife of Clynton. Thy Husband and his Master, innuendo the Plaintiff, &c. and doth not shew that he was his Master, nor when he was his Master, so that these are altogether uncertain. Thy Husband and his Master hath stolen my Wood growing in my Coppice, these words not actionable, otherwise it had been, if he had said, lying in my Yard, or my Apples in my Loft: Hobs Case was urged for these words He hath stolen an Acre of my Corn, and adjudged here, that an Action lieth not for these words. Haughton Justice. There is no answer as yet given to the great Exception of all, because there is no averment whereby it might appear the Plaintiff to be his Master, at the time when the words were spoken; this is only indeavoured to be helped by an (innuendo) that he meant him: But if the Plaintiff in truth was not then his Master, then there is no slander by these words as to him, notwithstanding he meant him, & so for this defect in the Declaration, the Plaintiff ought not to have his Judgment. Dodderidge Justice. Thy Husband and his Master, whose Master this is, is altogether uncertain; but if he had dominatim said such a one, this had been good: As go tell thy Lord Henley, &c. and this hath been here adjudged good; The Husband doth not here bring the Action; if the words had been, he hath stolen my wood, these words would have been Actionable, in this Case here it shall be intended, Wood growing and not cut: If the words had been, He came into my Wood, and cut down ten Loads, and stole this, these words not actionable, and yet he might come and carry the same away ten days after, and then this shall be Felony: But in Cases of Actions upon the Case for words, where the words are any ways doubtful, they shall then still be taken in mitiore sensu, Lignum dum crescere nescit; if the words were, he hath stolen my Lead, these words are actionable; but if he saith, from my House, there not Actionable, for these words, He hath stolen my Trees, these words are not Actionable, and so it was resolved in the C. B. Croke Justice. In Actions upon the Case for words, there ought to be certainty in the first place, or not Actionable: He hath stolen my Wood, if the words were, He is a Thief, for he hath stolen my Wood, these words thus spoken shall be taken in malam partem, and well Actionable; but otherwise where the words are, He hath stolen my wood generally. Haughton Justice said, That he would not deliver his opinion touching these words, He hath stolen my Wood, because he would not encourage the Plaintiff to bring his Action again (but by this, he declared his opinion, that the words were actionable) but the Court all agreed, that in this principal Case the Declaration was altogether uncertain and so not good, and so by the Rule of the Court, Judgment was given against the Plaintiff, and so entred, Quod querens Nil capiat per Billam.

Judgment against the Plaintiff.

Wheeler

Wheeler Plaintiff, against *Haydon* Defendant.

Entred Hillar. 8 *Jac.* B. R Rot. 1317.

IN an Action of Debt, upon the Statute of 2 E. 6. cap. 13. for not setting out of tithes; the Plaintiff being a Parson, made a Lease for 5 years to the Defendant, the Lease being for so many years if he should continue Parson; In an Action of debt brought for tithes, the Plaintiff declares upon a Lease made by the Parson, if he should live so long, and continue there Parson; The Question was, whether this be such a variance, between the lease made, and the Lease set forth in the Declaration, as shall vitiate the declaration. It was urged by George Croke, for the Plaintiff, that this was no such variance: A Parson makes a Lease for so many years, if he shall live so long, (and doth not say in his Lease, and continue Parson) but in his declaration; he expresseth this to be so, if he live so long, and continue Parson. Whether this now, shall be taken, and intended, to be the same Lease? it shall be so intended, and this is no variance, for nothing more is by this expressed in the declaration, than what the Law saith for him: For by construction of Law, and so much the Law saith, that it shall be a good Lease for so many years, if he live so long, and continue Parson, and by 24 H. 8. Brooks Cases fol. 10. placito 54. If a Parson makes a Lease for years, and dies, the Lease by this is determined in facto, and so also by Resignation; so if a man devises his goods to his Executors, to pay his debts, this is an idle clause, being no more than what the Law sets down before, that as Executor, he is to have the goods in this manner: And so here in this Declaration, this is an idle addition, the same being no more than what the Law said before, and is like unto the herb John in pottage which does neither good nor hurt; the Lease here made by the Parson, was for 5 years, if he continued Parson; the Declaration is upon a Lease made by the Parson, if he should live so long, and continue Parson; this is no such material variance, as to estop and hinder the Plaintiff from his Judgment, here the Jury finds the Lease as it was but made for 5 years, if he lived so long; this is no material variance from the essence of the Lease, for if he continue Parson, & if he live so long, this is all one, unum & idem in effectu; the Lease being to be avoided by the one or the other, which of them shall first happen; and this is no variance, being the same in substance, idem in substantia, and therefore these additional words shall not make the Declaration vitious. Like unto Claytons Case, Coke 5 pars fol. 1. A Lease made à die datus, declares of a Lease made, à dies confectionis: this is good, the same being all one, unum & idem, dies datus, & dies confectionis: If a Parson makes a Lease for years, and after resigns, the Lease is now void, and so if he be deprived, the Law saith, that by this also the Lease shall be void; this Addition here, is but abundantia; and the Rule of Law is, abundans cautela non nocet; so that the variance ought to be a variance in substance, otherwise no material variance. 18 E. 2. Fitz. title Bre. placito 836. In a Formedon in remainder, it was shewed how that the Land was given to him & hæredibus suis de corpore suo procreand; And the Writ was, sibi & hæredibus suis exeuntibus, the Writ was challenged for this variance, and yet the Writ was held good, because this was all one in substance, & so here in this principal case; & with this agrees.

2 Cr. 328. An Action of Debt upon the Stat. of 2 E. 6. cap. 13. for Tythes. *Mo.* 834. 2 Ro. 46. 717, 718. 1 Benl. 125.

24 H. 8 Brooks cases, fol. 10. placito. 54.

Coke 5 pars, fol. 1. *Claytons* case.

18 E. 2. Fitz. Bre. placito. 836.

12 E. 3. *Fitz. &c.* 12 E. 3. Fitz. title variance placito 77. and 30 E. 3. fol. 18. and here in this principal case, this addition is but matter of surplusage, and so not material. 30 & 31 *Eliz.* in C. B. Richardson against Bond; in Debt, upon a Bond, conditioned to pay mony such a day, and at such a place, pleaded payment, the Jury find that he paid the mony at another day, and in another place, before the day appointed for payment of it; the Jury found for the Defendant, the issue being payment or not and Judgment was there given for the Defendant, and there held, that the alteration of the day, and of the place of payment, was not material: To the like purpose there was a case, 32 & 33 Eliz. C. B. between Fabian and Winstone, in debt upon a Bond conditioned to tender mony at such a place and day, the Plaintiff shewed that he was there before the Sun set, to demand the same, and none was there ready to pay it: The issue there was, whether he were there half an hour before Sun set? The Jury find, that he was there a quarter of an hour before Sun set, resolved this to be a good finding, and to be all one: And that the condition was broken. Also in this principal case, the Plaintiff ought to have his Judgment; the issue is non debet, and the alledging of the Lease, is but as an inducement to the action, being brought against the owner of the land, for carrying off his Corn, and not setting out of his Tithes, and by way of inducement to this action, he shews, how he was Farmer of the Parsonage, so that this inducement is no ways at all material to the Action, which is brought to redress a wrong; so that matter of inducement to an Action is not material, if it be not pursuing; so is 19 H. 6. fol. 29. and 8 H. 6. fol. 25. In debt upon Arbitrament, the defendant said he did not submit, this there held not issuable, being but matter of inducement; so in this principal case, this matter of Inducement is not issuable, and the Jury here have found, that he had good cause of Action; and so in the like case here adjudged: in a prohibition, upon a modus decimandi pleaded, the Plaintiff declares upon a modus of 10 s. to be paid; the Jury find it to be but 9 s. yet this was adjudged here good for the Plaintiff in the Prohibition; so in this case, here is no material variance, but the declaration is good, and Judgment ought to be given for the Plaintiff. It was urged for the Defendant by Henry Yelverton, that this is a material variance. The Action is an Action of Debt, brought for not setting out of Tithes, and declares upon a Lease made by the Parson; upon Nil debet; the Jury found a special verdict, they find that the lease was made by the Parson for so many years, if he should live so long; they find that the declaration was upon a Lease made by the Parson for so many years, if he should live so long and continue Parson, this is a material variance, by reason of which the Plaintiff ought not to have his Judgment. Haughton Justice. Whether here be any material variance or not, is the question: There is here an apparent difference for the law here doth not imply so much as is expressed in the Declaration touching the lease; the words here added, are very material, & that in this respect; & hereupon there may be a difference in the case, as posito that the Parson be deprived unjustly the lease remains, but if the Lease be, if he shall so long live, and continue Parson, and he is afterwards deprived & put out unjustly; the Lease is now gone and determined, and shall have no longer continuance, tho he afterwards doth reverse this again; but otherwise it would be, if it were only limited to continue, if he should so long live; and so this is a material variance, the Law not saying so much, as these words thus added in the Declaration do import. Dodderidge Justice. This is no variance, by the adding of these words, being all one; for the Law ends the lease; when it ends the Parson, and no difference there is in the Declaration, the addition here is made to the words, not to the matter; as to the case put, of the deprivation of the Parson; by this the Lease is now gone, but if he Appeals from the sentence, then hanging this appeal, he continues still Parson, until sentence be given: if a Lease be made to a feme sole, so long as she continues sole, and unmarried, this is a Lease for life in Law, with livery made; no variance there is here: the law saith this, and hath made this limitation for him, the lease here may be determined by death, Cession, Deprivation, or Resignation; so that the matter here by

30, 31. *Eliz. C. B. &c.*

32, 33. Eliz. C. B. *&c.*

19 H. 6. fol. 29.

8 H. 6. fol. 25.

by him added in his Declaration, is no more than virtualiter is contained in his Lease, and this by construction of Law. Croke Justice at this time did something doubt of it: if a Parson makes a lease for 21 years, if he shall live so long; by this implicative, he is not to do any act, thereby to defeat, or to avoid this lease; but in the other case, if these words be added, and continue Parson, he is now by this tied to a Covenant, but by this he is at more liberty. Dodderidge Justice. If J. S. makes a lease to J. N. for life, if he shall live so long, and J. N. makes a Lease to another for 5 years. In his Declaration he doth declare of a lease for 5 years, if the other lives so long: is not this Declaration good? clearly it is, and yet no such lease was made unto him, and so in this principal case here, the Declaration is good, and there is no material variance to debar the Plaintiff from having of his Judgment. Haughton and Croke at this time differed in opinion from him: and so this case was adjourned to a further time. Afterwards Termin. Mich. 11. Jac. B. R. this case was moved, and argued by George Croke for the Plaintiff, and also by the Judges. Coke chief Justice, the Declaration here is good, and no material variance to hurt the Plaintiff. If the Lease here had been made to him for twenty years, and in debt upon the Statute of 2 E. 6. he declares of a Lease made for 21 years, yet this is clearly good, and this is not like unto a declaration in an Ejectione firmæ, which ought to be certain, or the same is not good, because there he is to recover the term it self; in this case here, the addition is no more by him, in his Declaration, than the Law implies; for if he be removed, the lease by this is determined. Haughton Justice, Here is a material variance in both points; the action is debt, this is brought for the right of the thing, and this is not like unto trespass, and therefore if he mistakes his title in his declaration, being his right, this will make the declaration vitious; if a Quare Impedit be brought against him unjustly, and he by this removed, the lease is by this ended, as well as by a surrender; the difference will be, where a Lease is made upon condition, and where it is upon a limitation; the limitation is the end, not the defeasance of the term, this is not like a condition, he may be living, and yet the lease determined by recovery. Dodderidge Justice, the lease is here mistaken only in the manner of the limitation of the lease, but not in the matter of it; the Statute here gives the Action of Debt unto the Parson for his Tithes: when the Action is not grounded upon the demise, but upon the Statute, as here it is, so that the demise is but the inducement to the action: and there such a strict and precise recital, according to the demise, is not of necessity to be expressed in the declaration: here is a difference only in words, but not in matter, the lease here was made for so many years, if he should live so long, and he in debt for not setting out of Tithes, declares upon a Lease for years, if he should live so long, and continue Parson, this is no material variance from the Lease, for if he resign, the Lease is void, and so is it if he be deprived, or removed from his Parsonage; In all these cases, the Law saith, that the Lease shall be determined: If Lessee for 10 years, grants a rent charge to one for his life, in an avowry for this rent, the grantee shall say, that the same was granted unto him for so many years, if he should live so long, as his Lease continued, but he shall not plead it as a freehold, drawn, and derived out of a chattel; but in his Avowry, he ought to set down, and express his case as the same is in Law. Croke Justice. There will be a difference where an Action of Debt is brought for Rent, and where the same is brought for a Collateral thing. In an Ejectione firmæ, the declaration ought to be certain, and that according to the truth of the case; but the same is not to be so, as the case here is, the declaration here being good, and no material difference between the Lease, as it was made, and as the same is mentioned and set forth in the declaration, the same being certain and good, and so Judgment ought to be given for the Plaintiff. Coke chief Justice, there will be a plain and evident difference, between an Action of debt for Rent reserved upon a Lease, being grounded upon a special contract, there the declaration ought to be certain, and there you ought

Trmin. Mic. 11 Jac. B. R. &c.

ought as it were, to hit the bird in the eye, or the Declaration not good, otherwise it is, where the Action is grounded upon collateral things, and by 35 H. 6. in case of a Lease for years, if he declares upon a Lease made of four Acres, where there were but two Acres leased, where the Action is brought upon the Contract, there he ought in his Declaration, to express the term precisely, but not so precisely for the Acre; but yet where he omits the half, this Declaration is not good; but it is not so in an action of debt brought upon the Statute of 2 E. 6. cap. 12. for not setting out of Tithes, if he declares upon a Lease made for 20 years, whereas the same was but for 10 years, this is good, for that it is not here material in this case, how he doth declare, so as tithe is to be paid to him out of the land: Lessee for life makes a Lease for 21 years, he ought to declare, quod cum demisit, for 21 years, if he should live so long, and he ought to aver his life; here in this principal case, there is no material variance between the lease it self, and the lease mentioned in the declaration, & parum differunt quæ re concordant. As to the case put of the Quare impedit. if it be erroneous, and afterwards removed, this being erroneous, and reversed, he shall be Parson again in Law, ab initio, and his lease shall be good against him; proprietarius, or firmarius, without making of any title, is good upon the Statute. And so by the whole Court (Haughton Justice, only to the contrary) the declaration here is good, and no material variance therein, from the lease, as it was made, so that the Plaintiff here had just cause of Action; and so by the Rule of the Court, Judgment was given, and so entred for the Plaintiff.

35 H. 6.

Statute of 2 E. 6. cap. 13.

Judgment given for the Plaintiff.

Whittier Plaintiff, against *Stockman* Defendant.

Entred Mich. 10 *Jac:* B. R. Rott. 176.

1 Ro. Rep. 86. Godb. 259. A Writ of Error to reverse a Judgment in the C. B.

IN a Writ of Error to reverse a Judgment given in the Court of C. B. the errour assigned and insisted upon, was in the misawarding of the venire facias, and so mistrial, the venire facias being awarded of one parish alone (S) of White Parish, whereas the same should have been of. 2. (S) of White Parish, and also of the Parish of Downton: upon this the case appeared to be. In a Replevin, for taking of Cattel; the Defendant avows, for that he ought to have common (S) totam pasturam, in Langley Wood, in Tichborne Farm, in the Parish of White, except those only of the Parish of Downton inter-commoners with him.) Upon this, issue was joyned, and for Trial of this, the venire facias was awarded of the Parish of White only: Whether this was well awarded, and so a good trial or not, was the only question. It was urged, that the venire facias was not well awarded, and so no good trial: for that the venire facias here ought to have been of both the Parishes, for that they of the Parish of White, are not to try, whether they of the Parish of Downton, are to have common there; and therefore the venire facias ought to have been of both Parishes, and this being but of one of the Parishes, the trial was erroneous; and for this was cited 50 E. 3. fol. 1. & 10 E. 4. fol. 106. It was against this answered, that the trial was good, and the venire facias well awarded: in the Avowry, the Avowant claimed common, (S) totam pasturam in Langley Wood, & Nec non common of pasture for the Parishioners of Downton Parish, pur cause de vicinage; the Plaintiff saith, that he hath used to have all the common in Langley Wood by prescription (except common only, for the Parishioners of Downton) the issue was joyned, and tried upon the prescription, claims totam pasturam, where, in White Parish, in what place, in Langley Wood, by reason of

10. E. 3. fol. 1. 10 E. 4. fol. 10 b. Ro. 118.

of Tichborne Farm, and all this in the Parish of White, and so the venire facias from thence well awarded; the venire facias is to be from such a place, as by presumption of Law may have the best Conusance of the fact, and so it is here. Croke Justice, If the matter goes to both Parishes, then the venire facias is to be of both Parishes. It was urged, that common pur cause de vicinage, cannot be had, but in another Parish, and not in the same Parish; he claims here, in alieno solo, totam pasturam, this said to be a strange prescription, and it is by the whole year, except for the Parishoners de Downton Parish, pur cause de vicinage, in this place, the Travers taken was absque hoc, that he had such a Common, and so all put in Issue, whether the Avowant had common, or the Inhabitants of Downton Parish had any: Upon this, the Issue joyned, and for trial of this, the venire facias of White Parish alone; this not good, but it ought to have been of both, as was objected: And if a venire facias ought to be of two Towns, and the same is only of one; this, as it was urged, hath been adjudged, to be no good trial: So here, this being but of one place, where it should be of two, is not good. Noy. The Prescription here is good, and so is the Trial, and the venire facias well awarded, and so no Error in the Proceedings; a sole Commoner cannot oust others from having Common, nor yet the Lord. There is a great difference between Pasture and Common, as appears in 27 H.8. fol. 12. An Assignee of a Commoner cannot prescribe to have sole Common, Temps. E. 1. Fitz. title Prescription, placito 55. A man may prescribe to have the sole Pasture in the Free-hold Land of another, after his Corn cut and carried away, for these are several things in themselves, the sole Pasturage and Common; and so the Prescription here is good, and the Trial good, and the Exception here is not the thing for which he prescribes, nor any part of it; the first being a thing in prender, and the second a thing in render: Several things in their nature (S) Common and Pasture, several as to their Exception, for Common inhabitantium of the Parish of Downton; this is a meer void Exception, for they cannot so prescribe, and for this was cited the Books of 26 H.8. fol. 4. & 5. 15 E. 4. fol. 29. The Case concerning a Prescription for Common, by the Citizens and Inhabitants of Coventry and 20 E. 4. fol. 10, 11 and Trin. 2. Jac, in the C. B. between Tinnery and Fisher, it was there adjudged, That a Prescription for the Inhabitants of the Ville of Dale to have common, was a void Prescription; and if the venire facias had here been de Downton also, this had then been clearly bad, for that the same would then have been of such a place, in which there was no Land, nor any thing there in Controversie, and so meerly void. Also the Jury here have not given any Verdict, but only for the damages sustained, and so for this they have given a good Verdict. Trin. 38. Eliz. B. R. between Binning and Brag in Trespass, and where there was a Prescription laid in another place, the venire facias being awarded of Misley, where the Trespass was done, this was there adjudged to be well awarded, and the Jury there tried the Trespass only where the same was done, but did not try the Prescription of another place, and this was held a good Trial; and so here in this principal Case, the Jury did not try the Prescription, they only enquired of the matter of damage, and this an apt and a good Verdict. And where it hath been objected, that the Inhabitants of Downton were to have Common (causa vicinagii) and that therefore they must be two Villes: As to this, it is very clear that two Manors in one Town, the one Manor may very well Inter-common with the other, pur cause de vicinage, and nothing is more usual than to have Common, pur cause de vicinage, in one and the same Town. Dodderidge Justice. If the venire facias was not here well awarded at the beginning, the same shall not be made good afterwards, and this is clear. Haughton Justice. Where the venire facias ought to be of two Parishes, and the same is awarded but of one, this is not good: The venire facias here in this Case being awarded but of one of the Parishes, is well awarded, and trial good; here is an Exception of a thing, which the Law saith cannot be, and so the same is an idle and a vain thing, which is thus excepted; for the In-

27 H. 8. fol. 12, &c.

26 H.8. fol. 4. & 5, &c.

Trin. 38. Eliz. B. R. &c.

Inhabitants of Downton are not such a Body, nor have any such capacity; thus to take it had been very idle, to put this to a Trial, which in it self is vain and cannot be: If the Inhabitants of Downton be not a Corps corporate, thus enabled to take, but this cannot so be here, that they should be thus Incorporated by intendment; but if they had brought an Action by this name, here it shall be so intended until the contrary be shewed: Pasture may be granted, and therefore one may well prescribe in this; in this principal case the venire facias was well awarded, the tryal good, and so no error in the Proceedings, but the Judgment given in the C. B. ought to be affirmed, Dodderidge Justice. If any thing by reason may be alledged to maintain the Tryal to be good, then the same shall be so, for the party for whom the Verdict was found: As to the Objection made, that he was to have totam pasturam, the sole Pasture (except those of the Parish of Downton) if the Exception had been of a person certain, as of J. S. de &c. then the Exception would clearly have been parcel of the Prescription; and if the Exception here was good in Law, then it is very clear, the venire facias for the Tryal should have been of both places: If the Issue had been upon a tenure, as whether one Manor had been held of the Manor of Dale, and Sale, the Tryal here should have been by a Jury of both places; and so here, without all question, it should have been, if this exception here had been good, the Trial should then have been of a Jury from both places, so that the single and sole question here, is no other, but whether this Exception here be good or not: this here is an idle Prescription, for the sole Pasture (except Common here for others) this cannot possibly be so, for by this he excludes the owner, who by the Grant is not to be excluded, nor ought others to be excluded, who have Common there, but as this Case here is, this stands well together with the Exception, and no repugnancy at all, for one may have the Pasture, and another may have Common there, and therefore there is a great difference between Common and Pasture, 13 H. 8. fol. 16. B. it is there said, that communia idem est quod commune cum aliis; and in 27 H. 8. fol. 12. the difference there appears between Pasture and Common, a Præcipe quod reddat there lies for Pasture for two Beefs, but not so for Common: If a man grants to another Pasture for twenty Beefs in his Manor of Dale; he shall not have this Pasture but where the Grantor pleaseth; otherwise it is, if he grant one Common for twenty Beefs in his Manor of Dale, he shall have this Common per mye, & per tout the Manor where the Grantee pleaseth; also a Commoner shall not have an Action of Trespass, quare clausum fregit, as appears by 12 H. 8. fol. 2. in Simon de Harecourts Case; otherwise it is in the case of him which hath Pasture, there he may well have an Action of Trespass, quare clausum fregit, so that these do very much differ in their nature; here the Exception is altogether uncertain, being of the Inhabitants of Downton, for they are not capable to have Common by such a name, so that this Allegation (by way of Exception) is surplusage, and the matter in it self, and so the Exception here is not good; but if this had been material (as here it is not) yet it is not here said, in the Parish of Downton, but in the Franchise of Downton, and so by intendment this ought to be all in White Parish; and so the venire facias was here well awarded, and no mistrial, and so consequently no Error in the Judgment, but the same ought to be affirmed. Croke Justice. The venire facias ought to have been of both places, if the Issue had been for a matter arising out of two Villes: But the matter here is, whether the thing put in Issue here to be tried, did arise out of two Villes or not; this doth not appear here to be so, but only out of White Parish, from whence the venire facias was: The Inhabitants here, are not a sufficient name to take any thing by, but only with this restriction (S) Quod talis habetur consuetudo, quod quilibet inhabitans, antiquum messuagium habens, &c. but this Case here is not so; but if the Exception here had been of such a person certain, as J. S. then the same had

13 H. 8. f. 16. B.
27 H. 8. fol. 12.
12 H. 2. f. 2. &c.

had been good, but not as it here is; so that here in this Case, there was a good and a proper Issue tryed, and the venire facias well awarded, and no error at all therein, and so the Judgment given in the C. B. not erroneous, but the same ought to be affirmed. Dodderidge Justice. The Non-suit in the Case will nothing at all avail the Defendant, if the Tryal was bad at the beginning, by the misawarding of the venire facias, no subsequent matter shall make such a mistrial (if it were so) to be good; but here there was no such matter, no mistrial, the venire facias being well awarded, and as by Law the same ought to be. Haughton Justice. By the Statute of 4 Jac. cap. 3. The Defendant is to recover Costs in the same manner as the Plaintiff should have had, if he had recovered, this should nothing avail the Defendant upon this Statute, the Plaintiff being Non suit, if the venire facias at the first was mis-awarded, but here the same was well awarded; and so no error at all in the Proceedings, or in the Judgment, but the same was well given, and so ought be affirmed. Dodderidge Justice agreed with him herein: And so the whole Court agreed clearly, that the venire facias here was well awarded, the Tryal well had, and the Judgment given in the C. B. no ways erroneous: And so by the Rule of the Court the Judgment was affirmed.

Statute of 4 Jac. cap. 3. &c.

Judgment affirmed.

Matthew Plaintiff, against *Crasse* Defendant.

IN an Action upon the Case for scandalous words spoken by the Defendant to the Plaintiff, upon Non culp. pleaded a Verdict was given for the Plaintiff, and damages: It was moved in arrest of Judgment, that the words are not actionable, the words appeared to be these spoken by the Defendant to the Plaintiff, Thou art a Whore-Master, for thou hast lain with Browns Wife, and hadst to do with her against a Chair, and sets forth in his Declaration, that by reason of these words he lost his marriage, ad damnum, &c. It was urged, that these words are not Actionable, they are not triable here, but examinable in the Ecclesiastical Court; and that this Case is not like unto Anne Davies Case, Coke 4 pars, fol. 16, 17. This being a Case brought by a man, and laying of his loss in Marriage by reason of these words thus spoken of him, and that this is the first president that ever was of such an Action brought by a man for such words & laying a loss of Marriage by reason of the words thus spoken of him; these words here are not Actionable, because this is a Spiritual matter and there examinable, as appears in Anne Davies Case; but for calling of a Woman Whore, by the custom of London, an Action upon the Case lieth there, but not here, unless it be further alledged by her, that by reason of the words she hath lost her Marriage and advancement, and so is Anne Davies Case. Croke Justice. The words here as they are spoken, are to be taken in deteriori sensu, in this Case, there is no difference between a man and a woman, as to the loss of preferment in Marriage, to call a man Whore-master, or a Bastard, no Action lieth here for these words, because this is triable and examinable in the Ecclesiastical Court; but couple other circumstances to these words, as here in this Case, and then the Case will be altered; here this prejudice happens unto him, he was in treaty for Marriage, and the same hindred by reason of these words, for as the saying is, Qui semel est malus, semper presumiter esse malus in eodem genere mali; and so for calling of one Bastard, an Action well lieth for these words, with other Circumstances, as if he entitles himself to be Heir, and so these words as they are here laid in this Declaration, are well actionable, and the Plaintiff ought to have his Judgment. Haughton Justice.

An Action upon the Case for words. 2 Cr. 323.

Coke 4 pars, f. 16, 17. &c.

stice. These words as they are here laid with these Circumstances, are Actionable: Willows, in their proper nature and kind to be cut down, is no waste, but with these Circumstances being added, they may be made to be waste, as if they grew before the scite, or in the view of the Manor-House, for to defend the same from wind; or if they grow in a Bank, to sustain and keep up the Bank, then the cutting of them down will be waste; and so is 12 H. 8. fol. 1. b. so here, these Circumstances as they are laid, make these words to be Actionable. Loss of his Marriage is expressly here lain by reason of these words spoken of him; and there is no difference at all between this Case, and the case of a Woman, there being equal benefit by Marriage, as well to the one as the other, and equal loss if the same be hindred by speaking of the words, so the Action here well lieth for these words, with these Circumstances laid in the Declaration, of the loss of his Marriage thereby; The words contain in them matter, by which the party Plaintiff is slandred, and the precedent words are maliciously spoken. * Dodderidge Justice. There is no difference at all between this Case and the Case of Anne Davies, loss of Marriage being laid in both cases, and so no difference at all in Law between them; tho the Crime be to be punished in the Ecclesiastical Court, he lays here a temporal loss and damage, and this makes these words Actionable, and so gives the Temporal Court here Jurisdiction: And like unto this Case, the Master shall have an Action of Battery for beating of his Servant, because he hath thereby lost his service, and so there was both damnum & injuria unto him; and where there is damnum, this shall be sufficient to maintain the Action, as here in this principal Case, the Action is grounded upon the hurt, wrong, and damage which the Plaintiff had sustained, by reason of these words thus spoken, (S) His loss of Marriage; and so the Plaintiff had just cause of Action, the words well actionable, and the Plaintiff ought to have his Judgment. Flemming Chief Justice. These words are determinable in the Ecclesiastical Court, if no other matter be coupled with them; but here, the Plaintiff hath further added special matter of damnification by these words, as they are set forth in his Declaration, where he shews how that there was speech and communication of a Marriage to be had between him and another, which by reason of these words did not proceed: But if he had not laid this so specially in his Declaration no Action would have lain by him, and yet here had been a great slander unto him. Anne Davies Case hath been well remembred, and no difference there is, between this Case now here in question, and that Case; as to the hinderance in Marriage in both Cases there is laid the loss of a Temporal benefit: It hath been objected, and said, that the Law makes the Wife subject to the Husband, this is a good Case, and the reason good, and all this makes very much for the maintenance of the Plaintiffs action here; for by reason of the speaking of the words here of the Plaintiff, he hath hereby lost this subjection which the Law would have given unto him. Bastard is determinable by the Ordinary; but if he adds further words, to intitle himself to be Heir, or shews some possibility of being Heir, this shall make the same words of calling him Bastard, to be actionable: Here he layeth two things, the main matter triable in the spiritual Court: yet when he layes matter subsequent here triable, this is sufficient, and it is no Plea for the other to say there was no such Communication for a Marriage, but the words are well Actionable for the slander; the Jury gave but 2 s. damages: but if such Cases came before me, I would have the suggestion to be examined, because greater damages to be given, if true; but say, the Jury had done well in this Case, and it is a good course to be taken to have the certainty of this suggestion to be well enquired of; and if the same appear to be true, then the greater damages to be given: And so the whole Court agreed clearly for the Plaintiff, that the words as they are laid in the Declaration, with the damage sustained by reason of them are well actionable; and the Plaintiff here had good cause of Action, according to Anne Davies Case, and the Case of Bastardy: And so by the Rule of the Court, Judgment was given, & so entred for the Plaintiff.

12 H. 8. 1. B.

Judgment for the Plaintiff.

Papworth

Papworth Plaintiff, against *Johnson* Defendant.

IN an action upon the case for a promise brought against the Defendant, Executor of I. S. upon his promise to pay a debt which was owing by the testator unto the Plaintiff, if he would forbear the same until the Will was proved. For non payment whereof the Action brought; upon non assumpsit pleaded a Verdict was given for the Plaintiff. It was moved in arrest of Judgment that the Declaration was not good, for that therein he declares generally, and sets forth, that whereas the testator was in his life time indebted unto him in such a Sum (but doth not shew how the debt did grow due): the Defendant, the Executor, in consideration that he would forbear the same until the Will was proved, he promised then to pay it; the exception taken, because the Plaintiff doth not shew in this his Declaration, for what cause this mony did first grow due unto him, for that it might grow due for such a cause, as that the Executor might not be charged with payment thereof: and if so, then as it was urged, his promise to pay this upon forbearance, would be to no purpose; and it was urged, that the assumpsit by an executor, upon a general indebitatus of the testator, is not good: It was urged for the Plaintiff, that the Declaration is good, without shewing how the debt did grow due from the testator, this being but as an Inducement to the Action, and that the Defendant by this promise hath confessed the debt; and so by his promise admitted himself to be chargeable therewith. Dodderidge and Haughton Justices, He ought here to have shewn in his Declaration how the debt grew due, for it might grow upon a simple contract, and so the Executor not to be charged with the same. Dodderidge Justice. An Executor shall not be charged upon a simple contract of the Testator, tho he have Assets in his hands to pay. Haughton Justice. If this were not a Debt that would charge the Executor, the first consideration then fails, and a promise then to pay this, upon forbearance, will not charge him: so at this time, the Court seemed to be of opinion, that the Declaration was not good, for the omission therein, in not shewing how the Debt by the testator to the Plaintiff did grow due; and so for this time, it was adjourned: Afterwards, this case was moved again. Haughton Justice. The consideration here laid in this Declaration, is the debt of the Testator, due to the Plaintiff, and the promise to pay this by the Executor upon forbearance; this ought to be a debt sufficient to charge the Executor by law to pay it, or his promise will not bind him, nor any ways hurt him; this ought to be shewed in the Declaration: This doth not appear to us to be so, and therefore the Plaintiff cannot here have his Judgment; if he had shewed the same to be a debt upon a general indebitatus, for a debt for Wares sold by the Plaintiff to the Testator, this had been good. Dodderidge Justice, The case here is an action upon the case upon an assumpsit against an Executor; upon his promise to pay unto the Plaintiff a debt due unto him from the Testator, and this promise so made in consideration of forbearance for some time, he promised to pay a debt to the Plaintiff, whereas by law, he was not to be charged with this debt: Whether this his assumpsit shall make him now to be chargeable with payment of this, which he was not liable to pay by law; & as to this particular point, he and the Court desired to see Presidents in cases of executors. 31 Eliz. one Stones case, a President shewed to be adjudged that such an action doth not lie against an executor upon his promise to pay, if it be not particularly shewed & expressed in the declaration, how the debt grew due, and not generally as here in this case. Flemming Chief Justice. If one be indebted to I. S. in 20 l. and dies, an action brought against his Executor, and shews the debt how it grew due: The Executor pleads Nil debet, and found against him, in consideration of forbearance,

Action upon the Case for a Promise against an Executor.

he then assumes to pay the same, whether this will not now make him chargeable as taking it in this manner upon himself: In this principal case, the meaning might be to have forbearance till the Will was proved, and then it might appear how the matter stood: clearly, the Plaintiff here, ought to shew in his declaration sufficient matter to charge the Defendant as Executor, with payment of the debt demanded, or his assumpsit to pay the same, will not bind him so to do; afterwards a President was shewed to the Court by Harris for the Plaintiff, where an Executor was charged with such a promise by him made, to pay a debt due by his testator, without shewing the same to be such a debt, as in Law would charge him. The Court then answered, that if the other side did not find, and shew other presidents to the contrary, they would then give their Judgment according to this president then produced, and shewed in Court, and so the Court advised them to search further for presidents, and in the interim this cause was adjourned to another time. Afterwards Termin. Mich. 11 Jac. B. R. the Court was moved again in this case, and some presidents produced, and shewed in Court, as Hillar. 1. Jac. Rott. 732. Sir Richard Westons case; and Coke 9 pa. fol. 87, 88, 89, 90. Pinchons case, that upon such a simple contract, an Action of debt lieth against Executors, shewing for what the same did grow due: and Coke 9. pars. fol. 93, 94. William Banes case, action sur le case against an Executor upon promise to pay upon forbearance, needs not to aver, that there were assets to pay, the Executor charged by the promise. Henry Yelverton, as to Sir Richard Westons case, remembred, there it appeared to be for money, and then it must be agreed to be so, as it was urged: but that differs from this case here, & divers cases have been since resolved, that the Plaintiff in his Declaration ought certainly to shew, for what the debt, by the Testator did grow due; or the Declaration not good. And Norwood & Reads case in Plowdens Commentaries, fol. 181. was likewise cited; the Executor charged with the assumpsit of the Testator. Haughton Justice. Where the assumpsit is upon an indebitatus assumpsit, by the Testator, such an Action upon the case, upon an indebitatus assumpsit, by the Testator, lieth not against the Executors, and of this we are all clearly agreed: But here in this Case, this doth not grow due, upon such an indebitatus assumpsit, but upon a collateral promise, made by the Executor. George Croke. If an Action be brought upon a general indebitatus, this is not good, without shewing the cause of the debt, for what cause the same did grow due; and as touching this, there have been two Judgments since, 1 Jac. the one a Case concerning Coventry, the other here in London. A Declaration upon an indebitatus assumpsit, brought hither by Writ of Error and the Declaration resolved to be bad, for want of shewing therein, for what cause the Debt grew due; the other in London, before Walmesely and Tanfield, and both of them here reversed by Writ of Error, and for this cause only. Haughton Justice, indebitatus assumpsit, generally not good; this hath been oftentimes condemned, because there is no certainty of the debt appearing on the record indebitatus. 1. This is to be proved before, in consideration of forbearance, promise to pay. Dodderidge Justice. This is not here upon an indebitatus assumpsit, but whereas there was such a debt owing, and this is uncertain, till it be shewed to be so; then the Defendant saith, if the Plaintiff will forbear him to prove the Will, or to take Administration, he doth assume to pay the same; this is clearly a good consideration, to charge him here upon his special promise, the Plaintiff having forborn him accordingly, and the President shewed of 1 Jac. ought to rule and direct us in our Judgments, unless the other side can shew us Presidents to the contrary; indebitus assumpsit, generally hath been held bad, the reason of it was this, because it was not known, nor did appear, how this debt came to be due, and in regard it might be by Bond, or by simple contract, and so there might be a double remedy, and therefore held not good; the Court upon view of the Presidents shewed were satisfied that the Declaration here was good; and so by the rule of the Court; Judgment was given, and so entred for the Plaintiff.

Termin. *Mich.* 11 Jac. B. R. *&c.*

Hilar. 1. Jac. *Rot.* 732. *&c.* *Coke* 9. p. fol. 93. *Wil. Banes case.*

Sir *R. Westons* case.

Norwood and *Reades* case, *Plow.* Com. fol. 181.

Judgment given for the Plaintiff.

Penson

Penson Plaintiff, against *Knight* Defendant.

Entred Mich: 10 *Jac.* B. R. Rott. 505.

IN a Writ of Error to reverse a Judgment given in a Redisseisin, the case appeared to be this. Two Coroners being in the County, the one of them being sick, and so could not come, the Writ of Redisseisin directed to the other, who did execute the same alone. This was assigned for error by Coventry; for that in a Writ of Redisseisin, the Statute is assumptis secum Coronatoribus, and upon the Redisseisin, the Sheriff returns, that he did take with him, one of the Coroners, the other being sick, and so could not come, and all this appears by the Record to be so, and so it was urged that this was a clear error; in 23 the Book of Assises placito 7. there this Writ abated for form, & 26 E. 3. fol. 2, 3. placito 10. to the same purpose. Dodderidge Justice, demanded whether one Coroner may execute this. The Statute of Merton, capite 3. doth assign a number certain, and the same is not to be diminished; and this is Coronatoribus: Here he ought to call unto him the Coroners, assumptis secum Coronatoribus, this is his authority, and this he ought to pursue, if there had been four Coroners, and he had taken two of them with him, this had been good, and the Statute well pursued, but not here, as this case was, taking but one Coroner with him; the whole Court agreed with him herein, that this was a clear Error, and for this Error, being only assigned, and insisted on; the Judgment was reversed.

A Writ of Error to reverse a Judgment in a Redisseisin.
Statute of *Mert.* cap. 3.
23. Lib. Assis. *&c.*
26 E. 3. fol. 2.
3 placito 10.
Statute of *Mert.* cap. 3.
Judgment reversed.

Freeman Plaintiff, against *Sheen* Defendant.

Entred Mich. 10 *Jac.* B. R. Rott. 66.

IN an Action of Debt, upon a bond of 1000 l. conditioned for the performance of an award, upon their submission to the award of certain Arbitrators, of all matters, Suits, and Controversies between them; and there then being a Suit in Chancery between them, the Arbitrators did award, quod quædam secta, & querela (and named the same between them) cessaret, and that the said Freeman, of this staret acquietatus, against Sheen, de qualibet materia & causa, in prædicta querela. In debt upon this Bond, the Defendant pleaded quod acquietatus fuit, the Plaintiff Replies and sets forth; that the Defendant had exhibited a second, and a new Bill there in the Chancery, containing the same matter, as was in the former Bill: upon this Replication, the Defendant demurs in Law, the only question was, whether here was a breach of the Condition, and so a forfeiture of the Bond, or not?

2 Cro. 339.
1 Ro. 432.
Action of Debt upon a Bond for not performance of an award.
1 Ro. 2. 7.

not? and whether the Defendant hath here set forth a good performance of the award, or not? It was urged by Coventry, that here was no breach; that the Plaintiffs Replication here is not good: the Plaintiff shews, that the Defendant had exhibited a new Bill, but doth not shew, that he took out any Process against him, nor yet that the Plaintiff himself had any notice of this, at the time of his Action brought upon the Bond. Coke 5 pars, fol. 24. in Broughtons Case, where the surety at the day, for saving of the principal Bond, came to the place, and none being there ready to pay the 100 l. he pays the same, and afterwards brings an Action of Debt upon his Counter Bond, and upon Non damnificatus pleaded, by replication shews all this matter; there it was adjudged for the Plaintiff, for that this payment by him, was a damage, and harm unto him; and 18 E. 4. fol. 27. 28. where errour of suit was a damnification; but it is not so here in this case; and in 18 E. 4. fol. 27, 28. if no Process was taken out, nor notice to the party, then no damage nor any breach, but if there was any damnification here, this is mispleaded, and therefore he is not to have any Judgment: the Plaintiff pleads, that he had exhibited quandam Billam; the awarde was, quod quædam Billa in Cancellaria Domini Regis cessaret, and no averment, whether the first or second Bill, was the same Bill, which was mentioned and intended, in and by the award. For the Plaintiff it was urged by George Coke, that here was a breach, by the not performing of the award: the Defendant pleads, quod stetit quietus, from all matters; the Plaintiff sets forth all this, and that afterwards a second Bill was preferred, containing all the former matters; the Plaintiff, to have Judgment upon Dr. Bonhams case, Coke 8 pars, fol. 120 and Ridgewayes Case, Coke 3 pars, fol. 52. where the plea in bar is bad, and the Replication not sufficient, yet the Plaintiff to have his Judgment. Also the award was quod cessaret & ulterius prosequi nollet, & quod staret acquietatus, of and from the suit, the Bar is, That he had ceased the suit, and did not prosecute the same, & quod stetit quietus, whereas he should have said, acquietatus. Haughton Justice, if one be bound to save another harmless, and he obtains a Process against him, this is a clear breach, but this is very much differing from a Bill preferred in the Chancery; the award here was, that he should not prosecute the said suit in Chancery; but that staret acquietatus of and from all suits touching the said matter; after this award thus made, he exhibits another Bill for the same matter, but takes out no Process upon it, this is no breach of the award, for if he complains again by a new Bill to the Lord Chancellor, without any Process taken out upon this, the party is not grieved, nor yet any ways molested by this. Dodderidge Justice agreed herein, for he hath once discharged the Plaintiff, and in performance of the award, he hath surceased the said suit in Chancery, and afterwards (as it is here alledged for breach) he hath afterwards exhibited a new Bill there, but hath taken out no Process upon it, and though this be for the same matter, yet the same is not at all material before Process be taken out upon it: Haughton Justice, if the award was that he should not prosecute the said Bill; if this be only to be taken for the Bill, and not for the matter contained in the Bill, then the prosecuting of a second Bill is clearly no breach of the award; but otherwise it is, if the award do go to the matter contained in the first Bill, then the prosecuting of a new Bill for the same matter will be a breach of the award, and this will be the difference. Dodderidge Justice agreed with him herein, and the difference to be, as was remembred. Haughton Justice. The prosecution here goes to the said suit; he saith, he did not prosecute the said suit, the award was, quod staret acquietatus de qualibet materia, in prædicta billa specificata. Whether by this award, the suit there, was to be discharged? If in Trespass, the parties submit themselves to an award, the Arbitrators do award quod staret acquietatus, this doth discharge the Trespass. Dodderidge Justice, The sole point and question in this case considerable is, upon the true meaning and construction of these words, in the award, (S) quod staret acquietatus, and the Defendant saith, the first suit was ceased without any further prosecution, and as touching this stetit acquietatus, the Plaintiff here sheweth, that

Coke 5 pars. fol. 24. *Broughtons Case*

18 E. 4. fol. 27, 28.

Coke 8 pars, fol 120. Dr, *Bonhams* case. Coke 3 pars, f. 52 *Ridgewayes* case.

that the first Bill ceased, but saith that he preferred a second Bill, for the same matter, but no process taken out upon it, neither was he any ways troubled, or molested by reason thereof: how can this then be any breach of the award, so that upon this first moving, and debating of the matter, the Court did incline in their opinion against the Plaintiff, that here was no breach of the award, but of this Curia advisare vult, and so the same was adjourned to another time. Afterwards (S) Termino Hillar. 11. Jac. B. R. this matter was moved again. Croke Justice. If he had said non molestatus, for exoneratus, it is not sufficient to say, stetit quietus, because there is an act to be done, acquietatus, & exoneratus, this is all one; here his exhibiting of another Bill, impeaches his credit, and hinders his liberty, and so this is a breach, though no process be taken out upon it, for by reason of this, he dares not go about his business. Haughton Justice. As to the matter of notice here urged to be given this is not material; if he hath acquitted him, he ought to plead this particularly; if one be bound to perform an award, if he doth nothing to impeach it, this is good; there is a difference between stabit acquietatus, & acquietaret, that which should make a breach of the award, is the molestation; the not shewing of the acquittal is no breach: the Bill here exhibited in Chancery, is no suit until process be taken out upon it; no such matter appears here to be, and till this be done, there is no breach; for there is no breach until he be molested, and no molestation can be without a suit, before he be sued, and no suit in Judgment of Law, until process be taken out against him: if in such a case, the award was, that he should be quiet, and discharged in this Court of B. R. and after he moves for a venire facias, which was not granted him, this is no breach, because he was not by this molested. Dodderidge Justice. Quod staret quietus, he may be quiet, and not vexed, but not discharged, acquietatus, this is to be discharged, acquietaret passive, imports the active to be done; if one do undertake that J. S. shall be cured of such a Malady, this cannot be without some act done, so here, he cannot be acquietatus, unless the other acquietaret, 18 E. 4. fol. 27, 28. The Plaintiff ought to have enforced this by saying, that he was in peril, and in danger, otherwise there was no damage came to him by this, which was done; he may keep this in his pocket, but the Plaintiff ought not to be hindred and feared from following of his business, he ought here to have shewed some special matter, by which damnificatus fuit; and this ought to have been specially shewed. It is here set forth, that by the award, he was to be acquitted de quadam secta; this is not good, being altogether uncertain, for he may have many suits; it ought to have been, secta prædicta, the averment here will not aid this: if the award here had been, quod staret relaxatus, this could not have been good, unless he had released him, and here he cannot be acquitted, if the other acquietare non vult. Croke Justice. What if it had been added here, quod acquietatus esset before such a time? Dodderidge Justice. Time will not make the matter better than it was, 21 H. 7. fol. 30, 31. John de Pusetoes case, who with another were bound to T. who did grant by his deed, that the said John de Puseto shall be quite discharged of this duty; the words they were, quod si esset arrestatus, vexatus seu aliquod modo inquietus: this there held to be a good discharge. Haughton Justice. If the award had been, that all Actions between them should cease, there the other ought to do no act: the whole Court agreed in this. Dodderidge Justice. 16. Eliz. Dyer. fol. 328. Mounford. Lessor assumes, that his Lessee quiete & pacifice, haberet & gauderet, absq; interruptione of any one, a wrong-doer enters, an Action upon the case lies upon the promise. 18. E. 4. fol. 20. to this purpose, but with this difference, where he is bound, that he shall enjoy his Land against all, there it shall be against all strangers, otherwise is, if it be only that he shall enjoy the Land, this is only against the party himself, and all claiming any title under him: and with this agrees 26 H. 8. fol. 3. b. where the Lessor doth covenant with his Lessee for years, to warrant the Tenements, during the term, to the Lessee, his heirs and assigns; this warranty shall be good against titles, but not against wrong-doers; and so this cause rested again upon a Curia ulterius advisare vult, and so the same was adjourned unto another

Term. Hill. 11. Jac. B. R. &c.

18 E. 4. fol. 27, 28.

21. H. 7. fol. 30, 31, &c.

16 Eliz. Dyer. fol. 328.

18 E. 4. fol. 20.

26. H. 8. f. 3. b.

Term. Pasch. 12 Jac. B. R. &c.

another time. Afterwards, Term. Pasch. 12 Jac. B. R. This matter was moved again, for the opinion of the Court herein. Coke chief Justice. The Defendant, by this award, is not to make any release to the Plaintiff, neither is he to plead, that he made him any acquittance; and clearly, he is not to shew here by pleading, how, or in what manner he did acquit him. It was urged, That the Plaintiff in his Replication sheweth, that 5 Jac. the first Bill was exhibited, that the award came afterwards, by whith he was awarded to cease this suit, and not prosecute the same any further, & quod staret acquietatus: afterwards (c) 8 Jac. the Defendant revives the suit again, by exhibiting a new Bill for the same cause. Coke chief Justice said to the Counsel, Do you think, that this putting in of a piece of Parchment, shall be a breach of the award? the meaning here was, to suffer him to be quiet if there was a suit, before the subpœna, which was not taken out, but only prayed, quid inde? the Plaintiff here ought to have alledged expressly, that the Bill which was exhibited in 5 Jac. was the Bill, touching which the award here was made; also the filing of a new Bill only, is no breach of the award clearly, the Plaintiff here, ought also to have averred, that the second Bill contained in it the matter of the first Bill; here it is exhibuit quandam billam in Curia Cancellariæ, against Freeman the Plaintiff 5 Jac. but doth not aver this to be the Bill, in the award mentioned: he only saith, quod post exhibitionem billæ predictæ, they then submitted themselves to an award: touching this Bill, then depending, the award made, as to this, to cease: there might be divers Bills there exhibited by him: and therefore he ought to mention the Bill in certain, for which the award was made, whereas there was a Bill they awarded this to cease, arbitraverunt quod quædam secta, &c. there might be divers Bills there, and so altogether uncertain, As to the breach, it is only said, that the second Bill contains the same matter, as in the former Bill, but no breach at all expressed: if he had said here the same Bill mentioned in the award, this had been good, and then any predict. would have helped this; also no disturbance can be, to make a breach, with Process taken out. Dodderidge Justice. What former Bill this was non constat; acquietatus not to be taken for quietus. Coke chief Justice. They award, that he should stand acquitted; whether by this ought the Defendant to make a release to him? By this he was not to make a release, quietus, & acquietatus, is all one: if an Arbitrator do make an award, between a Grantee of a Rent, and the ter-tenant, out of which land the rent is issuing, that he should stand acquitted of the rent by this award, the Grantee ought not to release the rent. Dodderidge Justice. In such a case, if one hath a rent charge, out of the Land of another, and as touching this, they submit themselves unto an award; the Arbitrator awards, quod staret quietus of the rent, in this case, he which had the rent, ought to release the same to the other, in performance of this award, if the award was, quod staret acquietatus, of and from an Information against him; a Cesser here is not sufficient, as to this, because the King may proceed in this. Coke chief Justice agreed with him herein; but here a release is also to be made of the act, acquietatus, and quietus in suits, is all one. Dodderidge Justice agreed with him herein. Coke chief Justice, The award here was, that he should cease Proceedings in the suit, & quod staret acquietatus, by this, no act is to be done by the party, who had the suit, as to make any release, but by this, the Arbitrators did conceive, quod staret acquietatus, by vertue of this their award thus made, & non aliter. Dodderidge Justice and the whole Court agreed herein, and that there is no breach laid by the Plaintiff of this award, by the Defendant, and so no cause of forfeiture of the Bond, nor cause of Action by the Plaintiff, against the Defendant upon the said Bond; and therefore by the Rule of the whole Court, Judgment was given, and so entred against the Plaintiff, & quod querens Nil capiat per Billam.

Judgment against the Plaintiff.

Cowley

Cowley Plaintiff, against *Lydeot* Defendant.

Entred Trin. 11 *Jac.* B. R. Rott. 822.

IN an Audita querela, the case appeared to be this, one Bates and Cowley were joyntly bound in a Recognisance unto Lydeot, who upon this had a judgment given for him in the C. B. against them both, upon which Judgment he had an Execution by an Elegit against Bates, and afterwards takes the Body of Cowley in B. R. in Execution also, for the same debt, and this after he had Execution delivered unto him upon the Elegit, and the Land extended, delivered unto him, to hold the same quousque, &c. and the goods also, for satisfaction of the said Judgment; and upon all this matter shewed, Cowley brought here his Audita querela, prays to have allowance of it, and to be discharged. Note, That the Court allowed of the Audita Querela, for that it appears by all the Books, that after an Elegit taken out and executed, the party shall not afterwards resort to take the body in Execution also; here in this case, in the C. B. upon his Judgment, he had execution by Elegit, against the Lands of Bates; and here in B. R. he takes the body of Cowley also in Execution and in Prison, upon the same Judgment, and for the same debt; and for this cause the Court allowed of the Audita querela, according to his praper, & for the point of discharge, the Court gave further time for the argument thereof, and so without any more said in this case, at this time, the same was by the Court adjourned to a further time, for the argument thereof; and the opinion of the Court therein, afterwards, (S) Term. Pasch. 12. Jac. B. R. This case was moved again unto the Court. Coke chief Justice, It appears by 33 H. 6. fol. 47. Hillaries case, if one do take the body of the party, this is not a plenary execution, but only ad executionem, and in 4 E. 4. fol. 38, 39. a good case to this purpose, in Debt against three or four, by several Precipes upon one Obligation every one of them bound in the whole; they came and pleaded, and the Plaintiff had Judgment given for him; it is there said by Copley the Prothonotary, that the entry of the Judgment in this case shall be, that the Plaintiff habeat recuperationem suam; against the Defendant, and against the two others which were bound with him, by their Obligations, & versus utrumq; eorum, & quod habeat executionem versus predict. the Defendants, & versus utrumq; eorum, and so he may sue execution against each of them severally, Blumfields Case, Coke 5 pars fol. 86. the entry is, quod unica fiat executio tantum, but this is to be intended such an execution which is a satisfaction. An Execution by Elegit, is the highest execution in its nature that is, and the Sheriff by this is to deliver medietatem terræ, the Execution is entire, and not to be divided. 1 Mar. Dyer. fol. 100. placito. 71. an extent upon an Elegit, is to be by inquisition per sacramentum duodecim proborum & legalium hominum, & infinitum in jure reprobatur; if an execution be had which is void, he shall here have another execution; but if an execution be once well Executed, and is lawful and good, and afterwards the Land delivered to him in execution, is evicted from him, he shall never have execution again by 50 E. 4. fol. 3. b. if a man hath an execution by Elegit, he cannot afterwards waive this, when upon a Judgment; the body of the party is taken in execution this is not in satisfactione, but only ad satisfaciendum, and the Statute of 32 H. 8. cap. 5. of Re-extents, upon a lawful execution this Statute doth not extend unto this case now here in question. Unica fiat executio, this is to be understood with satisfaction; if a man takes an Execution by an Elegit, and be afterwards evicted out of these

2 Cro. 338.
1 Ro. Rep. 8.
1 Ro. Abr. 896.
An Audita querela.
Godb. 257.

Term. Pasch. 12 Jac. B. R. &c.

1 *Mar.* Dyer. fol. 100. placito 71.

50. E. 3. fol. 4 b.

Statute of 32 H. 4. cap. 5. Re-extents.

Lands, thus taken in execution the next day, clearly he shall not have another execution. Nota, that afterwards, at another time Tho. Crew argued against the Audita querela; here they two are joyntly, and severally bound, several Judgments given against them, and that in several Courts: and for this, several executions he may well have; & so he having here the lands of one of them in execution, he may also very well take the body of the other (as he hath so done here) by a Capias ad satisfaciendum, and this good, and warrantable. It appears by 1 E. 3. fol. 4. & 7 H. 4. fol. 30. touching Executions, that they ought to be effectual, and real, here in this case the proceedings against one upon the Judgment, was by an Elegit, and by this the Land delivered to him in Execution, but yet this is to be no such impediment unto him, but that he may well also have a Capias ad satisfaciendum against the other: and this appears to be so by 7 H. 6. fol. 5, 6. 15 H. 7. fol. 17. & 15 in Dupledges case, & 21 H. 7. fol, 19. 18 E. 4. fol. 11. b. and 10 E. 2. Fitz. title Execution placito, 240. and in 31 and 32 Eliz between Palmer and Humfrey, it was adjudged, that the Capias ad satisfaciendum, is but as a pledge, and tho he have a Capias against the one, yet he may well have an Elegit against the other; but in case where it is against one and the same party, if he hath once elected one kind of Execution, he shall not here afterwards resort unto another execution but the parties here are several, and therefore if he takes a Capias against one of them, he may also have an Elegit against the other, and if so, if he have an Elegit against one of them, wherefore then should he not have a Capias also against the other? the same reason is for both. Coke 5 pars. f. 87. Blumfields case may be objected against this, that such an execution, as is here by Elegit, is valuable, satisfactory and a final Execution, whereas an Execution by a Capias ad satisfaciendum, is not final, but his body is to be taken, to the intent and purpose that he may satisfie the party, & his Imprisonment is not absolute but the same is to be quousque he do satisfie the party. George Croke argued for the Audita querela and for the discharge of Cowley the party, by the Elegit, the land cannot be delivered in part of the Execution, but it must be for the whole Execution, and in satisfaction, and here he hath taken and accepted of this Execution by an Elegit, & therefore the other party, being afterwards taken by him, by a Capias ad satisfaciendum, for the same debt he ought therefore to be discharged. It is true, that after an Elegit a man may have a Capias, but upon such an Elegit, a Nihil ought first to be returned, as appeareth in L. 5. E. 4. fol. 41. Brook, title Execution, placito 93. and tho by the book it appears, that after an Elegit chosen by the party, for his Execution, and a Nihil returned, that upon the prayer of the party, a Capias ad satisfaciendum was granted by two Judges of the B. R. (in the absence of Markham chief Justice) and being afterwards moved before him and other Justices of the C. B. and by the better opinion of them all, held that a Capias ad satisfaciendum did not lie after the Elegit; and therefore a Supersedeas was there granted, the entry being, that such a one, venit & elegit executionem suam de medietate, &c. but after the Elegit returned, once served and executed, no capias ad satisfaciendum is afterwards to be granted; and so is the difference agreed in all the Books: The reason appears plainly, if two are bound, the entry is quod unica stat executio, but this is to be intended of an execution with satisfaction; and this appears to be so by 4 H. 7. fol. 8. a. b. if Three are bound in an Obligation, each of them in the whole he hath a Judgment to recover against one of them, afterwards he sues the others: This recovery is no Bar, because he is not by this satisfied of the duty, and with this agrees 29 H. 8. Brooks Cases, fol. 21. placito. 102. that the taking of the body of one is a good execution but no satisfaction, unica executio cum satisfactione, here he returns the Elegit served, and executed, and his acceptance of this Execution, and therefore he cannot have a Capias ad satisfaciendum against the other; the reason of the Common Law in this is very good: If an Execution by an Elegit be once executed, and the Land being afterwards delivered in Execution, is evicted from the party, the party here shall not have a New Elegit, because he had the

1 E. 3. fol. 4. 7 H. 4 fol. 30.

7 H. 6. fol. 5. 6. 15 H. 7. fol. 14. 15., &c.

Coke 5 pars, fol. 87. Blumfields Case,

L. 5. E. 4. fol. 41. Brookes Execution placito, 93.

4 H. 7. fol. 8. a. b.

29 H. 8. Brooks Cases, fol. 21. Mich. 102.

the Land once extended, and this in full satisfaction; the which, as it is said in Blumfields Case, Cook 5 pars, is an end of the Suit, if he take a Lease of Land of one of them, in satisfaction of the Debt, he cannot afterwards resort unto another remedy, as appeareth by 9 *E.* 4. fol. 50. and Blumfields Case; if one hath an Execution against one by an Elegit, by this there is now an end of the Suit, Coke 3 pars, fol. 12. in Sir William Herberts Case: At the Common Law, the Body of a man was not to be taken in Execution for Debt, but his Goods and Chattels: Also he which is taken by a Capias, is to pay the whole Debt, or no part of it; if therefore the Debt be 500 l. and he hath had 400 l. of one of them, he shall not take the Body of the other, for the residue, upon the former reason, because he is to pay all of it, or no part of it: Here in this Case, he had Goods delivered to him by the Elegit, and had Land also in Lease for a certain time, & therefore he is not to resort unto the other by a Capias ad satisfaciendum, and so prayed an allowance of the Audita querela, and a discharge of Cowley the party from the Execution. Coke chief Justice. Without all question, as this Case here is, Cowley, who hath brought this Audita querela, ought by this to be relieved and discharged out of Prison from this Execution, so unduly and unjustly taken out against him; an Elegit is to be entred of Record, & the Entry is in this manner, (S) Elegit sibi fieri executionem, de omnibus bonis & Catallis, &c. And a wise Attorney will not enter this before it be returned and served. 4 Eliz. Dyer, fol. 205, and 208. touching this; a Capias is not to be entred before he hath Execution, 4 *E.* 4. 38, 39. The best Case in the Law for this, 33 H. 6. fol. 47. Hillaries Case; the party is to have unicam executionem, this is to be intended with satisfaction; if he be to have unicam executionem, when he hath this against one, he shall not resort unto the other: Where two are bound pro toto & in solido, one is bound to pay so much, when he hath Execution and satisfaction, this is sufficient; he hath the Body only ad satisfactionem facere, but not in satisfactione, it is a final Execution for one to have the money in his Purse; but what difficulty is there in this Case? He is satisfied by the Elegit, he hath Goods here to him delivered for part of his Debt, and for the residue he hath here, medietatem terræ quousque the Debt levied; and altho this be here Executory, yet he hath presently a good interest in him, and if after Execution here, he happen to be evicted of part of the Land, he shall not have here any new Execution, for that this is out of the Statute Law of the Statute of 32. H. 8. cap. 5. and so this still remains as a Case at the Common Law: If one have an Execution by Elegit, & part of the Land be evicted, he shall not have another Execution. Quia infinitum in jure reprobatur. No re-extent to be had, tho he loseth the Land by the Act of God: Here he was in several Courts he takes the Body in Execution, ad satisfaciendum: This was so done against the Law, because he was satisfied before by the Elegit, which he had in satisfactione: Here the Execution is Executory in Law: yet he hath a present Interest in him: and such an Interest it is as shall go unto his Executors: He might here have pleaded this, and so have shewed the Action, and Judgment given in the C. B. as it was objected, and if he might have pleaded this, and omitted the same, he shall not have an Audita querela: In answer to this Objection he could not here plead this for that 6 Jac. the Suit was in the C. B. and 7 Jac. the Suit in the B. R. and 10 Jac. the Elegit taken out; if he could have pleaded this here, he ought then to have shewed this matter, and so have demanded of the Court Judgment, si actio; but if he might have pleaded this and omitted the same, & pleads another matter, in which Judgment is given against him, then he shall never have an Audita querela for this: But the Case is not so here, he having just cause of relief by this his Audita querela, and being so unjustly taken in execution, and Imprisoned, he ought to be freed and discharged out of Prison. Croke Justice. An Elegit, à re nomen habet, & secundum nomen ita est, an Execution with satisfaction, and a plenary Execution here was, and therefore he was not by Law to resort to the Body of the other, by a Capias ad satisfaciendum, and so the taking

Coke 5 pars, &c.

9 E. 4. fol. 50.

Coke 3 pars, fol. 12. &c.

4 Eliz. Dyer. fol. 205, 208.
4 E. 4. f. 38, 39.
33 H. 6. fol. 47.

of him by this, was undue and illegal; but if all the Land delivered in Execution be evicted; or if he, against whom the first Judgment was given, after Execution upon the Elegit, had reversed this by a Writ of Error; in these particular Cases peradventure, the other party being taken by a Capias, shall have no benefit by such an Audita querela; but otherwise it is, where the first Execution remains integra; but when there is a total eviction, or reversal by a Writ of Error of the first Judgment, then this may be some motive to bar the other from any benefit by an Audita querela, as thereby to be discharged, being taken by a Capias ad satisfaciendum; but there is no such reason here in this principal Case, but that he had just cause to have this Audita querela for his relief, being unjustly taken and Imprisoned by a Capias ad satisfaciendum; and therefore for the matter by him set forth in this Audita querela, he ought to be discharged of this his Imprisonment. Doddridge Justice. There is no great difficulty in this Case, divers Books and Authorities there are in point, but they are all one in reason. Two are bound to another joyntly and severally, he may lay this upon the one, or on the other, or upon both of them joyntly, as by one joynt Action, but otherwise it is, where by several Actions, as against one of them in one Court, and against the other in another Court; but he ought not to have two satisfactions for one & the same Debt, but one satisfactory & plenary Execution ought to suffice the party; but both Suits shall stand and be in force, until the party hath an entire satisfaction against one of them; and this appeareth to be so, by the Book of 29 H. 8. Brooks Cases, fol. 21. placito 102. As in case of a Debt, where two are bound, for which one of them is sued in the C. B. and the other in this Court; both are to be Imprisoned until the debt be paid: Afterwards one of them pays this debt, the other shall then have an Audita querela to be discharged; the principal Case here is all one with this, and if it be in one Court, or in divers, this will make no difference at all; the party ought to have but one satisfactory Execution, and here he had so in the Court of C. B. by the Execution upon the Elegit, and a satisfactory benefit is the only benefit of which the other shall have advantage, for his being discharged of his Imprisonment, being taken by the Capias ad satisfaciendum: A Capias is a begun Execution, but not the fruit and effect of Law; it appears by 33 H. 6. fol. 47. a plenary Execution, which is payment, this is the fruit and effect of Law, and with this agrees 4 E. 4. 38. Also after an Execution by an Elegit, if the Land be afterwards evicted or the Judgment reversed by a Writ of Error, this shall make no alteration in the Case for this shall be adjudged the folly of the party to elect, to have such a manner of Execution, & by the which he had no profit; but where the party could not have Execution, as Coke 5 pars f. 87. in Blumfields Case, where the party taken & Imprisoned dies in prison, there the taking of the other is lawful, and he shall not here have an Audita querela, because there was no satisfaction by the death of him that died in Prison; and it appears by 4 H. 7. fol. 8. that the Body being taken, is but as a pledge, thereby to compel and enforce the party to pay the Debt, and so this appears by the Writ, Also eviction or reversal by Writ of Error, shall make no alteration in the Case if it were so; but there is no such matter here, but that this remains a very clear and plain Case, that the Plaintiff here in the Audita querela, ought to be discharged out of Prison. Haughton Justice. The doubt here ariseth upon consideration of the difference of Executions, here a Capias ad satisfaciendum; is no satisfaction; the same is only ad satisfaciendum, but not in satisfactione; and the Execution by a Capias, is no Execution; the doubt here only ariseth touching the nature of an Execution by an Elegit: And as to this, he which hath an Execution by an Elegit, hath by this such a present Interest in him, as that he may well grant this over unto another, the reason upon the Statute of 32 H. 8. cap. 5. that if this Land be evicted, he shall have no remedy by way of a re-extent, because he hath once had a plenary execution, & no apportionment can be here, without all question; and so the difference will appear to be very manifest, between an execution by

29 H. 8. *Brooks cases, &c.*

33 H. 6. f. 47. 4 E. 4. f. 38.

Coke 5. pars fol. 87. *&c.*

4 H. 7. f. 8.

Elegit

Elegit, by which he hath a term wholly in him, to grant, or to assign over, and the which is a satisfactory Execution in it self, and another Execution, which is not so; and so the Capias here issued out unjustly, and therefore the Plaintiff in this Audita querela, being taken and imprisoned by the Capias, ought to be discharged. Coke chief Justice. Allow the Judgment in this Court, to be for discharge of the party taken by the Capias; and after the first party brings a Writ of Error, and reverses the first Judgment, upon which the Elegit was had; He shall never after charge that party, who was before discharged here by the Judgment of this Court, because it was his Error, to take the body in execution, where he ought not so to have done, and he being once discharged by this Court, shall not be again taken in execution for the same matter; if an action of Debt be brought against a Sheriff for an escape, and he hath his body in execution; afterwards he hath the money due, paid unto him, and in his purse, and then the Original Judgment is reversed by a Writ of Error; the party by this shall not be restored to his mony again, because that this was a thing executed, and so the Court all agreed to relieve the Plaintiff in this Audita querela, and to free and discharge him out of Prison unjustly, and illegally taken, and imprisoned for the same debt, after a satisfactory execution before had, by an Elegit, against the other that was bound for the same debt, and therefore the Rule of the Court was; That Cowley the party Plaintiff in this Audita querela should be discharged, & quod exoneretur de executione Judicij prædict. and this by the Rule of the Court, so entred accordingly.

Judgment for the Plaintiff in the *Audita querela* to be discharged.

And it appears by the Books, where this matter concerning Executions to be taken, is debated, as by 36 H. 6. fol 23. and 24. the party shall not be enforced to take the body for his Execution, by 22 of the Book of Assises, placito 43. where the body is taken in Execution for debt; the Plaintiff there shall not have an Elegit nor a fieri facias: for that the taking of the body, at his suit and prayer, is a full execution: and if he dies or escapes, he shall not have another execution. L. 5. E. 4. fol. 41. The Plaintiff upon his Judgment prays an Elegit, a Nihil returned; and so prayed, and had a Capias; but there by Markham chief Justice of the B. R. and the Chief Justice, and other Judges of the C. B. he ought not to have a Capias after an Elegit; for that this is the highest execution that can be in the Law; and the entry is, quod venit, & elegit executionem suam de medietate, &c. and so is it cited to be adjudged. Mich. 30 E. 3. and so by Newton, in 19 H. 6. fol. 4. but upon a Nihil returned, he may have an Elegit, but no fieri facias after an Elegit. 17 E. 4. fol. 4. A Capias after an Elegit, given by Statute, doth not restrain an execution at the Common Law. 18 E. 4. fol. 11. a Capias after a fieri facias, where the Sheriff returns a Nihil upon the fieri facias: And so by the due perusal of these Books, and of the Judges Arguments before, the several kinds of Executions may the better be understood by all.

36 H. 6. fol. 23, 24. 22 Assis. placito 43.

L. 5. E. 4. fol. 41. the entry upon the *Elegit*

Mich. 30 E. 3 19 H 6. fol. 4. 17 E. 4. fol. 4. &c.

The

The Lady St. *John* Plaintiff, against *Piott* Defendant.

Entred, Mich. 9 *Jac.* B. R. Rott. 576, or 676.

2 Cr. 329. A Writ of Error upon Judgment in the C. B. in covenant.

IN a Writ of Error to reverse a Judgment given in the C. B. in an Action of Covenant, brought by an Assignee, for breach of Covenants; the Case appeared to be this. Sir Oliver Cromwel having the reversion of one house in Fee simple, and of another house for years, by a deed grants a reversion of the Fee simple house to one, and by another Deed grants the reversion of the term also unto him; the question was, whether this assignee should have one, or two Writs of Covenant for breach of Covenant. It was adjudged in the C. B. for Alderman Piott, the Plaintiff there, that he should have but one Writ of Covenant, and Judgment there so given accordingly, upon which Judgment a Writ of Error was here brought, but not for the matter in Law, which remains unquestioned, but for some other collateral matters expressed in the Declaration. Alderman Piott, the Assignee of Sir Oliver Cromwel, and Plaintiff in the Action of Covenant sets forth, that Sir Oliver Cromwel, being seized in Fee, of the capital messuage, and also possessed of another house for years, did Lease them both by one Deed to the Lady St. John for 10 years, in and by which Lease she did Covenant for to repair the houses, with all needful reparations during the term, and afterward Sir Oliver Cromwel, by two several Deeds assigned over the reversions he had in both houses, unto Alderman Piott, who for breach of Covenant brought his Action, had his Judgment, and upon this Judgment a Writ of error brought. George Croke for the Plaintiff in the Writ of Error, moved that a breach was assigned, but no breach assigned after Attournment, and therefore the Plaintiff in the C. B. failed in this, he being but an Assignee of the reversion; one part of the Covenant was, to leave the things demised, in as good repair as she found them; he hath also alledged the covenant to be broken in such things, for which no Action did lie, and entire damages given, and so the Judgment in this is erroneous: he hath also alledged a breach of Covenant for the breaking of stone and pavements, which was no cause of Action; also he hath assigned, that the glass was broken, but not carried away, non divulsum sed fractum only: this was no cause of Action, yet entire damages given for all these breaches; and for this cause the Judgment erroneous, and to this purpose there was a Case which is cited Coke 10 pars, f. 130. a. in Osborns case, between Poley Plaintiff against Osborn Defendant, Mich. 14 & 15 Eliz. B. R. an Action of Trespass brought for breaking of his Close, and beating of his Servant, and in his Declaration he did not lay per quod servitium suum amisit: damages entire given and for this omission in the Declaration, the Judgment was arrested; several other breaches alledged for which no Action did lie, that Locks and Keys, and Binns in the Buttery were missing, and it did not appear in the Declaration, that there was any there at the time of the Lease made, and so not good, and so the Judgment erroneous. For the Defendant it was urged; That there are two Covenants contained in the Lease, one to repair during the term; the other, to leave all at the end of the term, in as good repair, as at the time of the Lease made, and it is set forth in the Declaration, that he had not done so in parcella præmissorem, and names wherein prout sequitur, and so names them all, and so brought his Action occasione predictæ conventionis fractæ, this was the Writ, and to the Jury, in an Action of Covenant

Coke 10 pars, fol. 130. b. in *Osborns* case. *&c.*

venant he may assign twenty matters, and this shall not hurt the matter, but otherwise it is in debt; there the Jury may sever these matters, and give damages to so much; but they shall not sever these Damages, but they shall be entire according to that he hath suffered, and sustained, occasione predictæ conventionis fractæ, but not to make any severance of the same, as to distinguish, and say so much for one thing, and so much for another, but otherwise, it is to be in waste and trespass, there damages entire given, is not good: also, where parcel of the things assigned for breach, are material, and parcel not material, the Jury assigns entire damages, all which was materially alledged, but not for all, which was assigned generally. Dodderidge Justice. These Exceptions which have been taken, they do rest upon the words of the Lease and Covenants: there will be a great difference between an Action of Covenant and an Action of Waste; and that same thing done, may be a breach of Covenant, which shall not be waste; this case therefore is fit to be considered of; and that the Court may be the better advised herein, they desired Books to peruse; and so for this time, this case was adjourned until another time. Afterwards (S) Term. Mich. 11 Jac. B. R. this case was moved again for the opinion of the Judges herein. Haughton Justice. Here the reversion is granted of both the houses, the Covenant was to repair capitale messuagium, and to repair structuras of the other house; so the Covenant extends to both houses. Dodderidge Justice agreed with him herein, and that the Covenant here goes unto all; the words are quod sustineret, manuteneret, & repararat, these are the words of the Covenant, ac etiam, manuteneret predicta premissa, this goes unto all, structura, & paviamenta, are all one; the Covenant also goes further, ac ad finem termini sufficienter, manutenta, palata, tensata, to yield up, to maintain, sustain, uphold and repair, these words are of large extent, and goes to the whole. Coke chief Justice; (maintain) this word goes to the whole; the Curtelage is parcel of the house, and doth pass with the same; and the Farmer, or Tenant cannot take away the pavement from the Curtelage, because it is parcel of the same; these Objections which have here been made, are but like minutæ decimæ; Shelves are parcel of the house, not to be taken away. Objection made, because it is not shewed that the Shelves were fixed; prima facie, it ought to be so intended, that they were fixed, and these did pass unto the Lessee by the Lease, & therefore to be intended, that they were fixed; as to the words, divulsa & dirupta, and the Lessee was by Covenant to maintain, to sustain, and to repair: it is set forth for breach, that they were fracta, & d rupta, & cæterarum præmissarum prout sequitur, &c. This is good and sufficient, otherwise you will defeat all the Covenants, and a pavement also is structura, for they use Lime to finish it: if damages were severally assessed, it must then be intended to be done at several times. Dodderidge Justice. All matters of fact, are here confessed, and agreed by both parties. The Court did all agree in opinion clearly; that the Judgment was well given, and no errour at all therein: but the same ought to be affirmed, and so by the Rule of the Court, the Judgment formerly given in the C. B. was affirmed.

Termin *Mich.* 11 Jac. B. R. *&c.*

Judgment affirmed.

Rawlins

Rawlins Plaintiff, against *Barret* Defendant.

Entred Mich. 10 *Jac.* B. R. Rott. 668.

2 Cr. 324. A Writ of Error upon Judgment to make partition.

IN a Writ of Error, to reverse a Judgment given in a Writ of Partition. It was shewed in the Writ quod insimul tenent, the other pleaded, quod non tenent; hereupon they were at issue, and found by the Jury, quod insimul tenent and so Judgment to make Partition: upon this Judgment a Writ of Error brought, and for Error assigned, because it was not shewed, how they held. George Croke. This is no Error, being the course in the C. B. and so is the Book of Entries, without shewing Coment, and so are all the Presidents in Point. It was urged by Glanvil for the Plaintiff, in the Writ of Error; the case was further, that after this Judgment given, one of them died: also the Declaration is contra formam statuti, and there are two Statutes for Partition (S) 31 H. 8. cap. 1. & 32 H. 8. cap. 32. and it doth not appear upon which of these Statutes he doth declare. George Croke. The difference will be, where it is Fee-simple Land, and where not, but some other particular estate, be it in tail, for life, or for years; where it is Fee-simple, there not to shew Coment they did hold; otherwise it is in case of a particular estate. Croke Justice. In the Writ of Partition, there are two Judgments to be given, the first is, quod partitio fiat; the second Judgment is, quod partitio facta, sit firma, & stabilis: after the Judgment for the Partition, one of the Parties dies, and the other two bring a Scire facias, as Daughters and Heirs, and do not shew how: Where in the Roll, there is no second Judgment entred, but only, quod partitio fiat; here the Writ of Error is brought too soon, before any Partition had. Dodderidge Justice. In Barkley and the Lady Warwicks Case, the Writ of Error was brought after the first Judgment in Partition, and before the second, and therefore ruled to be bad, the same being brought too soon; for before the second Judgment, there is no perfect Record here to this purpose; See 21 E. 3. fol. 9. placito 25. in an Accompt. Man Secondary informed the Court, that this Writ of Error, upon the first Indictment, and before the second, comes too soon, and so it hath been divers times here ruled; the whole Court agreed, that this Writ of Error was not well brought, and so the same to be quashed.

Statute of 31 H. 8. cap. 1. &c.

21 E. 3. fol. 9. placito 25.

Rere

Reve Plaintiff, against *Harris* Defendant.

Entred Pasch. 11 *Jac.* B. R. Rott. 682.

IN an Action of debt upon a bond of 100 l. pur payment of 50 l. the Defendant Demands Oyer of the Bond, and of the Condition, and the same appeared to be for the saving of the Plaintiff harmless, being ingaged for him, & as his surety in 100 l. Bond, for the payment of 50 l. The Defendant to this pleads, Quod non damnificatus fuit; the Plaintiff replies, and sheweth that the 50 l. was not paid, that there was a Capias against him for the same, and so hereby he was damnified: and whether this matter shewed was a sufficient damnification, to intitle him to his Action was the Question, and held by the Court that it was according to Broughtons Case, Mich. 42 & 43. Eliz. B. R. and Coke 5 pars. fol. 24. where the Plaintiff at the day paid the 100 l. to save the penalty of the Bond, seeing none there ready to pay it, and this adjudged for the Plaintiff, and that his payment of the 100 l. was a damage and harm unto him, and this he did to prevent a greater harm; and so is 18 E. 4. fol. 27. that in such a Case, terror of Suit is a sufficient damnification, and so this default of paymant, and the Capias upon this, issuing out against the Plaintiff, is a sufficient damnification, the whole Court agreed herein clearly that by this non payment of the 50 l. and so the Capias going forth against him, by this he hath not saved him harmless; that this is a clear breach, and the Plaintiff is damnified by this, and so is well intituled unto his Action against the Defendant, upon this his counter Bond, and so by the rule of the Court Judgment was given, and so entred for the Plaintiff.

An Action of Debt upon a Bond to save harmless.

Coke 5 pars. fol. 24. &c.

Judgment for the Plaintiff.

Carrill Plaintiff, against *Pack* and *Baker*, Defendants.

Entred Mich. 10 *Jac.* B. R. Rott. 463.

IN an Action of Trespass, Quare Clausam, & liberam warrennam fregit, & Intravit, and for the digging the ground, the Defendants pleads Non culp. to part, and justifies in this manner (S) that the place where is a place in Harding; that there is a Common there called Harding Common, that Sir Edward Carril, Father of the Plaintiff, did store this place with Conies, and so the same came to Richard Carril the Plaintiff his Son who had Conies there, and made holes; that the Sheep of these Defendants, and of the rest of the Commoners, often fell

An Action of Trespass brought against Commoners.

 into

into these holes, and so were hurt; by reason whereof, these Defendants came with Ferrets and did chase the Conies, and digged down the Borows and filled up the holes, for the better preservation of their Cattel, and enjoyment of their Common, and so justifie: Upon this the Plaintiff demurred, the only Question was, whether this was a good Justification or not. George Croke for the Plaintiff, that this Justification is not good, for the Commoner hath no remedy given unto him but to take his Common with the mouth of his Cattel; and here the Plaintiff hath free Warren in this place: A Commoner is not to disturb the Lord of the soil; the remedy which a Commoner hath, is an Action upon the Case, or an Assise; it appears 12 H. 8. f. 2. & 3. and 13 H. 8. fol. 15. in Simon de Harecourts Case, that a Commoner hath nothing to do, but to take his Common with the mouth of his Cattel; he is not to have an Action of Trespass: to this purpose, see 4 H. 7. fol. 3. & 15 H. 7. fol. 12. Hillar. 29 Eliz. Old Plaintiff, against Cunney: An Action of Trespass brought against a Commoner for chasing in his Warren, and killing of his Conies, who pleaded that the Conies did increase, and so did surcharge the Land, and did damage to the Commoners, and for this cause he did kill them: Upon this Plea the Plaintiff demurred in Law, and adjudged the Plea not good, and that the Commoner could not justifie the killing of them, Pasch. 43 Eliz. B. R. Rot. 434. Bellow Plaintiff, against Langdon Defendant. In an Action of Trespass brought for chasing and killing of his Conies; the Defendant pleaded Non culp. ruled in that Case, that the Lord may do as he will with his own soil; he may either have Dear or Conies there, and the other cannot kill them, and so it was ruled against him, Coke 5 pars, fol. 104. in Boulstons Case: If a man make Conny Borows in his own Land, which increase to so great a number, that they hurt the Land of his Neighbour next adjoyning, he cannot for this have an action upon the Case, but as soon as they come upon his Land, he may kill them lawfully: Here they justifie the hunting and digging down the holes, this Justification is not good, & so the Plaintiff to have his Judgment. Sir Robert Hitcham for the Defendants, that the Justification is good, & that by authority in Law. The Cases before remembred were for killing, which must be agreed could not be justified, but the Chasing there never came in question, 12 & 13 H. 8. not ruled there, but only controverted, & two against two: The chief Justice there for the Commoner; the difference will be, where a Commoner doth intermeddle with the soil de novo, and where he only reforms a mis-fesance, 13 H. 8. there he medled with the soil de novo; if the Ter-Tenant do inclose, the Commoner may pull the same down again, for this only so done, to reform what was done: If the Lord do make a Pond on the Common, if the Commoner, notwithstanding this hath Common sufficient, this is good; but if all the Common be taken up in the Pond, they may well then let out the water, and so enjoy their Common, & this they may justifie in 13 H. 8. there the Commoner medled with the soil de nozo; and tho this was to drein away the water, and so thereby to meliorate the Common, yet in this the Court there was divided two against two, so that a Commoner may reform that which is amiss, & to the prejudice of the Common, but not to meddle with the soil de novo: Again as this Case is, the Ter-Tenant shall not take any advantage of this his own wrong; as if a man takes the Goods of I. S. and carries them upon his own Land, I. S. may well justifie his entry upon the Land, to take his Goods, and shall not be punished for the same in an action of Trespass, and that it shall be lawful for one to remove what is hurtful and a damage to him; to this purpose is 8. E. 4. fol. 5. and 9 E. 4. 35. which come to the reason of this Case now in question. Haughton Justice. The Action of Trespass here is brought for this cause (S) Quare Warrennam fregit &c. The Defendant by way of Justification, shews that he was a Commoner, that he digged down the Cony holes; and filled them up again, without confessing or avoiding of the Trespass, and so the Plea not good. Dodderidge Justice. By Prescription, or by Grant of the King a man may have a warren: If one which hath

12 H. 8. f. 2. 3. &c.

4 H. 4. f. 3. &c.

Pasch. 43. Eliz. B. R. &c.

hath no Warren, do put Conies into an Inclosed Ground, he cannot here have an Action of Trespass, Quare Warrennam, sed quare clausum fregit: Here the Action of Trespass is, Quare clausum & liberam warrennam fregit, & intravit, he pleads Non culp. and justifies; and so by this he confesseth that he hath a free Warren. Croke Justice. If the Plaintiff hath a Warren, the Defendant cannot justifie the killing of his Conies. Haughton Justice. Cony-Burrows are incident to a Warren. Dodderidge Justice. If the Defendants had pleaded Non Culp. to the Trespass in the Warren, this had been then well pleaded, and the Plaintiff must then have made it to appear unto the Court, that he had a free Warren; but here by this Plea they have confessed, that he had a free Warren: If the King doth grant unto I. S. free Warren in his Land, afterwards I. S. makes a Feoffment in Fee of this Land, excepting the free Warren, I. S. may clearly afterwards make Cony-Burrows in this Land de novo, and store the same with Conies. A Commoner may well distrain the Cattel of a Stranger, being upon the Common: but not so the Cattel of the Lord, neither may he chase them, tho they surchage the Common; and he said to the Counsel for the Defendants, that this last Case doth make the Defendants Case here to be without any great question, and so the Court was clear of Opinion that this Plea and Justification of the Defendants was not good, and so by the Rule of the Court, Judgment was given, and so entred for the Plaintiff, if better cause by a day given was not shewed the contrary; but no cause being shewed, the Judgment did stand.

Judgment given for the Plaintiff.

Bilsford Plaintiff, against *Flint* Defendant.

Entred Mich. 10 *Jac.* B. R. Rott. 536.

IN an Action brough for non-performance of an award made, the Case appeared to be this; the Defendant shewed, how that he & the Plaintiff had submitted themselves unto the award of I. F. concerning a Battery by the Plaintiff upon him, who did award the Defendant to release the Action and the Plaintiff to pay unto him 10 s. in satisfaction for the Battery: the Plaintiff sets forth the Breach in this, for that he tendred the release to the Defendant, and he refused to seal it per quod actio accrevit. The Defendant saith, that he refused to seal it, because the Plaintiff had not paid unto him the 10 s. awarded unto him, in satisfaction for the Battery; so that the question only was, Whether the release of the Action, or the payment of the 10 s. should precede. Haughton Justice. The release here is to be of the Action of Battery, and the payment of the 10 s. is to be in satisfaction for the Battery. Dodderidg Justice. The release is to be only of this Action of Battery, & not to be a general release of all other matters, as the Defendant supposed: If the award had been for one to pay mony, & the other to make a release, here the payment of the mony ought to precede the release; but in this principal Case here, the release is only of the Battery, and not of the payment of the 10 s. The Court clear of Opinion, that here was a good breach and the same cannot be helped, for by this Release which was tendred by the Plaintiff to the Defendant, to seal according to the Award; the payment of the 10 s. was not by this discharged, and therefore the sealing of the Release being tendred to the

An Action of Debt for not performing an award.

Defendant ought to precede, because this Release goeth only to discharge the Action as to the Battery and his refusal to seal this, is a clear breach, and so the Plaintiff had just cause of Action, and by the Rule of the Court, Judgment was given, and so entred for the Plaintiff.

Judgment for the Plaintiff.

Stillwell Plaintiff, against *Rider* Defendant.

Entred Hillar. 1 *Jac.* B. R. Rot. 875.

Trespass and Ejectment for Title of Common.

10 E. 4. f. 10. *&c.* ante. 86,87,88.

IN an Action of Trespass and Ejectment, concerning Title of Common, the Title of Sir George Moor, the Verdict passed against his Title: It was moved for him in Arrest of Judgment, that there was a mis-tryal, the venire facias being mis-awarded, the same being but of one place (S) Witley; whereas it should have been of two (S) of Thursly and Witley, according to the Book of 10 E. 4. fol. 10. and Lacy and Fishers Case, 21 Eliz. B. R. Dodderidge Justice. The venire facias is to be from the place where the Land is, and where the Common is; and so where the Common is appendant. The Court was clear of Opinion that the venire facias here in this Case was misawarded; for Thursley is not within the Manor of Witley, and the venire facias being here of Witley, saying nothing of Thursley, is not well awarded, for the same ought to have been of both (S) of Thursley and Witley: and therefore by the Rule of the Court, Judgment was arrested, and a venire facias de novo was granted.

Judgment arrested, *&c.*

Taylor Plaintiff, against *Terry* Defendant.

A *Scire facias* to the Justices of the *B. R.* in *Ireland.* 45 E 3. f. 19. *&c.*

A *Scire facias* granted by the Court to the Justices of *B.R.* in *Ireland.*

A Scire facias was prayed unto the Justices of the Kings Bench in Ireland, upon the Book of 45 E. 3. fol. 19. placito 18. A Procedendo here granted to them to proceed there, and the Register inter brevia Judicialia, fol. 43. A Writ of fieri facias directed in this manner, Rex Justitiario suo Hiberniæ salutem, &c. Dodderidge Justice. Nothing is to come hither out of Ireland, but only a Transcript of the Record; the Record it self there remains, according to the Prayer of the party: By the Rule of the Court, a Scire facias was granted to the Justices of the Kings-Bench in Ireland.

The

The KING against *Andrew Sorill.*

WHo was Indicted for stopping of Water. Hen. Yelverton moved the Court to quash the Indictment, the same being insufficient; it is laid therein. Quod quædam pars aquæ, was by him stopped; that this is not good, being so uncertain. Croke Justice. It ought to have been, Quædam pars terræ, aqua coopertæ. Dodderidge Justice. If the same had been shewed to be a Water-course, and that this had been turned; then to have said, magnam partem aquæ, had been good, according to Lutterels Case, Cook 4 pars, fol. 88, 89. And the Case between Wikes and Searl in B. R. there remembred; and 8 Eliz. Dyer, fol: 248. placito 80. where the Count was against the Defendant in an Action upon the Case; quod divertit magnum cursum aquæ &c. and a President there cited, which was, Mich. 12 & 13 Eliz. Rott. 1168. An Assise of Nusance, pro diversione majoris partis cursus aquæ, and held good. Dodderidge Justice, and the whole Court herein agreed with him, that quædam pars aquæ here is not good and so the Indictment for this Cause is insufficient; the Exception taken allowed good, and so by the Rule of the Court, Sorill, the party Indicted was discharged, and the Indictment quashed.

An Indictment, 2 Cr. 324.

Coke 4 pars, f. 88, 89, *&c.* 8 Eliz. Dyer, fol. 248, *&c.* *Mich.* 12 & 13 *&c.*

Indictment quashed, and the party discharged.

Tipping Plaintiff, against *Swan* Defendant.

IN an Action of Debt, brought upon the Statute of 2 E. 6. cap. 13. for not setting out of Tithes, a Verdict for the Plaintiff: It was moved in Arrest of Judgment, That the Declaration was not good, for that the Statute therein is mis-recited; in the Declaration the Statute is recited to be, where Quilibet subjectus dicti domini Regis, the Statute being, that every of the King's Subjects, &c. and so for this mis-recital of the Statute in the Declaration the same is not good. Dodderidge Justice. This is a plain mis-recital of the Statute, for by the recital this is only tied unto King Edward the sixth, and to no other, and for this cause the Declaration is not good. Haughton Justice agreed with him herein; for domini Regis, this implies the Politick capacity: Another Exception was taken to the Declaration, because he doth not shew that he is the Proprietor. Fleming Chief Justice. The Statute here is mis-recited, dicti domini Regis is not good, for there is no such Law as in the Declaration is mentioned, and so the Declaration not good, and therefore the Rule of the Court was, Quod querens Nil capiat per Billam.

An Action of Debt, *&c.* 2 Cr. 324. 1 Bulst. 218.

Judgment *quod querens Nil capiat per Billam.*

Porter Plaintiff against *Ager* Defendant.

IN a Writ of Error, to reverse a Judgment given in an Action of Accompt. Hen. Yelverton. Neither in an Accompt, nor in a Writ of Partition, doth a Writ

A Writ of Error upon a Judgment in an Action of Accompt. 2 Cr. 324. Ante. 104.

a Writ of error lie upon the first Judgment. Man Secundary informed the Court, that upon a general Writ of error upon a Judgment given in Accompt, the first Judgment that he shall Accompt, and the second Judgment also shall be reversed if error be therein. Dodderidge Justice. By this appeareth, that the general Writ of error goeth to both the Judgments, as well to the one as to the other: The whole Court agreed with him herein.

Baker Plaintiff against *Chew* Defendant.

A Writ of Error to reverse a Judgment in Debt.

IN a Writ of Error to reverse a Judgment given against him in an Action of Debt: the error assigned was, that there was a mis-trial, the venire facias being mis-awarded, the payment was to be made in Lincolns-Inn-Hall, and the venire facias was from Holborn, and so not good, but the same should have been of Lincolns-Inn, this being the most certain place. Hen. Yelverton for the Plaintiff; the venire facias was well awarded, it was never heard of any venire facias to be had of Lincolns-Inn, Grays-Inn, or of any of the Inns of Court. Dodderidge Justice. The payment was to be at Lincolns Inn-Hall in Holborn; the venire facias here ought to be de Holborn, for this is the Town, and so the venire facias here was well awarded: For if a thing be laid to be done in such a Manor in Dale, and the parties are at Issue upon it, the venire facias here ought to be de Dale; and so the whole Court agreed herein, that the venire facias was well awarded, the Judgment well given, and not erronious; and so by the Rule of the Court, Judgment was affirmed.

Judgment affirmed.

Nota, That in this Case Chew having his Judgment against Baker, afterwards, Termin. Mich. 11 Jac. the Rule of the Court was, that Baker should pay unto Chew so much money before such a day, and if he failed herein, then Chew should have him in execution upon the first Judgment; he failed of payment, and so he was taken by the Sheriff in execution upon the said Judgment, who being thus in execution, sued out an Audita querela in the Chancery, and upon a Suggestion by him there made, he obtained an Injunction, and a supersedeas, and the party thus taken, and being in execution, by an Order made in Chancery, was bailed; and so set at large (the party being not satisfied of his debt.) Jo. More moved the Court, to have him to be called in Court, to make answer to his not performance of the Order of the Court, in payment of the money ordered by him to be paid: the Court answered, that the Order of the Court was well performed, for by his failer of payment, he was taken into execution upon the Judgment. The Court advised him to move this matter in the Chancery, and there to shew all the proceedings herein, and that this was there so done after Judgment, and after the party taken here in execution; and so to see, what the Court there will say unto it, and then afterwards to move this Court here again in it, when the Court is full; and if this shall be said to be an escape in Law, the Sheriff then is to be charged with it; for the party cannot be taken, being once delivered by Order of the Court

Audita querela.

The

The King against *Skeit*, and others, *&c.*

SKeit and others were endicted upon the Statute of 8 H. 6. capite 9. for forcible entry; exceptions taken to the Indictment, that the same was insufficient, the same being that Locus in quo, ad-tunc, & ad-huc, existens liberum tenementum, of him, in reversion; this is not good, as it was urged, for if so, then no disseisin. Haughton Justice. Yet the words may be true, if he entred afterwards. Dodderidge & Coke Justices, then if it were so, he cannot have a Writ of restitution. Coke Justice, here is a double repugnancy in this Indictment; for after the (adhuc existens) it is extra tenet. Another exception was taken, because it is said, that customary tenants, and doth not shew the same to be secundem consuetudinem manerij. The whole Court clearly agreed; that for these exceptions taken, the Indictment was insufficient, and so by the Rule of the Court, the Parties Indicted were discharged, and the Indictment quashed.

Indictment upon the Statute of 8 H. 6. cap. 9.

Indictments quashed, and the parties discharged.

Collicum Plaintiff against *Tucker* Defendant.

IN an Action upon the Case brought for stopping up of a way with a hedge: upon Not guilty pleaded, a verdict was given for the Plaintiff: It was moved in Arrest of Judgment that the Declaration was not good, it being therein set forth that he ought to have a way over the Land of the Defendant, for his carriages, at any time when he should have occasion to use the same, and shews that the Defendant stopped the same, so that he could not use it; the exception taken, because in his Declaration he doth not shew, that he had occasion to make use of the way, and how. The Court over-ruled this exception, and did hold clearly, that the Plaintiff ought not to come and shew the Defendant, that he had occasion to make use of the way; these words the Law saith for him, and it had been very idle for the Plaintiff himself to have said so to the Defendant, for this is not like the case of a Feoffment made, to reinfeoffe or of a grant of a rent charge, upon condition, and if broken, this is to be shewed; but here the Plaintiff may well have his Action upon the case, for stopping of his way, without shewing of the cause he hath, to make use of the way. Dodderinge Justice. The Plaintiff here may well have his Action, if his way be stopped; for this is the contract and agreement of the parties, That he should have a way: if a man makes a feoffment in Fee by Indenture of his Land, reserving a way to him over the Land, this is clearly as a grant, and so good, and it is to be used, quandocunq; he will: and he ought not to come to the Defendant, and tell him when he hath occasion to use the way, he is not to stop the way, at any time; if he doth so, an Action upon the case well lieth against him; and so the Court was clear of opinion for the Plaintiff, that he had just cause of Action for stopping of his way; that the Declaration was good, and so by the Rule of the Court, Judgment was given, and so entred for the Plaintiff.

An Action upon the Case for stopping a way.

Judgment for the Plaintiff.

Shuttle

Shuttleworth Plaintiff, against the Corporation of *Lincoln* Defendants.

A Writ of Restitution for an Alderman.

Upon a Writ of Restitution the case appeared to be this, An Alderman of Lincoln was removed for cause, and Shuttleworth elected Alderman to his place; afterwards the Alderman first removed, the cause of his removal appearing to be insufficient, prayed to have a Writ of Restitution, to be restored again unto his place of Alderman, which was granted unto him by the Court, with a Rule to remove Shuttleworth again, and to restore the other; afterwards one of the Aldermen died, and so another place now became void; and Shuttleworth who was removed upon the Writ of Restitution, and by the Rule of the Court, in regard that he had now undergone the Office, and charge of Major of that Corporation, and there now being a place there void, and they by their Charter, being to have twelve Aldermen, he moved the Court for a Writ of Restitution, to be restored to his place again; the Court answered, that they could not write to them, to elect such an one, this Court, being only to deal in cases of Restitution, by granting of Writs of Restitution, upon bad and undue removals: the Corporation there having a free Election amongst them; and so they are to elect accordingly. Croke Justice. Shuttleworths election, the validity of this rested only upon the cause of removal of the first, whether the cause was good or not; if good, then Shuttleworth a good Alderman; but if the cause proved not good, but the first restored again, as here he was by a Writ of Restitution, and the Rule of the Court, he is then in his place, statu quo prius; and Shuttleworth being removed, he is now likewise, statu quo prius, no Alderman, nor can he be any without a new election, by the Corporation, for he hath now no right at all, by force of his former Election: if the first cause of removal be not good, and the right of Shuttleworth rests only upon this; and upon his Restitution; but there is very great reason that the Corporation should again elect him, if they have a place now void. The whole Court clear of opinion, against the granting of a Writ of Restitution, as this case is unto Shuttleworth; for he cannot be restored to the place of an Alderman, to a new place, by force of his former election, for by his removal, he is now, statu quo prius, No Alderman, and so not to be restored to the place of an Alderman; And so the Writ of Restitution denied by the whole Court.

The Writ of Restitution denied, *per curiam.*

Park Plaintiff, against *Lock* Defendant.

Entred Hillar. 10 *Jac.* B. R. Rott. 481.

An Action of Trespass laid to be done in *Cornwal.*

In an Action of Trespass, brought here against the Defendant, in custodia marischalli, in the Declaration, the Trespass was laid to be done in Cornwal the Defendant pleads in abatement of this Action, and sets forth the Charter o

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King E. 1. granted unto the Stannery Court, thereby enabling the Stannery-workers to plead there, and there to be impleaded in the Stannery Court, and therefore prays the benefit and the priviledge of this, to have the trial there: Against this it was urged, that the Court here is now to hold Plea of this: Notwithstanding their Charter; for this Court may hold Plea of Debt, Covenant, Detinue, notwithstanding the Statute of Magna Charta, capite 11. Communia placita non sequantur Curiam nostram, &c. he being here, in custodia mariscalli, the Plaintiff may here declare against him, in what matter he will, and his coming in here is not inquirable. Mich. 40. & 41. Eliz. B. R. Rot. 284. Braynes Case, who killed Watts within the Cinque Ports, and this was murther. Dorothy the Widow of Watts did declare here against him in custodia mariscalli, the Charter was pleaded, that he ought to be tryed before the Constable of Dover, but this was not allowed; he was found guilty and hanged; the Court agreed in this, and said, that if one be here in custodia mariscalli, he is not to be fetched away, and if he should not answer here, being in Custodia mariscalli, none then could have remedy against him; and therefore being here in Custodia, by the Rule of the Court, he was enforced to answer.

Magna charta cap. 11.

Mich. 40. 41 *Eliz.* 2. *&c.*

Priviledge disallowed *per curiam.*

Roberts Plaintiff, against *Roberts* Defendant.

Entred, Trin. 9 *Jac.* B. R. Rott. 164.

IN an Action of Trespass and ejectment; upon Non culp. the Jury found a special Verdict; the case appeared to be this: That Roberts had three Sons; and being seized of Fee simple Lands, & also possessed of Leases for years, and he being so seized and possessed made his last Will and Testament in writing, by which he did devise unto his Daughters, certain Sums of mony for their Portions, & my Sons, when they are of age: To Stephen my youngest Son, Germine and Sandy closes (which was a term for years) and before they come to 21 years, I make it to my Executors, and they to make them in goods, as they shall think good; makes his Executors and dies so seized and possessed at the time of his death, Stephen was then within age, and dies before that he accomplishes his age of 21 years, intestate, and the administration of the goods & estate of Stephen, was granted to the Plaintiff; the Executor of Roberts proves the Will and enters, claiming this Lease as a Legatee, and afterwards assigns all his right and interest in this unto the Defendant, so that the Question was between the Administrator of Stephen, and the Assignee of the Executor, which of these two should have this term, the sole question being, whether this was a present interest, vested in Stephen the Son by the words & meaning of the Will, or only to be as an executory devise, and so resting in contingency; if it be a present interest in Stephen, then his administrator to have it, otherwise if it be but as a contingent estate in Stephen & so then by his death, before the contingency do happen, the same is at an end and determined. This case was argued at large by George Croke, for the Plaintiff, and by Davenport, and Hen. Yelverton for the Defendant. And after their Arguments, Haughton Justice. Coke 3. pars, fol. 19, 20, 21. Borastones case will go very far in this case, whether by this devise unte Stephen, this be matter of contingency, or matter of time, will be the question. Dodderidge Justice,

Trespass and Ejectment.

Coke 3 pars, fol. 19. *&c.*

stice. The matter will rest here much upon the words; If he devileth his term unto his Son, and until he come to his full age of 21 years, that his Executors shall have the profits: here the Son clearly hath a present Interest; but if he doth devise that his Son shall have such a Lease, after that he comes to his age of 21 years, and that in the interim, his Executors to have the profits; here is no present interest in the Son, but the same doth rest in contingency. Croke Justice. A man doth devise his term unto his Executors, until his Son shall come unto 21 years, he being then 15 shall not the Son have the residue of the term by Implication? quasi dicaret, he shall. Dodderidge Justice. We are to look unto the intent, and meaning of the Testator, if this be here a Contingency. Whether it was the intent of the Testator, that if his Son died before 21 years, that this term should then come unto strangers. Haughton Justice. His intent and meaning was, that it should come to him who by Law had good right to have it; as here the Administrator of Stephen may have: The Court commanded Books to be brought to them for that this case will rest upon the true construction of the words of the Will. Dodderidge Justice prima facie, inclined to be of opinion, that the Administrator of the Son should not have this term. Haughton Justice, that the Administrator of Stephen the Son, and not the Assignee of the Executor should have the same. Afterwards, at another time, this matter was moved again, and Argued by the Judges. Haughton Justice for the Plaintiff, that the Administrator of Stephen ought to have this term. It appears by this Will, that the Testator did intend two things: First, to advance his Son Stephen with this term. Secondly, that his Executors should take the profits thereof until the full age of Stephen of 21 years, the same to be by them disposed of, for the benefit of his Children, for the increasing of their portions, and so to raise stocks unto them, and the words of this Will ought to be construed, as to have performance made of these two points; by the Will meant and intended. He made disposition of his personal Legacies, p. out by the Will; and for his Leases, he by his Will disposed of them to his Sons, at their full age of 21 years, & before they come to 21 years, I make it to my Executors, and this is as much as if he had said, I make it to my Executors, until my Sons shall accomplish their several ages of 21 years; this was his meaning, that his Executors should have this in the interim, until they came to 21 years; and he willed further that they should have this, to the use of his Children, and to raise a stock for them; and also they to make them in Goods, &c. this is all one as a devise of the profits unto these his Children, here the Will is entire, the words of which, are not to be divided; but construction is here to be made out of the Will. Borastons case, Coke 3. pars, fol. 19. A Legacy there is limited unto one when he shall come to his age of 21 years, this is meerly in contingency, so it should be here in this case, if here was only a devise of this term unto Stephen, when he should come unto the Age of 21 years, and without any further words; but it is not so here; We ought to make construction upon the words precedent, and subsequent in this Will, upon all the words together; and if the Land here devised unto Stephen, had been Fee-simple Land; no difference then had been between this case, and Borastons case, but that case would then have overruled this case, to be no contingency here, but a present Interest; but being a term here, the difference is, in this regard; it may be a Question whether by this Devise to his Executors, every of his Sons shall have the several profit of his term by himself, for his part, as to this, it shall not so be, but they are to take the profits of all altogether, and this taking of the profits & the disposition and distribution of them for several portions, this by the will is put absolutely in the power of the Executors; and for the term in them, such construction is to be made, they are to have the same Usque, &c. the Sons come to their age of 21 years; also the Father, who was the Testator fixed his eye upon the minority of his Sons, and when they should come unto 21 years, and he had this in his intention, but not of their deaths intervenient, he never once dream for thought of this; Borastons case, Coke 3 pars fol. 20. b. where the Testator devised

Coke 3 pars, fol. 19. &c.

Coke 3 pars, fol. 20. &c.

devised his Land to his Executors until Hugh Borastoo his Son should come to his full age of 21 years, for payment of his debts, and performance of his Will, this to be intended as the Court there held, that he had made a computation, that the profits to be taken by his Executors, during the minority of his Son (which was by the space of 12 years, would be sufficient to pay his debts, & to perform his Will; & therefore by the death of Hugh, the interest of the Executors did not cease, & so here in this case the Executors to have this, as long as Stephen shall be within age; and so for this time, it shall be in their power: and no difference there is between Borastons case and this case now in question, as to this matter; and so there is no contingency in this case, but the Executors are to have this so long, and that by way of computation. If the Estate had been limited for life, and after the decease to remain to another, this is after the determination of the Estate. If a man deviseth Land to I. S. for life (and after) that his Executors shall sell the land, they may sell this land in the life time of the other, the word (after) this is as much as to say, after the determination of the estate; it is very apparent, here, that the meaning of the Testator was by this his Will, to advance Stephen his Son, but not by a contingency; in many cases in the Law, a Deed is so to be managed, that one entire construction is to be made of all the words, and so it is to be in case of a Will: if a man give land to another in the premisses of the deed, to him & to his Heirs, and in the latter part of it, to him and to his Heirs males of his body, here he shall have, 1. an estate tail, and afterwards a fee-simple: in case of a Releas made by the Disseisor, and the Disseisee to another: this is the Releas of the Disseisor, but first by construction of Law, it shall be said, first to be the Releas of the Disseisee to him, and so is Paramour and Yardleys Case in Plowdens Commentaries, fol. 540. for so the Law will marshal the words, ut res magis valeat, quam pereat, and so here is no contingency in this case, but that Stephen by the words and meaning of this Will, hath a good and present interest, and not in contingency, and so his administrator hath good right, and Judgment ought to be given for him. Dodderidge Justice. The administrator of Stephen, is here to have nothing of the estate limited unto Stephen, the same being to commence meerly upon a contingency, and he dying before the same hapned; for the argument of this case, I will rest upon the words of the Will: the Will is found in hæc verba, the special verdict being, I do give to my Daughters 80 l a piece; and my Sons when they come to the age of 21 years, to one of them such a Lease, and to my Son Stephen the Lease now in question, and before they are of 21 years. I make it to my Executors and they to make them in goods, as they shall think best. Stephen dies before 21 years, the sole question is, whether he had a contingent or an absolute estate before he attained to his age of 21 years? if an absolute estate, and the same vested presently in him, then his administrator is to have the same, but otherwise it will be, if no present interest was setled in Stephen, by the words of this Will, but a devise to him upon a precedent limitation, as touching the quality of the person to take, and when to take. It hath been agreed to me, that if he had rested upon the premises, upon the first part of the Will (8) if he had devised this unto Stephen, when he should come to the age of 21 years, without any other words, that this should have been a meer contingent estate: We are now to look into the subsequent words of this Will, and to examine, whether they will make any alteration in the case; as to this, clearly they will not: it appears by this Will that there was a two-fold purpose in the Testator. First, to devise his term with a limitation. Secondly, to devise his personal estate to them; and this by him left unto the discretion of his Executors: but they were to have these Leases upon a limitation of time: the latter words here of this Will do not any ways impeach the former. It is to be considered, whether it was the meaning of the Testator here to have this term to be setled in Stephen absolutely or not, but upon a contingency; if he had here said and for my Sons, Stephen and Robert, till they come of full age of 21 years, I will that my Executors shall have the said term, this clearly had altered the case, but here the devise is made

Coke 3 pars fol. 20. b. *Borastons* case.

Plowdens Commentaries, fol. 540. in *Paramour* and *Yardleys* case.

upon an express limitation precedent, & here he is out of this limitation; but if he had devised the term here unto Stephen, and till 21 years of my son, I devise this to my Executors; here the Executors are to have this only, until his son Stephen accomplished the age of 21 years. If one had then demanded of the Testator, who should have this term, if his Son Stephen never came to his age of 21 years, he would then clearly have answered, that his Executors should have had the same; here by the words of this Will, his Executors to have the term, until his Son comes to 21 years, and if this never happens, the Executors then to retain the same. Also as to the personal estate raised, this is not limited to be out of this term; for if he had said, and they to make them out of it in goods, &c. it would be otherwise, but this was here left to be out of his goods in general. As to the words of the Will, all the words of the Will, with this construction do very well stand together; but not by any other construction; and by this construction, all the words stand well together, and with the intent of the devisor. As to the cases remembred in 24 H. 8. Br cases, fol. 9. placito 50 Brooke title Devise, placito 27. a man deviseth 20 l. to I. S. to be paid within 4 years after his death, and dies, and the devisee dyeth within the 4 years, that yet his Executors shall have the money; here in this case clearly there is a present interest vested in I. S. the devisee, and this shall go to his Executors; and so likewise in Latimers case, 36 H. 8. Dyer fol. 59. where he devised to his Daughter 500 l. for and towards her marriage; here there is an interest presently vested in her, but in the end of that case it is cited to be 5 Eliz. that if the payment was limited, to be at the day of her marriage, or age of 21 years, and she dies before the one or the other happens, in this case her Executors shall not have it: and this case did induce me to be of this opinion; this being in effect, as our case here is, there will be a difference, if the devise was, I will that my Executors shall pay so much to my Daughter at her day of marriage; if she dies before, her executor shall not have this; but if he deviseth so much unto his Daughter, at the day of her marriage, to be paid by his Executors & she dies before, there otherwise it shall be, her Executor here shall have the same, so here in this principal case there is by this Will but a limited estate unto Stephen, & so according to the intention of the Testator not the administrator here of Stephen, but the assignee of the Executor being the Defendant, is to have this term. Croke Justice, That the administrator of Stephen here ought to have this term. 3 questions are propounded, and well answered in this Will, & this which is primum in intentione, is ultimum in dispositione; the first Question is, Quis? who should have these his Leases? He answers to this directly (S) my three Sons; here now is primum in intentione, so that here now by these words in the Will, the persons to have, and the things they were to have, are here certainly designed and set down. The 2. Question is, Quando? when they shall have this? The answer is, when they are of the full age of 21 years. The 3. Question is but Quis interim? who shall have the same in the mean time? The answer to this is, that my Executors: there will be a difference between a contingency, which may have a certain time for to commence, and that by computation of time: if a man devises 100 l. unto his eldest Son when his second Son should come to the age of 7 years, & he dies before he doth accomplish this age: Notwithstanding this, clearly the eldest Son shall have this 100 l. when the time prefixed shall happen by effluxion of time, for there is definitum tempus, the time set down; but if it be upon an uncertain contingency, this ought then first to happen, aut nunquam, this shall never happen; so in the case in 36 H. 8. Dyer, if one devises 100 l. to his Daughter, to be paid at her age of 21 years, and she dies before, her Executors shall have this, for this is a Legacy, & a present interest passeth by this devise, & the payment of this is only deferred till her age of 21 years. I agree the rule that hath been taken touching Wills, that construction shall be made upon all the words of the Will; if he had here devised these Leases to his Sons when they should come to the age of 21 years, and that his Executors should have the same in the interim, each one of

24 H. 8. *Br.* Cases, fol. 9. *&c.*

36 H. 8. *Dyer* fol. 59. *Latimer's case.*

of them when he comes to his age of twenty one years, shall have his term by such construction made, & reddendo singula singulis, and the eldest shall not tarry for his part, until the youngest shall come to his age of twenty one years, for each of them shall have his term in his turn, 13 H. 7. fol. 17. b. by Fineux. A man having a term for years, by his Will deviseth, that his youngest Son shall have this after the death of his Wife, she shall have this during her life by implication; if a man by his Will deviseth, that his Executors shall have his term, until his Son John shall come unto the age of 21 years, when his Son John comes to this age, he shall have this term by implication; the devise here in this Case to his Executors, is sub modo, 19 Eliz. Dyer, fol. 356. Chick devises a house to a Woman in Fee-simple, and after her decease, to W. his Son, adjudged, that the Wife had an Estate for life, the remainder to the Son for life, the remainder in Fee to the Wife; for the Law shall make all the words of the Will to stand, ut res magis valeat, quam pereat; and so here it is very apparent by the resolution of these Questions (S.) Quis, Who shall have them? Quando, When? & quis interim, Who in the mean time? (S.) My Executors; so that here is no uncertain contingent, and the death of his son in the interim, never once came into his consideration; but if it had been here, in case of an uncertain contingency, the contingency then ought first to happen, and so upon the whole matter, Judgment in this Case ought to be given for the Plaintiff, for the administrator of Stephen. Dodderidge Justice. If I make a Lease to J. S. until his son comes of full age, he being then within age, (S) of the age of 15 years, this is good, and a plain case; the reason of this is, because there ought to be a certain interest at the time of the making of this Lease, he was then 15 years of age, and therefore he was to have this for 6 years; but when one is to have a thing, and this is to have a precedent contingency before it begins, this certainly shall not begin before the contingency happen; for by such construction as hath been here made of this Will you will hereby break the intent of the Devisor by this his Will; and Judges ought to expound Wills according to the meaning of them; here he meant to advance his Will. Haughton Justice. If I devise, that J.S. after the death of J.N. shall have my Land, to him and to his Heirs, this is an executory devise; but if I afterwards do devise this to J.N. for his life, this is now a devise to him for life, with the remainder over to J.S. Dodderidge Justice agreed this so to be. Haughton Justice. It is very material to be known, Whether the Profits of this Land were intended by the Will to go unto the benefit of the sons. Dodderidge Justice. It is here only to be considered, Whether the Testator by this his Will, did intend a present or a future Advancement to his Sons. Haughton Justice demanded, Whether the Executors here ought to raise with the Profits of these Lands so devised, personal portions for his sons, or out of all his other Goods generally the same to be out of the Lands devised. Dodderidge Justice. The same ought to be out of all generally: The Court then said, that they would be better advised of this Case, and so by the Rule of the Court the same was to stay statu quo, until the Court should be full: Afterwards on another day, the Court being full, this matter was moved again. Haughton Justice maintained his former Opinion, by the Will this is a present Interest, and no contingency in Stephen: Construction is not to be made upon the first part of a Will by it self, but upon all the words and parts of it, the same being entire; and here the whole Will being laid together, that which is contingent at the first, is now by the subsequent words of the Will, made to be dependent upon an Estate certain, and so Judgment ought to be given for the Administrator of Stephen. Dodderidge Justice. The general question in this Case is, Whether he intended to advance Stephen absolutely; or upon a contingency; whether presently, with a present Interest, or upon a contingency: It appears, that the Will of the Testator was to advance his Will, and his intent also was to advance Stephen his son, so as the rest, and his Will should be also advanced, and this upon a contingency; we all agree in the general Rules, that every Will shall be construed according to the intent

13 H. 7. f. 15. B &c.

19 *Eliz. Dyer*, fol. 356.

and

and meaning of the Devisor: The true Reasons of this, 1. Because that Wills are made, plerunque in extremis, when men are grieved in Body, and troubled in mind. 2. Because he is inops consilii, at the same time, and therefore the same to be taken according to his intent; but yet this will admit of some Exceptions: If it be demanded what intent this should be, even such an intent as agreeable to the Law of the Land otherwise all will be frustrated. A second Exception is this, What intent? even such an intent as you may collect and gather out of the words of the Will and foreign intents are not to be received. A third Exception in the gathering of the intent, not to take the words out of the Will, but to make such a construction upon the Will, so that if it may be, all the words in the Will may stand; and these are the three Exceptions out of the Generals: now to apply these unto the Case of a Will, it is impossible, by Cases, to prove the intention of the Testator; but to look into the Will it self, and in this Will now in Question, there are two reasons which induce me to be of this Opinion. 1. The Testator himself makes a plain difference in his will, between a present, and a future Advancement; he had four Daughters, and his eldest son he advanceth them presently, without any time of limitation, but his youngest son Stephen, when of the age of 21 years; and doth by this his will demonstrate what he shall have, & quando, and he hath limited the time with a contingency: If one had demanded of the Testator who he intended should have this lease in the interim till his sons came to the age of twenty one years? the answer is, out of the words of the will (S) I make it to my Executors: If he had been further demanded what if he never come to his full age of twenty one years who shall have the same then? the Answer by the will that his Executors to have this until the Son comes to his full Age of twenty one years, and if he do not attain unto this age, his executors then to keep and retain the same; for his intent appears to be to advance his will, and to raise a stock for his youngest sons, they to make them in Goods as they shall think good; this left in time and quantity to the Executors & may be made more or less, according as the contingency shall happen: This is the first reason, and it stands with all the parts of the will, drawn from the difference which the Testator himself, by the very words of his will, did make between a present and a future advancement; the reasons given in Boraston's case, Coke 3 pars, and in Manning Case, Coke 8 pars did move me to be of this opinion, the which I shall maintain, by reasons drawn out of those Cases, & vivida argumenta, ought to be in Case of a will: In Boraston's case, there the intent of the Testator appeared to be to advance his son, and his Heirs also, and that with the Fee simple; he there intended to advance his Heirs also, and that not by Purchase, but to take and be in by way of descent, this was his intent there very apparently and for this cause no contingency there; and notwithstanding the first Devisee there died before his Age of 21 years, yet his Heir should have the Land, the reason of this is there collected out of the will it self, and as there, so here in this Case his intent appears plainly to advance his will; and here this could not be, but by his having of this Lease to come unto his Executors upon the death of his son, before his age of 21 years: but this could not be in Boraston's case, by reason that the Inheritance was devised unto his Heir, when he comes to his age of 21 years: Also, if this Estate here, devised to his son, should not rest in a contingency, the words of the will should then be broken, the words being, I make it to my Executors, &c. and they for to make them in Goods, as they think best: And it was the intent of the Testator here in this case, to advance his will, and not the Administrator of his Son, who might be a meer stranger unto him, it being in the power of the Ordinary to grant Letters of Administration to whom he will; and this intent of the Devisor is plainly collected out of the very words of the will, upon the difference therein made by him, between a present and a future advancement, and one part of the will ought here to be expounded by the other, according to the Case in 9 Eliz. Dyer, fol. 261. A man seised of Land

Coke 3 pars, &c.

9 Eliz. Dyer, fol. 261.

Land in a Ville, in two Hamlets of the said Ville, he devises all his Lands in the Ville and in one of the Hamlets, none of the Land in the other Hamlet shall pass, because of the intent of the Devisor, appearing by the words of the Will, which is to be observed; and by this Interpretation which I have made, no part of this Will here is broken, which shall be by any other Interpretation made of the same; and this Exposition, which I have made of this Will, goeth to the advancement of the Will, which every Executor is to intend and endeavour to do: another reason out of the Will, by this his Will, he intended to advance his sons, by making of future provisions for them, and this to be when they had discretion to make a right disposition of the same, but not before, and that, as is expressed by the Testator himself in his Will, to be at their ages of 21 years, 36 H.8. Dyer, f. 59. the Lord Latimers Case is a very pain. Case, where he devised 500 l. to his Daughter, for and towards her Marriage; by this he gives unto her a present and absolute disposition of the sum, and clearly she might have disposed of the same, where, and as she would, and she making no disposition thereof, her Executors should have the same; but the Case there remembred of 2 Eliz. if such a Devise was made to be paid at a day to come, & death happens before, there the Executors shall not have the same, because the intent and meaning was only a future, and not a present advancement, but the same to be in contingency; & so here in this Case now in question, the intent and true meaning of the Testator, by the very words of his Will, appeared so to be; and so Stephen the Son dying here before his age of 21 years, and so before the contingency happened, no Estate or Interest was at all vested or setled in him, and so consequently nothing could come to his Administrator, & therefore he having no good title to this Lease, Judgment ought to be given against him, and for the Defendant, the Assignee of the Executor. Croke Justice. That Judgment ought to be given for the Administrator of Stephen, this being not a meer contingent Interest in him: I agree this to be a future expectation of an interest, but this not to rest at all upon a contingency: I agree, that to trace the intent and meaning of the Testator, out of the very words of his Will, that this is Sacra expositio testamenti: First, I see here by this Will, an alarum of death unto him, saying unto him, dispone tua, nam morieris; next I observe in the Testator, viscera patris erga pueros, and this by a gradation. First He makes by his Will provision for his Daughters, Portions for them. Secondly, Provision for his sons; he had three younger sons, Edward, John, and Stephen, and Stephen was first in his intention; for ubi amor, ibi animus; here is tacita quæstio but expressa responsio, the provision for his sons, it is ultimum in dispositione, & id unum deest, when are they to have it? here as to this, is by him expressed, tempus definitum, at 21 years; this was expressa responsio. by the very words of the Will, but quis interim? here is tacita quæstio, but expressa responsio as to this also, being my Executors, I make it to them, &c. They are only Custodes bonæ fidei, to make them in Goods; so that here, by the very words of this Will, it is primum statutum, that his sons shall have his Leases: There is a difference between an uncertain contingent (as when such shall be utter Barresters) and a contingent certain; as here in this case, ante oculos ponere, in certain, and so reddendo singula singulis, singulatim & seriatim, each of them shall have his Lease, when he shall come by computation to the time of 21 years: Littera occidit, this was his intent; in Borastons Case, the lively construction of a Will is there fully expressed, also a devise ought to concur with the Rules of Law, and therefore if a man deviseth his Land to one and to his Heirs, and if he die without Heir, that another shall have the Land; this is void, for this cannot so be by and according to the Rules of Law: A limitation to one, and to his Heirs males, is a Fee-simple, but in a devise, it is an Estate tail, as appeareth in 18 H.8. Brooks Cases, fol. 1. placito 5. and 27 H.8. f. 27. a. The reason of this is, that he at the time of the making of his Will, by intendment of Law, was inops consilii, and therefore the Law doth supply this for him, that he intended the Heirs of his Body, 2 Eliz. Dyer, fol. 171. Frenchams Case: A good

36 H.8. Dyer 59. &c.

Borastons case.

18 H.8. &c.

2 Eliz. Dyer, fol. 171, &c.

good Case touching a devise, and the intent of the devisor, here by the words, and meaning of this Will Stephen the son had a good and present interest, and not depending on a precedent contingency, and so upon his death, his interest is come unto his Administrator, who hath the best right to this Lease now in question, and for whom, Judgment ought to be given. Coke chief Justice. Judgment in this case ought to be given for the Administrator of Stephen, the matter here in question is for the Lease of German, and Sandy Closes; and the doubt ariseth upon the death of Stephen within age, this Lease being devised unto him, quando, even when he should accomplish his age of 21 years. Quis interim, he answers in his Will, before which age, or till which time, I make it to my Executors, what to do with all, the Will answers & they to make them in goods, as they think fit; & then concludes his will, in this manner, & so with all the rest of my goods, &c. I make it to my Executors, here Stephen the son dies before this his age of 21 years; the question is, whether his Administrator shall have this Lease, which was in this manner limited, and devised to Stephen; this is the general question, and the pinch of the case: for the true construction of the state of the question, it is to be examined, whether a future, or a precedent interest, doth pass here unto Stephen the son by this will: if the age here, ought to precede, then the Executors of the devisor, are to have this lease, but otherwise it is, if Stephen have a present interest by this will, to him devised: Wills and the construction of them do more perplex a man, than any other learning, and to make a certain construction of them, this excedit juris prudentum artem; but I have learned this good rule, always to judge in such cases, as near as may be, and according to rules of Law; and in so doing, I shall not err, and this is a good and a sure rule, if a will be plain, then to collect the meaning of the Testator out of the words of the Will: we all agree in all these Rules but we differ in the application of them; here by this devise, there is an interest presently vested in Stephen the son, Reasons to prove this; applicatio est vita regulæ. 1. By way of introduction into the case, I do affirm, and agree the three Rules before remembred: every estate, or interest, is either in esse, or in contingency. As to estates in esse, they are of two sorts; either they ought of necessity to vest in interest presently, and without possession, or else in interest and possession presently: if a Lease be made at the Common Law, to one for life, the remainder over, &c. and that post mortem of the Lessee, this shall remain to another, this is a remainder, yet the words are future, and contingent, because the same is to commence and begin upon the determination of the former estate; in which case, there was no contingency; but a Lease for life, the remainder over. And as touching contingencies, some of them go downwards; If I have a term for 100 years and do devise this to one for life, and after his disease, that this shall go to another, he hath a present Interest in this, but yet such an Interest, as cannot be released nor yet granted; as it hath been adjudged in Plowdens Commentaries f. 524. b. in Welkden and Elkingtons case. Such a remainder of a term, limited to the son, & good, and if he dies before this accrues unto him his Executors shall have this, and he may release this, but not grant it. Contingencies are only in three cases in the Law. 1. When the Person and Estate is certain, but upon some collateral event which may happen, and which may not happen. 5 E. 3. fol. 27. where William made a Lease to John for his life, reserving rent unto William during the life of William, and that after his death, the Land should remain to the Lessee, and his Heirs: this is a contingency, although uncertain, whether William shall survive. Plowdens Commentaries in Colethirsts case, there is a contingency in the person. Aston and Hose case, Pasch. 36 Eliz. Rott. 348. by limitation to convey unto the use of one in tail, Provided, if he do such an act, then not to remain, this shall never remain, if he doth not the act: The second case of contingencies, (S) when the persons are uncertain, and the estate certain, and the time also certain, as touching this, it appears in the Register, in Formedon. If land be given to husband and wife, and the heirs of the body of the survivor of them, they have here an estate for their lives; but when one of them dies, the estate then doth alter, yet the Survi-

Plowdens Comment. fol. 524. *&c.*

5 E. 3. fol. 27.

Plowdens Comment. in *Colethirsts* case, *&c.*

Register in Formedon.

vor

vor of them is uncertain and I have heard Wray chief Justice of this Court say, that it had been here adjudged, that if the persons to take be uncertain, this is in contingency, as a Lease for life made to husband and wife, the remainder to the survivor of them for 21 years, the husband sells this and dies, the wife survives, & afterwards dies, her administrator had the Lease, and not the vendee of the husband, because that no interest was then vested it him, for that it was impossible to divine which of them should survive, and the husband could not grant away this contingency. A 3 case of contingencies, when the persons and the estate also is uncertain as a Lease made for life, the remainder to the right heirs of I. S. this is a contingent estate. Lovesses case, Pasch. 9. Jac. in C. B. Loves made a Feoffment to the use of himself for life, with divers contingent uses; this is a good case touching contingencies: There was uncertainty in the person, and also in the estate. Now as to the words of the Will: If I make a Lease to one, during the minority of my Son Clement, until he shall come to the age of 21 years, the remainder to my son Clement and his heirs; this is setled in him: if a man makes a lease to another, during the minority of his son; the son dies, by this the estate shall cease, otherwise it is in case of a Will, because of the intent, there it shall be taken by way of enumeration of the years: these words (S) (hen) & (when) are not much material in this case here; the Law always delights in vesting of estates, and contingencies are odious in the Law, and are the causes of troubles, and vesting and setling of estates, the cause of repose and certainty. Fauxes case, Hill. 35 Eliz. a limitation of a use to the Daughter, if the son comes from beyond sea, and accomplisheth his age of 21 years, or dies, he comes from beyond sea, and levies a Fine, both contingencies, or die: the Law delights in vesting of Estates, as the Judges there said; and if he come from beyond sea, or die, whether the one or the other, the estate shall vest. Trupennyes Case, afterwards called Baldwin and Locks case Pasch. 37 Eliz. a Lease was made to Trupenny for so many years, if He, his Wife, or any of his Children shall live so long, sever the disjunctive, and it makes it several, so that the Law still delights in vesting of estates, and in preventing of contingencies, which are dangerous to the King for Wards, and dangerous also to the subjects; here it appears out of the Will, and that upon incident consequents to the will, that Stephen the son should have the interest in the Lease presently; the executor here by the words of the will, is to have the same usque Stephen the son should come to the age of 21 years, at 21 years his son to have it, he never once had it, in consideration that his youngest son Stephen might happen to die before his age of 21 years; but he fixed his eyes upon this only to advance them by his Will, with these Leases: Also 2 he may marry and have issue, before he comes to the age of 21 years, and the executors may be Strangers to the Testator; he intended to advance him and his Children, before his Executors: and put the case that Stephen his son, had married de facto, and had a Child, shall not his issue have this, before his executors? without all question he shall. The 3 Reason, no provision is here made for any debt. A fourth Reason, expressio eorum, quæ tacite insunt nihil operatur, and that which is here said in this will, is as much, as if had said, that his Executors should have the Lease usque, &c. and after to his son, to his executors and administrators: also, omissio eorum que tacite insunt nihil operatur. A fifth Reason, that Stephen the son here should have a present Interest, in regard that he may dispose of it (according to the opinion of some) at the age of 17 years, by his will, but by all at 18 years, he may make a Will, and might have disposed thereof, and without all question, if it had been demanded of the Testator, he would have declared his meaning to have been so, that his Executors should have the Lease usque, but until his son Stephen came unto his age of 21 years, and if you make a contingency, in such a case by this way, you will inrich Executors, which are for the most part strangers to the Testator; and by this poor Children shall be deprived of their means and livelyhood, and this will be the consequents

Fauxes Case Hill. 35 Eliz.

Trupennyes Case, or *Baldwins & Locks* Case, Pasch. 37 Eliz.

of such contingencies: many by their Wills do limit estates unto their Sons at their age of 24 years, and some at 25 years. In Justice Wyndhams case, 5 pars fol. 8. b. a man seized of 3 Acres in fee, makes a Lease of one Acre to A. for life, of another Acre to B. for life, of the third acre to C. in tail, and afterwards reciting the estates, doth Covenant with his Brother, that after all the estates ended & determined, he and his heirs should stand seized of the said 3 acres, to the use of his brother in tail, presently by the death of one of the tenants for life, the brother shall have this Acre, and shall not stay till the other estates be ended; but reddendo singula singulis, by the Covenant, the estate in the several acres, vests presently in the brother, without any expectancy, but to take effect in possession, as they fall, and so here in this case, and 6 E. 3. fol. 53. agrees with Windhams case, for the Law always delights in vesting of estates, and for this purpose, will by construction make copulative words, to be as disjunctive words; this case hath been put and agreed, that if Land be devised to I. N. after the death of I. S. this is a contingent devise, but some doubt may be made of this; see the Lord Pagets Case, put in the Rector of Cheddingtons Case, 1 pars fol. 154. a good case, touching the vesting of a use, no contingency there, the Law works the estate, and so here in this case. Hill and Bacons Case, 39 Eliz. B. R. the very same case with this principal case here, and I was then of Counsel with the Executor, but Judgment was here given against him, and the Executor then standing by me, said to me, I thank you, you have spoken more for me, than the Testator ever meant; and so in this case, Judgment ought to be given for the Plaintiff, the Administrator of Stephen the Son, and so by the Rule of the Court, Judgment was so given and entred accordinly.

Coke 5 pars, fol. 8. b. *&c.*

6 E. 3. f. 53.

The Lord *Pagets* case, put *Coke* 1. pars. fol. 154. *Hill* and *Bacons* case, 39 *Eliz. B. R.* Judgment given for the Plaintiff.

Sir *George Reynill* Plaintiff, against *Sackfield* Defendant.

Action upon the Case for Words.

IN an Action upon the case for scandalous words, upon non culp. pleaded, a verdict was found for the Plaintiff. It was moved in Arrest of Judgment, that the words, as they are laid in the Declaration, are not actionable: the words appeared to be these, spoken by the Defendant of the Plaintiff. (S) The Deed which Sir George Reynill shewed forth before Sir John Tindall, was forged, and made under a hedge. It was urged, that there was no scandal unto him by the speaking of these words, for it may well be made under a hedge; otherwise, if he had said, that it was forged under a hedge; a case in 39 Eliz. was remembred, an Action upon the case, brought by one Reynolds for words being, Thou art a cozening Knave, and shewedst forth a forged deed, a Verdict was found for the Plaintiff, but he could never have his Judgment. Croke Justice. The sense of the words are here to be considered, made it, this is only the fabricating of it, under a hedge, in a corner, according to the true saying, qui male agit, odit lucem: these words are scandalous, and well actionable. Haughton Justice agreed that these words are actionable; the first words here are not actionable, you made it; as much as to say, you forged it: if one should say, this horse was stolen from I. S. and you stole it, these words are well actionable. Dodderidge Justice. Divide this case into parts, if he had said, this is a forged Deed, and you knew it to be forged, these words are well actionable, because these words do make him subject to punishment for this his concealment of forgery; if these words here, being severed, shall not be actionable, yet they being all conjoyned together are well actionable, & quæ non prosunt singula, juncta juvant. Convert the words here, if he had said so, you made this Deed under a hedge, and forged it, these words are well actionable; so here these words severed and disjoyned, are not actionable, but conjoyn them together, then here is an apparent scandal, and

39 Eliz. *Reynolds* case.

Judgment for the Plaintiff.

and for this cause well actionable, and so the Court agreed clearly, that these words were actionable, and by Rule of the Court, Judgment was given for the Plaintiff

Smale Plaintiff, against the King Defendant.

Entred Trin. 11 *Jac. B. R.* 2. pars. Rott. 14.

IN a Writ of Error, to reverse an Utlary, upon a presentment assigned for Error. 1. That the Capias was awarded contra Franciscum, and the return was quod Francis, in English, Non est inventus. 2. That the exigent bears Teste, after the return of it: The Court held the last error to be a good error; and for this error, by the Rule of the Court, the Utlary was reversed.

A Writ of Error upon an Utlary. Utlary reversed, *per Curiam.*

Kirkby Plaintiff, against *Ungle* Defendant.

Entred Pasch. 11 *Jac.* B. R. Rot. 176.

IN a Writ of Error to reverse a Judgment given in an Action upon the case, in London, the first error was in the Judgment, which was against the Defendant in the Action, quod capiatur, where it should have been, quod sit in misericordia, and the Defendant taken by force of this. A [2] Error, for that the bail was taken, without any Scire facias issued out against him; the Court clear of opinion that the Judgment was erroneous, and so for these errors, by the Rule of the Court the Judgment was reversed, and a supersedeas granted by the Court to deliver the party so taken out of Execution.

A writ of error reversed, 1 Bulst. 179. 2 Sid. 70. Pop. 203. 8 Co. 59. 60. ante 55. Judgment reversed.

Marker Plaintiff, against *Cross* Defendant.

Entred Trin. 11 *Jac. B. R.* Rott. 232.

IN an Action of Debt upon a Bond, upon oyer demanded, the condition of the Bond appeared to be in this manner. (S) That whereas the above bounden &c. shall and will, &c. where the same should have been, if the above bounden, &c. shall and will, &c. The Court all clear of opinion, that this was a meer void condition, the same being altogether insensible, and not compulsory, as the same ought to be, and so the Obligation is single, and without condition.

Debt upon a Bond.

Bayly Plaintiff, against *Maynard* Defendant.

An Action upon the Case for words.

Judgment for the Plaintiff.

IN an Action upon the case for words, upon non culp. pleaded, a Verdict was found the for Plaintiff; it was moved in Arrest of Judgment, that the words were not actionable, the words were these, spoken by the Defendant of the Plaintiff Thou art a Roguish Knave, and a Thief. Cur. Notwithstanding this be spoken in the Adjective sense, yet the word (Thief) here is a distinct word by it self, and scandalous, and so these words, as they are spoken are scandalous, and actionable, and so by the Rule of the Court, Judgment was given and so entred for the Plaintiff.

Sir *Thomas Waller* Plaintiff, against *Hanger* Defendant.

An Information for Prisage.
Mo. 832.
3 Bulstr. 1.
1 Ro. rep. 138.
Latch 261.
Calth. 33.
Post. 26[illegible].
Information abated *per mort.*

IN an Information for Prisage, who virtute literarum patentium, tam pro domino rege sequitur quam pro seipso, the Defendant demurred upon the information, the Plaintiff dies, hanging this demurrer: The Question moved, whether by the death of the Plaintiff, the Information doth abate, or not? The Court all clear of opinion, that by the death of the Plaintiff, the Informer, the Information doth abate; but otherwise it is, in case of a Relator, upon whose Relation, the Kings Attorney General doth prosecute; here the death of the Relator doth not abate and determine the suit; also the Informer here, being the chief Butler to the King. The 1. Information here virtute officii, and he replies, as in his own right, the Court clear of opinion, that the Information here was abated.

Holeman Plaintiff, against *Karwithy* Defendant.

Entred Pasch. 10 *Jac.* B. R. Rott. 581.

Action upon the case for a trover & *conversion.*

IN an Action upon the case, for a trover and conversion of a certain quantity of Corn. The Defendant pleads in Bar of the Action, and intitles himself by a trover in London, without making of any answer to the property alledged in the Plaintiff, and without any travers; and for this cause, the Plaintiff demurred in Law to this Plea in Bar, for that by Hen. Yelverton for the Plaintiff, no colour will serve in this Action, but he ought to have taken a travers, with an absq, hoc that they were the proper goods of the Plaintiff, and to this purpose there was a

Case

Case adjudged in point, between White Plaintiff, against Price Defendant, in a Trover and conversion for goods: the Defendant by his plea in bar, intitles himself to the goods, by a sale of them, to him made by &c. and makes no answer at all to the propertie, and possession alledged to be in the Plaintiff, that he was possessed of them, as of his proper goods; and for this cause only, in the Exchequer Chamber, this case was adjudged against him, and for the Plaintiff, by all the Judges. Dodderidge Justice, Possession, without property, is a good cause, to maintain an Action in general, (S) an Action of Trespass, but not in this Action; for that in trespass there are many Pleas, which will well serve, as his freehold; the which shall not be so in this Action here of Trover and Conversion; in this principal Case, the Court was clearly of opinion, that for this omission, the Plea in Bar here was not good, and therefore by the Rule of the Court, Judgment was given, and so entred for the Plaintiff.

White Plaintiff against *Price* Defendant.

Judgment for the Plaintiff.

Goodgroome Plaintiff, against *Moore* Defendant.

Entred Pasch. 10 *Jac.* B. R. Rott. 204.

Upon a motion in arrest of Judgment, by George Croke, the case appeared to be this: upon the trial of a Custom of a Copy-hold, a verdict was found for the Plaintiff, the matter moved in Arrest of Judgment, was, That there was a mis-trial; the venire facias being misawarded, the same being but of one place, whereas it should have been of two; the custom of the Copyhold was alledged to be, in the manno of de Warrfield, within the manno of Warregrave, and the venire facias was de Warrgrave tantum, where the same ought to have been of both, (S) de Warfield, & de Warregrave, and this is warranted so to have been by the Book of 9 E 4. fol. 50. Dodderidge Justice. If Dale be alledged to be within the Manno of Sale, the venire facias is to be of Sale only; and if the venire facias had been here, De Manerio, this had been good, which was agreed unto by Haughton Justice. Dodderidge Justice, and the Court agreed this venire facias to be well awarded, and that the Book of 9 E.4. fol.50. doth not warrant the venire facias here to have been of both places; so that here is no mis-trial in the case, the venire facias well awarded; and so by the Rule of the Court, Judgment was given for the Plaintiff.

Arrest of Judgment.
2 Cr. 327.
11 Co. 17, 18.

9 E. 4. fol. 50.

Judgment for the Plaintiff.

Rogers

Rogers Plaintiff against *Parrey* Defendant.

Entred Trin. 11 *Jac.* B. R. Rott, 223.

An Action upon the case upon a Promise. 2 Cr. 326.

IN an Action upon the Case grounded upon assumpsit, upon Non assumpsit pleaded, a verdict was found for the Plaintiff. It was moved in Arrest of Judgment, that the Declaration was not good, wherein the case appeared to be this, The Plaintiff shews in his Declaration, that in consideration of so much by him paid to the Defendant, the Defendant did assume, and promise unto the Plaintiff, that he would not exercise the trade of a Joyner, in a shop, parcel of a house, to him demised in London, for 21 years, durante termino prædicto, and for breach shews, that he had demised this to a Joyner, who did there exercise the trade of a Joyner, during the said term, and contrary to his promise, unde actio accrevit, exceptions taken to the Declaration. 1. Because he doth not say, that he there used the trade of a Joyner during all the said term, and whether this shall be taken to be so by intendment, when he saith only, during the term generally, whether this shall be intended to be the whole term, or but for some part of it. Coke chief Justice, there will be a difference, where the assumpsit is in the Negative, and where in the Affirmative, as where a man is bound, that such an one shall inhabit in such an house durante termino, this shall be taken for the whole term. and so is Colthirst, and Bejoshins case, in Plowdens Commentaries, fol. 21. but where the promise is in the Negative, this is as much as to say, and undertake, that he will not do it at any time during the Term; and this is the difference. Haughton Justice. He ought to have alledged, this Lease to be made, and to have continuance. Coke chief Justice. This ought not to be by him so alledged in this case, in as much, as it was a Lease certain to him for 21 years, and he ought not to aver that, which of it self doth certainly appear unto the Court; here this doth appear of his own shewing and so no need of any averment; and as the Objection made, that this Lease may be surrendred up; this shall not be so intended, if it be not shewed by the other party; one well saith thus of discretion, ista discretio discretionem confundit, and so it may be said here in this case, talis certitudo certitudinem confundit & destruit. Croke Justice. The doubt which at the first troubled me, was, for the binding of one, that he should not use and exercise his trade, being his livelyhood, Coke chief Justice, This is not so, being but for a time certain, and in a place certain, but no general restraint there is here. The Court agreed with Croke Justice herein, that a man cannot bind one, that he shall not use his Trade generally, this is not good; but Coke chief Justice, Croke Justice, and the whole Court, agreed all in this clearly, that as this case here is, for a time certain, and in a place certain, a man may be well bound, and restrained from using of his Trade; and so by the whole Court here is a good breach of promise assigned, which well entitles the Plaintiff to his action, that the Declaration is good; and so by the Rule of the Court, Judgment was given, and so entred for the Plaintiff.

Plowdens Commentaries, fol. 23. *&c.*

Judgment for the Plaintiff.

Ex-

Exceptions taken to the Return of a Writ of Rescous.

NOta, That the Sheriff of Huntingtonshire, did return a Rescous against two two, (S.) Against the Father, and the Son; against the Father, for rescuing of his Son, and against the son for rescuing of himself; as to the Father, the return was sufficient and certain, both for the time and place, but as against the son, George Croke did except against the return, that the same was insufficient and uncertain, the same wanting such certainty, both of the time when, and of the place where the same was done. Dodderidge Justice. The Return here is good and certain, and this shall be intended to be at the same time that the Father did rescue the son, that the son, also at the same time, did there rescue himself; for the Return is of the rescous of the Father, that he did rescue his son, and this is certain to all respects, and the son rescued himself, without any limitation of the time when; this shall be taken here to be at the same time, for this word (&) is here a Conjunction Copulative, and couples these two together, to be at one and the same time. Haughton Justice. A Prisoner may be well rescued by others, and yet he himself not to have any notice hereof, or be any ways consenting thereto, nor guilty thereof; and it may so be, that one may rescue a Prisoner at one time, and that he himself may well rescue himself at another time, and so the same may be at several times; and therefore, for that in the Return of the Rescous against the son, for rescuing of himself, no time is set down in the Return when this was done, the Return for this cause is insufficient: But by the Rule of the Court, the son being present in Court, was for this Rescous fined at 40 s. and Imprisoned, and a further time for the Father to appear.

The Return of a Writ of Rescous.

Gregory Plaintiff, against *Wilks* Defendant.

IN an Action upon the Case, for scandalous words spoken by the Defendant of the Plaintiff, upon Non culp. pleaded, a Verdict was given for the Plaintiff: It was moved in arrest of Judgment, that the words were not Actionable: The Case appeared to be this, One Martin did exhibit an Information against two, tam pro domino rege, quam proseipso in scaccario; afterwards Martin procures Licenses to make Composition with them: The Defendant said, that the Licenses which Martin had out of the Exchequer are forged, and Gregory forged them: moved by Hide, that these words are not actionable, because they are words indefinite and uncertain; he doth not say all the Licenses, and he may have other Licenses, and the Statute of 18 Eliz. cap. 5. which sets down the order of those Licenses, the same is to be observed. Haughton Justice. The Plaintiff here is slandered by these words here, inasmuch as the Law doth admit of such Licenses of the Court, truly for to compound, and these to be in Scriptis, under the hand of the Court, and therefore it shall be a good cause of Action against one, for saying that this License was forged, & this to be so, notwithstanding the inference made out

An Action on the case for words.

Statute of 18 Eliz. cap. 5.

Statute of 18 Eliz. cap. 5.

out of the Statute of 18 Eliz. cap. 5. It is here laid in facto, that an Information was brought against them, and Licenses laid to be obtained to compound and it is likewise laid, that the Defendant said, that these Licenses were forged and that by Gregory the Plaintiff; if it had been shewed that there were other Licenses, it might then have been otherwise, but no such thing appears, being no laid, none mentioned but only these Licenses, and as the words are here laid, they are scandalous and well actionable, and the Plaintiff ought to have his Judgment. Dodderidge Justice. It is here laid in this Declaration, in the innuendo, that these are the same Licenses, of which the words were spoken: The Information was against two, and so it is laid, and Licenses obtained by the Informer, to compound this in Judgment of Law, is but one License, notwithstanding the Information was brought against two. Croke Justice. The matter here is, the forging of a License, and it is not material whether many or few, if forged. Dodderidge Justice. The Declaration here makes this plain, that these words are actionable, for examination being had of these Licenses, granted by Baron Southerton; and so it is set forth in the Declaration, that Dixit de prædictis licentiis, that they were forged; this makes all very certain, and goeth unto the whole. Haughton Justice. agreed herein, that this expression in the Declaration doth help all: And so the Court was all clear of opinion, that the words, as they were spoken, are scandalous unto the Plaintiff, and well actionable; that the Plaintiff had just cause of Action, and his Declaration certain and sufficient, and therefore by the Rule of the Court, Judgment was given, and so entred for the Plaintiff.

Judgment for the Plaintiff.

Killick Plaintiff, against *Barns* Defendant.

An Action of the case for words.

IN an Action upon the Case for words spoken by the Defendant to the Plaintiff: The words being, (Thou art a conjuring Knave) upon Non culp. pleaded, the words were found, and a verdict given for the Plaintiff. Heath moved the Court in Arrest of Judgment, that the words are not actionable, for by this, he only calls him Knave in effect for which words no Action lieth: so if he had called him thievesh Knave, no Action lieth for these words, as it hath been here adjudged, and so of villanous Knave: The Court all agreed clearly, that these words are not actionable, unless he had shewed some other matter by way of inducement to the Action; as if he had said, That he raised Spirits; but as the words here are laid to be, they are not actionable, and so the Rule of the Court was for the Defendant, & quod querens nil capiat per Billam.

Judgment for the Defendant, *quod querens Nil capiat per Billam.*

Printise Plaintiff against *Hodgskin* Defendant.

In an Action of Trespass and Ejectment.

IN an Action of Trespass and Ejectment, tried at the Bar, it was upon the Evidence to the Jury, held by Haughton Justice, That if Lessee for years be of 20 Acres of Land, rendring a certain yearly Rent, the Lessee is ousted of one Acre, the Lessee still continues payment of his whole Rent unto his Lessor; yet this payment of the Rent is no Possession for the Lessor, but the Lessee by this is ousted, and

and he in the Reversion disseised of his Free-hold. But by Dodderidge Justice, this is not so, if it were, this would then be very grievous to him in the Reversion, if by the Lessees permitting such an ouster, and still paying of his Rent, if this should be a disseisin to the Reversioner; and Coke 3 pars. fol. 77. & 78. Fermors Case over-rules this in the Case of Fines, that the Lessor shall not by this receive any prejudice at all, for that here may be fraud between the Lessee, and the party which ousted him of part, which is manifested (as in the Case of Fines) by payment of his Rent.

Coke 3 pars, f. 77. 78. &c.

Hodges against *Humkin*, the Maior of *Liskerret*.

A Certificate upon the return of a *Habeas corpus*.

Upon the Return of a Habeas Corpus, and the Certificate of the Maior of Liskerret, for cause of the Imprisonment of Hodges; he certifies the Cause to be (Quia se male gessit) and for using of undecent speeches to him, and that in his Hall with a spit, insultum fecit, & conatus fuit eum vulnerare, this he certifies, for the cause of his Imprisonment by way of Justification. Hodges being thus Imprisoned, was brought up by a Habeas Corpus, and upon the Return and Certificate, the causes of his Imprisonment therein expressed. Mallet took divers Exceptions to the Certificate of the Maior. 1. The Certificate ought to contain certainty in the Causes of the Imprisonment, which is not so here, the same being too general (S) Quia se male gessit, also if there was any just cause of Imprisonment, by undecent words by him used, then his Imprisonment ought to have been presently pursuing the offence; as appears, Coke 8. pars, 119. 120. in Doctor Bonhams Case, that the Imprisonment ought to be immediately after the offence, but here it appeareth, that the words were spoken in June, and the Imprisonment for these words was in August following. As to the manner of the offence, it is set forth, that he in his Hall with a spit, insultum fecit & conatus fuit, eum vulnerare) there wants these words (that he did not so do) Also, that which was done, was done in the Kitchin, not in the Hall; here he ought to have had legale Juditium, & he was not here to have been his own Judg. Also for the manner of the Imprisonment, this is no ways at all justifiable, as to have him thrust into the Dungeon and to be there kept without bread or meat; also there is no cause here shewed, for keeping of him so long in Prison: for excuse of himself herein he saith, that the contempt still continued from August, the time of the Imprisonment, until his receiving of the Writ of Habeas Corpus; but in all his Certificate he doth not express (as he ought to have done) what manner of contempt this was (this being the ground of his Imprisonment) that so the Judges here might have judged of the sufficiency thereof, and that this ought to be so certainly shewed, appears by Speccots Case, Coke 5 pars, fol. 58. and Coke 8 pars, fol. 68. B. in Trollops Case: The cause of Deprivation, and the cause of Excommunication, ought to be certainly expressed; so here the cause of this Imprisonment, ought to have been expressed in this Return, what the same was in particular, and not in general words (as in Speccots case) that he was Scismaticus inveteratus; or as in Trollops Case, that he was excommunicated, Propter diversas contumacias, not good; thus in the general, without shewing in particular how or for what, that so the Court here may judge of the cause, and so in this Case now here in question; also the Maior here hath offered a great contempt to the dignity of this Court, for that after the Habeas Corpus delivered unto him, to remove the Prisoner by him thus committed, upon offer of very good and sufficient Bail, for two days together he refused to send him, in contempt of this Court,

Coke 8 pars, f. 119. 120. &c.

Coke 5 pars, fol. 58. &c.

 and

and therefore prayed for the poor man his enlargement out of Prison, and an Attachment against the Major for his contempt. Haughton Justice. The words spoken, was not in presence of the Major: Here the Imprisonment was altogether unlawful, the same being without these words, (S) (Quousque) and without shewing for what cause he was thus Imprisoned by him; he ought not to Imprison him for ever, & therefore his return as to this is sufficient; for in this his Return, he ought to have shewed the certain cause of his being Imprisoned by him, so that the same cause ought to appear to the Court, whether the same was lawful and just or not; he ought also to have expressed the time, for what time he did Imprison him: In both these matters he hath here failed, and therefore his return is not good: Then as to the matter of the assault, being the sole ground and cause of Imprisonment: This as it is alledged, is meerly frivilous and idle, as in the Return the same is expressed: He ought also to have shewed in his Return, what manner of Imprisonment he had imposed upon him, the which he hath not here done, and so for this cause the Return is insufficient: the Major is conservator pacis of every place, and may keep the Peace from being broken, as against himself. Dodderidge Justice. This Return here, as to the mis-demeanors of the party Imprisoned, this doth stand upon three parts. 1. For his words, in saying, that such a one being Major, was not Major. 2. For calling of him a Lyar, and this proved. 3. For the assault. For the two first, He cannot here justifie the Imprisonment, for he cannot Imprison him for his male gestures towards him: As for the assault, this cannot continue so long, as between the time that the offence is here laid to be done (being in June) & the Imprisonment for the same being in August following: And for the other matters expressed in the Return they are very frivilous, and no ways at all material. As to the Return it self the same is bad, and uncertain throughout, and this was a very barbarous course by the Major, to have him Imprisoned in such a manner, as to be kept in a Dungeon, and that without Bed Bread, or Meat, & that without any just cause at all, and so the Return here is insufficient, the Imprisonment unjust, and the party ought to be inlarged. Croke Justice. This Return is not good, but altogether uncertain and insufficient here, both the Major and Hodges ought to learn how to behave themselves: Here the speeches used by Hodges, are very unseemly speeches, and unfit to be used by him to any one, much less to such a person as the Major was, being a person in authority and an Officer of the King; but yet, for such words thus used, the Major ought not to use a malicious kind of Imprisonment, in regard of the time of it, when the same was, being so long time after the offence, as in August, for an offence in June before; and also in regard of the manner of this Imprisonment, and of the place where, he being to be thrown into a Dungeon, and so to be there kept, without any Bed to lie on, or any bread or meat to eat, and for all these Causes, the Imprisonment was unlawful; Imprisonment ought always to be according to the quality of the offence, and so is the Statute of Magna Charta, cap. 14. and of Marlbridge, cap. 1. secundum magnitudinem, & qualitatem delicti the punishment ought to be, and correspondent to the same, the which is not so here in this Case: Also the punishment ought to be inflicted for the offence, flagrante crimine, whilest that the offence is fresh, the which was not observed here; and the Imprisonment here was unjust, being so long time after the offence: For one to say that the Major is a Lyar this is punishable, for this is the ready way to bring him into contempt, and therefore he ought, and that deservedly to be punished for this but the manner of this punishment ought to be observed: Here the return is altogether bad & insufficient, the Imprisonment unjust and unlawful, and so the party ought to be discharged, Dodderidge Justice agreed herein: And if a Constable do arrest one and put him in the Stocks; as he may do by the Book of 22 E. 4. fol. 35. B. yet he ought not to keep him there by the space of a Week, no more might the Major keep him here in Prison so long as he hath done. Haughton Justice. It would be good and very

22 E. 4. fol. 35 B.

very fitting to bind them all to their good behavior, and so by the Rule of the whole Court (there being no cause shewed to detain Hodges in Prison) he was by the Rule of the Court set at liberty, and absolutely discharged of his Imprisonment.

Hodges by the rule of the Court discharged.

Dolley Plaintiff, against *Davies* Defendant.

IN a Prohibition moved for by Yelverton, the Case appeared to be this: The Defendant being Parson of a Parish in Bristow, did libel in the Spiritual Court against the Plaintiff, being an Inn-keeper of the Bear in Bristow, to have Tithes of the Profits by him made, of his Kitchen, Stable, and Wine cellar, and says in his Libel there, that he made great gain in selling of his Beer, having bought it for 500 l. and sold the same for 1000 l. and so libels for the third part of the Profits of the same, and sets forth in his Libel, that this Tithe is due unto him, per communem legem Angliæ: and sets forth in his Libel, that negociando & traficando, he doth bargain and sell Beer in his Inn for 1000 l. which he bought for 500 l. and gained in his sale 300 l. and better, of which gain he ought to have Tithe. Yelverton moved for a Prohibition, setting all this matter forth in his suggestion; and further shewed, that the Defendant had yearly of the Plaintiff 40 l. at the least. Dodderidge Justice. The Defendant would have Tithe, as I think, also of the Kitchin-stuff. Clench Clerk of the Papers, informed the Court, that there was a Parson who libelled for Tithes, of the gains of 10 pound for 100 l. put out, and a Prohibition was granted: In this principal Case, by the Rule of the Court, a Prohibition was granted.

A prohibition upon a Suit for Tithes against an Inn-keeper.

A prohibition granted.

Painter Plaintiff, against *Warn* Defendant.

IN an Action upon the Case for scandalous words spoken by the Defendant to the son of the Plaintiff, of the Plaintiff his Father; the words were these (S) Thy Father is a Thief, and hath stoln more Goods than I am worth: Upon non culp. pleaded, a verdict was found for the Plaintiff. Warre moved the Court in arrest of Judgment. 1. That these words are not actionable, 6 Jac. B. R. an Action brought for these words, (S) Thou art a Thief, and hast stoln the Lead off of the Church, and upon a motion, in arrest of Judgment, held not actionable. 2. The Declaration here is without a special averment, that he was worth so much in Goods, and that he had such Goods; and without such an averment here, the words are not actionable, in 42 Eliz. B. R. An Action upon the Case for words was brought by a Goaler, for these words spoken of him. (S) The Goaler hath no sheets in his house, but those that were stoln for him; adjudged that these words were not Actionable, without a special averment in his Declaration, that he had some sheets in his House; & so here in this principal Case, the Plaintiff in his Declaration ought to have averred, that the Defendant was worth so much in Goods when he spake the words. Dodderidg Justice. The words here

An Action upon the case for words.

42 Eliz. B. R.

here are actionable without any such averment: the first words, thy father is a thief, these words are actionable of themselves; the subsequent words (S) & hath stollen more goods than I am worth: these last words do not sound at all in mitigation, but rather in aggravation of the former words; if the words were, thou art a thief, for thou hast stollen horses in London, he needs not to aver that there were horses there, no more needs he to make such averment here in this case. Croke Justice. The words are actionable, the Declaration good, and there needs no averment in this case: If the words were, thou art a thief, and hast stolen as many horses, as I have fingers and toes; there needs no averment in this case. Haughton Justice agreed herein. Dodderidge Justice. The case of the Lead was not so, as it hath been cited; the words there were, thou art a thief, for thou hast stoln Lead off of the Church; or, for thou hast stoln my Apples; these words are not actionable; but otherwise it should be, if the words were, thou art a thief, and hast stoln the Lead off of the Church, these words are actionable, for in such actions of the case for words, there is a great difference between these words (S) (and) and (for) as it hath been divers times adjudged; for where the words are (S) thou art a thief, and hast stoln, &c. in an action brought for these words, no averment ought to be made in the Declaration, of the latter part of the words, after the (and) being uncertain; but otherwise, if the words were, Thou art a Thief, (for) thou hast, &c. here the first words spoken, have a necessary relation and reference unto the latter part of the words, after the (for) and for this cause, in such a case there ought to be a special averment of the latter part, otherwise the former words will not be actionable, and in such a case, these latter words may well be in mitigation of the former words; but as for this Principal case here, the words clearly are well actionable, without any such special averment to be made, as hath been urged. The whole Court agreed with him clearly herein, that the words are actionable, the Declaration good, without any such averment, and so by the rule of the Court, Judgment was given, and so entred for the Plaintiff.

Note the difference between (*and*) and (*for*)

Judgment for the Plaintiff.

Glascock Plaintiff, against *Rowley* Defendant.

A prohibition to the Court of Requests.

IN a Prohibition to the Court of Requests, the case appeared to be this: Glascock being Lessor for years, rendring rent unto him, with a condition of reentry, for non-payment, the Lessee sowes the ground, and afterwards assigns over the interest of his term for one year, and the Corn then growing upon the Land unto Robert Rowley the Defendant and complainant in Chancery, for to be saved harmless of a bond of 60 l. in which he was bound with the Lessee; the Rent was behind, and being demanded, was not paid; the Lessor (being the now Plaintiff) enters for a forfeiture, & after in commiseration of the Lessee, (after acceptance of his rent) grants the Corn upon the Land, to a third person to the use of the Lessee, and for his benefit; hereupon Robert Rowley the Assignee of the Lessee, prefers his Bill in the Court of Requests, against the Plaintiff the Lessor, and against the Lessee, and the Assignee of the Corn, and doth thereby suggest a Combination to be between the Lessor and Lessee, to make a forfeiture of the Lease, and so by this way, to defeat him of the Corn, being his sole security, for his saving harmless from the Bond of 60 l. in which he was bound with the Lessee. In their Answer to this Bill all the Allegations in the Bill, were by them denied upon Oath; yet without any further proceedings, or any proof at all made of the matter in the Bill contained; the Court made there a Decree against Glascock the Lessor, and the other Defendants in the Bill to this effect, (S) that they all of them, should save

save the Complainant harmless, from the said Bond of 60 l. Upon this, Glascock by George Croke, moved the Court for a Prohibition. Dodderidge, Haughton, and Croke Justices. We will never here examine a matter, after a Decree there passed, and pronounced by them, notwithstanding that the Judges there, in the Court of Requests, have erred in their proceedings, and mistaken the matter, in point of equity. But if they will there intermeddle, with matter in Law, where any of the parties have remedy by the common Law, there in such a case this Court will grant a Prohibition, to prohibit their proceedings, but in no other case: The Court was all clear of opinion, that here was a plain mistaking of the matter of equity by them; and if this matter had been before us, in point of equity, we should have seen no cause to have charged Glascock with the bond of 60 l. or with any part of it, but only the others; here they have erred in their Decree, in the matter of equity, the which we cannot here now remedy. Haughton Justice. Here they have suffered him to enjoy his term, and to have his rent accordingly, as the Law hath given it unto him, but yet they by their Decree, have triced him in another manner, in making him subject and liable unto another charge (S) the penalty of the Bond of 60 l. and this is as grievous, as if they had done the other; but this we cannot now help: yet if they have there commonly used to do so, we will then remedy this here one way or other. The Court was clear of opinion, that they saw no cause to charge Glascock, but they would be very well advised as to the granting of a Prohibition here in this case.

Nota, That in this case Glascock, in the Court of Requests, put in his answer to the Bill jointly with the other Defendants, in which he did not well, for he having matter sufficient to free and discharge himself of all matters in the Bill (which the other Defendants could not do,) he ought to have answered alone by himself, and then if he had done so, peradventure they would not have made any Decree at all against him, but against the others: but now he joyning with them, in answer, shall be also participant with them, in undergoing the sentence of the Decree, which passed against them all, and so no Prohibition was granted. Prohibition denied.

Child Plaintiff against *Horden* Defendant.

IN an Action upon the Case for a promise, the case appeared to be this; There being some difference between the Plaintiff and the Defendant, touching the quantity of the Rent to be paid by the Defendant to the Plaintiff, the Defendant said, that if J.S. would say and affirm, that the Rent reserved upon the Lease was 6 l. he did then promise, and assume, for to double this to the Plaintiff. J.S. did affirm the rent to be 6 l. the Plaintiff demanded payment of double the sum according to the promise, which the Defendant refused to pay; upon this refusal the Plaintiff brought his Action, and upon Non assumpsit pleaded, a verdict was given for the Plaintiff. Henden moved for the Defendant, in Arrest of Judgment, that the Declaration is not good, because that no notice is therein laid, to be given of this, unto the Defendant, it being only laid in the Declaration, that J. S. affirmavit the rent reserved to be 6 l. without any notice at all express, or implied, given of this to the Defendant, as he ought to have done, and as was requisite to have been done here in this case. 1. Because there was no time certain set down, like unto Barrows case, 19 Eliz. Dyer, fol. 354. placito 32. where money was to be paid, or tendred, at a place, for the altering of a use; no day being limited for the same, notice ought to be given to the party, to be there to receive the same & this to be so because no time was limited, but indefinite: here that which is to be done, touch- An Action upon the case for a Promise. 19 *Eliz. Dyer*, fol. 354. *&c.*

touching the affirmation of the rent, what the same was, was to be done by a stranger (S) by J.S. and this is also with a penalty, to double a rent, if he affirms it to be 6 l. and therefore notice ought to have been given unto him of this. 6 Jac. Teddy Plaintiff, against Benstead Defendant, where one did assume, to pay unto the Plaintiff 10 l. if he married such an one, he ought here to have notice of this, to him given, before payment, as in that case it was held. Yelverton, no notice is to be given in such a case, of a payment of money, upon a marriage had, as it hath been here adjudged; if J.S. marry such an one, his Kinswoman promised to give him 10 l. no notice is to be given of the marriage, and so also it is, if one promise to give 10 l. to one when he doth marry; no notice is to be given of this; otherwise if the payment was to be with a penalty, there notice to be given, here he is only to double his rent, cum inde requisitus. Haughton Justice. This here is an implied notice; there will be a difference, where the thing is to be done privately, to the Plaintiff himself, there notice is to be given of it, but if it be to be done by a stranger, there you which have undertaken this, at your perils, you ought to do it without any notice given to you of the same: here the Defendant was by the Plaintiff requested to pay this money, according to his promise, which to do he refused: upon which refusal, the Plaintiff here had just cause of Action against the Defendant, without any notice to be given to him, of what J.S. had affirmed, as touching the rent, the Defendant having undertaken to pay the same, and he is as privy to the Act, to be done by J.S. a stranger, as the Plaintiff himself is, and therefore no notice of this is to be given, the difference being, where the thing is to be done privately by the Plaintiff himself, as tender of money by him there notice of this ought to be given; otherwise where it is to be done by a stranger, there the Defendant at his peril, ought to take notice of it. Croke Justice, if a man be bound to J. S. to enfeoff him at such a day, he ought to be then, and there, ready upon the land, to have the same made unto him; otherwise it is, if he was bound to J.S. to enfeoff a stranger, at such a day, for here he hath taken it upon him, to have him there at that time. Dodderidge Justice. If a man be bound, to pay such a Judgment as another hath against J.S. here he is bound to take notice of it, being in case of a Bond; and so is 8 E.4. f. 1. 11. & 21. and 18 E.4. fol. 18. & 24. and 1 H.7. f. 5. a. but the doubt here in this case is, being in the case of a promise, to pay money upon an Act to be done by a stranger, for that he may do this in secret, of which the other cannot take any notice; but in this principal case, the Court was clear of opinion, that the Declaration was good, without any notice laid to be given to the Defendant of what J. S. had affirmed, as touching the rent, that the same was 6 l. and therefore (notwithstanding this exception taken in Arrest of Judgment, for want of notice expressed in the Declaration to be given, by the Rule of the Court, unless better cause shewed, Judgment to be given) for the Plaintiff. This Case was afterwards moved again. Coke chief Justice, every special case hath his special reason, the exception is here well taken, according to the record, but without any scruple at all, the Declaration, notwithstanding any thing which hath been objected to the contrary, is good and sufficient, without any notice therein laid to be given by the Plaintiff to the Defendant, of that which J. S. had affirmed, as touching the rent, and this doth very much differ from Francis case, 8 pars, f. 92. If a man be bound to perform the order of J.S. no notice is to be given of this (unless there be a special provision for notice to be given) but he at his peril, being bound, is to take notice of this, because he hath undertaken upon himself to perform it, and where such an undertaker is to do and perform a thing, there he is to do and perform the same, according to his undertaking, without any notice to him given thereof; so it is if one be bound to pay so much as he shall be found to be behind in arrerages of rent: no notice is here to be given him of this, in Francis case, there great prejudice should follow, if no notice should be given being in case of inheritance, and none shall lose his inheritance, without notice given of the thing to be done by him. If one doth bargain, and sell a Manor the Copy-holders shall not forfeit their Copy holds, without notice given to them; but a di-

6 Jac. Teddy Plaintiff against *Bensted.*

Note the difference where notice is to be given and where not.

8 E.4. fol. 1. 11. 21. 18 E. 4. f. 18. *&c.*

Coke 8 pars, fol. 92. in *Francis* case.

a distress, and an Avowry may well be without any notice given here in this principal case, the same is in Lieu of an Arbitration, and no notice is to be given of this, because he hath undertaken upon himself, to do and perform this (S) that if J.S. should affirm the rent to be 6 l. that then he would double this; and he did assume and promise to do this; this he is by his promise, and undertaking to do, and perform, without any notice to him given, that J.S. had affirmed the rent to be 6 l. Haughton Justice agreed herein, that the Declaration here is good, without any notice therein laid to be given unto the Defendant, that J.S. had affirmed the rent to be 6 l. Dodderidge Justice, in cases of notice, this difference is to be observed; to one who is ignorant of the thing to be done by him, there notice is to be given to him of the same; but if a man undertakes to do the thing, there he also undertakes, to do and perform all the Circumstances, incident to the doing of the same, and that without any notice to him given of the same; as if a man be bound to pay unto J.S. 10 l. when he arrives at London, he ought then at his peril to pay this to him, and that without any notice to him given of his arrival there, he ought here to take notice of this himself, because he hath bound himself to pay it; & this appears by 18 E.3. fol.18 & 24 where one was bound to pay the Arrearages, that J.S. should be found in an account before auditors assigned; he ought here to pay this, without any notice to him given thereof, he being to take notice of this at his peril; so it is where a man is bound to pay, and discharge such a Judgment; for where one doth undertake upon him to do, and perform such an act, there he ought to take notice of all matters necessary thereunto, and therefore for this cause, in this principal case, no notice is to be given, because he hath undertaken to do it; & so the Declaration here is good, without expressing of any notice therein to be given by the Plaintiff to the Defendant. Croke Justice, as touching the point of notice, and where the same is to be given, and where not, the difference will be, where the thing to be done, hath reference to a third Person, and where to the party himself, who is to have benefit by the not doing thereof, there notice is to be given unto him, because he is cooperarius. Coke chief Justice. The difference is, where the act to be done, is to be done to a meer stranger, who hath no interest, and where to the party himself, the book of 33 H. 6. which is a leading case, for the point of notice, and 2 E.4. if a man be bound to J.S. to enfeoff J.D if he refuse the same, the Obligation is forfeited, for when he names one, to whom the feoffment is to be made, by this he hath undertaken for him, that he shall accept of the feoffment; otherwise, if it were to enfeoff the party himself, to whom he was bound, and he refuses to take it; it is a true rule, verba ligant homines, in this principal case clearly no notice ought to be given by the Plaintiff to the Defendant, but he is to take notice of what should be affirmed by J.S. and he affirming the rent to be 6 l. the Defendant ought to double the same according to his promise, and undertaking, and he refusing to pay this being demanded, the Plaintiff for this had good cause of Action, his Declaration is good without expressing of any notice to be given of this by the Plaintiff, to the Defendant, and so by the Rule of the Court, Judgment was given, and so entered, (absque ulteriori motione) for the Plaintiff.

Difference touching the giving of notice.

18 E. 4. fol. 18, 24.

Difference as touchinggiving of notice.

33 H. 6. 2 E. 4.

Judgment for the Plaintiff.

Steeneman Plaintiff against *Richardson* Defendant.

IN an Action upon the Case for scandalous words spoken by the Defendant to the Plaintiff, the words were these (S) Thou art a Sheep-thief; upon Non culp. pleaded, a verdict was found for the Plaintiff. Winne moved the Court for the Defendant in Arrest of Judgment, that these words were not actionable, being senseless words; for the Plaintiff it was urged, that the words were actionable, the

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the same being very sensible, and significant words, in the Countrey, when they were spoken, and it is laid in the Declaration, that they were spoken in Westmerland, where such a manner of speech is frequent amongst them. Croke Justice. A Sheep thief, and a stealer of Sheep, is all one in signification, if one speaks these words to another (S) Thou art an out-putter, these words will bear an action in Westmerladd, being there taken, and commonly known, to be a Horse stealer; The Court all agreed herein, that the words, as they are laid, are actionable; If one saith to another, Thou art a cunning thief, these words are actionable, an adjective word proceeding of (cunning) will not aid the same, no more here in this principal case, and the custom of the Countrey is to be observed. Dodderidge Justices. This case here hath been adjudged, in an action upon the case for words being, Thou hast strained a Mare, adjudged to be actionable, because the custom of the Country, where the words were laid to be spoken, those words, were commonly taken, for stealing a Mare, and so the manner of the speech, and the place where the words were spoken, is considerable; the whole Court agreed the words, as they are laid here to be spoken, to be actionable, and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

Judgment for the Plaintiff.

Warrain Plaintiff, against *Smith* Defendant.

Entred Pasch. 11 *Jac.* B. R. Rott, 288.

In an Action of Trespass and Ejectment. 1 Ro.Rep. 151. 277. 2 Cr. 364. 11 Co. 66, 67.

IN an Action of Trespass and ejectment, upon Non culp. pleaded a special verdict was found, and argued at large by Councel on both sides, and at the last. Termino Pasch. 13 Jac. argued by the Judges, and Judgment then given for the Defendant, as the same appears at large. Coke 11 pars, fol. 66, 67. Magdalen Colledge Case.

Where a case is to be adjourned into the Exchequer Chamber, and where not. *Calvins* case, Coke 7 pars, fol. 1. *&c.*

Note, That after several Arguments at the Bar in this Case, and before the Judges argued the same, or delivered any opinion at all therein, Montague the Kings Serjeant, moved the Court in this case, being a case of very great consequence, to have the same, by the Court to be adjourned into the Exchequer Chamber, to receive there a final Judgment; upon the Arguments of all the Judges. The Court denied to do this. Coke chief Justice. This is derogatory from the ancient order of the Common Law, excepting in two cases: no case in Law can be shewed to be adjourned into the Exchequer Chamber, before Argument by the Judges in the same Court, where the cause is hanging; and these were two. The case of the Postnati, Calvins case, 7 pars fol. 1. and the Case of Suttons Hospital, 10 pars, fol. 23. and no others: before Argument here, and difference in opinion by the Judges, or agreement by the Judges; upon their differing in opinion, to adjourn the same thither, or by Writ of Error; and if it should be otherwise it would be very much against the dignity of this Court, of which we are Judges, and as Judges we are to maintain the dignity thereof. Dodderidge Justice, we are now made the proper Judges of this cause; and therefore the same ought first to be argued here, and after argument by us, for cause of difficulty, we may then adjourn the same over into the Exchequer Chamber, but not before. The whole Court agreed with him herein. Coke chief Justice. These rules are to be observed, for the adjournment of cases of difficulty, into the Exchequer Chamber. 1. This ought to proceed ex motione curiæ, but not of the party concerned. 2. This ought

Rules for the adjourning of cases into the Exchequer Chamber.

to

to be after argument, but not before, and upon difference in their opinions, or by Writ of error. 3. When the case is adjourned thither, if a Judge dies, the matter for this is not to stay, but to proceed; and if one of the Judges have there argued, and afterwards one of the Judges dies; the matter is not to stay, till another Judge be made, but the same is to proceed, and a new Judge being made, he is not then to argue; and so it was in the case of Suttons Hospital. Flemming chief Justice, ægrotat, the other Judges did go on in their Arguments, and if a Judge dies after argument there begun, and before he hath argued, (the party then whom it most concerns (gaudeat de bona Fortuna) and the puisne Judge after made, is not to argue this case; and so the rule of the Court was, to have the same argued here in this Court the next term, which accordingly was so done; & in Termino Pasch. 13 Jac. the same was argued by the Judges, and after very long argument, the same was adjudged for the Defendant, and against the Plaintiff.

Term. Pasch. 13 Jac. B. R. adjudged for the defendant.

The KING against *Walter Thomas*

IN an Indictment against Walter Thomas for the killing of one George Conard tried at the Bar by a Jury of Middlesex. Coke chief Justice. This Tryal here is publick, ut pœna ad paucos, metus ad omnes pervenerit, the Jesuits have much slandered our Common Law in the case of trials of offenders for their lives, in the manner of their trial, in regard that Counsel, and also examination of Witnesses upon oath, is had and admited against a Delinquent: but a Delinquent to have no Counsel to speak for him, nor to have any Examination of Witnesses upon Oath against him: in answer unto this, The Law of England, is a Law of Mercy; the Judge, before whom the trial is, is to look unto the Indictment, and to see that the same be sound, and good in point of Law; the Judge ought to be for the King, and also for the party indifferent; and it is far better for a Prisoner to have a Judges opinion for him, than many Counsellors at the Bar; the Judges to have a special care of the Indictment and to see that the same be good in all respects; and that Justice be done to the party. As for directions to the Jury in case of murther, grounded upon former malice, it is very clear, and so it is adjudged in Plowdens Commentaries, that if two men fall out, malice before is not any thing material for the Jury to enquire, but the subsequent matter (S) who began the affray; for that the killing may be murther in either of them, & if he be killed who offered the first wrong, yet it may be murther in the other who killed him; and the subsequent beginning not material. The Jury went together, and returning, gave up their verdict, and found the Prisoner guilty of manslaughter, who then prayed the benefit of his Clergy, which was granted unto him, being Psalm 51. vers. 14. Libera me a sanguinibus Domine. Croke Justice. This ought to be so between man and man, (S) homo homini Deus, sed non homo homini Lupus. Coke Chief Justice. By the Statute of 18 Eliz. cap. 7. we may imprison such an offender for one year, and to have him kept in salva & arcta custodia without bail or mainprise; according to this, the Court allowed him his Clergy but imprisoned him for half a year, there to continue without bail or mainprise, and also during the time, to be kept in salva & arcta custodia, and this for the odiousness of the Fact; for that he is, vir sanguinis; the Court also in their discretion, did bind him to his good behaviour afterwards.

An Indictment for killing of *Conuard*.

Psal. 51. v. 14.

Statute of 18 Eliz. cap. 7.

Clergy allowed; imprisoned for half a year without Bail and the good behaviour.

The Case of *Small*, a Prisoner in the Marshalsie.

Touching the regulating of the Prison of the Marshalsie.

NOta, Upon a motion made in Court, to have some redress in the Prison of the Marshalsie, for the governing of the Prisoners there being in Execution, who having so great liberty there in the prison, and in continual going abroad by Bail and Baston, so that they will lie there, consume their estates, and not pay their Creditors; and therefore, for the redress of so great a mischief the Court was moved to have them there kept, in salva, & in arcta Custodia; and not to be suffered to have there so great liberty, and so by this way they may be enforced to pay their Debts, and so to procure their liberty and enlargement. Coke chief Justice. By the Statute of 1 R. 2. cap. 12. Prisoners, sub Custodia, are not to go out of the Prison by Bail and Baston, unless it be by the Commandment of the King, or by the King Writ, or by the agreement of the parties, and not otherwise, or in any other manner; and such kind of liberty given unto them by their Keeper, without any such former Warrant, is clearly an Escape in Law: And as for the Rule there, I will never give any allowance unto this, for that delicatus debitor, est odiosus in lege: But hereafter we will confine them to be sub ferris in arcta Custodia, and this will be a means to make them to pay their Debts; and to the Counsel which made this motion, Coke chief Justice said, You shall have the effect of your motion, and it shall be well done of you to advise your Client to bring an Action of Debt upon an Escape, against the Marshal, and you shall have Justice, for this is a clear Escape in Law.

Statute of 1 R. 2. c. 12.

Sprint Plaintiff, against *Hicks* Defendant.

A Writ of Error to reverse a Judgment in the *C. B.* in a Writ of Annuity.

IN a Writ of Error to reverse a Judgment given in the C. B. in a Writ of Annuity there brought: The Error assigned was, that where a Rent-charge was granted to the Plaintiff, there he brought a Writ of Annuity, and in his Declaration, doth count of a Rent-charge granted unto him, and concludes, by force of which he was seized in his Demesn as of Free-hold, so that the question is, whether this Declaration be good or not, and whether this be any election made by him to have this as a Rent-charge or not. Coke chief Justice, that the Declaration is good, and that this is no Election to have this as a Rent-charge; and to this purpose there was a Case adjudged between Ward and Fulwood, where Lessee for anothers life granted a Rent-charge for his own life, then he for whose life the Lease was made dies: It was adjudged, that the Grantee here may have a Writ of Annuity, and this here for necessity, because that there was no other remedy here for him; Ethat by the death of him, for whose life the Lease was made, the Grant remains to charge his person in a Writ of Annuity, but the Rent-charge as to charge the Land is determined, because the Estate which the Grantor had in the Land, is by his death determined: In the principal case here the Grantee shall have election to have this as a Rent-charge, or as an annuity; this appears by 3 E. 6. Dyer, fol. 65. placito, 1 Eliz. Dyer, fol. 227. placito 43. where in 3 E. 6. the same exception is taken to the Count, and

3 E. 6. Dyer fol. 65. & r.

and 11 Eliz. Dyer, fol. 281. placito 17, 18, 19. touching the point of Election: Here in this principal Case, this was a Rent-charge, but by bringing of this Writ of Annuity, he hath now changed this, and hath made it an Annuity: Then, as to his false conclusion, (S) That he was seized in his demesn, as of Free-hold, in which he mistook the Law; this his mistake shall not hurt him, nor make his Declaration vitious, as if one pleads an Estate tail, and conclude virtute cujus, he was seised in Fee, this shall not make his former Plea to be bad, because he hath mistaken the Law in his conclusion: In this principal Case, the claim which he made to be seized of this in his demesn, as of Free-hold, is no claim at all in Law, nor yet any election, this being but a false claim, he having mistaken the Law: If one in such a Case, after such a grant made unto him, and before any Election made, doth purchase parcel of the Land out of which the Rent was to issue, this Rent now by this Purchase is quite gon, because that prima facie, the Law saith, that this was a Rent charge; in Plowdens Commentaries, fol. 224. in the Lord Barkleys Case, the third Exception to the pleading there; if a man pleads a gift in Tail, and concludes virtute cujus he was seized in Fee, this conclusion being false, and but the false suppoſal of the party in which he hath mistaken the Law; this shall not make his first plea to be vitious, (which the whole Court agreed) Croke Justice. If a man grants a Rent-charge out of Land, which he hath by a defeasable Title: Provisoe, that he shall not charge his person, this is a void Proviso, because the Grantee hath no other remedy to have this, but by charging of his person in a Writ of Annuity, if the Land should be evicted (which was agreed unto by the whole Court) and so it shall be also in all cases of necessity. Coke chief Justice. And the whole Court agreed clearly, that the Declaration here was good, that the Judgment was well given in the C. B. and is not erroneous, and therefore by the Rule of the Court, Judgment was affirmed.

11 Eliz. Dyer, fol. 281. &c.

Plowdens Commentaries, &c.

Judgment affirmed.

Ewer Plaintiff, against *Chamberlain* Defendant.

NOta, That in this Case a Writ of Error was brought in the Exchequer-Chamber, by Ewer, to reverse a Judgment given here against him for Chamberlain, and a Certiorare granted to remove the Record: The Error was, that in the Declaration on the File, mention is there made of six Closes, in the Roul but only three Closes. Yelverton moved the Court to have this amended, and made to agree with the Roul: Damages given but for three, the Bill is the foundation, and the Judgment is to be given upon this. Coke chief Justice. The Judgment is to be given upon the Writ, this being the foundation of the Original: If he assigned breach of Covenant in six Closes, and concludes but in three, how can we here amend this? this matter, if it be so, is not here amendable, yet it is true, that sometimes we may well amend the Declaration by the Bill. Dodderidg Justice. The Bill here is in Covenant for a breach in three Closes, and in the conclusion it is & sic; he assigns the breach in six, this is to be amended. Coke chief Justice. If this be so, then it is but surplusage, and so no need of any amendment. Dodderidge Justice. Forgetfulness of the Clerk, who mistakes himself in summing up in the quæ in toto se attingunt, this mistake is amendable, and shall not prejudice the party. Coke chief Justice, and the whole Court agreed herein: The Rule of the Court in this Case was, that if this be amendable, the Judges in the Exchequer are to direct the amendment of it.

A Writ of Error in the Exchequer Chamber.

The Court denyed the Amendment.

Croford Plaintiff, against *Bliſſe* Defendant.

An Action upon the caſe for words.

IN an Action upon the Caſe for words, by the Defendant ſpoken of the Plaintiff to another, who firſt ſaid unto him, If it had not been for ſuch a mans Oath (meaning the Plaintiff) at ſuch a Court Baron, I had not been caſt; Upon this, the Defendant ſaid unto him, I marvel, that you being a wiſe man, will marry your Daughter to ſuch a forſworn man (meaning the Plaintiff) for theſe words an Action brought, and upon non culp. pleaded, a verdict was found for the Plaintiff. Tho. Crew moved the Court in arreſt of Judgment, that theſe words were not Actionable, the rule and difference in Law in ſuch Caſes, is this. If one calls another a perjur'd man, theſe words are actionable, and it ſhall be intended that the ſame was in a Court of Juſtice, and to have a neceſſary reference unto this; but for theſe words, forſworn fellow, no Action lies; but if theſe had reference to a Judicial Court, they are then held to be Actionable, and this is the general difference in Law, touching theſe and the like words: But it doth not appear, by any thing that is ſhewed, that there was any cauſe to keep a Court Baron, and if no Court, then it is no other, but to call one generally a forſworn fellow: Here it is ſaid, In Curia Baronis ſocæ domini regis, apud Sommercotes, and doth not ſay, apud ſocam prædictam. Coke chief Juſtice. This is not good; for ſwearing in a Court amounts unto perjury; but there, if he forſwear himſelf in a matter not material, he is not to be puniſhed for perjury, becauſe in a matter impertinent to the Iſſue, & ſo no party is by this grieved, and therefore he which will have benefit by an Action for ſlanderous words for Perjury (ſaying that he was perjured) he ought certainly to ſhew this to be in a Court, and in a matter pertinent to the Iſſue; alſo if the words were, that he was forſworn, dando evidentiam ad exitum, this is good; and ſo if in a judicial Court forſworn, this doth amount unto perjury; but if no Court, then the ſame is coram non judice; and ſo becauſe it was not here certainly laid to be within the Soake; the Court was all clear of opinion that the ſame was not good. Coke chief Juſtice. Non refert quid notum ſit judicii, ſi totum non ſit in forma judicii, as Bracton obſerveth; and ſo the whole Court was clear of Opinion, that the Declaration here was not good, and therefore the Rule of the Court was, *Quod* querens nil capiat per Billam.

Bracton.

Judgment against the Plaintiff.

May Plaintiff, against *Gilbert* Defendant.

A Prohibition to the *Arches*

IN a Prohibition, the Caſe appeared to be this: The Defendant did prefer a Libel before the Biſhop of London, in the Conſiſtory Court, and this was for a Seat in the Church; ſentence there paſſed againſt the Defendant & his Witneſſes, and upon this Sentence they appealed unto the Arches. Dyat moved the Court for a Prohibition, in regard the title to the ſaid Seat or Pew was grounded upon a Preſcription: The Court anſwered, We may determine this point upon the Canon Law, if they may appeal: But as for the title, we are not here to meddle

meddle with it, this being for a Seat in the Church. Haughton Justice. This disposition of Pews in the Church, belongs of right to the order and discretion of the Ordinary; and to this purpose is the Case in 8 H.7. fol.12. and Sir William Hall's Case against Ellis. Dodderidge Justice. I moved this Case in the Court of C. B. and it was for a Seat in the Church: An Action there brought for disturbance, and I there cited Halls Case; and 9 E. 4. fol. 14. The Case of the Grave-stone and Coat Armor; for the taking of which, an Action of Trespass lies at the common Law, and therefore by the same reason an action of Trespass should lie for such a disturbance in a Seat in the Church; but there the Judges did all of them say, that they would not meddle with the deciding of such controversies for Seats in the Church, but would leave the same to them, to whom more properly it belonged. Croke Justice. Halls Case was this, where a man did build an entire Isle in the Church, and was at continual charge to repair it; if he be disturbed in the use of this, he shall for this disturbance have his remedy at the Common Law; and so it hath been adjudged; but the Judges all said, We are not here to meddle with Seats in the Church. Dodderidge Justice. This appeal here is like unto a Writ of Error at the Common Law; but it doth differ in this, by the Appeal the first Sentence or Judgment is suspended, but after a Writ of Error brought, the first Judgment still remains until it be reversed; and this reviewing in this manner, is like unto an attaint at the Common Law. Coke chief Justice. It was Pims Case in the C. B. and 8 H.7. fol.12. that the Ecclesiastical Court have Jurisdiction and power to dispose of Pews and Seats in the Church; but if there be an Isle, built by a Gentleman, or by a Nobleman, and he hath used to bury there, and there hath his Enãigns of Honor, as a Grave-stone, Coat-armor, or the like, which belongs not unto the Parson; if he take them, the Heir may well have an Action of Trespass: Otherwise it is, where the same is repaired at the common charge of the Parish, there they have the disposing of them: Ellis and Halls Case remembred, a Kentish Case, there the Seat was repaired by him, and was belonging to his capital Messuage, by Prescription, and so triable at the Common Law: And so where the Case is special, that the party doth wholly and solely repair the same, in such a Case, if a Suit be there concerning such a Seat, a Prohibition well lieth, but not otherwise: But if a Noble man comes to dwell in the Countrey, he is now within the sole order and dispose of the Ordinary, for his Pew and Seat in the Church; and upon the former difference was Pims Case adjudged in the C. B. in this principal Case, a Prohibition was denied by the whole Court.

8 H. 7. fol. 12.

9 E. 4. fol. 14.

8 H. 7. fol. 12. &c.

Prohibition denied *per Curi* Mo. 878. Godb. 199. 12 Co. 105. 3 Inst. 202. Hob. 69. 1 Brul. 45. Cro. Ja. 367. 1 Ro. Abr. 625.

March Plaintiff, against *Brace* Defendant.

IN an Action of Debt for Rent, the Plaintiff declares upon a Lease for years, made unto him, 1 Jac. rendring rent, and for rent behind, the Action brought; the Defendant pleads in Bar, confesseth the Lease made unto him, in manner as the Plaintiff had set forth, but pleads further, that after this Lease thus made unto him, and before the Action brought, he assigned his Lease over to one Collins, and that after this Assignment, for rent which afterwards grew due, the Plaintiff being the Lessor, had received his Rent of Collins the Assignee; and so by this his acceptance of the rent of the Assignee, he had now taken him for his Tenant and so demands the Judgment of the Court, Whether after this his acceptance of the rent of his Assignee, this Action will lie against him for this rent; upon this Plea in Bar, the Plaintiff demurs in Law: The question being only this, Whether

An Action of Debt for Rent. 2 Cr. 334.

ther by this acceptance of the Rent of the Assignee, having no particular notice given to him of this Assignment, shall be said to be an acceptance of him as of his rent, or as the Rent of the first Lessee by his hands, & as his Servant or Baily; & whether any notice be here requisite to be given to the Plaintiff, the Lessor of this Assignment or not; and if notice be requisite to be given, whether then this acceptance of the rent by the Plaintiff, of Collins the Assignee, be not a sufficient notice in it self of this Assignment: It was urged for the Plaintiff, that the Bar here is not good, and that the Action here is well brought, for that particular notice ought here to have been given to the Plaintiff of this Assignment, and then he might have had his Election, whether to have brought his Action for his Rent against the Assignee, or against his first Lessee, for without such notice given, the Plaintiff might be at a very great prejudice, for that his Lessee might assign his Lease over unto a Beggar, to one altogether unable to pay his Rent; but having notice given him of the Assignment, he might then have had time to have made enquiry of his ability, before he received any Rent of him; and if upon such enquiry he found him unable to pay his rent, he might then still keep him to his former Tenant; and where notice is to be given, and where not appears, Coke 3 pars, fol. 64, 65. in Penants Case, where many Cases are put to this purpose, together with the great inconvenience that may happen to the Lessor, for want of notice of the Assignment of his Lessee; and also in a Case adjudged here in this Court, Termin. Mich. 10 Jac. where Sir Francis Ventris was Plaintiff against Goodcheap Defendant, in an Action of Covenant, where the termor did Covenant for to repair the House leased unto him; the Lessee assigns his term, the house became ruinous, the Plaintiff brought his Action of Covenant against the Defendant his Lessee, after his Assignment, the Defendant pleaded the Assignment, before which the House was not ruinous, and pleads also an acceptance of the Rent afterwards of the Assignee. Judgment was here given for the Plaintiff, against the Defendant the first Lessee; and to this purpose is 25 H.8. Brooks cases, fol. 16. placito 74. For the Defendant it was urged, that the Bar of the Defendant was good, and that the Plaintiffs Action here did not lie against the Defendant; and for this was cited 41 E. 3. fol. 25, 26. the Countee de Staffords Case, of Lord and Tenant compared unto this Case; and 22 E. 4. fol. 36. Brook tit. Avowry. placito 110. If there be Lord and Tenant, the Tenant makes a Feoffment in Fee, the Lord is not bound to accept of the Feoffee for his Tenant, before notice to him given of the Feoffment, and tender of the arrearages; but when the Lord will accept of the Feoffee for his Tenant, before notice and tender of the arrearages, by this he shall lose his arrearages: And if notice be requisite here in this case, the acceptance of the Rent here by him is sufficient notice, Coke 3 pars, fol. 24. in Walkers case, Marrow and Turpins Case cited, which was, Pasch. 41 Eliz. in the C. B. Rott. 2485. where in an Action of Debt for Rent, against an Administrator of a Termor, who pleads an Assignment of all his term, of which the Plaintiff had notice, and accepted of the rent by the hands of the Assignee, due at a day after the Assignment; upon this Plea the Plaintiff demurred in Law, and the same was adjudged against him, because the privity of contract, as to the Action of Debt, was determined by the death of the Lessee: And it was there also held, that if the Lessee Assigns over his Estate, the Lessor may charge the Lessee, or the Assignee at his Election; and therefore if the Lessor accepts the rent of the Assignee, he hath by this acceptance determined his Election, and cannot have an Action of Debt against the Lessee afterwards, for a rent due after the Assignment, no more than if the Lord once accepts his rent of the Feoffee, he shall not afterwards avow upon the Feoffor. Dodderidge Justice. If the Lessor do once allow of the Assignee for a Termor, he cannot afterwards resort unto his first Lessee, to recover of him the rent behind, by an Action of Debt: It is here to be considered of touching this payment and acceptance of the rent of the Assignee, whether by this he doth take sufficient notice of the Assignment, as in Walkers

Term Mich. 10 Jac. B. R. &c.

25 H.8. &c.

41 E.3. fol. 26. &c.

22 E. 4. fol. 36. &c.

Coke 3 pars, fol. 24. &c.

41 Eliz. C. B. Rott. 2485.

Case

Case Cok 3 pars before remembred, if the Lessor takes notice of this, and accepts the Rent of him, he shall not resort after to his first Lessee; if the Lord accepts rent of the feoffee, he is by this barred of his arrearages; but here it is Objected, and said, that he received of Collins (who was the assignee, but not so expressed to be,) so much, pro redditu prædicto, and that if he had not any notice of the Assignment, this payment is in judgment of Law, the payment of the first Lessee, and that by the hands of Collins, as his servant, but not of Collins, as the Assignee; but as to this, and which makes the matter very clear, it is here pleaded, that he accepted this rent of Collins, and that pro redditu de Collins; and so by this it appears fully, that he took notice of the assignment made unto him: and then, he cannot resort for his rent unto his first Lessee again, but without notice of the assignment, either given to him, or taken by him, the acceptance of the rent makes nothing at all in the case. The Court inclined to be of opinion, that by this acceptance, he did take notice of the assignment, and then clearly, by the whole Court he cannot afterwards resort unto his first Lessee again, the Defendant to have his rent of him; for that in his Declaration here, he doth count upon a Lease by him made unto the Defendant, rendring rent; the Defendant in his Bar doth confess the Lease, but pleads further, that he had afterwards assigned over this his Lease unto Collins, and that after this assignment thus made, he had accepted the rent of Collins (S) so much pro redditu prædicto, and that after this acceptance, he brought this his Action of Debt against him, for rent due at another day. The Court was clear of Opinion, that this Plea in Bar, by the Defendant was good, and that the Plaintiff, after this his acceptance of the rent of Collins the Assignee, could not resort unto his first Lessee to recover his rent behind against him; and therefore the Rule of the Court was, that if the Plaintiff, by a day to him given, did not shew better cause to satisfie the Court in this matter, then Judgment to be given for the Defendant, & quod querens Nil capiat per Billam.

Coke 3 pars, *Walkers* case.

The Judgment of the Court against the Plaintiff.

Nota, That afterwards (S) Termino Hillar. 11 Jac. B. R. This matter was moved again, and argued by Counsel of both sides. Coke chief Justice then demanded, whether this Action of Debt, now brought against the Defendant, was for rent due after the assignment or not? Answer to this was made, that it was for rent due after the assignment. Coke chief Justice, It is then a very plain and clear case, that the Bar here is good; after the lease made the Lessee is chargeable, by reason both of the privity of Estate, and of Contract, which privity of Estate is now gone, by the assignment but the privity of Contract still remains and the Lessor may take the one or other for his Tenant, but when the Lessor after the assignment, hath accepted the rent, then due of the Assignee, this is a good Bar now unto him, from resorting again unto his first Lessee; and this Plea in Bar here, by the Defendant, being good to a common intent, is good, and this is proved by Walkers Case, before remembred; and as to the notice, whether to be given or not, if this should be material, the same ought to come on the Plaintiffs side to be alledged; but the acceptance of the Rent by the Plaintiff, here of the Assignee, is also a sufficient notice of the assignment, if notice be requisite. If there be a Lord and Tenant, and the Tenant dies without Heir, an Abator intrudes, and makes a feoffment in fee, the Lord accepts Rent of the Feoffee, by this his acceptance he shall be barred of his escheat; this principal case here, is a common case, and very clear, and that the bar of the Defendant, here is clearly good; and that the Plaintiff hath mistaken himself here, in bringing this Action against the Defendant his first Lessee, for rent due after the assignment, and after his acceptance of rent, of the Assigne, which is a sufficient notice in Law, by him taken of the assignment, and so Judgment ought to be given against him. Dodderidge Justice. This privity of contract, between the Lessor and his Lessee, may be several ways determined as by death or by the acceptance of the rent of the Assignee, as here in this principal case, and so the Court clear of opinion, that no special notice ought here to be given to the Plaintiff, of the assignment, his acceptance is a sufficient notice of the same, taken by him; the acceptance of rent, of the

Term. Hill. 11. Jac. B. R. &c.

Walkers case.

Heir

Heir of the Disseisor, or of his Feoffee, shall bar the Lord of his escheat, as appears by 7 E. 6. Brooks cases, fol. 94. placito 433. the privity of contract is determined by death in this principal case by the Plaintiffs acceptance of his rent of the Assignee; the Defendant the first lessee is by this freed, and discharged; the bar here is clearly good, the Action not well brought against the Defendant: and so Judgment was given for the Defendant, & quod querens Nil capiat per Billam.

Judgment for the Defendant *quod querens, &c.*

Bust Plaintiff, against *Wadsworth* Defendant.

An Action of debt, upon a Bill made at *Hanbrough.*

IN an Action of Debt, brought against the Defendant, upon a Bill made at Hanbrough, in the Low-Countreys, which was to pay 67 l. at Hanbrough; the Plaintiff brings an Action of Debt here in this Court, for 56 l. the Defendant demands Oyer of the Bill, and so demurrs in Law upon the Declaration, for the variance between the Bill, and the Declaration. Dodderidge Justice. The Plaintiff here ought to have demanded in money in Hanbrough: If a man be bound to pay so much money in Dollars, or in French or Spanish money, he ought to make his demand accordingly, and 21 E. 4. fol. 38. In Det the Plaintiff counts upon a Bill, by which the Defendant was bound to the Plaintiff, in 20 l. Flemmish, and all the Bill was written in Flemmish, dated octavo die Decembris Lxx. octavo, & interlessant Domini Mcccc as the usage was amongst Merchants; and the Plaintiff declares, and names the place, year and day, when the Obligation was made, and delivered; the Defendant there demanded Judgment of the Court for the variance between the Count, and the Obligation. In this principal case, the Court agreed, that the Plaintiffs demand ought to have been according to his Bill, and having not so done, for this cause Judgment was given against him, and the Rule of the Court was, Quod querens Nil capiat per Billam.

9 E. 4.
21 E. 4. fol. 38.

Judgment against the Plaintiff.

Brown Plaintiff against *Crashaw* Defendant.

A Prohibition upon a *Modus decimandi.*

IN a Prohibition, upon a supposed modus decimandi. Yelverton Sollicitor, moved the Court, for a consultation to be granted, for that the Plaintiff in the Prohibition, had not sufficiently proved his suggestion, the same being only proved by him, by two persons, which were both of them attainted of Felony, and so could be no good and sufficient witnesses in Law. Coke chief Justice, It appears by 11 H. 4. fol. 41. b. that if one be attainted of Felony, and pardoned, he shall not afterwards be sworn of a Jury, for that he is not probus, & legalis homo, for pœna mori potest, culpa perennis erit, and therefore such an one shall not be sworn of an Inquest, and this is a good challenge to a Juror returned to serve, that he hath been before attainted of Felony, and though pardoned for the same, yet he is not a fit person to serve of a Jury, nor yet to be an indifferent witness; and by the same Reason the testimony of such an one for a Witness in all cases, is to be rejected, and upon the same reason, I will not take the testimony of a Recusant convicted, for a witness, for by the Statute of 3 Jac. cap. 5. a Popish Recusant being convicted for the same, is to be excommunicated, and so to be taken as an excommunicated Person, & in this principal case, upon examination, it was found, that the 2. witnesses, which proved the suggestion for the Prohibition had been attainted of Felony; and therefore

11 H. 4. f. 41. b. Godb. 288. 266. Hob. 89. Brownlow 2 p. 34. 47.

Statute of 3 Jac. cap. 5.

fore by the Rule of the Court, the Prohibition was disallowed, (the suggestion being unduly proved) and a Consultation was granted.

A consulation granted.

The Attourney General for the KING, against *Hugh Griffith*, and *Hugh Holland*, & *Alios*.

NOta, that divers Recusants in Middlesex were brought to the Bar to take the Oath of Allegiance, which was tendred unto them. Coke Chief Justice. The Oath of Allegiance sequitur personam non locum, and any Justice of Peace may minister this, there is Allegiance in ore, and in corde also. In the taking of this Oath, Salus populi suprema Lex; this City of London, it is Cor regni, and in ancient time, the Writ was used, De leproso amovendo, for fear of infecting of the body; and such Writs are now very requisite to remove you, for you infect the Soul, which is much more dangerous. In the Book of Assises, anno 30. fol. 177. placito 19. Sir Thomas de Seton brought an Action de scandalis magnatum, against Lucie, who was the Wife of one C. and shews that he being one of the Kings Justices, yet the Defendant in the presence of the Treasurer, and of the Barons of the Exchequer, did openly call him Traitor, Felon and Robber, a tort, and in despight of the King, and in slander of the Court, and to his dammages of 1000 l. for which he prayed remedy; the Defendant brought a Bull from Rome from the Pope, for to disable the Plaintiff, thereby proving the Plaintiff to be excommunicated; this was held Treason in the time of King E. 1. à fortiori, here for you to disable the King: we are here Justices of the Peace of Middlesex, and because you refuse to take the Oath of Allegiance, you are to be committed to the Prison of the Marshalsey, to be tryed at the Sessions; you would make the King, to be tenant at will of his Crown, and of his Land; this is of dangerous consequence to all; upon this, Wrighter, a Recusant in Essex, took the Oath in Court, and was to find sureties for his good behaviour. Coke chief Justice. By the Statute of 3 Jac. cap. 5. every Recusant convict, is to be excommunicated; and therefore in my Circuit, I do not admit of them for witnesses, between party and party, they being no competent witnesses; and therefore you being to find sureties for the good behaviour we will not take Popish Recusants for your sureties. Wrighter was bound to his good behaviour, the Bond 200 l. Upon this, divers other Recusants being then present, did take the said Oath of Allegiance in Court, (S) Hugh Griffith and Hugh Holland, and found sureties for their good behaviour. Coke chief Justice. All convicted Recusants ought to depart out of London; and are not to inhabit within 10 Miles of London, and they which do now dwell in London, are to have convenient time to remove their habitations. Coke Justice to the Recusants, say not now to your selves, juravi lingua, mentem injuratam habeo. Mary Fryer also being present in the Court, took the Oath and found sureties. Coke chief Justice.

Recusants at the Bar to take the Oath of Allegiance.

30 Assisar. fol. 177. placito 19.

Wrighter took the Oath, and found sureties. Stat. of 3 Jac. cap. 5.

A Recusant convict to be excommunicated.

Hugh Griffith, *Hugh Holland* took the Oath and found sureties.

Mary Fryer took the Oath

Leges communes, si nescit fœmina miles,
Clericus, & cultor, parcit sibi judex, & ultor.

Divers other Recusants then present, took the Oath in Court; and found sureties for their good behaviour. Coke chief Justice, melius est recurrere, quam male currere. Ligeantia, est quasi legis essentia. Coke chief Justice To the Recusants then present in Court, said, We have God, the King, and the Law of the

Land on our side, also we have here dealt very favourably with you, and not in any rigorous manner; for we may by the Law of the Land attach every one of you by a Writ De excommunicato capiendo, being by the Statute of 3 Jac. capite, 5. excommunicated being convicted; but we have here taken a more favourable course with you, (S) only to bind you to your good behaviour, and to take of you sufficient sureties for your performance hereof, and if afterwards you do not conform your selves according to the Laws of the Land, then we will deal with you according to the rigor of the Law by Writs of Excommunicato capiendo, for it shall be better and far safer to have you to lie in Prison, than to be at large, and not to conform your selves. The whole Court agreed with him herein.

Stat. of 3 Jac. capite 5.

Dorrington Plaintiff, against *Waller* Defendant.

An Action of Debt upon a Bond.

IN an Action of Debt brought by the Plaintiff, as Executor, upon a Bond of 200 l. upon Oier demanded of the condition, by which it appeared, the payment to be made within two days after the date of the Bond, (but no sum at all named in the condition to be paid.) 1. The Plaintiff declares upon a Bond to pay so much, cum inde requestus fuit; upon nil debet pleaded, a verdict was found for the Plaintiff. It was moved for the Defendant in Arrest of Judgment, that the Declaration here was not good, for this variance, no sum at all being named in the condition of the Bond to be paid. Coke chief Justice. If this be so, the same is a material variance; if no sum be mentioned in the Condition of the Bond, then the Bond is single, and without condition, and being bound to pay so much upon a single Bond & no day set down in the Bond for the payment thereof, then he is to pay the same upon request. And so in this case if it be so, the Declaration is good, and upon examination of this, it appeared to the Court, that no sum was specified in the condition, and therefore by the opinion of the whole Court, the Obligation is single, and so the same ought to be paid upon request. And so by the opinion of the whole Court, the Declaration here is good, and that so Judgment ought to be given for the Plaintiff, and accordingly by the Rule of the Court, Judgment was entred for the Plaintiff, but Execution to stay till the next term.

Judgment for the Plaintiff.

Bedo Plaintiff, against *Piper* Defendant.

An Action of debt, a Writ of execution to the Sheriff of *Radnor*. Stat. of 27. H. 8. cap. 26. *Plowdens* Commentaries, *&c.* ante 54.

IN an Action of Debt upon a Bond; the Action laid in Herefordshire, upon nil debet pleaded, the Plaintiff had a verdict, Judgment and Execution, and a Writ to levy Execution was directed to a Sheriff in Wales, of the County of Radnor, who did not execute this Writ, but made this return to the Court, quod breve Domini regis ibi non currit; the question was, whether this was a good return or not, and herein it was taken into consideration, whether Writs of Execution might go into Radnorshire, as this Case was, or not: It was urged that such a Writ should well go into Wales, for that the Statute of 27 H 8. capite 26. by which Statute, Wales and England are annexed and made one; and so is it in Stradling & Morgans case in Plowdens Commentaries, f. 200. in the answer to

to the third matter there moved in Arrest of Judgment. Coke chief Justice. Before the statute of 27 H. 8. capite 26. some doubt might have been made of this; but this statute hath now made the matter very clear, and put this out of question; which might have been before questionable; and as touching this matter, there is a good case in Mich. 13. E. 3. Fitz. title Jurisdiction placito 23. in a Writ of Cosinage, and demands the Castle of R. and Commote of I. Answer was made, that the Castle is in Wales, where the Kings Writ did not run; and it is there said by Parning, that there are three things that give Jurisdiction to the Court here. 1. Because the Writ Original, was directed to the Sheriff of Herefordshire, who witnessed that he had given summons. 2. Because the tenant came and affirmed the Summons; and thirdly, because he had the view; and it is said that the Castle and Commote were in Wales; yet there said, that the Court was not to be ousted of the Jurisdiction, in regard that by the Commote a great Seignoiry, as land, services, and rents is demanded: and also because this Castle and Commote were held of the King in chief, as of his Crown; and that such Castles are pleadable here, and not else where, and so it was; and the Grantee of the King, of these had aid of the King in this case, and Pasch. 15. E. 3. Fitz. title Jurisdiction placito 24. A Quare Impedit brought by the King for a Church in Wales, and there held good; and so is 14 H. 4. for that none can write to the Bishop, but the King, & no subordinate Court is to Write to the Bishop. Dodderidge Justice agreed herein, otherwise by this means you may defeat all the Executions in England, 1 E. 4. fol. 10. A Writ of Execution to go to Chester, and so to Durham. And so the Court in this principal case did clearly agree, that this Writ of Execution here, did well go into Wales, and that this return of the Sheriff, being Quod breve Domini Regis, ibi non currit, is a bad return, and ought to be amended, and by the Rule of the Court, the Sheriff was amerced 10 l. for this his bad, and false return. The Court all clear of opinion, that the Writ of Execution did well, and legally go into Wales, and so it may well be into the County Palatine of Durham.

Mich. 13. E. 3. *&c.*

Pasch. 14 E. 3. *Fitz. &c.* 14. H. 4.

1 *E.* 4. f. 10.

The Sheriff amerced for his false return.

Draiton and *Cotterill* Plaintiffs, against *Smith* Defendant.

IN a Prohibition, the case appeared to be this; Smith Libelled against them in the Spiritual Court, for tithe-hay growing in their Orchards; upon this suit they prayed a Prohibition grounded upon this suggestion, that they have time out of mind used to pay for a Modus 40 s. to the Vicar, and this to be in lieu of all tithes here due to the Vicar and Parson, and upon this suggestion a Prohibition prayed. Coke chief Justice. If the Parson sues in the Spiritual Court for tithes, and the other pleads a modus to the Vicar, this modus now can never come in question by this suit between the Parson & him, for tithes due unto the Parson, but this is to be questioned, and determined there in the spiritual Court, to whom the tithes do belong, whether to the Parson, or to the Vicar; and this hath been divers times adjudged in this Court, and in the Court of C. B. in Bushes case for Pankeridge Church; and it hath always been clearly held, that if the right of tithes come in question, between the Parson and the Vicar, to which of them the same doth belong, this is a suit properly belonging to the spiritual Court, to hear and determine this, & in such a case they are not there to be ousted of their Jurisdiction; and this being now a question between the Parson and the Vicar, to which of them this tithe did belong, for which the modus is alledged to be paid; therefore no Prohibition is to be granted in this case, though there be a modus suggested

A prohibition

to be paid unto the Vicar for all Tithes here due to the Vicar and Parson, the Parson suing for the Tithes there as due unto himself, and not unto the Vicar, so the question is as touching the right of Tithes between the Parson and the Vicar; which is a sute proper for the Spiritual Court; and this is to be observed for a sure rule in such a case, never to have a Prohibition granted; the reason of this is, because that the modus suggested to be paid, cannot come in question, upon this suggestion of this payment unto the Vicar, but only the right of Tithes to whom they belong, whether to the Parson or to the Vicar, and divers Judgments have been accordingly given in the like case, and so by the Rule of the whole Court, a Prohibition was denied.

A prohibition denied. 3. Bul. 91. 92.

Nota. Certiorari to *Durham* denied *per Cur.*

Nota, that a motion was made to the Court, for a Certiorari to Remove a Record from Durham. Coke chief Justice. We will not grant such a Certiorari to Durham, for they have Law, and pleadings there as we have here; the whole Court agreed herein, saying we have denied this before, and though we have power to do this, yet we will not in such a case ouste them of their Jurisdiction.

Thurseden Plaintiff, against the Executors of *Warthen*, Defendant.

An Action of debt for not performing of Covenants.

IN an Action of Debt for not performance of Covenants, upon Nil debet pleaded, a verdict was given for the Plaintiff. Weare for the Defendant moved the Court in Arrest of Judgment, and the case appeared to be this: Warthen being Lord of the Manor of Dale, did covenant for himself, his Heirs, Executors, Administrators and Assigns, within 7 years upon request to convey and settle upon the Plaintiff a Copy-hold Estate, pro termino vitæ suæ secundum consuetudinem manerii; and this to be done upon request made by the Plaintiff, the Covenantee to him, his heirs, executors, or assigns; the Plaintiff shews that Warthen the covenantor died, and that he requested the Defendants, the Executors of Warthen to perform this within the time, which to do they refused, unde actio accrevit; and by the Covenant this was to be done, infra unum mensem, post rationabilem requisitionem. It was not shewed in the declaration, what Estate Warthen had in the Manor. It was urged, that here the request ought to have been made to the heir, and not unto the Executor; for it is not to be intended that the covenantor had but an Estate for years in the Manor, but rather a Fee simple, for that a general, and not a particular Estate is to be intended to be in him, which is a Fee-simple, and so the request here of necessity, ought to have been made unto him, who was to make the Estate, and this was the heir, not the executor, for the Executor could not do and perform this, and therefore the request here made unto him is not good, and so no breach of covenant for that no particular estate is to be intended to be in Warthen the Lord, and the covenantor, unless that the same was specially shewed. Dodderidge Justice. He might here have an estate for years in the Manor, and the request was to be made to the executors. Croke Justice. If he had nothing in the Land the heir shall not be charged but his Executors only. Haughton Justice. He might be seized in Fee of the Manor, and then

then the request ought not to be made to his Executors, but to his Heir; it doth not here appear, what Estate he had in the Manor, and we are not to intend, that he had one Estate more than another; but for the generalness here, it not appearing what Estate he had in the Manor (none being shewed) this makes the matter here the more doubtful. Dodderidge Justice. If a man makes a Feoffment in Fee of his Manor of Dale, upon condition, that if he, his Executors, or Assigns, do pay so much money, that then it shall be lawful for him to enter again. The Court all agreed, that this is a personal matter, and the Executor here is to render the money. Coke chief Justice. The request here made to the Executors is good, because the Executors do represent the Person of the Testator, as to the performance of Covenants, by him to be by Covenant performed. The whole Court (except Haughton Justice, being absent,) agreed herein clearly. Dodderidge Justice. It being generally undertaken, and no Estate shewed; it shall here be intended, that he had only an Estate for years in the Manor, and if he had no Estate at all in the same, his Executors are then bound to procure this to be done, according to the Covenant of the Testator at their peril, and here, this is after a trial, and a verdict for the Plaintiff. The Court all agreed, the request to be well made to the Executors; that their not performance of this, was a breach of Covenant, and so by the Rule of the Court, Judgment was given for the Plaintiff.

Sir *Christopher Heydon* Plaintiff against *Godsole*, *Shepherd*, and *Smith* Defendant.

Entred Mich. 11 *Jac.* B. R. Rott. 172.

IN a Writ of Error brought here by him against Godsole, Shepherd and Smith Defendants to reverse a Judgment given for them at the Assises of Norfolk in an Assise of Novel disseisin, before Sir Thomas Flemming, and Sir J. Dodderidge then Justices of Assise: And upon the bringing of this, the case appeared to be in this manner; the Assise being brought, and the first day, the Jury being at the Bar ready to be sworn, the Defendant came and confessed the seisin, and the disseisin as the Plaintiffs had declared, and upon this the Plaintiffs petunt Judicium, Ideo consideratum est, &c. and the Judgment was entred, quod recuperent seisinam, per visum recognitorum, and upon this a Writ of error was brought, and this assigned for error, because none of the Jury were sworn, and so there was no such Judgment. Coke chief Justice. They are not recognitors; before they be sworn, they appeared the first day, the Defendant confesseth the seisin, and the disseisin, the Plaintiff released the costs; if they had their Judgment per seisinam the same had then been good without any question; but this is here entred, per visum, &c. and they are not Recognitors before they are sworn. Also it doth not appear here, that they had the view; and by this, the King hath a loss, for they ought to enquire for the King. But as to this, I have a Judgment which doth contradict this, and it was in the time of Wray chief Justice. It was one Mr. Bartlets Case, against whom Baxter brought an Assise of Fresh force: Nul tort pleaded, and the Jury find the disseisin, but enquired not of the force, for the King

A Writ of Error to reverse a Judgment in an Assise of *Novel disseisin.* 2 Cr. 334 341. Mo. 834. 2 Ro.Abr. 492. 1 Ro.r.14. Godb. 249. 247.

Seisinam.

Baxter Plaintiff against *Bartlet* Defendant.

King. Upon this a Writ of Error was brought, and the rule of the Court was, that this was no error, it being only the Office of the Court to enquire of this for the benefit of the Defendants; and this shall not turn the party to any prejudice, and therefore this was held no error, and the Judgment affirmed. George Croke. Object. That this is good here, otherwise he could not have a Redisseisin. Dodderidge Justice, this doth strengthen the Redisseisin, which is given by the Statute of Merton capite 3. Afterward this Case was argued by Germine for the Plaintiff that the Judgment was erroneous, for that there is a great difference between Assises, and all other Actions. In an Assise, the Jury is ready the first day, and so is 19 H. 6. fol. 43. a. & 15 H. 7. fol. 16. b. that it is error, if there be no view in an Assise. 24 E. 3. fol. 26. a. Assise brought for land in 2. villes, the Recognitors, ought to have the view in both. 18 Assisarum placito, 1. & 31. Assisarum placito 27. Assise de Kent, in two Counties. 22 E. 4. fol. 15. b. fol. 16, 17. where it appeareth, that it is necessary in an Assise, for the Jury to have the view; otherwise the Judgment cannot be effected, the old Book of Entries, title Barre en Assise, placito 1. fol. 60. touching the view, in an Assise. George Croke, that the Judgment ought to be affirmed, the same being given, Quod recuperent seisinam per visum Recognitorum; this assigned for error, because they had not the view, being not sworn; the damages released, whether the Judgment should be per visum, is the question; all the cases before remembred are to be agreed, that in an Assise, the Recognitors ought to have the view; but yet if they have good knowledge of the Land, the same may be taken, without the view. It must also be agreed, that Land in both Counties, is to be put in view; here they had the view, but to prevent the trial, the Action was confessed; here the Judgment shall be, quod per visum, recuperent, they are to recover, because the Sheriff, per visum recognitorum, (but not Juratorum;) the Sheriff is to deliver the seisin; there is no President in all the Book of Entries, of a Judgment given; but upon the taking of the Assise, the Recognitors, are not only when they are sworn and taken, but when the Writ is returned they are called Recognitors; before they are sworn, they are all named Recognitors, and the Judgment here given, per visum recognitorum; by the Statute of Merton, capite 3. Judgment in an Assise per recognitionem; and Westmin. 2. cap. 30. in an Assise and Redisseisin, quod recuperet per redditionem; if the Demandant may enter, being not put in Execution by the Sheriff, he shall not have a Redisseisin, by 8 H. 5. fol. 1. If all the Recognitors are dead, but one, he can have no Redisseisin. this doth then fail, for by 8 H. 5. fol. 1. the enquiry is to be per primos juratores & per alios, the Redisseisin is to be enquired of; the reason of this is, because the Sheriff, and the Recognitors, have knowledg, what land they shall put in view; and if so, then in this manner the Judgment is to be; the Redisseisin goes to the land; the Judgment is to be per visum recognitorum, notwithstanding the damages are released. 4 Jac. at Norfolk Assises, in Lent, there was a President before Popham chief Justice, where there was a confession, in an Assise, and yet notwithstanding this, the Judgment was, Quod recuperet, per visum juratorum. Coke chief Justice.

Statute of Merton cap. 3. 19 H. 6. fol. 43. 15 H. 7. f. 16. b. 24 E. 3. fol. 26. 18. &c. 31 Assisarum placito 27. &c. Old Book of Entries, &c.

Statute of Merton, cap. 3. &c.

8 H. 5. f. 1.

4 Jac. at *Norfolk* Assises.

Assisa venit recognoscere, he makes his plaint, he needs not to set down the town, for this is in the Writ; and this would have been a good exception, if it had been so set down: the tenant may demand Oyer of the Writ; & si non potest dedicere, but that injuste eum dissesivit, notwithstanding this, the Jury is yet to be taken for the damages, to enquire thereof; but if the Plaintiff saith, that he will release the damages, then there is nothing more for the Jury to do: the Judge gives Judgment, quod ideo consideratum est per curiam, this is good, quod recuperet seisinam, per visum recognitorum, this is good every way, per visum Assisæ predictæ, this is good, and warranted by President, ex errore sequitur error, as it is here, the same is according to the common course, and we are to intend that they had the view. 21 E. 3. fol. 60. There is a notable case, in a Writ of contempt against the Bishop of Norwich, whereas the Abbey of St. Edmonds Bury, being of the foun-

21 E. 3. fol. 60

foundation of the King, by an Ordinance, made exempt, from the Jurisdiction of the Ordinary and if he shall do contrary, to pay unto the King 30. Talents; the which Bishop had there visited, against the Prohibition of the King to him to the contrary, and this by him done, a tort, & in despite del Roy; he was found guilty of this, and his temporalities were seised into the Kings hands, and there adjudged that the King shall recover Les besants, and that the price shall be interpreted, and set, by the King himself, of what price the same should be, more or less, so the King was to certifie by his Writ, for the value, Del Besant, for the trial of the value of the Kings coyn shall be, by the Kings Writ, and by this, he certified a Besant, to be of the value of 100 l. as appears by the certification of the King, as I have seen by the Record of the same; the which Sr. Nicolas Bacon did shew unto me: the Judgment here in this principal case, was well given, and no error in it, and so the same ought to be affirmed. Croke Justice. This Judgment is not erroneous, but the same is to be affirmed: and to warrant this, we have Presidents, but none for the disaffirming of it, and to do so, this were ambulare in tenebris, and it is not said of necessity, recognoscere, but parati sunt, to do so, and so, quacunque via data, the Judgment here was well given, and so ought to be affirmed. Dodderidge Justice, if no president had been in this case, the reason which I have heard, would very much move me, upon the Statute of Merton, capite 3. In a Redisseisin, to have seisin per visum, An Assise in Law, is the speediest remedy a man hath, and so it is said to be festinum remedium, the Jury they are always ready; the Law doth not ordain the view in an Assise, for a naked Ceremony, but to put the party into seisin; they are called Recognitores, for their having of the view, and jurati: after they are sworn, the party, after issue, may take advantage, that they have not the view; their having of the view is not of necessity, but for them to know the Land, and this by the view, but when they have not the view, we are yet to intend that they have the view. 3 things there are, which the Recognitors are to do. 1. To have the view of the Land. 2. To try the seisin, and disseisin; and 3. To try, and enquire of the damages; here nothing is left for them to do, but to bring the party into the seisin, and possession of the Land, and nothing else; and therefore the Judgment ought to be per visum, and being so given and entred, the same is well given, and ought to be affirmed. Haughton Justice agreed herein, and there is no Authority, nor any President, contrary unto this; but all the Presidents in the Book of Entries are per visum, notwithstanding, they are not absolute Recognitors, until they are sworn, yet they are Recognitors, and so called, when they are returned; if the Assise be taken, the Recognitors sworn at the Assises, the Judgment is deferred, all the Recognitors die before the day in Bank; this shall not be assigned for Error, he shall not have a redisseisin, at the day in Bank; the Assise taken per redditionem, by the Statute of Westmin. 2. cap. 30. if a Redisseisin being to be enquired of, the view is to be had, and the Judgment, per redditionem, is to be per visum. In this case the Judgment was well given, and according to the Presidents, and so not erroneous, but ought to be affirmed. Coke Chief Justice. No Redisseisin, but where the Judgment is per visum, but when the Judgment is by Reddition, he may have a Redisseisin, and this is an infallible rule. Another exception was taken, because there was no County expressed in the Warrant of Attorney: it was answered, that this was not needful, for that it was entred at the Assises, in proprio comitatu; the Court clear of opinion, that this was a good answer to this Objection. Coke chief Justice, 28 Assisar. placito 28. In an Assise, matter confessed, the Plaintiff did not release his damages, the Jury to be taken for to enquire of the damages were not released. Mich. 25. & 26 Eliz. Baxter and Bartlets case before remembred, where the Recognitors in an Assise of fresh force, did enquire of the seisin, and disseisin, but not of the force. They found this, and damages, this was no error, being the office of the Court to enquire of this, and they not finding the force, this was better for Bartlet, for that he was not then to be taken by a Capias, for the force. And so the whole Court agreed

Statute of *Merton*, cap. 3.

Statute of *West.* 2. cap 30.

28 Assisar. placito 28.

Mich. 25. & 26 Eliz. 2. *Baxter* and *Bartlets* case.

Judgment affirmed. *per Curiam.*

agreed in this, that the Judgment was not erroneous, but well given, and therefore by the Rule of the Court, the said Judgment thus given at the Assises, was affirmed.

Term. Pasch. 12 Jac. B. R. &c. Mo. 834. Godb. 247. Cro. Ja. 341.

Nota, that afterwards (S) Termin. Pasch. 12 Jac. B. R. this case was recited again by the Counsel for Sir Christopher Heydon, that whereas in an Assise, a Judgment was given against him, at the Assises held for the County of Norfolk, and the same affirmed here in a Writ of Error, by him brought, and for the reversing of this Judgment here given against him, a writ of Error was by him brought in the Exchequer Chamber, and had obtained a supersepeas, to stay the execution, and now having notice, that no writ of Error lies in the Exchequer Chamber to reverse the Judgment given here, upon the first writ of Error, therefore he brought a writ of Error in Parliament, to reverse the Judgment here given against him; upon the writ of Error, George Croke moved the Court for a writ of Execution, upon the Judgment here given in the writ of Error, of affirmance of the Judgment given at the Assises, by the Judges of Assise. Coke chief Justice. No writ of Error lies in the Exchequer Chamber, upon a writ of Error brought here, and so a Judgment here given; in affirmance, or in disaffirmance of the Judgment before given; but in trespass, Detinue, Ejectione firmæ, where the Judgment is originally here, upon a suit here begun, a writ of Error lies in the Exchequer Chamber, but not otherwise; and this Supersedeas was here had of an ignorant Clark, in the absence of his Master, and that by Buller an Attorney, who came unto him, and said, that he had been with me, and that I had agreed unto it, and this was the common course, to bring a writ of Error in one hand but not sealed with wax, in the other hand, & so he obtained a supersedeas by this practice, for this an Attachment was granted unto him. And as to the Attorney which hath so granted the Supersedeas, without any writ of Error hanging he is to be favored, because this was so done, ex ignorantia; but this is to excuse him, a tanto, sed non a toto, for that ignorantia facti excusat, and therefore for this his Act thus done he is to be committed (and so by the Rule of the Court he was.) Also as to the writ of Error, to be brought in Parliament, you cannot have this, but of necessity you ought to have the Kings hand, and his License to shew for it, otherwise you can have no writ of Error there; also in case of a writ of Error brought in Parliament, the chief Justice is to carry the Record, and the Transcript of the same thither, to the upperhouse, and to bring back with him again into this Court, as the entry of this is to be here, coram rege, and they there to proceed upon the Transcript only: The Petition to the King, for to have such a Writ of Error out of the Chancery, is to be directed to the Lord chief Justice, commanding him to bring the Record before the King in Parliament, to be there redressed; and the King begins in this manner (S) fiat justitia, 23 Eliz. Dyer, fol. 375. placito 19. Whalleys Case, touching a writ of Error brought in Parliament; upon this the Term and Roll of the Record, and a Transcript were brought, by Wray chief Justice, in superiorem cameram in Parliamento; the Roll was remanded in Banco regis, and the Transcript remain in Curia Parlimenti, but no mention there made of any Supersedeas granted, 1 H. 7. fol. 19. & 20. Flowerdews Case. A good Case, as touching the manner and form of a writ of Error brought in Parliament, 1 E. 3. fol. 46. b. placito 65. touching a writ of Error brought in Parliament: As to the granting of a Supersedeas in this Case, upon the writ of Error brought in Parliament, upon the Judgment given here in the former writ of Error; we will of this be very well advised, and the Records in this point shall be examined, 5 E. 2. Fitz. tit. Error, placito 89. touching a writ of Error brought in B. R. at Westminster, to reverse a Judgment given in the Kings Bench in Ireland; the Record shall not be removed to this Court, out of the Court there, but only a Transcript of it, and that for two reasons. 1. Because the Record

29 *Eliz. Dyer*, fol. 375. &c. Error in Parliament.

1 H. 7. fol. 46. placito 65. error in Parl.

1 E. 3. fol. 46. &c. Error in Parl.

5 E. 2. Fitz. title Error placito 89. &c.

Record there, as here, remanet coram rege. 2. For prevention of the dangerousness of this by Sea, and so subject to peril and to miscarry, and therefore a Transcript shall be sent hither to us, but no mention is there made of any Supersedeas: There is here a double Judgment, and Execution hath been once delayed already by a Supersedeas, upon a Writ of error brought in this Court: It appears 5 E. 2. that they which do conquer, may impose what Laws they please upon the conquered; and therefore King Henry the third, ordained Ireland to be governed by the Laws of England, and that they should be subject to the Laws of England, 14 H. 3. 9 Februarii. 1229. called Statutum Hiberniæ, made at Westminster, and therefore Errors in their Proceedings, in Judgments there given in the Kings Bench there, are to be reversed here, because they are subject unto the Crown of England: And our Parliaments here, in ancient time, did bind them of Ireland, 34 Assisar. placito 7. Judgment given in a Writ of Error in the Kings Bench in Ireland, a Writ of Error upon this brought in the Kings Bench in England, and the same well lieth; as it is there held by the Court, and there by Knivet, the C. B. there upon a Writ of Error, do send but transcriptum brevis, and of the Record, but not the Original it self; but in Ancient Demesn, Franchises and Justices of Assiss. upon a Writ of Error, do send the Writ Original, and the Record it self, and not only a Transcript of it; yet by 37 Assisar. placito 5. per Finchden, there Ireland do not send the Original Record, but only a Transcript, 8 H. 5. Fitz. tit. Error, placito 88. If one sues a Writ of Error in Parliament, he shall have a Scire facias out of the Parliament to the party, and it shall be returned at the next Parliament, for the Common day in a Scire facias, is forty days, as it is not certain when the Parliament shall be dissolved; and there by Hankford, if a Writ of Error be brought in Parliament, upon a Judgment given in B. R. the Record ought to remain with the Justices, and they are to shew the Record to the Parliament, or to send a Transcript of it: But if the Parliament be dissolved before the Errors are discussed, then all is gone. Dodderidge Justice agreed with him herein. Coke chief Justice If no presidents can be found for the granting of a Supersedeas in this Case, we will not grant the same; and in a Case of this nature, and of so great a consequence, we which are Judges, do not use to go but with leaden feet, and the King hath very well shewed to us the way, by his saying, Fiat Justitia; we will therefore see the Records; and so the Rule of the Court at this time was, that as to the Supersedeas prayed, this to remain in Court, neither allowed, nor yet disallowed. At another time, George Croke prayed to have Execution upon the Judgment here affirmed, notwithstanding the Writ of Error here brought in Parliament, and that no Supersedeas may be granted in this Case, after a Judgment here affirmed in a Writ of Error, for the mischief to the party, by being delayed of his Execution; it appears by 2 H. 7. fol. 12. A. 5 H 7. fol. 22. and 9 H. 5. fol. 13. A. In what Cases a Supersedeas shall be granted, and in what not, and by 6 H. 7. fol. 16, what Writs are in themselves a Supersedeas in Law. 16 H. 7. f. 12. a. b. In a Writ of Error, the party shall have but one Supersedeas; here are two Judgments, and by 8 H. 5. upon a Writ of Error brought in Parliament, no Execution is to be stayed. Coke chief Justice. This is a Case not obvious in a Writ of Error, upon a Judgment affirmed here in a Writ of Error; and if there never hath been a Supersedeas granted by this Court, upon a Writ of Error brought in Parliament, to reverse a Judgment here given, we will not here begin a President in this kind, we having no Book, nor yet President for to warrant this; and therefore it may be as well said in this Case, as Littleton in his Chapter of Knights Service, fol. fol. 23. placito 107. 108. said upon the Statute of Merton, cap. 6. of disparagements of the Heir in Marriage, that no Action may be brought upon that Statute, in regard it was never yet seen nor heard, that any action was ever brought upon this statute, & that if an action might be had upon this matter, it shall be intended at sometime or other to have been put in

14 H. 3. &c.

34 Assises, placito 7. &c.

37 Assis. pla. 5. 8 H. 5. Fitz. tit. &c.

2 H. 7. fol. 12. a. &c.

Littleton chap. Knights Service, fol. 23. &c.

Ure: There are only five Books in the Law which do speak of this point, (S) of a writ of Error in Parliament, upon a Judgment given here in this Court, the which are, 42 Assisar. placito 22. The Countess of Pembrokes Case, 22 E. 3. fol. 3. Fitz. tit. Error, placito 8. a writ came to Sir William Thorp Chief Justice de B.R. to cause to be brought the Record and the Process in the Parliament, of a Judgment which was given for the King at the Suit, &c. And note that a Petition was there made to the King, before that the writ was granted; and so the Roll, in which the Process & the Judgment was brought by Sir William Thorp into the Parliament, upon which the King did assign certain Counts and Barons, and with them the Justices to determine the business; and before any thing was done herein, the Parliament was ended: There it is said, that the Judgment cannot be reversed but in Parliament, and for that this was ended in this business, Ulterius nihil agendum est, 8 H. 5. Fitz. tit. Error, placito 88. before remembred, 1 H. 7. fol. 19. & 23 Eliz. Dyer, placito 375. Whalleys Case; but in all these Cases, there is no president of any Supersedeas granted, and therefore to make a new president of this in this Case, periculosum existimo; but this may be moved for a question, to see, examine, and to consider of it, whether this writ of Error, depending in Parliament, be not in it self a Supersedeas to the Court; but of this, it is very fit for us to be well advised herein: The Case in 1 H. 7. f. 20. is a very notable Case; if the Error be apparent in a writ of Error here brought, we use to Bail the Defendant; if he be taken in Execution, shall they in Parliament do so, upon a writ of Error there brought to Bail the party? this they cannot there do, for the great delay that may be, for that is altogether uncertain how long, or how little and short a time the Parliament will continue, and for this reason they cannot there Bail the party, and this proves a great difference to be between a writ of Error brought in Parliament, & a writ of Error brought here in this Court, so that it is good for us to be very well advised of all this, whether for delay only, this writ of Error is here brought, and then whether this writ of Error be not a Supersedeas in it self, as in a second deliverance; the Certiorari is, 5 H. 7. fol. 22. before remembred, where a Supersedeas shall be granted, and where not. Croke Justice. If no president can be shewed to enduce us to grant a Supersedeas in this case, we ought not to grant this. Dodderidge Justice. In 1 H. 5. The Parliament there made an Order, upon which the Proceedings were stayed by a Supersedeas. Haughton Justice. If 1 H. 5. be as it is remembred, this is then a good proof that a Supersedeas here ought not to be granted; there is no such ordinary Process in a writ of error brought in Parliament, as in a writ of error brought here in this Court, and this is very apparent by the Case of 1 H. 7. fol. 20. Coke chief Justice. If a writ of error be brought here upon a Judgment given in the C.B. we are to have but Tenorem Recordi here; whether this writ of error be a Supersedeas to the execution there, 34 Assisarum, placito 7. Fitz. tit. Error, placito 81. A good case as touching a writ of error here brought to reverse a Judgment given in the Kings Bench in Ireland, there debated at large, as to the proceedings herein, and what Record is to be removed, where the Original, and where a Transcript only of the Record is to be sent, 21 E. 3. fol. 46. error in Parliament shall not be reversed but by another Parliament, 7 H. 6. fol. 28, 29. by Cottesmore, the Parliament may err, and this shall then be reversed by Parliament, & non aliter, for there is not a higher Court than this is; and so agrees, that the Judges de B. R. may reverse their own error in the same Term, without suing by a writ of error in Parliament; and so for this time this Case was adjourned: At another time George Croke, & Noy, took exceptions to the writ of error, that the same is not good, being not warranted by the Presidents, this was a writ of error to remove a Record upon a Judgment given, inter, &c. before Sir Thomas Flemming, militi. capitalis justiciarius ad placita coram nobis tened' assignat', &c. This left out, so that his addition is here omitted and left out. 2. For that in this

42 Assisar. placito 22. &c.

8 H. 5. &c.

1 H. 7. fol. 19.

23 Eliz. Dyer &c.

1 H. 7. fol. 20.

5 H. 7. fol. 22.

1 H. 7. fol. 20.

34 Assisar. &c.

21 E. 3. fol. 46.

7 H. 6. fol. 28, 29.

this Writ of error, he hath made no mention (as he ought to have done) between what persons the Judgment was given in certain, it being not here shewed who was the Plaintiff, and who the Defendant, and this contrary to the Register, & to a Writ of error brought in Parliament. 3. For the omitting of the County & place where the Assise was taken; here it is generally, ad Assisam nostram at Norfolk; also in the certification of the record, no time is limited when, and so the proceedings erroneous: But if the Writ of error be good, yet this is no cause for to stay the execution, this Writ being only for delay; and therefore, seeing that no president can be shewed to stay execution, the Court was prayed to grant execution: The rule of all the Books being, that when an execution is once stayed by a Supersedeas, not to have another Supersedeas upon a second Writ of error brought, being in the case of a Judgment given, in affirmance of a former Judgment, and no president can be shewed in such a case to stay execution; also as well as he ought to make mention of the parties in the Assise, in the Writ of Error, so he ought also to make mention of the Assise here; he hath here mentioned the parties, but not shewed what kind of Assise this was, this ought to be certainly shewed. Against this, & for the Supersedeas it was argued by Sir Francis Bacon the Kings Attorney, and by Davenport, and urged that generally upon a Writ of error brought, a Supersedeas is granted, and this general comprehends all: that this is the rule and practice of Law, and to this purpose is 6 H. 7. fol. 15. b. An Information for the King in the Exchequer Chamber before all the Justices, against divers Merchants-strangers of the Still-yard, for divers Merchandizes Shipped and not Customed, Process continued, till Judgment given against them for the King: Upon this, they brought a Writ of Error, returnable before the Lord Chancellor and Treasurer, at a day certain, at which day of the return, neither the Chancellor nor Treasurer came, and so the same discontinued by their not coming; and so upon a second and a third Writ of Error, all discontinued by their not coming; there a Supersedeas prayed and awarded upon the third Writ of Error: Also this Writ of Error is well warranted by president of Parliament, this being drawn by former Presidents; this Case is rare, but familiar: As to the Supersedeas, it may be said, that in regard the Roll remains here, and only a Transcript there, and therefore a Supersedeas: The difference between the Common Law and the Civil Law is worthy observation, and herein the Common Law doth much surpass the Civil Law, for in their Appeals, the Appeal doth put in suspence the very Judgment it self there; but at the Common Law, a Writ of Error being brought doth only put in suspence the Execution of the Judgment, usque, &c. and this is the better way: And if it shall be so in the Proceedings here in this Court, upon a Writ of Error here brought upon a Judgment given in the C. B à multo fortiori, it shall be so, between the Proceedings in this Court, and in the High Court of Parliament, the same reason, the same Law. As to the objection made, because they sit here in this Court, ad terminos certos, but it is not so in Parliament, and that therefore, herein there will be a difference: As in answer to this, the same is no difference, for no prejudice can happen by this, for if the Parliament be ended, the party may then proceed upon the Judgment and Record here: As to the omission of the addition, this is not material, being only an addition of Honour; and a Writ of Error shall not abate for false Latine, Register fol. 17. a President there of a Scire facias de errore corrigendo per Parliamentum, upon a Judgment given in Assise of fresh force at Bristol; this President comes not home to the Case now in question, nor is any Warrant for this; but in the old book Entries, fol. 302. there is a direct President of a Writ of Error in Parliament, to reverse a Judgment given in the Court of the B. R. as this case here is; then as to the chief matter, whether the Writ of error here in it self, is not in Law a Supersedeas to this Court, for to stay Execution, that the same is a Supersedeas; the reason of Flowerdews Case, in 1 H. 7. fol. 19. & 20. doth prove

6 H. 7. f. 15. b.

Difference between the Common and Civil Law, &c.

Old Book of entries, f. 302.

1 H. 7. fol. 19. 20. &c.

prove this, who being in a Writ of Trespass, condemned in B. R. and in execution, deliberatus mariscallo postea, he brought a Writ of error in Parliament, directed unto the chief Justice, to certifie the Record in Parliament indilate: It was moved there amongst the Judges, whether first he ought not to shew unto them there a clear and pregnant error in the Record; for otherwise, as it is there said, all the records there by Writs of error, might so be brought into the Parliament, & there the party in the first Action shall be without his execution by all the Judges in the Exchequer Chamber to this purpose; that in such a case first to have a Bill indorsed by the King, and upon this the Chancellor shall make him a Writ of Error, and then the chief Justice of the B. R. shall bring with him in Parliamento in camera Parliamenti intra dominos, the said Writ of Error, & prædictam billam sic indorsatam, and the whole Roll, in quibus continentur placita, & processus, in quibus supponitur error, and there shall leave transcriptum totius recordi, & processus cum clerico Parliamenti; and the chief Justice shall bring back with him all the said rolls into the B. R. for that the Rolls concern other matters; and also for that the Court of B. R. may afterwards, if the Judgment be affirmed, proceed to execution if it be not had before: And two reasons are there givtn for the bringing back of the Record, and leaving there a Transcript. 1. Because the same concerns other matters. 2. (Which is chief) Si judicium affirmetur, potest progredi ad executionem, so that by this in that interim, they could not proceed to execution, 5 E. 2. Fitz. Tit. Error, placito 89. the case of removing a Record out of Ireland, they to proceed there to execution after Judgment affirmed here, 20 H. 6. fol. 4. a Scire facias sued out of a Fine against the Tenant who was served, the demandant prayed execution, and for the Tenant a Writ of Error was cast in Court, to remove the record in B. R. by the Justices: notwithstanding this Scire facias, we ought to obey this Writ of Error, and to send the record in B. R. and by this our hands are closed up, and we cannot proceed, in regard that our record is removed; this there so said by Ascough Justice, and so agreed by Newton, 2 H. 7. fol. 7. Granthams Case, who was condemned in Debt, brought a Writ of Error in B. R. and discontinued this; the Plaintiff had his Execution, and a Capias ad satisfaciendum against the party, &c. afterwards in the same term, another Writ of error was brought de Recordo quod coram vobis residet, errors assigned, and a Scire facias ad audiendum errores: It is there said, that by this new Writ of error, notwithstanding the Execution, that the hands of the Justices are closed ad faciendum aliquam executionem, 21 E. 3. fol. 24. touching the same matter; and in 7 & 8 Eliz. Dyer, fol. 244, 245. placito 63. If a Writ of Error be delivered to the chief Justice, or to the Clerk of the Treasury, this shall stop the awarding of Execution, 15 E. 4. fol. 21. b. accordingly; a Writ of error in C. B. returnable in B. R. if the Judgment be affirmed, the party shall sue Execution in B. R. and not in the C. B. and the Writ is there recorded, & processum cum omnibus ea tangentibus nobis mittatis, so that by this Writ of error, the hands of the Justices are foreclosed, as to do Execution; otherwise it is of a Writ of error in the Exchequer, returnable before the Chancellor and Treasurer to amend the Rolls, and afterwards they in the Exchequer to do Execution. At another time Haughton Justice rehearsed the Case as it stands in Court upon this Writ of error: And whether this Writ of error as it here brought, be sufficient to remove the Record or not, is the first Question. As to this Writ of error, five exceptions have been taken unto it: The Writ of error as it is here brought is not good, and for one cause principally: The first exception which hath been taken, was for that in this Writ of error, it is not expressed who was Plaintiff, and who Defendant in the Assise. Secondly, because it is to remove and to certifie the record, sub sigillo vestro; the Writ is good notwithstanding these two exceptions: The first exception is against express Presidents, and against the common course of a Writ of error, F. N. B. fol. 24. in a Writ of error no mention is made who is the Plaintiff or the Defendant; and so is the common

5 E. 2. &c.

2 H. 7. fol. 19. &c.

21 E. 3. f. 24. 7 & 8 Eliz Dyer, fol. 244. 245. pla. 63.

15 E. 4. f. 21. b.

F. N. B. f. 24.

common course here in a Writ of error, to say inter such a one and such a one, but when he concludes ad damnum, there to nominate the party who is damnified; & this is the common course and experience, and so the Writ is good notwithstanding these two Exceptions, being against the Presidents and common experience also: The other two Exceptions are not so material to be discussed at this time, but in Parliament, when the Record is removed thither; but in the regard that these Exceptions have been also taken to the Writ as before, I hold the Writ, for these Exceptions not good; the one Exception is for the omission on the Warrant of their Commission as to say, per breve certainly, in regard it may be sine breve per billam, as well as per breve, and therefore this is to be shewed in the Writ of Error; and this to be so, is well warranted by Presidents: Another Exception, because that in the Writ of error there is no mention made in what place the Assise of Novel Disseisin was taken, and this ought to be expressed for the more certainty, and for these two exceptions the Writ is not good; but the great cause of all why this Writ of error here is not good, is for the apparent variance that is between the Writ of error in Parliament, and the Record of the Assise, taken coram Tho. Flemming milit. capital. Justic. ad placita coram nobis tenend. assignat. & Johan. Dodderidge, milit. Justic. ad placita, coram nobis tenend. assignat. In the Writ of error in Parliament, for to remove the Record, the addition in the Commission is omitted, and after the name of Flemming, coram nobis, is there omitted; but this is expressed after the name of Dodderidge, and this is a material variance, and this is such a difference between the Writ and the Record, that by this the Court hath no sufficient Warrant for to remove the Record: These three things are to be observed in a Writ of error. 1. It is to be rightly observed, before whom the plea was held. 2. In what manner this was held. And 3. Between what persons this was. For the first, The same is proved by 28. H. 6. fol. 11. error in the C. B. to remove the Record; the Writ was; Rex Johanni Prisot, capitali Justiciario nostro de Banco salutem, quia in recordo, & processu ac in redditione loquelæ quæ fuit in curia nostra, coram vobis, inter, &c. whereas the Writ should have been, coram vobis & sociis vestris, the Record and the Rolls being all of such a form, and therefore no such Record there was in this place, for that all the Records here are, Coram Johanne Prisot, & sociis suis, so the Writ held to be insufficient, and the party there was driven to have a new Writ of error: And so in the Exchequer, if the Writ be Rex. Thesaur. & Baronibus scaccarii nostri salutem, quia &c. in recordo, &c. quæ fuit coram vobis, &c. and the records there are coram Baronibus, and not coram Thesaur. & Baronibus, and therefore bad. For the third, between what persons. 9. H. 6. f. 4. John Frankner Citizen of London, brought a Writ of Debt against a Woman, as executrix to one B. and in this recovers; she brings a Writ of error to the chief Justice of the C. B to have the record brought into the the Court of B. R. by which the record was sent into the B. R. and the Justices there did see the Writ by which the record came before them; which Writ was false, for the same was of a record which was between the Woman, and B. the Testator, whereas it should have been between the Woman and the said J.F. and so not good, and so the record came in without any Warrant by the Justices, and so no record by this Writ remained to B. R. but was still in the C. B. and therefore they would not proceed unto the errors: Then as to the manner, this ought also to be pursuant: if it was per breve this ought then to be so; and so if it was per Billam, the Writ ought to be accordingly; and so if it was sine breve; the Writ of error still ought to be pursuant: as for the manner as to this, 2. R. 3. f. 2. b. Collins Case, in a Writ of error the same ought to pursue the manner, and if error be alledged to be in these points, the Record by such a Writ of error is not to be removed, if the same doth vary in any of these points. So here; in this principal case, the addition before is part of his name, and this is mistaken, and notwithstanding this appears to be all one, yet (as it ought to be) this is not pursuing the original record, and therefore not good

Three things to be observed in a Writ of Error. 28. H. 6. f. 11.

9 H. fol. 4.

2 R. 3. fol. 2. b &c.

good, but it hath been said, that this is a variance, only in point of surplusage, and in this regard, the same is not so much material, but notwithstanding this allegation, this variane shall make the writ to be vitious; as touching this, is the Case in 2 Eliz. Dyer, fol. 173. Sir John Parret was outlawed, upon a Judgment in Debt, where in the Orignal, the Plaintiff had his addition of Sadler, and in the Scire facias, for execution, it was Salter, a writ of error was brought, in which the Plaintiff was named Salter; this writ was directed to Sir Anthony Brown by name, &c. de errore, &c. and this without warrant, in regard there was no such original, he was therefore enforced to bring a new writ of error; and yet here was a variance only in surplusage, (S) in the alias dictus. 3. Assisarum, placito 17. John Capellanus of the Church of Dale, brought a writ against A. upon traverse of the Action, it was found against the Demandant, who brought an Attaint, by the name of John Parson, of the Church of Dale, and for this variance, by Judgment, the writ abated, and yet this was a variance only in Circumstance. 39 E. 3. agrees with this; there Clericum for Capellanum, held a material variance; but it hath been Objected, that this should be good by way of the relation of the words ad placita, &c. & Johanni Dodderidge, Unius Justic. ad placita, coram nobis tenend. assignat. that this last clause ought to have relation unto Flemming also; but this cannot be so, for as they have in their Commission, two several additions, so these both ought to be specially named in the writ of error, and for the omission of this, the writ is not good; and if the Record had been removed by this writ, this had been so done without any Warrant for the same; and if it be so that this writ of error, here brought, is not good; then here is an end of the case, without saying any thing to the other matter, as touching the Supersedeas, but posito, that this writ of error, as it is, be good, then whether a Supersedeas shall be granted, or not, and whether this Writ of error be a Supersedeas, of it self, or not? As to the force of this writ of error, the same is of such force, as that by this writ of error, our hands here are closed up, as to the doing of execution, this doth stay execution, and this is a Supersedeas, in its nature and this hath not been much withstood, nor gainsaid; but what stay of execution this is, all experience proves this generally, a writ of error is of this nature; and if we have granted execution, a Supersedeas may well be granted, and this is the common course. All inferior Courts, are to stay execution, after a writ brought, in a higher Court, and this appears by 9 H. 5. fol. 13. the Abbot of St. Albans case, where a second writ of error was there brought, and there it is said, that a writ of error is a Supersedeas of it self, to stay execution upon the Judgment; and 6 H. 7. fol. 15. b. before remembred, the best book in the Law, for this point, it is there said, that the Judges ought to stay execution, after a writ of error brought upon their Judgment; so that it appears very plainly, that a writ of error, generally brought, is in its nature a Supersedeas. But the question here in this principal case, is grounded upon two reasons; here is error upon error, after two affirmative Judgments, and a Supersedeas granted, once before. whether now in such a case as this here is, this writ of error here, shall have the same power & force as other general writs of error, as in the case of an Attaint, between which, and the writ of error, as to this matter, there is no difference, but they are all one. 5 H. 7. f. 22. proves this, the reason there given, that a writ of error shall be a stay of execution, is, for that hanging the writ of error, it stands indifferent, how the Court will determine of this matter, whether they will affirm, or reverse the Judgment, and therefore good reason to stay the execution in the interim, and therefore the doubleness of the Judgment, being the first reason to make the difference, is no reason at all, nor makes any difference as to this; the second reason made in regard that the body of the Record here remains, and only a transcript of the Record remains there in Parliament; and that this writ of error may only be for the greater delay, and therefore, execution not to be stayed: but this no reason at all, nor yet makes any difference, though it be in Parliament. For as this Court here hath Jurisdiction

2 Eliz. Dyer, fol. 173. placito 16. & 6.

2 Assisarum, placito 17.

39 E. 3.

9 H. 5. fol. 13. &c.

6 H. 7. f. 15. b.

5 H. 7. fol. 22.

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on over the Court of C. B. so the high Court of Parliament shall have the same Jurisdiction over this Court; and as a writ of error here brought, shall be a Supersedeas, to stay execution upon a Judgment given in the C. B. so a writ of error brought in Parliament, upon Judgment given here in this Court, shall be also a Supersedeas, to stay execution here, and no difference there is at all between a writ of error brought here, and a writ of Error brought there; as to this matter, the authorities in point, are but few, and have been before remembred, but this point is fully determined by the book of 1 H.7. fol. 19.20. before remembred, Si Judicium affirmetur potest progredi ad executionem; out of this may well be collected a very strong Warrant, that in the interim they ought not, if affirmed, then, &c. therefore before Judgment be affirmed, not to proceed. As to the granting of a Supersedeas, the same is not requisite, for that the Writ of error is in it self a Supersedeas; and so notwithstanding two of the exceptions taken, the writ of error here brought is not good, but for two other of the exceptions, they are good, and of force, but they cannot now come properly in question before us; but for the fifth exception, the writ of error is not good, and so as the case now standeth, if this writ of error shall be here adjudged by us to be bad, then this Court is at liberty to grant execution, and so the writ of error being here bad, and vitious, execution therefore ought to be granted. Dodderidge Justice. Two questions have been here moved, 1. Whether this writ of error, as it is, be a good warrant to remove the Record? 2. Whether the Court shall grant execution upon their Judgment, or shall grant a Supersedeas to stay execution; and whether this writ of error be a Supersedeas of it self, to this Court, to stay execution, until the matter be there determined in Parliament? To this writ of error, 5 exceptions have been taken, that the same shall not be good; to these I shall speak, this case with the circumstances observed, is very rare, there being but few books and Presidents, in the point; the writ of error here is good, and a sufficient warrant to us to remove the record; as to the exceptions that have been taken; the first and the fourth are agreed, not to be material; the third and the fifth insisted upon, as being only material, but these are more properly to be debated in Parliament, and not here; as to these no reason hath been given, to stay the removing of the Record; the second exception is the most material exception; First the Rule is put, Coke 3. pars fol. 2. in the Marquess of Winchesters Case, out of 9 H. 6. fol. 1. and the same affirmed in 7 Assisarum, placito 5, and 26 Assisarum, placito 31. and to be agreed, that generally in all cases, where a man is to execute a Record, or to defeat a Record, there no variance ought to be between the writ and the Record and in 3 H. 6. f. 16. a. this rule is there also affirmed, where by Paston, if the writ of error be not according to the first record, the writ shall abate, in the Case put out of 9 H. 6. f. 4. it is very apparent, that there was no writ of error sufficient to remove the record, for the writ there mentions the suit to be between other persons, contrary to the record, and so not the same record, in 1 & 2 Phil. and Mary. Dyer fol. 105. a writ of error brought here, upon a Judgment given in a writ of entry in the post against, &c. in the C. B. the original writ of error was de Loquela quæ in curia nostra, & coram justiciariis nostris, & per breve nostrum, inter partes prædict. and the Judgment, and the Record was given and entred, anno 37 H. 8. and the writ of error was brought anno 1 E. 6. and this adjudged to be no warrant to remove the record into the B. R. to this purpose is 9 H. 6. fol. 4. and 2 R. 3. fol. 2. Collins Case, and 4 & 5 Phil, & Mary. Dyer, fol. 164. a record was removed, and brought in B. R. out of a Court of ancient demesne, in the County of Darby, per breve de falso judicio, ad sect. &c. versus, &c. the writ was, sub sigillo tuo, & sigillis quatuor legalium hominum ejusdem curiæ; where it should be, sub sigillo tuo, & per quatuor legales homines ejusdem curiæ, so that this is a material variance, upon which record they could not proceed, and by 4 H. 6. fol. 4. per omnes justiciarios, in such a case, where matter of substance is wanting in the writ of false Judgment, or in a writ of error, that the Plaintiff shall have another writ out of the

1 H. 7. f. 19. 20.

Coke 3 pars fol. 2. &c.

9 H. 6. fol. 1. 7 Ass. placito. 5. &c.

3 H. 6. fol. 16.

1 & 2 *Ph.* & Mary *Dyer*, fol. 205.

9 H. 6. fol. 4. &c.

4 H. 6. fol. 4.

the Chancery, directed unto the Justices, de Banco, reciting the matter, and commanding them to proceed to the discussing of the Errors, in the Record, quod coram vobis residet. 2 Eliz. Dyer, fol. 173. Kirks case. John Kirk Sadler, brought an Action of Debt against Parret, who brought a writ of error, directed to Sir Anthony Brown, chief Justice of the C. B. before the return of which, he was removed, and Sir James Dyer, made chief Justice there; the Original was Sadler, but in the Process, and in the writ of error, he was named Salter; also the Writ was directed to one chief Justice, and another chief Justice did certifie the Record, this was not good, but he was forced to bring a new writ of error, De recordo, quod coram vobis residet. 2 Eliz. Dyer, fol. 180. Caverly impleaded B. for Debt upon an obligation, endorsed with condition, to save him without damage touching his account of the Sheriffwick de S. in comitat. Ebor. Judgment was given for the Plaintiff, upon this Judgment, a writ of error brought; the verity of the case was this, the Writ of Debt was brought against Biesley, and another by several Precipes, several issues joyned, and several judgments given, and one writ of error, tantum, brought to remove both the Records, supposing the suit to be inter C. querentem, & B. and others Defendants, the which was not good, in this case, and so for this cause Heywood chief Justice did refuse to receive the Certification into the Court of B. R. 28 H. 6. fol. 11, 12. before remembred, to the same purpose, so that it appears by these cases, that if the writ of error do vary materially from the Record that such a writ of error shall not be a Warrant to remove the Record, so that by reason of such a variance, it cannot be known, what Record ought to be removed; but if the variance be between the Writ, & the Record, and yet it is apparent enough, what Record ought to be removed, notwithstanding this variance, the writ of error shall be good, and the Record by this may be removed. As to the first exception taken; for that it appears not by the writ, who was the Plaintiff, and who the Defendant in the Assise; this is an exception, but for curiosity, being needless to shew this, yet there are express Presidents both ways. Fitz. N. B. fol. 24. Letter D. an Assise removed in the C. B. for difficulty, and there adjudged, a writ of error brought here in redditione judicij loquelæ, quæ fuit coram vobis, per breve inter such and such, and doth not name, who was Plaintiff, nor who Defendant. Fitz. N. B. fol. 25. Letter B. Rex dilecto, &c. cum nos nuper, &c. ad, &c. in recordo, & processu, quæ fuit coram vobis, &c. per breve nostrum; inter W. de T. petentem, & I. de R. tenentem, and so here he names, who was Plaintiff, and who Defendant. In a writ of error, upon a Judgment given in trespass, inter A. & B. there it is known by Circumstance who was Plaintiff, and who Defendant; so as to this error, this hath been resolved to be good, this exception notwithstanding: a second exception, as this case is, this being error upon error, and it is to certifie a Record between such and such, and per breve nostrum, if this be omitted, it is not material; for the Record is without it, singled out, this is good enough, and hath sufficient certainty to be known, and we ought not to be lead by Presidents, if they be without reason, and this is sufficiently supplied here: for a writ of error, if it hath any intendment, notwithstanding an omission of any part be, yet if it may appear, that the Record ought to be certified. 19 Eliz. Dyer, fol. 356. An Action of Covenant brought by A. B. Assignee of C. D. the party named in the Indenture, upon which a recovery was had; the Defendant brought a writ of error, the writ was, between A. B. querent. and F. G. Defendant, omitting the words (assignee de C. D.) which was in the writ, and Count de Covenant, exception, that the Record could not be removed by this writ of error, for that there was no such Record. Manwood agreed this to be so, for that the word Assignee, is the substance of the action of Covenant, to the Plaintiff, and the writ of error is founded upon this Record, and so ought to agree with it. But all the other Judges were of a contrary opinion, and that A. B. which is the entire name, and sur-name of the Plaintiff is sufficiently, mentioned in the writ of error (without the other additions to remove the Record and

2 Eliz. Dyer, fol. 173. &c.

2 Eliz. Dyer, fol. 180.

28 H. 6. fol. 11, 12.

Fitz. O. B. f. 24. D.

Fitz. N. B. fol. 25. B.

19 *Eliz. Dyer*, fol. 356.

and so the same shall be taken good by implication, Pasch. 20. E. 3. Fitz. title Brief, placito 251. in Escheat, the Writ was Feloniam fecit pro qua abjuravit regnum, the Writ was challenged, for that it did not shew, what Realm he abjured: Yet the Writ was awarded good, and Hillar. 31 E. 3. Fitz. title Brief, placito 327. Baron & feme brought a Writ of Ravishment of I. the eldest son and heir of the wife which was ravished: Judgment demanded of the Writ, for that the wife being living cannot have an heir; by the common Law there it is said, that it shall be intended by the Writ, to be the son of the wife by another husband, and so the Writ held good; so here in this case it shall be implyed, this to be here per breve. In an Assise there are four Commands made to the Sheriff. 1. Quod faciet tenementem illud reseisiri, this is to quiet the possession. 2. Videre tenementum illud: to have the view. 3. Summoneas eos per bonos, &c. to summon the Jury. 4. Pone per vadios, & salvos plegios, &c. here Sommoniti, & capti, &c. which implys this to be per breve, and this exception notwithstanding the Writ here is good; the third exception, and upon which it hath been very much relied, and which is the greatest of all the rest, and yet notwithstanding this exception, lay all here together, and the Writ is good, where the sole difference was in the omission of a surplusage, being a part of the addition of the name which was but surplusage, nuper justiciariis nostris ad Assisas capiend. tenend. assignat. coram fidel. Tho. Flemming, & Johan. Dodderidge, &c. ad Assisas tenend. assignat. this refers to them both, and so good; this is only a denotation of the name and of the person, and doth not concern any thing touching their Jurisdiction; here the nomination of the Person is certain enough; the omission here is only in point of surplusage, therefore good; if it had been coram justiciariis nostris Tho. Flemming, & Johan. Dodderidge, ad placita coram nobis in Comitatu Norfolk ad Assisas capiend. tenend. assignat. this had been good and sufficient, 6 E. 6. Dyer. fol. 77. a good Case to this purpose. In a Quare impedit. Judgment given at the Assises, a Writ of Error here brought in B. R. directed to the Chief Justice de banco, scilicet quia in recordo & processu, ac etiam in redditione judicii, loquela quæ fuit coram vobis, & sociis vestris per breve, inter, &c, it was there moved, that this Writ was false, for that by all these words it shall be intended, that the Judgment was given, coram justiciariis de Banco; whereas in truth it was by the Justices De nisi prius; in hoc dubio Bromley chief Justice herebat, sed tandem, hoc non obstante the first Judgment was affirmed; and this was a greater case than our case here; and this Writ of Error did remove the Record: But a variance which shall be material, ought to be such a variance, as makes the Court to be in a doubt, what Record they ought to certifie, and this shall be material, but otherwise it is, where the matter is not made doubtful; our Case here is in a Writ of Error, upon a Writ of Error, and so no doubt is there here of what Record is to be certified, this is set forth unto us in individuum, and so good. The fourth exception because the Writ of Error hath these words in it (S) Sub sigillo vestro; this is not worth the speaking unto, this being the form of all Writs of Error. 23 Eliz, Dyer. fol. 375. Whaleys case. 22 E. 3. fol. 13. 1 H. 7. fol. 19. 20. 8 H. 5. Fitz. title error placito 88. all agree for this manner; so that these are words of course; The fifth and last exception, because in the Writ of Error, no mention is made of the place, where the Assise was taken; but the Writ of Error here doth mention this where it was taken; and this is to be sent into the Parliament, & omnia ea tangentibus. 2 E. 3. fol. 51. old print, placito 11. which is a notable case, Geffry Scorlage, brought a Writ of Error in Parliament, upon a Judgment given in the Exchequer; divers exceptions there taken, and to the Writ of Error for the omission in this of the word Communitas, yet notwithstanding, this was ruled good; this is a good case and very observable, for divers things, which was in a Writ of Error at the common Law, in Parliament, before the Statutes in this case made. 2. What was here the ancienter custom. 3. That the record was well removed, the records, and book authority for this learn-

Pasch. 20. E. 3. Fitz. tit. Bre. placito. 25.

Hil. 31. E. 3. Fitz. title. Bre. placito. 327.

6 E. 6. Dyer, fol. 77.

23 Eliz. Dyer fol. 375. &c.

2 E. 3. fol. 51. &c.

Old book of entries. f. 302. &c.

learning are not many, in the old Book of Entries, fol. 302. one President in the point only. 23 Eliz. Dyer, Whalleys Case, the Roll of which case, if it could be found was our very case. As to the other point touching the Supersedeas, the writ of error being good, it is not now in our power, either to award, or to stay execution, for our hands are by this writ of error closed up; every writ of error being clearly a Supersedeas of it self; where in a writ of error, the party hath once had a Supersedes, and this writ abates by default of the party himself, there for a rule to be observed, in another writ of error by him brought, no second Supersedeas shall be awarded; otherwise it is, if no default be in the party, but the writ of error doth abate by the not coming of the Justices; in these cases if he hath 10 writs of error, one after the other, all these are of themselves a Supersedeas to the execution, and this appears by 6 H. 7. fol. 12. for this writ of error doth close up our hands; and so in this principal case the writ of error here brought is good; and by this the record is to be removed, and execution to stay; this writ of error being of it self a Supersedeas to the same. Croke Justice. In Angustiis positus sum. In this writ of error I confess, facilius est destruere, quam construere. Sed melius est construere, quam destruere. I desire to choose the better part, rather than the easier part. I shall insist upon the fifth and last exception; omission (per breve) the fifth exception taken, because it is not shewed who was the Plaintiff, and who the Defendant, whether this be so material an exception, or not, as it hath been urged? I deny this to be so, nego consequentiam, I observe this for a rule: If you have one (&) this (&) will well distinguish who is the Plaintiff, and who the Defendant; the first that is mentioned is the Plaintiff, the second the Defendant, (cum breve) by this word (&) it appears plainly who was the Plaintiff, and who the Defendant; another exception taken, quia sub sigillo, this hath been well answered, communis cursus, communis forma is so, 5 E. 2. 8 H. 5. 1 H. 7. 23 Eliz. Dyer, Whalleys Case before remembred; all of them do concur in this, as to the exception, because there is omitted (per breve nostrum) I doubt of this, because it may be per billam, vel sine breve; therefore this ought to be certainly shewed, for it was per breve, and we by this writ of error, ought to remove Assisam Loquelæ, which was sine breve, and so not the same, and therefore not good. As to the exception taken for not shewing, &c. the place where, this hath been well answered. As to the other exception (S) ad Assisas tent. coram. T. Flemming milit. capital. Justice, ad placita, and omit the addition subsequent, coram nobis, in this agreed with Dodderidge, if it had been coram Justiciariis nostris. T. Flemming & John Dodderidge, coram nobis tenend. assignat. this addition alone had been good, and refers to them both; but as it is here it is not good, writs are not to abate for every nicety; but here, when he would make a perfect description of the Person, ad placita, a reference in the perclose, shall not suffice by a reference and relation to the first, because this ought to be twice named; and for this omission the writ is not good; so if one doth meddle with the reciting of that which he ought not, and doth vary in it, this is not good, 6 H. 7. in a writ of error, omits (assignat.) this is not so material a variance; for this is but abundans, and this shall not vitiate the writ; here in this writ, he doth not shew ubi placita should be held, nor yet de quibus placitis, and so the Writ of Error not good for these Exceptions; for debile fundamentum fallit opus: Also in the Writ it is Nuper Justiciariis, whereas the same ought to have been adtunc Justiciariis, for that Nuper may be before, or of latter time, so that Nuper is altogether improper: Also it was of Land in Bakenthorp, and it doth not appear in all the Writ, that Bakenthorp was in the County of Norfolk, and so for this cause, the Writ not good: As to the other matter of the awarding of a Supersedeas; if the Writ had been good, we ought then Supersedere executioni, and the ground of my Opinion in this, shall be common experience; and therefore in the Proceedings in London, upon a Judgment given there before the Sheriff, upon which Judgment, a Writ of Error is brought in the Hustings there; this Writ of error

5 E. 2. 8. H. 5. &c.

6 H. 7.

error is a Supersedeas of it self to stay execution, and if any doubt be made, that the party will yet proceed to have execution, then there is a special writ to be directed to him, to prohibit them from so doing, (S) Non debeatis, & minus juste, as appears in Fitz. N.B. fol. 22. I. And so for these exceptions, the writ of error here brought in Parliament is not good, nor a sufficient warrant to us for to certifie the record thither. Coke Chief Justice. The Case here is upon a Judgment given in an Assise by confession, before the Justices of Nisi prius, and affirmed here in a Writ of error; upon which Judgment so given here, a writ of error is brought in Parliament; by the current of all our Books, a writ of error brought in Parliament, upon a Judgment given here, is directed to the Chief Justice, who is the Keeper of records; but the writ ought to be allowed of by the Court. As to a Parliament, first it is good to observe the ancient forms, for in ancient time, the Lords and the Commons of Parliament did sit together in one and the same Room, but afterwards they were divided, and to sit in several rooms, and this was so at the request of the Commons, but yet they still remained but one Court; and of all this I have seen the Records, one in the time of King Henry the first, where all of them did sit together, and mention is there made of the degrees of their Seats; so in the time of King Edward the third, 39 E. 3. afterwards they were divided at the desire of the Commons; errors, and all indivisible things, were to be brought to be discussed in the Upper House; the point here considerable is, whether this writ of error here brought, be good or not, so that by this we have sufficient Warrant for to remove the Record, or sufficient matter of defect in this writ of error to stay a the removing of it, hic labor hoc opus est. No president can be shewed, agreeing with our Case here, in the point of a double Judgment, the Books remembred of, 42 Assisarum, 22 E. 3. 8 H. 5. 7 H. 6. 1 H. 7. 23 Eliz. Dyer, none of these in case of a double Judgment given; this is not material for the first point but it will be material for the second point, 22 E. 3. f. 3. a. the leading Book by which it appears, a Petition to be before sued unto the King, before this writ of error in Parliament is to be granted, by which writ the Roll in which the Process and the Judgment was, was brought by Sir William Thorp Chief Justice, into the Parliament, upon which the King did assign certain Counts and Barons, and with them the Justices for to determine the said business, 1 H. 7. fol. 19. Fitz. tit. error, placito 88. touching this matter; and 10 H. 6. there Gascoign chief Justice did carry the Record thither, and brought it back again, and there left a Transcript of the Record, upon which they proceeded by this writ of error; as here it is, we have no sufficient warrant to remove this record, and our case, as here it is, hath accordingly been so adjudged before in the very point: As to this which hath been first said, that if the writ had been Justiciariis nostris, Thom. Flemming, & Johan. Dodderidge, &c. lately Justices of Assise, ad placita coram nobis, &c. that this had been good, and should go unto them both; but were the Case so, I hold it not good, unles their Commission had been so, conjoyning them in this manner together, but not otherwise, for the writ ought in every regard, to agree with their Commission, or the same not good, and no warrant by this sufficient for us to remove the Record; the writ ought to agree in all things, for every Chief Justice is a Knight, but every Knight is not a chief Justice: If in the Writ he varies from the Court, the party Agent or the Defendant, if in the writ he mistakes any of them, the writ is not good; here he hath mistaken in the addition of the Judges, in this writ of error, and so the same not good: As to the exception, for the omission of (per breve) for it may be per breve, or sine breve, and therefore he ought to shew which: In the time of King Henry the first, I find divers Records, and by some of them it appears, that the chief Justice here did sit also sometimes in the C. B. and in 5 E. 4. fol. 4. Markham Chief Justice of B.R. and a Justice in the C. B. and sometimes he sat in the Exchequer, &c. indefinita propositio universalis, if the sub-

42 Assis. 22. &c.

1 H. 7. f. 19. &c.

5 E. 4. fol. 40

ject be universal; ad placita here it is too general, for it may be taken of the B. R. C. B. or Exchequer: Reversing of Records is odious in Law, and therefore the Writ of error ought to agree in all points with the record, never to give way to reversals; for small and slight mistakings being but trifles, & apices juris non sunt jura. Two things are to be observed in all Judgments. 1. The Substance of them, And 2. The Form, but this ought to be the essential form, for that forma essentialis dat esse; but we are not to give way unto literal form, especially in Writs of Error, which is only but a Commission to examine, and not to be tied to so literal a form, in which there is no such form: As to the Objection of relation, without all question that shall not be so here in this Case: If in the Writ of error he mistakes the Judges, he mistakes also the Judgment, and for this I rely upon Parrets Case, 2 Eliz. Dyer, fol. 173. It may be, that the Judgment was before two, or before one tantum, and if a man in pleading meddles with a thing which is surplusage, and with which he needs not to meddle; if he commits any contrariety in this recital, this shall abate his Writ, and to this purpose it appears at large in Plowdens Commentaries, fol. 84. 85. in Partridge and Crokers Case, 2 Eliz. Dyer, fol. 173. where John Kirk, nomen & cognomen alias dictus, Sadler, had a Judgment against Sir John Parret, who brought a Writ of Error, which was directed to Anthony Brown chief Justice of the C. B. (where note) that the best course in such a Case, is not to direct the Writ to such a one nominatim, Chief Justice of the C. B. but generally to the Chief Justice, &c. there in the Writ of Error he was named Salter; this variance was but in the alias dictus, & that in a matter of surplusage, and yet this was held a material variance to abate the Writ; for it is there said, there was no such Original by the addition of Salter, & therefore he was forced to have a new Writ of Error, for that the Writ of Error ought to agree with the Record, without any variance in all the essential forms, and according to this is 2 R. 3. fol. 2. 5. Collins Case, in an Action of Debt upon a Bond, where the party was named right, and so the sum right; the variance there in the time of the King, as upon a Judgment given 37 H. 8. upon this Judgment a Writ of Error brought, 7 E. 6. and the Writ of Error saith, in curia nostra, whereas the same was in the time of another King: This is not good: In a Writ of Error, the party ought as it were to hit the Bird in the eye, as in this to shew certainly, and without any variance, the Court, the party, the Judge, the addition of the party, and the alias dictus, otherwise the Judges have no power to remove the Record; and for this Cause, 2 Eliz. Dyer, fol. 180 Heywood in B. R. refused to receive the certification of the Record, contrary to the Writ of Error; and upon this first point, see also 9 H. 6. 27. Assisar. 28 H. 6. and 19 Eliz. Dyer, fol. 356. Assignee omitted in the Writ of Error; all which have been before remembred. As to the second point here, we have here a double Judgment, no president in this Case can be shewed for to direct us herein, & quod non lego non credo. As to the Supersedeas, two parts in this to be considered. First, to see what Judgment we have here given. Secondly, what Judgment they shall there give in Parliament: The Judgment here given was, Quod judicium affirmetur, & stet, in omni robore suo, & effectu; this is the Judgment here at this day, in a Writ of Error, when the Judgment before given is by us affirmed, but in 21 E. 4. f. 44. a. the Judgment in a Writ of Error is, if the Judgment be affirmed, Quod judicium redditum remanebit stabile imperpetuum; but now our Judgment in such a Case is, as before is expressed: If your Writ of Error here be good, yet this is not here brought to reverse the Judgment given in the Assise, before the Justices of Assise, but the same is here brought, only to reverse our Judment here given in the first Writ of Error; so that this Writ of error here now brought in Parliament, is brought upon the second Judgment, and this Judgment may be well reversed, and yet the first Judgment to stand in force; and Execution upon this Judgment may well be granted, notwithstanding this Writ of Error; but if the Writ of Error in Parliament, had been brought upon the first Original

2 Eliz. Dyer, fol. 173. &c.

Plowdens Comment. fol. 84, 85. &c.

2 R. 3. fol. 2. 3.

2 Eliz. Dyer, fol. 180.

21 E. 4. fol. 44. a.

Original Judgment, if this had been reversed, this should also have reversed the second Judgment here given, which is only founded upon the first Judgment, 38 H. 6. fol. 3, 11, 30. in a Formedon: A good case touching this, for as it is there said, so here, to judge upon the insufficiency, 11 H. 4. fol. 4. a notable case to this purpose, two Judgments in the affirmative, in a writ of annuity; a writ of Error brought upon the first Judgment, and reversed, and by this both the Judgments shall be reversed, because that the second is dependent upon the first; and when the Original Judgment is shaken by a writ of error, the dependent Judgment shall be also by this shaken: But as this case here is, we have two distinct affirmative Judgments, and notwithstanding supersedere executioni, by the writ of error for the second Judgment, yet this is no stay of the execution upon the first Judgment, 13 E. 4. fol. 4. A man hath Judgment to recover, in a writ of Annuity; afterwards he hath a Scire facias for the said Annuity, and Judgment to recover, and prays execution upon the Judgment in the Scire facias; the Defendant brings a writ of error upon the Judgment given in the Annuity, and prays a stay of Execution, for that if the first Judgment be defeated, which is the principal, the Judgment in the Scire facias shall be also by this defeated, for that this Scire facias is of the same thing which was adjudged in the writ of Annuity: See the Book, in the end of which Case there is a good Note put, One brings a writ of error, and doth not sue for to have the Record, the other prays to have execution: A new writ of error is then put in, notwithstanding which execution was awarded, or otherwise the party might be for ever delayed; agreeing with this, is 6 H. 7. fol. ultimo, where a writ of error is brought only for delay, execution shall be awarded, 8 H. 7. fol. 10. a. & 43 E. 3. fol. 3. a. A man recovers Land, and hath execution of it, afterwards he is disseised, and brings a Redisseisin, and in this recovers; if a writ of error be brought upon the first Original, and this reversed, this shall also reverse the Judgment given in the Redisseisin, so that two Originals are here reversed by one writ of error; and with this agrees, 11 H. 4. fol. 6. 8 R. 2. a writ of error brought here upon a Fine, in the Transcript of the Fine, and this was between the Prior de M. and Seymor, affirmed here, and upon this, a writ of error was brought in Parliament, and all the Judges were called unto it, and found to be erronious, the Fine was only reversed (and therefore the Chief Justice, recordum illud reduxit) & ob errores illos judicium redditum coram rege reversetur, & breve Cancellario for possession, so that the Judgment only in this Court to be reversed: So that the difference is, where there be two affirmative Judgments, and where but one; I never saw any Supersedeas granted in this Court in such a Case as this is, (and yet I will not grant execution) but moved the party to bring a new writ of error. Dodderidge Justice. You shall do well to make your new writ of error better, 6 H. 7. fol. 15. A good Case touching the date of the writ of error. Coke chief Justice. This is to be observed, that the writ of error do agree with the Record; so the Court denied to grant Execution, the writ of error not being good, nor any Warrant to remove the Record, and so the Court did nothing more herein, but left the party to bring a new writ of error, as by his Counsel he should be advised.

38 H. 6. fol. 3. 11. 30. 11 H. 4. fol. 4.

13 E. 4. fol. 4.

6 H. 7. fol. ult. 8 H. 7. f. 10. a.

11 H. 4. fol. 6. 8 R. 2. &c.

6 H. 7. fol. 15. b.

The party left to bring a new Writ of Error.

Mirill

Mirril Plaintiff, against *Nichols* Defendant.

Entred Mich. 8 *Jac.* B. R.
Rott. 402.

Essex Jury Trespass and Ejectment.

IN an Action of Trespass and Ejectment, upon Not-guilty pleaded, the Jury found a special Verdict, to this effect, They find that John Cutting being seised in Fee-simple, of Lands in divers places, (S.) Of the Manor of Allens and Rumbals in Essex, and of other Lands in Kent; and also of two several Moieties which he had by several Purchases, the one of them lying in Essex, the other in Kent, makes his last Will and Testament in writing, in manner following, (S.) First, I do devise to my Wife, the House wherein I dwell, called Allens, alias Rumbals for her Life; and by this his Will, grants a Rent-charge of twenty Marks yearly, unto the Master and Fellows of Keys Colledge in Cambridge, to be issuing out of Allens and Rumbals in Essex, with a Clause of Distress for the same; and in this his Will, he adds further, I devise the House which my Wife hath, and all other my Lands in Essex, charged as aforesaid, to Stodderidge my Son in Law, (under whom the Defendant claimed) and as to my Moieties, (which he Purchased by several Purchases from one and the same person) I do devise all my Moieties in Kent unto Anthony Bearblock my Son in Law, (and under whose Title the Plaintiff claimed) saying nothing at all of his Moiety in Essex, and having but one Moiety in Kent; and whether these words, (S.) All my Moieties in Kent, shall carry both the Moieties to Bearblock, was the only Question: Upon the Trial at the Bar by an Essex Jury, the Court was clear of Opinion for the Title of Bearblock, under whom the Plaintiff claimed; this Case was afterwards argued at the Bar upon the special verdict, by John Moor for the Plaintiff, and by Bing for the Defendant, and now the same was argued by all the Judges. Haughton Justice. That Judgment ought to be given for the Plaintiff for all these Lands: The material Clause in this Will, (and those and all other my Lands) concerning all my Lands in Essex and Kent, these words are not material, notwithstanding they contain all, yet out of these words no Argument can be made, as to the disposal of any of his Lands; as to the subsequent words in the Will, and the clause therein, whether this shall carry any other Lands but those which were charged as aforesaid; there will be a great difference in a Will, between words of restraint, which do follow general words, and which do follow particular words, and to this purpose is 2 E. 4. fol. 29. the last Case in a case of a release being, Relaxavi totum jus quod habeo in omnibus illis terris, quas quondam habui, ex dono & Feoffamenro domini, R. The same to be averred which they were; and 34 H. 8. Brook tit. Releases, placito 19. General words are to be restrained: It hath been objected, out of these words, (other Lands) To this it may be answered, That these words may be as well translated and placed otherwise: All those my Lands charged as aforesaid, and all other my Lands; but there is no warrant for this, to take these words from one place in the Will, and to put them in another place, where in once place they do carry one sence, and in another place another sence and meaning, and therefore the words are to be

2 E. 4. fol. 29.

34 H. 8. Br. &c.

as they are placed in the Will: an Argument hath been made upon matter subsequent; part to take effect during the life of his Wife, and part after her death, and other part after my own death; as to this, if any other Land had been charged, it should extend to this, and if none, then these words are idle; for these words are not to be extended to other Lands, but unto these which are charged. As to the second Clause, as concerning my Moieties, I devise all my Moieties in Kent to Anthony Bearblock, whether these words both his Moieties shall pass unto him; where he speaks of his Moieties in Kent, he having but one Moiety there, and another Moiety in Essex, that both the Moieties shall pass by these words: And as for this, I relie upon the specialty of the words, as before upon the generalty, the Moieties, and all my Moieties; this is a special description of what he intended to pass unto him by this his Will, and not to be restrained by the words subsequent (and all other my Lands in Essex) 2 E. 4. fol. 29. before remembred, touching the construction of general words in the Premises, which do include certainty sufficient in them; and also upon this reason in Law, Quod utile per inutile non vitiatur, 12 Eliz. Dyer, fol 292. The Case of the Parish of Hurst, extending into two Counties; this restraint here to the County of Kent, when he hath before made so full an expression of his meaning, shall not make any restraint, but that both the Moieties shall pass. It is expressed in the Will, that he had several Moieties, the one in Essex, and the other in Kent. It hath been objected, because he had them by several purchases, and at several times, he had one Moiety in Kent, by the Fine, and the other Moiety in Essex; this restraint shall not correct these words, which are special; If a man doth give to another black Acre, and white Acre, in the County of Kent, if white Acre be in the County of Essex, yet this is good clearly for white Acre also; for that relation of words is always to be taken according to the matter to which they are applied: If a man makes a Lease for Life to one, without Impeachment of waste, Proviso quod non faciat vastum in domibus voluntarie, this is a good restraint by this Proviso, by 9 H.6. f. 35. a. 34 E. 3. Fitz. Avowry placito 258. A gift in tail made to J.S. tenendum libere & quiete, the remainder in tail rendring rent; this clause here of the reservation, shall refer to the last (S.) to the remainder, but if the gift had been in tail, the remainder in tail rendring rent, this reservation here shall go to both the Estates; so here in this principal Case, this Moiety in Essex, by the words in the Will (of all my Moities) shall pass unto Anthony Bearblock: It is found in the special Verdict, that Anthony Bearblock made a Lease for years unto William Bearblock, of the Moiety, being the Land mentioned in the Declaration, and that William Bearblock made the Lease of this unto Mirril the Plaintiff, who hath a good Title to this Moiety in Essex, being the Land in question under the Title of Bearblock, and so Judgment ought to be given for the Plaintiff. Dodderidge Justice. Judgment in this Case ought to be given for the Plaintiff. 7 Jac. the Lease was made to the Plaintiff by William Bearblock for five years, who entred, and was possessed, until he was put out by Nichols the Defendant, whereupon the Action was brought; upon this special Verdict found, the Plaintiff here hath good Title to the whole. As to the difficulty of this Case, in the first part of the Will it appears, that John Cutting, who made the Will, had a House, with Lands and Tenements to this belonging, and enjoyed therewith, makes his Will, and by this he deviseth it to his Wife for her Life; he also had Land which he meant to charge with a Rent unto the Colledge, to be issuing out of this his House and Lands, called Allens alias Rumbals, and this he intended to give unto Stodderidge his son in Law: It is found, that Cutting at the time of his death, had no other Lands but Allens and Rumbals; taking the Will thus as it is, and so found by this interpretation which I shall make, all the words of this Will will well stand together: In construction of Wills, we ought to pursue the intent of the Devisor, as near as possible may be, and this ought not to be a Forraign intent, nor yet an intent taken by an averment, unless it be in two special Cases, as it is so held, Coke 5

2 E. 4. fol. 29.

12 *Eliz. Dyer*, fol. 292. *&c.*

9 H. 6. f. 35 a. 34 E. 3. *Fitz.* tit. *&c.*

pars

Coke 5 pars, fol. 68. &c.

pars, fol. 68. in the Lord Cheyneys Case; foreign allegations made, that he meant to advance Stodderidge, with his Lands in Essex, and Bearblock with his Lands in Kent: The words of doubt in this Will, All those, &c. charged as aforesaid, he gives unto Stodderidge, All those, and all other, charged as aforesaid; this ought to be other than those, I take All those, quæ illa, this is a Relative; and to have an Antecedent; the Lands given to the Wife, the House, and such Lands as I have in my occupation at the time of my death, all these, and all other, charged as aforesaid; the charge is mentioned in the Will, and so he to have these Lands which his Wife had, and which are charged with a Rent to the Colledge, those not to be extended any further, than to that which before was mentioned; Omnia illa Messuagia &c. as it is Coke 2 pars, fol. 33.a. in Doddingtons Case, he gives unto his Wife (All) this is very plain by the words of the Will, All those, and all other my Lands in Essex, immediately after my decease for part, and after the death of my Wife, for the other part, those charged to the Colledge; by the Verdict it is found, that he had no other Lands in his hands, tempore mortis, but Allens and Rumbals: The next Clause in the Will, concerning my Moieties, and all other my Lands in Kent, I give the same unto Anthony Bearblock; whether by these words in this Will, the Moiety which he had in Essex, shall pass unto Bearblock or not: As touching this, it is to be considered, what Lands Bearblock hath devised unto him by this Will; Three Reasons do move me to hold, that this Moiety which he had in Essex, is also devised unto Bearblock, by this Clause in the Will, and these are also to be enforced out of the very words of the Will (and all my Moieties) he doth not speak any thing at all before of them; the Moieties, they are words indefinite, and the same is as much as if he had said, All the Moieties; an indefinite Speech, doth amount unto a universal: If a man be bound that his feoffees shall enfeoff J.S. and he hath four Feoffees, they are all for to do it, as appears by 20 H. 6. so if a man be bound to keep the Prisoners in such a Goal, this is intended to be of all the Prisoners there; and so 20 H. 7. First Here the Land intended to be the whole Lands. Secondly, Because the words are indefinite. Third Reason, And all other my Lands in the County of Kent, I give unto Bearblock, other, this ought to distinguish other from Moiety; the County of Kent carries the Moiety in Kent, this is distinguished, so that the first Moiety of necessity ought to be the Moiety in Essex; and this to be so, is without any alteration of the words of the Will; the verdict here, as it is, is very imperfect: Seisin and possession is found in cutting divers things found, and some contradictions are herein, but they are and may be thus reconciled because the one goes to the Seisin and the other to the Possession: another matter of defect there is here in this verdict, there being no ejectment found, the right is in Bearblock, and in Mirril the Plaintiff, who claims under him, and so Judgment ought to be given for the Plaintiff. Croke Justice. Judgment in this case ought to be given for the Defendant; Cutting doth here by his Will, 1. Devise his House in Essex, and other Land in his occupation, to his Wife for her life; then in his Will follows, and concerning all my Lands, &c. he makes bimembrem divisionem. (S.) his Lands in Essex and in Kent: this ground to be propounded, for construction of Wills; the Law supplies the defects of the Devisor, he being by intendment inops consilij. 1. No Will ought to be construed, per parcellas, but by entireties. 2. To admit of no contrariety, nor contradiction. 3. No nugation, nor any Nugatory thing ought to be in a Will; and these Rules being observed as a Key, they will open all the doors in every Will; and this bimembrem divisionem I shall pursue: that which by this Will was given formerly to the Wife, he doth subsequently charge. In Wills and Testaments, such construction sometimes shall be made, to make that prius, which was posterius, and that posterius which was prius, (concerning all my Lands) he makes this distribution, &c. Allens was subject to the charge: and all those, and all other my Lands in

Rules for the construction of a Will.

in Essex, charged as aforesaid, I do give and devise unto Stoddard all in Essex; these passed by him to Stoddard. It hath been said, this is to be restrained, but I do not take it so; there are no words of restriction, nor yet of description, but of Declaration, whether here be any repugnancy in this will; here he saith, charged as aforesaid, this being as much as to say with the charge aforesaid; for here transit terra cum onere, & this is all one in sence. It hath been objected, that here is no warrant to make such a transmutation of words, but a good warrant there is for this construction to take the same, with the charge he speaks, de modo, non de re, if such a construction should be here admitted, as has been objected to be, this would be to offer violence to the Letter; & also a contradiction in the case, and to make a Nugation of the words, and if it should be so, nothing is to come unto him after his death; for that nothing is charged but Allens, &c. It hath been also objected out of the other division wherefore he did not speak specially of his moity in Essex. When he speaks of Kent; he then speaks also of the moities, not of the moity, but of my moities; which, not indefinite, the kind of restriction, is observable, and all my other Lands which is the relative which I now have, or hereafter may have in Kent, the particular relative, antecedent to this, all which I have in the County of Kent, this follows indefinitely, all my moities, but that in Essex which passeth not, & by this construction, all the parts of the will do well stand together, without any contradiction, or Nugation: and so Bearblock by this will hath no title at all to the Land in Essex, being the Land now in question, nor consequently, the Plaintiff under him; and so Judgment ought to be given for the Defendant. Coke chief Justice. The matter here rests upon putting of the case aright; here is first no Land at all devised to the wife, but only the house; if he had leased all the Land for years, he should then have had nothing in his possession, and then she should have nothing; this Cutting was seized de separabilibus medietatibus, ac de quibusdam terris in Comitatu Essex, ac de diversis aliis terris in Essex; he deviseth the house, together with all such Lands, as at the time of my decease, shall be in the only occupation of my self, to my Wife for her life; uncertain it was, how much she should have, she might have but little, and she might have nothing; then he deviseth out of Allens, a rent to a Corporation, to Keys Colledge in Cambridge, and herein he mistakes the very name of their Corporation, yet clearly this is good; the Plaintiff here hath good right, and that to all the Land in question; nothing is here by this Will devised to the Wife, but the house, (illa) here is illa, all these parcel of those nemo tenetur divinare, and other my Lands charged as aforesaid, this is Alleas and Rumbals. Will you not reject the Land charged? No, this shall be, Viperina expositio, quæ corrodit viscera textus; then as concerning the moities: if Bearblock be not to have them, they then fall to the heir at common Law; the moities, and other my Lands in Kent, it hath been said, that this is to be referred unto the Land there; the moities he is to have, quæ, he hath said it, the Devisor himself, the moities, that is both, and other my Lands, other, which this must be, other, than this is very clear, this for the door to the Window. 2. Devises in this Will, the first to Stoddard, the second to Bearblock. Wills ought to be taken according to the true intent and meaning of the party, who makes the Will; as mens bodies are, so sometimes are their words, as touching the construction of Wills, the meaning of the Devisor ought to be collected out of the words of the Will, and in this, intentio cæca is not to be taken, nec intentio mutila, nec manca, non sic itur ad astra, nec incerta, nec aliena intentio, if so, in all such cases we are to give Judgment for the heir, and cases there have been of all these, Index animi sermo, as in the Lord Cheyneys Case, 5 pars fol. 68. intentio cæca mala, and so was it here adjudged, Hillar. 29. Eliz. between Petward and Erasmus Coke, in Ejectione firmæ for Land in St. Edmonds Bury, where a man was seized of 3 Houses, he had two Sons and three Daughters, he made his Daughters heirs with his Sons; as Job did, Job Chap. 42. vers. 15. he devised one house to one of his Sons, a second House to another of his Sons, and further willed that if any of them died without Issue, the Survivor to have that part: The question was, whether this was a Fee simple, or an Estate in the Sons; here was cæca intentio, by the

3 Leo. 18.

Coke 5 pars fol. 68. in the Lord *Cheyneys* Case.

Hillar. 29. Eliz. B. R. *&c.*

Common Law part and part like; and therefore it was held, that they had but for life, and when there is nothing but such a blind intention, the heir to have it, and so it was adjudged, that the heir was in of a Fee-simple by descent. Mich. 40. & 41. Eliz. B. R. George Downhale, against Richard Catesby. Entered Trinity 36. Eliz. B. R. Rot. 817. in a Formedon in the C. B. and brought hither by a Writ of Error; the question did arise upon the Will of Robert Downhale, who devised Lands to Thomas his eldest Son in tail, and if he died without Issue of his body, then he willed, that all such right, use and possession, which Thomas had in the Lands to him devised, should descend, and come unto his two younger Sons, Ralfe and Christopher Downhale, and to their Assigns. Brook title devise placito, abridging the case of 22 E. 3. fol. 16. vouches Littleton, that by such a devise made to one and to his assigns, that this should be a fee-simple: Littleton hath no such word, but a devise made to one Habendum sibi imperpetuum, this a fee-simple, and so the abridgment in this is to be reformed in this will, there is cæca & manca intentio, and therefore in that case it was adjudged in the C. B. and here also, that by the devise to his two sons, and to their assigns, that by this will, they had but an estate for life, and according to this is the Book of 34 H. 6. fol. 7. b. adjudged, a man may be inops consilii, but not inops sensus. Mich. 30. & 31. Eliz. between Morris and Maule. John Gunnerby being seized in Fee of the Manor of Stoake in the County of Suffolk, in 25 E. 3. made a gift of this unto Stephen Scroop in tail. 3 H. 7. a recovery had against him, and this was to the use of Thomas Scroop and his heirs. Jeffry Scroop made his will, and by this did devise this to his wife for life, and afterwards to the use, rectorum hæredum, secundum antiquam evidentiam; and averred, that no other Evidence was but this. 1. This is cæca intentio, heirs of whom of I. S. or I. N? he ought to have here said, suorum, or meorum, for the omission of this, the same was both cæca & manca intentio, for there wanted in the will, words of Demonstration; whose heirs he meant and intended, for it might be heirs of a Stranger, secundum antiquam evidentiam (this was the first settlement of Gunnerby) In this Case it was resolved, that no averment will help this, for none can tell what he meant by these words: and so here was in this will intentio cæca, manca, aliena, & incerta, and therefore it was adjudged, that nothing did pass by this will, but that the Land should descend unto the Heir. 16 Eliz. Dyer fol. 330. placito 20. Claches Case a good case as touching this matter; there it is said that the Judges are to Judge upon the words of the Will. Mich. 20. & 27. Eliz. in the C. B. Rot. 451. between Loveles and Loveles, a man devised his Gavelkind Land, unto his eldest Son, and to his eldest Issue male of his body; he dies, having Issue Male at the time of his Death; the heir in reversion, brought an Action of Wast against the Issue; the Question was, what Estate the Issue had? It was adjudged, that the Action of Waste did well lie: Notwithstanding he was not in rerum natura, at the time of the Devise, yet the Devise was to him for life, the remainder to his Issue, and the adjection of the eldest here, corrects the general learning; and so here he had but an Estate for life. Mich. 38. & 39. Eliz. John Hill was seized of Land in the County of Suffolk (S) of Rowletts, Rivetts, and Downings tenements, had 2 sons, made his Will, and by this he devised Rivetts, unto Robert his son, Rowletts unto Richard his son, and Downings unto Robert, but names no estate to any of them, and that after his death, part of it go to another, and that he should pay mony to the same; the question was what Estate this was, after the death of any of them then to go to another, he devised the Land to his Son, and after his death to another, Proviso, that if he hath issue, and survives his wife that it should go to his Issue; he dies, living the wife, the devise is to the Issues which survive the wife, yet by the death of the father, living the wife, the Issue lost by this, and adjudged against him, and yet without question he meant so in his private intention that it should come to the Issue of his Son, yet the same went away to another of the kindred from the Issue, and this rule was there given, as touching wills, in which no understanding is to be a-

Mich. 40. 41. Eliz. B.R. &c. Mo. 864.

22 E. 3. f. 16. *Brooks* devise placito 33.

Littleton Cap. Attornment, f. 133. placito 585.

34 H. 6. fol. 7. b.

Mich. 30. 31. Eliz. Morris and Maule.

16 Eliz. Dyer. fol. 330. &c.

Mich. 26. 27 Eliz. C. B. &c.

Mich. 38, 39. Eliz. &c.

against

gainst the express meaning in the will. As to the principal case here now in question, he deviseth by this will his dwelling house to his wife and that she should have it clearly, together with all Lands, which I shall have at my disease, in my own possession and no other; what land she should have by this will, is not known to any, by consequent, the same was devised, but none at the time of the making of the will, there being then no certainty at all of it what Lands they should be; he charges Allens, alias Rumbals; and then there is this clause in the Will, (S) and all those (which he had devised to his wife) but none can tell what they were, other than those, which are they, these are to be the Lands charged as aforesaid, (S. Allens and Rumballs) all my Lands charged as aforesaid, this being as much as to say with the charge, and as it hath been said, this is aliena intentio. As touching the moities, the moities, an indefinite proposition to be taken for a universal, as it hath been said in some cases, it shall be so, and in some not, as when the subject is universal, but otherwise it is where particular; these parcels in the will specified, if he had them by one purchase, the same may well be called medietatem; but otherwise, where he had them by several purchases, he had two moities, subjecta particularis, propositio ideo particularis; if a man deviseth to another, all his Lands charged, he shall have nothing by this, by the rules of the Common Law; here being moities in the plural number devised, you cannot satisfie the words of this will, nor yet the meaning, and intention of the devisor with one moity, when he by his Will doth devise unto him all his moities; if it were in a grant in such a manner, the moities should pass; for there is a certain demonstration of the thing to be granted, and in a grant you shall never refer one certainty upon another, and you cannot here have the Plural Number to be satisfied with the singular, (as his moities with one moity) if the same was in a grant, there both the moities should pass, and so it shall be here in this case, for the like reason, the same Law, and the reason is the same here: a second reason for this, that this should be so, otherwise a repugnancy would ensue; other than the moities, and so it cannot go to this. A third Reason, why this should include the other, for he would not have used, and named Kent, and in the plural number all his moities, if his intent and meaning had not been so to pass both the moities; and this construction well suits, first, with the very words of the Will; moities in the plural number, and also with the intent and meaning of the Devisor, the same appearing by his own words, in his Will (S) I do devise all my moities unto Bearblock, the which he would never have so expressed, knowing he had two moities, if he had intended to have devised but one of the moities to him, and so there is no contrariety this way, by making this construction; and so the Plaintiff here hath good title, and Judgment ought to be given for him.

Judgment given for the Plaintiff.

Note, that in this case, all the 4 Judges did agree, that for the house, Allens alias Rumballs, the same was by this Will devised to Stodderidge, and so for the principal matter, by the Rule of the Court, Judgment was given, and so entred for the Plaintiff.

Watts Plaintiff, against the High Commission Court.

A Prohibition to the High Commission Court.

IN a Prohibition, George Croke moved the Court for a Prohibition for Watts Parson de S. to the High Commission Court; the case appeared to be this; Watts the Parson was deprived for incontinency, and another presented to his living; afterwards he procures a Pardon, and so by the Relation of this, he was to be restored again to his Benefice; he was sued in the High Commission Court for this matter of Incontinency, after he obtained his Pardon, yet they still proceeded in the High Commission Court against him to give costs; upon this a Prohibition was prayed to stay their Proceedings; the Pardon being granted unto him before the sentence there given. Coke Chief Justice. Incontinency is a heinous offence in Clergy men, and by former Statutes the same was made felony, before allowance of Marriage in the Clergy, but it is a greater offence now at this day in them, Marriage being allowed to them. It was fornication before, but now it is Adultery: suits in the High Commission Court, and in the Star Chamber, are the Kings suits; and tho another be the Plaintiff there, yet the King may pardon this, and if the pardon be before sentence there given, clearly they shall there give no costs afterwards, and this is a clear and plain Case, as it is resolved, 5 pars. fol. 51. a. b. in Halls Case, that if the pardon be before sentence, the same hath discharged all: And then they cannot there proceed to any sentence of the principal, and by consequence, nor for costs, being but accessary: so the Court gave time to examine, whether the Pardon was before the sentence, for the costs, or not. Burtons Case, A Warwickshire Case, in the time of Queen Eliz. a good Case, to what purpose a Pardon shall relate: afterwards, upon view of the pardon, it appearing to be before sentence, as the Court was before informed, by the rule of the Court, a Prohibition was granted.

Coke 5 pars f. 51. a. b. *Halls* case.

Sir *William Boyer* Plaintiff, against the High Commission Court.

A Prohibition &c.

IN a Prohibition prayed to the High Commission Court, for their examining there upon Oath, in Case of Simony. Coke chief Justice. Simony is worse than felony, it is an enormous offence; if money be paid for to present one to a benefice, altho it be not paid to the Patron, neither had he any knowledg of it, yet the Incumbent for this shall be avoided, and the Patron also shall lose his presentment, pro hac vice: the Statute of 31 Eliz. cap. 6. is so strongly penned against the Incumbent, that if the Patron be privy unto it, he shall also be punished: an Action of Debt was brought in the C. B. the Defendant in Bar pleaded that the same was entred into for payment of money for Simony; yet the bond was held good; and we are not to take any notice of Simony, this being punishable in their Court; and if they there meddle only pro salute animæ, they are not then to be prohibited, otherwise it is, where they will there examine the person upon an article

Stat. of 31. Eliz. cap. 6.

tend-

tending to the title of the patronage, there, in such a case, they are to be prohibited. Trinity 10 Eliz. Leighs case, he entred into a Bond to the High Commission Court, for to live chastly; they would there have examined him upon Oath: as touching this, the Rule of Law is, Nemo tenetur seipsum prodere; they may there examine upon Oath if he be a Parson, or an Ecclesiastical man, but not a Lay person: and as touching the like matter there, it was one Gawens case, they would there have examined him upon Oath, and they were prohited, & quandocunque they by their examination do draw the right and title of a benefice into question, there they ought to be prohibited; they are not to examine, in a matter upon a penal Law; if they do so, they are to be prohibited; so in Leighs Case before, they would have examined him upon Oath, upon a Penal Law, but they were prohibited; and so in Gawens Case in this Court, he entred into a Recognisance to the High Commission Court, not to commit incontinency; being afterwards questioned there for this, they would have examined him upon Oath, whether he had lived incontinently or not: and for this, they were stayed here by a Prohibition. It would be a great matter, if they should be suffered, for to examine there upon Oath; in case of a penal matter, they are not to be permitted so to do. In all this, the whole Court agreed with him. Coke chief Justice, you cannot here have a Prohibition, because they examined upon Oath, touching the Simony, and this is cleared, because this was so done voluntarily, and notwithstanding the Incumbent be dead, yet the crime remains, and is living, and the examination here by them, was only, pro salute animæ; but see, and consider if there be any Article, to be examined upon, which any ways draws the right and title of the Benefice into question, and if so, then clearly a Prohibition is to be granted, but not otherwise, and so no Prohibition granted.

Trin. 10. Eliz. *Leighs* case, *&c.*

Gawens case.

No Prohibition granted.

Moyle Plaintiff, against *Ewer* Defendant.

Entred Mich. 10 *Jac.* B. R. Rott. 171.

IN an Action of Debt upon the Statute of 2 E. 6. capite 13. for subtraction of Tythes, the Plaintiff entitles himself to the Tythes as proprietor of the Rectory, tempore quo, &c. the Defendant in discharge of Tythes, pleads in Bar, that 30 Septemb. 7 Jac. tempore quo, &c. the Plaintiff was possessed of the Land, sown with Corn (but had not then the Parsonage:) and that tali die, before severance of the Corn, he did sell, and pass this away unto the Defendant, and before severance, he came to be Parson of the same place, and so demanded Judgment whether contrary to his own grant, by this puisne title happning unto him in the interim, he shall have tithe. To this Plea in Bar, the Plaintiff demurred in Law. Davenport for the Plaintiff urged, that the Plea was not good; for that he shews no place in his Plea, where the grant was, that so issue might be taken upon it with him, & so no place from whence the venire facias should be, for the trial of it, and so not good. A second exception to the Plea, that it is not good; in his Plea he saith, that tempore quo, the Plaintiff was possessed of the Land sown with Corn; he doth not say, that he was then possessed of the Parsonage, but at the time of the taking, he was proprietor of the Rectory; this is confessed, and it shall not

An Action of Debt, *&c.* 2 Cr. 361. 1 Ro. 655.

not be intended, that he was Parson at the time of the sale, but afterwards, and for this, the case was; a man possest of a Lease for years, of Land sown with Corn, he doth grant this; and before severance, becomes to be Parson of the same place, whether he shall now have tythes of this Corn, contrary to his grant: it was urged for the Plaintiff, that he hath good right, and title to have tythes of this Corn. As to the point in Law, touching payment of tythes, where two Interests are conjoyned in one and the same person, simul & semel, as if one be Lessee for years of a Parsonage, and of other Land also, within the Parish, sown with Corn, and before severance he sells this Corn; whether by this sale, he hath also sold the tythes of this Corn; this is a sale in Law, being owner of the Land, but not as owner of the tythes: these are two several and distinct interests, and stand together, without any suspension, Non potest agere in seipsum. 30 H. 8. Dyer, f. 43. If a Parson doth purchase a Manor, afterwards makes a Lease of his Parsonage, notwithstanding the unity that was before, he himself now shall pay tithes; and so of his Feoffee, if he wants words, to be discharged of payment of Tythes: to this purpose there was a Case. 31 Eliz. in the C. B. between Mills and Hind. where a Parson of a Church did Lease parcel of his Rectory, rendring rent, and made a discharge pro omnibus exactionibus, & demandis, pro eisdem terris rectori debitis, there adjudged, that these words shall not discharge him of payment of Tythes, and there resolved also that a release of all actions, or demands by a Parson, made unto a Parishioner, shall not discharge him of payment of Tythes, without special naming of the same. 21 H. 6. fol. 43. A man may grant his Tythes by way of contract, but this ought to be, by the name of Tythes, and not by the name of Corn: If a Parson hath Land sowed with Corn, he grant the Land the Corn here shall pass inclusive; the Corn doth pass with the Land; If a Parson grants his Rectory, reserving the Land, he shall here pay Tythes to his grantee. by 37 H. 6. fol. 35. If Lessee for years sows the land, by a Feoffment in Fee made of the land, the corn passeth; the question in this principal case is, whether by this grant or sale of the corn, he by this, passeth away his tithes out of the same. 38 E. 3. fol. 6. tythe is not tythe, before severance of the tenth part; and it is there said, that the severance ought to be, to the same purpose and intent: for Tythes are not due, nor is the tythe within the Statute of 2 E. 6. before severance, no tythe predial until the same be levered, and set apart, as the Tenth from the Nine parts, and so upon the whole matter, Judgment was prayed for the Plaintiff. Haughton and Dodderidge Justices, that the Parson may well grant his tithes growing upon the Land. Dodderidge Justice, a Parson may grant his tithes before severance, and therefore the property of them doth not grow unto him, only by the severance, but the severance gives unto him the Lay Interest. Haughton Justice, agreed with him herein. Dodderidge Justice, you have not here alledged in the Plea, that he was Parson at the time of the sale of the Corn. Coke chief Justice, it is not here averred that he was Parson at the time, for if a Parson sows the ground, and is afterwards deprived, or doth resign, if the corn was not levered at the time of the successors coming in, he shall have the tythe; If a Parson sows the ground, and afterwards makes a lease of the same, he shall now have tythe of his Lessee; and so if he do sell the same, it will be all one, Hales case was this, a man sows his Land, and then underhand grants the corn, and afterwards he carries away the corn this was adjudged to be fraudulent, though he which carried away the corn, had nothing in it, and this shall be a carrying away within the Statute; and though he who had right did not carry away the corn away, yet this was fraudulent; and this there adjudged to be a carrying away within the Statute, by reason of the private gift to his friend, purposely to do it, to defraud the Statute. The Court clear of opinion, that the Plea in Bar here in this principal case, is not good, that the Plaintiff had good cause of Action, and so by the Rule of the Court, Judgment was given, and so entred for the Plaintiff.

30 H. 8. Dyer, fol. 43.

31 Eliz. C. B. *Mills & Hind.*

21 H. 6. fol. 43.

37 H. 6. fol. 35.

38 E. 3. fol. 6.

Stat. of 2 E. 6. *Hales* Case.

Judgment for the Plaintiff.

The

The Corporation of Physitians Plaintiff, against Doctor *Tenant* for practising of Physick.

IN an Action of Debt brought against Doctor Tenant, for his practising of Physick, contrary to the Charter to them granted by King H. 8. in the Tenth year of his Reign, &c. he being no Doctor of any of the Universities in England, nor licensed by the Colledge of Physitians for to practise: upon Nil debet pleaded, a verdict was found for the Plaintiff. It was moved by George Croke, in Arrest of Judgment for the Defendant, that the Declaration was not good. 1. For that the Action is here brought, by the name of the President alone, whereas the President, and Colledge, being but one joynt Corporation, ought to have all joyned in the Action, which they have not so done, and therefore, the Declaration here is not good. 2. It is shewed in the Declaration, that the Colledge was incorporated in the time of King H. 8. but it is not shewed in facto, by what name they were incorporated; and it is further shewed and divers Priviledges to them granted, not shewing what, whereas all this ought to be shewed, (being all matter of fact,) and it is further set forth, that none is to practise Physick, without their license; this is not good. 3. By this Declaration he demands 60 l. (S) five pound for every month; one Moiety thereof to be to the President, and Scholars, and the other to the King; the Jury find that he owes for one month, not shewing what month. Coke chief Justice. 14 H. 8. a private Act for their incorporation, by the name of the President and Colledge, the Action here brought in the name of the President alone, and this is no ways to be answered, unless that the Act doth specially give the action in this manner, to be brought by the President alone, and so to recover, to the use of the Colledge. As to the other matter, they are not to shew how they are incorporated: but this ought to come on the other side, 22 E. 4. fol. 34. touching the pleading of an Act done by a Corporation, by their known name; also they have no such corporation by Letters Patents, by the name of President and Colledge. 15 Aprilis, 14 H. 8. the Act of confirmation of their Letters Patents: their Letters Patents are good; the whole Court agreed in this. It was urged by Montague the Kings Serjeant, that the Action here was well brought by the President alone, and that they are enabled so to do, by the Act of Parliament, the Act of Confirmation, being thereby enabled, placitare, & implacitari per nomina, of the President and Colledge. Coke chief Justice, this is to be taken, and intended of the whole Corporation, being a Corporation aggregate of many; may the President here sue alone? then he ought to demand the same for himself alone; here he demands it, for himself and the Colledge; this he cannot so do without special words to this purpose, thereby to enable him to bring the action alone, and to recover to himself and the Colledge; the Action of Debt is here brought by the President alone, and declares quod reddat ei and to the Colledge so much. Coke chief Justice, quod possunt placitare, & implacitari; this ought to be the whole body; this Action cannot here be brought as it is, by the President alone, without special words so to do. Dodderidge Justick, clearly the President here cannot sue alone, in his own name; the Court clear of opinion, that the recovery, is to be to him alone, as the Action is brought; and so all the four Judges, (S) Haughton, Dodderidge, Croke Justice, and Coke chief Justice, agreed clearly in this, That if the President here might bring the Action alone in his own name, yet the recovery ought not to be to him, and the Colledge, as the Declaration here is, Dodderidge Justice, and Coke chief Justice, clearly the President here cannot sue in his own name, but the whole Corporation with him, the suit to be in the name

An Action of Debt against a Doctor of Physick.

Jo. 261. 3 Cr. 256.

22 E. 4. fol. 33.

15 *Aprilis* 14 H. 8. &c.

Judgment *quod querens nil capiat per Billam.*

name of them all. Haughton Justice, he may here well bring the Action alone, in his own name. The whole Court agreed in this, that the Declaration here was not good, and that the Plaintiff ought not to have Judgment, and so the Rule of the Court was, Quod querens Nil capiat per Billam.

Dominus REX and *Allen* Plaintiffs, against *Tooley* Defendant.

Entred Mich. 11 *Jac.* B. R. Rott. 23.

An Information upon the Stat. of 5 Eliz. c.4

1 R. rep. 10. Calth 9.

2 Ro. Abr. 404. & 406.

Yelv. 217.

Stat. of 5 Eliz. cap. 4. labourers.

IN an Information upon the Statute of 5 Eliz. capite 4. for using the trade of an Upholster, in which he was not brought up, but in the trade of Wool-packers: to this the Defendant comes in, and pleads the Custom of London, and shews that he was a free-man, and so enabled by the Custom to use any trade, &c. Judgment was prayed for the King, and the Informer; the Question ariseth here upon the Statute of 5 Eliz. capite 4. and touching the Custom of London, for using of trades, the Defendant here is questioned by this Information for using the trade of an Upholster, for this, first to enable him so to do, he pleads the Custom of London, but no custom there is, here in the case; at the Common Law, a man may use any trade, as Taylor, Merchant or the like, an Action lieth for negligence, but not for the using, and so is the Register, and many Books, an Action against a Smith for pricking of a Horse in his shoing; and that which is used at the Common Law, is not to be called a Custom, and this is no custom, which is here alledged by him, that he may use any Art, Mystery, &c. this being no more than what the Common Law saith; and that which is the Common Law, ought not to be laid as a Custom, as it is resolved, Coke 9 pars 75. b. in Combes case, that which is used per totam Angliam, is the Common Law, and so not to be laid to be a Custom; and so is, 34 H 8. Dyer, fol. 54. Quod habetur consuetudo, inter Mercatores per totam Angliam, this is not to be laid by way of Custom; because it is the very Common Law and so is 34 H. 8. Brooks Cases, fol. 57. placito 255. Brook title Customes placito 59. and with this agrees, 22 H. 6. fol. 21. Horselows Case, an Action upon the Case, brought against an Inn Keeper, exception there taken to the Writ, being secundum legem, & consuetudinem regni, it appearing, that the matter did lie in Custom, which shall not be intended the Common Law; but it is there answered, what is the Custom of the Land, but the Law of the Land. 21 E. 4. fol. 53, 54. in Dower, laid to be endowed of the third part by Custom, which is to say, the Common Law of the Land, and so by the very common Law, it was lawful for any man to use any trade thereby to maintain himself, and his Family; this was both lawful, and also very commendable, but yet by the Common Law, if a man will take upon him to use any trade, in the which he hath no skill; the Law provides a punishment for such offenders; and such persons were to be punished in the Court Leet, and by Actions brought, as by the cases before, and F. N. B. fol. 94. an Action upon the case against a Smith, for pricking a Horse; for by the Law, they ought to be skilful, before they undertake such faculties; so that this user of trades, is the general liberty of the Kingdom, given by the Law, to every subject, and therefore this ought not to be

Coke 9 pars, f. 75. b. *Combers* case.

34 H. 8. Dyer, fol. 54.

34 H. 8. &c.

21 E. 4 f. 53, 54.

F. N. B. fol 94.

be laid, as here it is, as a private custom, and so not good, for that consuetudo regni, & lex regni, is all one, and a man cannot prescribe in a custom, per totam Angliam; for this is the Common Law and not custom; and so is Bracton libro 1. capite 3. Consuetudo loci, est Lex loci, and so is 7 H. 6. fol. 31. and 8 H. 6. fol. 3. a general custom is taken for the Common Law; and so here, this custom as it is pleaded for a general custom, is not a custom, but it is the common Law, and so this Plea not good. But if this be a custom, yet it is not good, as it is here laid, because he doth not shew that it was so used, according to 22 E. 4. fol. 48. he ought to have said, usitata, & approbata. But admitting this to be a good custom, as the same is pleaded, whether this custom be well confirmed by Parliament, that this is not well confirmed by Parliament, the same being laid to be per regem in Parliamento. Plowdens Commentaries in Partridge and Crokers Case, f. 79. it is there said, that three things are requisite to make a perfect act of Parliament. (S) 1. To have the consent & assent of Lords. 2. The assent of the Commons, and 3. The assent of the King, and without all these consents, there cannot be a good Act of Parliament, and this appears to be so by 33 H. 6. fol. 13. 22 E. 3. fol. 3. 4 H. 7. fol. 18. 6. yet divers Acts of Parliament are in force, tho these three assents are not specified within the same, but only Dominus Rex Statuit, as it well appears, Coke 8 pars. fol. 20. a.b. in the Princes Case, as Dominus rex in Parliamento suo, Statuta edidit, & Dominus rex de communi concilio suo statuit, & Dominus Rex in Parliamento statuit, and all this by use good; but yet, when the party will plead an Act of Parliament, for his benefit, then he ought fully to plead this by the Law, as 10 E. 4. 5 H. 7. fol. 1. a Licence to occupy Land for a certain time, to be pleaded as a Lease: It hath been objected, the devise of Land in London, by their custom in Mortmain, against the Statute De Religiosis, made to prohibite the same: in answer to this, in 45 E. 3. fol. 25. and 28. Assisarum plato 24. there the reason of this appears, why they may devise Land there in mortmain by the custom, because their customs were confirmed after the said Statute made to the contrary, and this confirmation had relation to their former usage by custom, 7 H. 6. Statham title custom, the last case, if a man will intitle himself by a custom, which is restrained by a Statute, he ought to shew that the custom is confirmed after this Statute, as if one will say, that in London there is a custom to devise in Mortmain, without licence, he ought to shew a confirmation of their customs; after the Statute de Religiosis, Brook title London, placito 29. That all their customs and Liberties, were continually from time to time confirmed. This Statute of 5 Eliz. capite 4. had a special aim at the City of London, as appears by the words of it, and by the Proviso in the act, that this act, nor any thing there shall be prejudicial to the Cities of London, and by this clause it appears, that it did specially intend to include London, for all other matters. The Statute of 5 Eliz. was made for two ends as well appears by the preamble, for the maintenance of skill in all Trades, and it shall be very prejudicial to the Kingdom, if such be suffered to exercise Trades, in which they have no skill, & Statutes which are beneficial for the common wealth, shall have a large and beneficial construction, as appears Coke 3 par. f. 7. 8. in Heydons Case, this Statute of 5 Eliz. hath always had a very large construction, the same being made in maintenance of manual Occupations; & to this purpose, Pas. 41 Eliz. in the C. B. it was adjudged, where the Widow of a Woollen Draper married with one not free of the City, who would have used that Trade, there adjudged that he could not so do, unless his Wife had been an Apprentice to the same Trade. For the Defendant, it was urged that his Plea was good, both for the matter and form of it; he pleads here, that he used the Trade of an Upholster per spatium, &c. That the City of London is an ancient City and shews the custom in this City used, that any Free-man may use any Trade or manual Occupation in the said City, which custom hath been confirmed per regem in Parliamento; and shews that he is a Free-man of the Company of Wool-packers, and used the Trade of an Upholster according to the custom; and to this Plea there is a demurrer, that this Plea is good: the matter here in question ariseth upon the Statute of 5 Eliz. cap. 4. It hath been objected, this to be no custom, because it is the

Plowdens Commentaries, fol. 79. *&c.*

33 H. 6. fol. 13, 22, *&c.*

Coke 8 pars f. 20. *&c.*

10 E. 4. f. 4. 5 H. 7. fol. 1.

Brook tit. *London* placito 29 Stat. of 5 Eliz. cap. 4.

Coke 3 pars, fol. 7. B *Heydons* Case. Pasch. 41. *Eliz.* C. B.

Common Law of the Land, this is a good custom; the difference will be this, what is a custom, and the Common Law of the Land, is not to be called a custom, but the Common Law; and it is all one in kind, Common Law and common custom; for one Trade to intermeddle with other Trades, is against the Rule of the Common Law, but here by a private custom he may use this, it is not laid here to be the common custom within the whole Realm, but the same only appropriated unto the City of London: As to the confirmation of their customs, per regem in Parliamento, this is good, and according to the usual form in the Register, and the old Book of Entries to plead no further, but confirmed per regem in Parliamento, but if not confirmed, the same is not material: This custom is good, notwithstanding not confirmed: The great question then is, whether this private custom be taken away by the Statute of 5 Eliz. cap. 4. that it is not taken away by this Statute: London is a famous City, called the Kings Chamber, Camera Regis: This private custom here is not taken away by the Statute of 5 Eliz. but the same still remains good; this Statute was made for the benefit of the common wealth: The reason why this was not taken away by the Statute is, because this is a private custom, 19 H. 6. fol. 64. B. a good Case to this purpose which opens the reason of this case, because private mens interest, not private mens custom. Fortescue there the Kings Serjeant when the case was adjudged, he was made chief Justice, argued against the King, & that the custom of London should not be taken away by a general Act, unless the special custom be therein named: So here in this principal Case, for in London, not one of a hundred useth the Trade in which he was educated; if this should be otherwise, many would be by this undone, in regard that this custom hath been in Peace ever since the making of the Statute of 5 Eliz. 12. Eliz. Dyer fol. 290. a good case as touching the custom of London: If you take away London, you take away the Treasure of the Kingdom, and it was never the meaning of this Law to take away the using of Trades, nor of this particular custom, being for the benefit of the City, and without which it cannot be maintained, nor well subsist; upon this Statute of 5 Eliz. it is first to be considered, whether this Trade of an Upholster be within the restraint of this Statute, & whether this Statute shall extend to restrain Citizens, and Free-men of the City of London. 1. No Trade is restrained by this Statute, if in London, then not within the same; this Case here concerns London in general, the Free-men of London have this special custom, this custom excludes others, and includes themselves which are within it: No man was compelled to labor before the Statute of 5 Eliz which was made to prevent this mischief, by which Statute it is provided, that no man shall exercise the said Trades, if he was not before a Prentice in the said Trade, the Statute 5 Eliz. divides it self into several branches. 1. Pur Prentices. 2. for retaining of. 3. in Husbandry 4. Between Master & servant. 5. To enable one to take Prentices. After this then comes the restrictive clause, that none shall use any Trade, if he was not brought up as an Apprentice in the same; & then comes the Exception for London and for Norwich. 1. This Trade here of an Upholster, is not a Trade within this Statute; but admit it be a Trade within the Statute, yet the City of London, by the Proviso in the Statute, is excepted out of the restraint. 1. That this Trade is not within the Statute, for these Reasons. 1. In the first Branch of this Statute, there are named 31 several Trades and in the next Branch 25 several other Trades, and in another Branch 6 All these are named specially and no Upholster named: This Trade was never known to our Ancestors, for there is no Latine word for it: The Plea is, that he used the Trade de un Upholster; if there had been any Latine word for it, the Plea had not been good, being in English: One saith, that Tapeciarius is the Latine word for an Upholster; but this cannot be so, there being no such word, but Tapes for Tapestry; Plumarium à pluma, this cannot be Latine for an Imbroiderer, 11 H. 7. cap. 19. and 5 E. 6. cap. 23. These two Statutes made for Upholsters, and both in full force at the making of the Statute of 5 Eliz. Also exceptio quæ firmat

Statute of 5 Eliz. cap 4.

19 H. 6. fol. 64. B.

12 Eliz. Dyer, fol. 290.

Statute of 11 H. 7 &c.

mat legem, exponit legem, Husbandry is out of the Statute of 5 Eliz. 18 H. 6. fol. 13. for this, because if Husbandry be an Art or Mystery, it is a Mystery within the Statute of Additions, but not within this Statute, by which they are to be Apprentices for seven years, to learn skill in their Trade; but no skill there is in this, for he may well learn this in seven hours: But admitting that this is a Mystery within 5 Eliz. yet this Statute doth not extend to the City of London; this Branch hath reference to the Branches before, in manner and form aforesaid, these cannot extend to London: the first Branch extends to Cities Corporate for Prentices, and this clause excludes London; the next Clause extends to Market Towns not Corporate, this not to London; the next Branch unto 25 Trades there specially named, this not extends to London: If it be so, that this Branch is not by it self, but hath reference to others, and admitting that this be within the letter of this Branch, yet London is excluded, other than such persons who now use this in London, so as this doth not only extend to bodies Natural, but to Bodies Politick, 21 E. 4. fol. 55. touching the Liberties of Norwich, not to be returned in Juries; this is an Inheritance in the Corporation, yet every particular person there is to have the benefit of this immunity; there is also in the Statute of 5 Eliz. an Exception for London and Norwich; it appears by 25 Assisar. placito 61. when a thing is excepted out of a Statute, this sine qua non is also excepted; to this purpose also is 22 Assisar. placito 61. in case of Grants, for by a Grant of one thing, all the incidents to this shall pass also, Coke 8 pars, in the Case of the City of London, fol. 126. 127. that London is not within the Statute of 5 Eliz. and that a man be a Free-man of London, these three manner of ways. 1. By Service as an Apprentice. 2. By Birth. And 3. By Redemption: And if London should be within the Statute of 5 Eliz. then all these three Freedoms should be taken away, which in London is lawful by their Custom & this would be very mischievous if these should be all taken away which shall so be, if London be within the restraints of this Statute of 5 Eliz. It appears by 38 Assisar. plac. 18. 45 E. 3. fol. 26. London is not within the Statute of 7 E. 1. de Religiosis for Mortmain, the Customs of London from time to time confirmed. Coke chief Justice. If a man be free of one Company in London, he shall be free of all, and many times a general act shall not take away a lawful Custom, as the Statute of Præmunire, by which a man shall forfeit all his Land; this shall not take away the force of the Statute, De donis conditionalibus, as it was resolved in Trudgens Case: It is true, as it hath been urged, that skill is requisite of necessity in legal matters, 3 Eliz. Dyer, fol. 169. objected, That an ill Custom by Act of Parliament confirmed, shall not be made good, 49 E. 3. fol. 3. the Custom of the City of London pleaded; for the Whitauries, &c. adjudged to be a void Custom. Quia un Corporation by way of Custom, cannot so take, especially where the same is against a Statute in the Negative. Coke Chief Justice. As to this, in all general Laws, the Judges have always had a special care unto particular Customs, of particular places, and this is the reason of the Kings power; for Non obstantes, the King he is trusted with, by and for the Common wealth, Latimer, 50 E. 3. being of the Counsel, gave the King Counsel, for Non obstantes, and then this was dispensed withal, but this was then very much disliked of by the Counsel: As to this principal Case, Privilegium est quasi privata lex: touching the Statute de Religiosis, penned very strictly against Mortmain that none might, arte vel ingenio, Colore termini; yet may such a devise be in London by the Custom, and they have often had general Confirmations of all their Customs & Liberties they ever had: two Cases there have been in the Exchequer, upon this Statute of 5 Eliz. cap. 4. One was the Case of a Brewer, the second of a Pippinmonger; whether these were within the restraint of the Statute of 5 Eliz. for Brewers, the Barons held a Brewer to be out of the Statute, for if they are divided into ten parts, not nine Apprentices of them; it was therefore adjudged for them and affirmed, and also for the Pippin-monger, Judgment given that he

21 E. 4. fol. 55. &c.

25 Assis. plac. 61.

Coke 8 pars f. 126, 127. &c.

38 Assis. plac. 18. &c.

Statute of 7 E. 1. &c.

3 Eliz. Dyer, fol. 196.

Statute *De Religiosis*

Statute of 5 Eliz. cap. 4.

was also out of the Statute: A Writ of Error upon this brought, & the Judgment affirmed; for the Statute speaketh of Mystery or Trades, and they all resolved a Pippin-monger to be out of the Statute, because there was no Mystery in buying of Pippins, and therefore he was out of the Statute. A Monger in the Saxon is a Merchant, and therefore a Coster-monger keeps his name; the Statute of 5 Eliz. saith all Trades: An Upholster is neither a Trade nor Mystery, no skill required in it: And if a man doth marry a Widow, and may not use that Trade which her former Husband used, by this he will be undone: Judges ought much to favor particular Customs grounded upon Reason; the reason why Pippinmongers were adjudged to be out of the Statute, was because there was no skill requisite to be in them, and so no skill requisite to be in Upholsters, Porters, Tankerd-bearers, no Art at all in any of these, Fallere, flere, & nere, est muliere; ostendi mihi molendinarium, & ostendam tibi furem. A Miller hath a golden Thumb: The Court inclined to be of opinion, that an Upholster here is not within the Statute of 5 Eliz. but they would be further advised herein, till another time. Coke chief Justice. An Upholster is clearly out of the Statute, for it ought to be such a Trade and Mystery which hath skill to be used in it, otherwise it is out of the Statute, the Information here is, Existens artem, misterium, sive occupationem, he might as well have said so of a Pippin-monger: If the Widow of a Free-man takes a second Husband, he may well use the Trade of the former Husband, and yet he not Free of the same, and so for this time this Case was adjourned till a further debate: Afterwards, Termino Trin. 12. Jac. B. R. this matter was moved again, and long debated. Coke chief Justice. As to the Statute de Religiosis; by this general Act, the Custom was gone, but afterwards there came a general confirmation of the Customs of London, by the Statute of 37 E. 3. cap. 6. Rastal. fol. 16. by which it is Ordained, that Artificers, and Handy-crafts people, shall hold them every one to one Mystery which he will choose, so that by this it appears, that the Statute of 5 Eliz. was not the first Act made for these matters; and by experience it appears in London, that if a man be free of one Trade, he may well exercise any Trade there, For if a Free man dies, if his Wife, being his Executrix or Administratrix, shall not be suffered to use this Trade (as it is the common course there) this will be her undoing; for if they be free of the City, they may use any Trade there: As to the principal Case here in question; this Statute of 5 Eliz. hath never been so expounded, as to extend unto the City of London: An Upholster also is clearly out of the Statute of 5 Eliz. & he shall be no more said to be within the restraint of this Statute, than a Pippin-monger, or a Plow-man, for an Upholster is no Trade of himself, but is derived out of other Trades. Croke Justice. This hath been vexata questio: The Customs of London are very great, and by these three ways a man may be a Free-man of London: As 1. By Patrimony, or Birth. 2. By Service, or Apprentiship. And 3. By Redemption for Mony. The two first are the best, Nemo nascitur Artifex. Dodderidge Justic. 23 Eliz. Dyer, fol. 373. a good Case, by which it appeareth, that a Custom which standeth with reason is good, and to be upheld. Haughton Justice. This Statute of 5 Eliz. was made for to restrain the using and exercising of Trades without skill, and therefore London is to have priviledge against this Law, more than any other place. Coke chief Justice. Unskilfulness is a sufficient punishment for him. Dodderidge Justice. The great difficulty here rests upon the Informers part, to make an Upholster to be within the Statute of 5 Eliz. Coke Chief Justice. A Brewer is there named, but not in the Branch upon which this Case is: Another Clause there in the Act, upon which this is grounded, (S) any Trade; the Plow man is a Trade, and so is the Pippin-monger also, and Mystery, which desires skill; all his skill is, in so laying his Apples, as to keep them from rotting: It hath not as yet been described unto me as a Judge, what an Upholster is; the point here only is, whether this Statute of 5 Eliz. doth extend unto him or not: As to

Termino Trin. 12 Jac. B. R. &c.

Statute of 37 E. 3. &c.

23 Eliz. Dyer fol. 373.

to the Custom, and the confirmation thereof pleaded, the same clearly is not well pleaded. Dodderidge Justice. It if it hath been used contrary, before and since the making of the Statute, to make now any alteration of it, would be dangerous, and make a great Garboil. Haughton Justice demanded whether a Painter was within the Statute of 5 Eliz. or not. Coke chief Justice. He is within the Statute, for a Painter is specially named in the Statute, and so also is a Tile-maker, but not an Upholster: And so for the Court to be further advised, the same was again adjourned to another time, to have then a final end of it. Afterwards, Term. Michael. 12 Jac. B. R. this matter was moved again, and argued at large by both sides. Coke chief Justice. This Statute of 5 Eliz. doth not extend to a Husbandman clearly; Cain was Agricola, Abel pastor ovium, these are out of the Statute, and yet they may well take Prentices: There are 61 Trades mentioned in the Statute; a Dawber & a Thatcher these two are not within the Statute, Trade, skill, &c. yet seven years to be Prentice: This Statute is not only that one should have skill, but made purposely to keep Youth from idleness, and to bring them up in labor; there is a Corporation of Gardiners and yet a Gardiner is out of the Statute of 5 Eliz. for every one that will, may well be a Gardiner. Dodderidge Justice, When you have a custom, and this is expressed by confirmation, by Act of Parliament, a general Law shall not afterwards take away this custom, being so expressly confirmed before. Coke chief Justice. A general Law shall not take away any part of Magna Charta; and by 45 E. 3. fol. 26. all Acts made against this to be void: Laws are called Libertates, quia liberos facit: A man is not to be restrained that he shall not labor for his living, and they which are bound by this Law, volens nolens, are compelled to labor and to serve: And so the Court seemed to be clear of Opinion against the Informer that the custom, as the same is alledged, was good, though ill pleaded; but yet howsoever, they enclined all to be of Opinion, that an Upholster was not a Trade within the restraint of the Statute of 5 Eliz. no more than a Brewer or a Pipping-monger: But the Court pronounced no final Judgment in the case, and so the Informer perceiving the Opinion of the Court, did not further prosecute the same, but the same was ended by agreement between the parties.

Termin. Mich. 12 Jac. B. R.

45 E. 3. fol. 26.

No Judgment given, but ended by agreement.

Nota, per Coke chief Justice. When one is taken, and in Execution, he ought then to be in salva, & arcta Custodia, (S.) Salva for the Goaler, and arcta for the party, the Plaintiff; the party by this being coarcted to pay his Debt.

Burton Plaintiff, against *Palmer* Defendant.

Entred Trin. 10 *Jac.* B. R. Rott. 1056.

IN a Writ of Error to reverse a Judgment given in the C. B. in an Action of Covenant there brought by Palmer against Burton his Master, having been his Prentince, for turning of him out of his service, within his term, and in his Declaration, sets forth the custom of London, for taking of Prentices by every Citizen and Freeman of London; and that Burton, being a Freeman of London, did take

take him to be his Apprentice, and that he was bound unto him accordingly, and that he turned him out of his service contrary to his Covenant. unde actio, The Defendant in Bar pleads, that he departed willing, and of his own free will; and returned not again to him, and takes a travers, absque hoc, that he turned him away, prout, &c. hereupon issue was joyned, and verdict, and Judgment for the Plaintiff; for the reversing of which Judgment, a Writ of Error was brought, and for Error it was alledged, that the Declaration was not good, but altogether insufficient: this case was first argued Term. Pasch. 11 Jac. B. R. and urged for the Plaintiff in the Writ of Error, that the Declaration was grounded upon the Custom of London, which custom extends it self only to the City of London, and not elsewhere, and here it appears, that the retainer was laid to be at Newark upon Trent, and the turning away out of his service, it appears by 21 E. 4. fol. 6. a. that an Infant cannot bind himself an Apprentice by the Common Law, but by the Custom of London, an Infant within the age of 14 years, may bind himself an Apprentice by Indenture; here the Declaration is, that he was 14 years of age, and within 21 years, this Custom (as it was observed) was for increase of Trade, and of the Companies within the City there, and therefore this shall not be extended out of the City, and by 35 H. 6. fol. 28. and 1 E. 4. fol. 16. b. the Custom of London, shall not be in force, out of the City; and there Littleton puts the difference where a Custom shall bind, and be allowed in all Courts, and where only in the Court of the ville, or City where this is alledged. A custom and usage, shall bind and be allowed, in all Courts, where the Customs and usages do arise of Land, or usages of the Country, as that of Gravelkind Land, which is to be partible, and so of Borough English Land, the youngest son to inherit, and where the Wife shall have the Moiety of the Land, and the Infants to have their Portions out of the goods of the dead; by Custom as it is in Devonshire, they shall maintain Actions in this Court, by their Custom and usage, and in every Court which hath power to hold plea; otherwise it is of Customs, which take effect in the Court, where the custom is used, and there begins to be in force; these are not allowable, but within such a Court, City or Borough, where they are used, as in London, the custom is, that in Debt upon a contract, if the Alderman of the City will record this, the Defendant, in an Action against him shall be ousted of his Ley-gager, and this is a good custom, and allowable in the Court there; but if the Party will bring his Action here, the Defendant shall have his Ley-gager, although the Alderman comes here, and records the contract: also by the custom of London, an Action of Debt is maintainable against Executors, upon a simple contract, without any specialty; but it is not so here, and yet the recovery there shall be good, and effectual to be alledged, in all Courts, and yet the Action is not maintainable here, by the custom; and so by this appears, that the custom only extends it self, within the City, by 9 Eliz. Dyer, fol. 255. placito 3. a foreigner, as well as a Freeman may devise his Fee-simple Lands in London, to another in fee, by the custom, in mortmain, without a License from the King; here in this case, the action is grounded upon a custom within the City of London, but not out of it; the custom, as it is here expressed, is too general, and so not good. 1. It is here laid, that it is lawful, to take any person whatsoever, whereas it ought to be a Freemans son, such are as fit for Prentices. 2. To take them for any number of years, this is not good, for so he may be a Prentice for 20 years, and the Law in this would be unreasonable. Hill. 31 Eliz. B. R. Rott. 758. Billingley, or Kinnersley against Coke, in an Action upon the case for words, for saying that the other was perjured, there the custom was alledged to be, that where any person, or persons whatsoever, quicunque, which shall be there examined, before, &c. This custom was there questioned, as being too general; for that by such a custom, an Infant may be so there examined, &c. which is not to be suffered; and therefore the custom not good, and so ruled, and so is the custom alledged here in this case,

Term. Pasch. 11 Jac. B. R. this case first argued.

21 E. 4. fol. 6.

35 H. 6. f. 28. 1 E. 4. f. 16. a. b.

Note the difference touching customs and usages.

9 Eliz. Dyer, fol 255. placito 3.

Hill 31 Eliz. B. R. &c.

case, any person or persons, and so not good, being too general, another exception to the Declaration, the Custom being here laid to be, that a Citizen and Freeman may retain Prentices, and it is not here shewed in the Declaration that he was a Citizen, but only a Freeman, and so not good; in 38 Assisarum placito 18. and 45 E. 3. fol. 23. it is declared, who shall be said to be a Citizen, and who not, here it is shewed that he was a Freeman, but not a Citizen, whereas he should have shewed, that he had been both the one and the other; and so is it, Coke 4. pars fol. 54. in the Commonalty of Sadlers case, otherwise by the Custom, they are not enabled to take Prentices. It was urged for the Defendant, that the Declaration was good; as to the first exception, that the Custom is unreasonable, this is not so, the custom being laid to be, to take for any number of years, if not less than 7 if for more years, then the party shall be bound by his own contract; if above 14 years: as to the second exception le custome here alledged is but as an inducement to the action, the Action being grounded upon the Indenture; but if the Action had been grounded upon the Custom, there he ought to have pursued the same strictly, & precisely, here he is not restrained, but that he may take Prentices at any place, as well as at London, at Islington, or at any other place, he may take a Prentice; and this taking, is well warranted by the Custom, as to the third exception, because he doth not shew, that he was a Freeman, and a Citizen; this is fully shewed, for it is shewed, that he keeps a shop in London, (a Habberdashers shop there) which cannot be, if he was not a Freeman and Citizen there; he sets forth that he was Liber homo, but doth not say Civis, and so the Declaration is good and sufficient. Flemming chief Justice. The great fault that I perceive in this, is, the Juries giving of intire Damages. Haughton Justice, if the custom will enable the party to an Action, this ought to be reasonable. Flemming chief Justice, he ought to be civis, & liber homo, he is only said here to be liber homo, this is the greatest point, and most material, the number of years are not so material, for he may be bound, by his own contract. Dodderidge Justice, he may be liber homo, & non civis, his being a Citizen makes him subject both to scot and lot, he ought therefore to have laid him to be, civis & liber homo, so that this is a material exception, and so without any further opinion at this time delivered, this case was adjourned to another time, for the Court further to consider of it. Afterwards, Term. Hillar. 11 Jac. B. R. the Court was moved again in this case, the exception to the Declaration, grounded upon the custom, which was, that every Citizen and Freeman of London, may take Prentices; it is here said, that he was a Freeman of the City of London, but not a Citizen, against this it was urged, that being laid to be a Freeman of London, this doth imply so much that he was a Citizen. Coke chief Justice. In the case in the Exchequer, it was agreed who should be said to be a Citizen, there he was only inquilinus, and so not taxable to Scot and Lot, 8 H 6. the case of Bristow, a Merchant of London dwelt at Bristow, he is no Citizen of London; as to the Custom, a man may be a Freeman of London by three ways, 1. By Service, as to be a Prentice, and afterwards to be made Free, having served out his time, and this is the best kind of Freedom. 2. By Redemption, fine, or ransom paid for his freedom; and 3. By Birth, as a Freemans son is free, he ought to be Civis à Civitate. Dodderidge Justice, the custom is, that every Citizen and Freeman, & liber homo Civitatis, the Custom here is laid right, but not well pursued, the freedom by Birth here shall not aid it. For the Father may be free, and yet dwell in a forraign place; the Court was all clear of opinion, that the Declaration was not good, and so the Judgment given in the C. B. was erroneous, and not well given, and therefore by the Rule of the Court, the Judgment was reversed.

38 Assisar. placito 18. 45. E. 3. fol. 23.

Term. Hill. 11. Jac. B. R. &c.

8 H. 6.

Judgment reversed.

Nota, by Haughton Justice, that in an Action of Debt for corn sold, Non indebitatus, is no good plea for the Defendant, neither can any President be shewed to warrant such a plea; the Court agreed with him herein, and Man Secondary, there is no such President to be shewed, to warrant such a plea.

Indebitatus. Nota.

Heath

Heath Plaintiff, against *Ridley* Defendant.

Action of Debt upon the Statute of Usury. 1 Bulst. 182. Po. 301. Mo. 59. 2 Sid. 463. 2 Cr. 335.

Judgment and Execution granted contrary to an Injunction.

Statutes of 27 E. 3. &c.

IN an Action of Debt at the common Law, upon the Statutes of Usury of 13 Eliz. cap. 8. and 31 Eliz. cap. 10. The Defendant pleads the general Issue, which was found against him, and so Judgment to be given against him: A day was given by the Court to the Defendant, to move in Arrest of Judgment, if he had any legal matter to move to stay Judgment: In the interim, the Defendant goes into the Chancery, prefers his Bill there, and there procures an Injunction to stay Judgment and Execution here: But notwithstanding this Injunction, the Court here proceeded, and did grant Judgment and Execution. Coke chief Justice. Look into the Statutes at large, of 27 E. 3. cap. 1. Rastal fol. 326. and of 4 H. 4. cap. 23. Rastal fol. 226. against such Proceedings to stay and hinder Judgments and Executions; and it is much to be wondered, that none will inform upon these Laws in such cases against the party that procures such Injunctions, after Judgments at common Law, or to stay Judgments and Executions, after Trials had, for that by the same Statutes, be it in Plea real or personal, after Judgment given, the party ought to be quiet, and to submit unto it; for that Judgments being once given, in Curia domini Regis, are not to be reversed nor avoided, but by a legal course, (S) per errorem, or per attinctam, and so by the Rule of the Court, in this case, Judgment and Execution was granted.

Judgment and Execution granted.

Thomas Plaintiff, against *Owen* Defendant.

Execution by the Sheriff after a *Supersedeas.*

NOta, That after a Trial, Verdict and Judgment, in an Ejectione firmæ, and a Writ of Habere facias possessionem, to the Sheriff directed: A Writ of Error was here brought, and a Supersedeas granted, directed to the Sheriff to stay Execution, this Writ of Error, and the Supersedeas shewed to the Sheriff, who contrary to this did yet do Execution; the Court upon this, was moved to grant a Writ of Restitution, in regard that this was a great contempt in the Sheriff. Haughton Justice. This case was in the C. B. after Judgment there, and a Writ of Habere facias seisinam to the Sheriff, a Writ of Error was brought, and a Supersedeas to the Sheriff, which came to him as he was going to do execution; the same was shewed to him, who refused to obey it, but did execution, this notwithstanding, and upon this a Writ of Restitution was granted by the Court, because this was an apparent contempt in the Sheriff. Dodderidge Justice If he had the Writ of Error, and will keep this in his pocket until Execution be done, this will alter the case; but in this principal case, here he did not, but did shew the same in time to the Sheriff, who contrary to this did do Execution: And so the Opinion of the Court in this case was, that a Writ of Restitution should be granted, the which by the Rule of the Court was granted accordingly.

A Writ of Restitution granted.

Hix

Hix Plaintiff, against *Gardiner* Defendant.

IN an Action upon the Case for erecting of a Mill: In this Case, the Question insisted upon, was, touching the validity of a Custom, by the Plaintiff, being Lord of the Manor of D. for to bind Resiants and Inhabitants within his said Manor, to come and grinde at his Mill: It was by Coventry for the Plaintiff urged, that the Custom here, as it is laid, is good and sufficient, and that notwithstanding the exceptions before taken against it: It appears by the Register, fol. 153. that this Writ, De secta ad molendinum, est breve de recto, and lyeth, inter extraneas personas, pro secta tali substracta, and they are to be bound by this, but more properly it lies between, and against Inhabitants and Resiants, within the Precinct of the Manor, 17 E. 3. fol. 64. B. & 22 H. 6. fol. 14. to the same purpose, here the custom, as it is laid, is good: As to the Exception taken to this Custom, that the same is laid too generally, being that every Inhabitant and Resiant, to be bound to grinde at this Mill, yet this is good and sufficient, and it is no more than is in the Case to have a customary Common; so here in this case, Coke 6 pars 60, 61. Gatewards Case, that in matters of discharge, Tenants may well prescribe, as to be discharged of their Tythes, paying a modus; so a Prescription may be against an Inhabitant for matter of charge, 8 E. 3. fol. 37. cited Coke 8 pars, fol. 125. in the Case of London, Wagoners case, in an Action of Trespass by Jeffery at Hay, against William at Ford, for breaking his Fold in Hastings; The Defendant shews, that J. de F. was Lord of the Manor of H. that he and his Ancestors, and all the Lords of the said Manor have used to have, liberam faldam, throughout the whole Mille de H. and that none in the Mille there to have Frank Faud, without Agreement made with the Lord, and that if any do contrary to this, the Lords have used to abate it: So that though foldage be for the maintenance of agriculture, and much favoured in Law, yet by custom, a man may be barred of it in his own Land, and another may have it, agreeing with this is 3. E. 3. fol. 3. Mich. 32 & 33 Eliz. B. R. Sir George Farmour Plaintiff, against Brook; the case of the common Bake-house in Torcester, in the county of Northampton, for all the Tenements within the same Mille, this was adjudged à good custom and reasonable; upon which President, this Principal case was grounded: Another Exception was taken, because the custom is laid, that he should grinde no corn there; as to this, it is onely the corn which he spends in his House, 19 E. 2. Fitz. tit. Assise placito 399. & 16. E. 3. Fitz. tit. Avowry, placito 92. This is warranted to be good, by way of Tenure, to grinde all the corn at his Mill which he spends in his House; and if this be so, and good by way of Tenure, à fortiori by Prescription and custom, this may so be: Another Exception was taken, that the custom, as it is laid, is not good for the incertainty of it, being in messuagio sive tenemento, within the Manor; this custom, as it is laid, is good and certain: Another Exception, that the Plaintiff entituling himself by a Lease, from the Dean and Chapter de D. of the Mills, but saith nothing at all of the Suit owing to these Mills, this is good, without any such expression of the Suit in the Lease, for that this doth pass inclusive, and as appurtenant, and by 17 E. 3. fol. 64. B. Suit to a Mill, is appendant to the Mill; and in pleading of a Lease of the Mill, it is sufficient, without mentioning of any thing

An action upon the Case for erecting a Mill.

17 E. 3. fol. 64. b. &c.

8 E. 3. fol. 37 &c.

3 E. 3. f. 3. &c.

19 E. 3. Fitz. tit. &c.

17 E. 3. fol. 64. b.

thing in the Lease, of the Suit: Another Exception, because in pleading by the Plaintiff it is set forth, that the Defendant, being an Inhabitant and a Resiant, within the said Manor had erected a Mill, but doth not shew the time when this Mill was erected, yet this pleading here is good, without any such precise shewing of the time of the erecting of this Mill, it shall be taken by intendment that he hath erected a Mill, and so done contrary to the custom; and to this purpose there was a case, Mich. 43. & 44. Eliz. where one Simpson was Indicted for the publishing of a forged Bond (Sciens) the same to be forged, adjudged this (Sciens) to be referred to the time of the publication of this Bond, when no time was shewed when he had knowledge of the forging of it; so here in this case it shall be intended, that he was an Inhabitant within the Manor, at the time of his erecting of this Mill, per quod; the Plaintiff, amisit sectam, unde actio, &c. 8 Eliz. Dyer fol. 248. and Coke 4. pars, fol. 89. Lutterels Case: An action upon the Case brought for turning of a Water-course, ad damnum of the Plaintiff: So here in this principal case, the Plaintiff is well entituled to this Action against the Defendant, for his damage sustained, & the loss of suit to his Mill, by this new Mill, erected by the Defendant, contrary to the custom, here the pleading good, and so the Plaintiff ought to have his Judgment, Coke chief Justice. This is a very strong case; this is a good custom, the Exceptions taken are of no force, and have been well answered as to the lying of this Writ, De secta ad molendinum, this lies not always between Lord and Tenant, but where there is a Tenure where there is no Tenure, there it lies by custom, and you cannot imagine the reason of a custom, the custom of Borough English and Gavelkinde, are no reasonable customs, the reason to be shewed of the beginning of them is impossible: Sir George Farmours Case, remembred the custom for Torcester common Bake-house for the whole Town; in Lancashire, by custom, upon the death of Tenant at Will, and for years: Heriots to be paid, good by custom, and so the custom, here being laid to be, that every Inhabitant to grinde at his Mill, this a good custom 8 E. 3. f. 37. & 3 E. 3. fol. 3. adjudged so in point, in the case of a Fould, liberam faldam, and with this agrees 6 E. 3. where the rule is that a custom may be extended throughout the whole Manor. Croke Justice agreed herein, that here is a good custom as it is laid, and the pleading good: If a man hath a common Ferry, and prescribes to have obelum for every Footman passing over, and denarium for every Horseman, and that none shall pass but over this Ferry, this is a good prescription, as it hath been adjudged here in this Court. Dodderidge. Suit to a Mill, may be by reason of Tenure or Service, and also the same may be by Custom, and then it may well be among Strangers, and so this custom here is good and reasonable, and the pleading good, and the Exceptions well answered. Haughton. The custom here is good; the party here charged, hath also a benefit by this, and the rule of Law is, and as Littleton hath it, Lex plus laudatur, quando ratione probatur, and so it shall be also of a custom, here the party hath his Tenement, he hath benefit by this, and this custom, is reasonable, as well upon a Tenant, as on a Stranger. Dodderidge. In the Register of Writs, in the Writs of Trespass, there the custom of Beverly is put, being that none to erect a Dy-house, without the assent of the Lord of the Manor; this a good custom, and a good President there. Coke chief Justice, The Writ de secta ad molendinum, is a Writ of right in its nature, in which battel may be joyned; if no reason can be given, for the beginning of this, or of any other Custom, yet non sequitur, this Custom to be for this cause unreasonable, and against reason in the beginning of it, for that for some things no reason can be given; and as the Rule is, Qui rationem in omnibus quærit, rationem destruit: Writs there are in the Register: for the performance of others, and such like Customs as this here is: The Court all clear of opinion, that this Custom here is good, and well pleaded, and so by the Rule of the Court, Judgment was given for the Plaintiff.

8 Eliz. Dyer, fol. 248. &c.

8 E. 3. fol. 37. & 3 E. 3. fol. 3. 6 E. 3.

Judgment for the Plaintiff.

Nota

Nota, In a Prohibitions prayed to stay Proceedings in the Court of Requests. Coke chief Justice. It is to be observed for a general Rule and Maxime of Law, that if any Court of equity do intermeddle with matters that are properly at the Common Law, and which concerns matter of Free-hold, they are then to be prohibited; the reason of this is, because they draw the matter there, ad aliud examen, and this put in arbitrio, boni viri, and there Rules and Judgments are as binding as the Laws of the Medes and Persians, not to be alteted, and upon which no Writ of Errour nor Attaint lyeth; and this is the true reason, why they, in such cases ought to be prohibited, before their Judgments given, by the Common Law, all matters are to be decided, either by twelve men by a Jury, or by twelve Judges; in the Exchequer Chamber, if a Jury do erre in their verdict, being given, afterwards the party is not without his legal remedy, for an Attaint lieth against them for his remedy; and if the Judges do erre in their Judgments, for the parties remedy, a Writ of errour lieth; and the party is not without his legal remedy; but after a Judgment or Decree given in a Court of Equity, if erronious, no remedy hath the party against whom the same is given, for no Errour or Attaint lieth in such a case.

Nota. Touching a Prohibition to the Court of Requests. 2. Cr. 335, 336, p. 215.

William Hetly Plaintiff against Sir *John Boyer*, Sir *Anthony Mildmay*, *Matthews*, *Robinson*, & *All.* Defendants.

NOta, The court was moved for the discharge of William Hetly out of prison being committed by Sir John Boyer, Sir Anthony Mildmay, and others the Commissioners of Sewers in the county of Northampton, upon the Statute of 23. H. 8. cap. 5. giving them power to do, as in the Statute is expressed: The case appeared to the court to be this, The commissioners of Sewers in the county of Northampton did assess a Fine upon the Mille de D. and did appoint this Fine to be levyed of the cattell of William Hetly, and William Carryer, and another, to take his cattell, and to sell them for the Fine, which they so did accordingly: upon this, Hetly brought his Action here in this court, and had Judgment against them; upon this, Hetly was called before the Commissioners, and by them questioned for this, and by them urged to release the Actions he had against them, (S.) Against Carryer and the other who took his cattell; and for his refusing so to do, supposing the same to be unjust, they committed him to the Gaol of Peterborough, and their commitment of him to the Gaoler was, To take the body of William Hetly, and him there to keep without Bail or Mainprize, till he should hear farther from them, of some order to be taken for his Delivery; upon this the court was moved for his discharge, and for an Attachment against the commissioners. Coke chief Justice. Touching the words of the Statute, which gives them power to act in some things according to their discretions; this is to be Legalis discretio, & discretio est scire per leges quid est justum; In this case here, the Commissioners of Sewers have committed Hetley, untill he release a Judgment, which he hath in this court, against one Carryer, and another, for the unjust taking of his cattell; for this unjust and illegal commitment of theirs,

Touching the Comissioners of Sewers, and their power, 2. Cr. 336.

we will grant an Attachment against all the Commissioners, and set good fines on all their heads, for this their imprisoning of Hedley, till he release his Actions, which he hath in this Court against others, for unjust taking of his cattel, by their command, this matter being inauditum, and not to be suffered to go without exemplary punishment, and therefore by the Rule of the Court An Attachment was awarded against all the Commissioners of Sewers, returnable the next terme, for that this is not sufferable, for them, thus to imprison one of the King's free Subjects in such an unjust way, and manner. Afterwards, Term. Pasch. 12. Jac. B. R. this matter was moved again, and some of the Commissioners present in Court, and by the Court demanded, what answer they could make to this Act of theirs, and how they could justify the same. Coke, the Actions were depending here in this Court, and such things as the Commissioners doe, as appertaining to their Commission, this is by authoritie, derived, and given unto them by Act of Parliament, and where in the Act of Parliament, these words are (S) where some matters, in their proceedings, are left to their discretions. As to this, the true exposition of the words in the Statute (S) left to their discretions) that is sana, & legalis discretio, and this is discernere per legem, quid est justum, and this is, and ought to be according to the Law. This which is here done, by the Commissioners, is a very great offence (S) after a Judgment given here in this Court, for the procuring of it, and for refusing to release it, for this, to commit a free-born subject to prison, and there to continue without bayle, or mainprise, this is a very great offence, and of a high nature, and for this, Sir John Boyer, one of the Commissioners, being present in Court, is to be committed, and to have a Fine imposed upon him, for the same. Croke Justice, as to the words of the Statute, (left to their discretion) this ought to be sana discretio, and this is discernere per legem, quid est justum, otherwise it is indiscretio, I agree in the censure, that he is to be committed, and fined for this great offence. Dodderidge, they have here medled with a matter, that was merely collaterall. If a fine be by them imposed upon a Township of 5. l. and for malice, the cattell of this party, onely taken, and of no others; this apears to be malice apparent, the whole town amerced, and one man to be onely punished, he might very well have his remedy for this at the Common Law, and no greater duresse could there be than this was, and for this I do agree in opinion, that he is to be fined, and imprisoned, untill he hath paid the fine. Haughton agreed herein. The Warrant by them made, is a direct opposition, unto the order, and Judgement of this Court, and therefore for this he is to be fined, and imprisoned, of which Fine we will advise, for the King hath an Interest in it. Coke. The Commission of Sewers is as necessary as may be, but in Commission is more abused than this is; for they do pretend the good of the Common wealth, but do intend their own proper good. As to their taxes, in this they do misdemeane themselves, for they cannot taxe a whole township, but onely particular persons, as it was resolved in a Case in Cambridgeshire. 8.E. 3. the record of this tax, every Town they are to tax and rate every man by a proportionable rate, they cannot do what they will, but they are to follow and pursue, their directions by the Statute, they have not an absolute power, but they are bounded, and are to proceed, according to the rules of Law, (this being contrary to the common opinion, that they may do what they will,) by the Rule of the Court, Sir John Boyer was fined 200. l. for his ignorance, otherwise for this so great an offence, he deserved to have been fined 500. l. and to be imprisoned till he pay his fine.

Term. Pasch. 12. Jac. B.R. this matter moved again.

8 E. 3. 1.

Sir *John Boyer* 200. l. Fine.

Nota, That at another time, this matter was moved again, Mathews and Robinson, two other of the Commissioners being present in Court. Coke chief Just. demanded of them, whether they might taxe and rate whole Townships, or no: they answered, that as they conceived, they might so do. Coke. You cannot so do, but this is to be done severally (S) every man, every inhabitant, by himself, and this proportionably; and so it hath been adjudged; and advised them to view the

the Statute of 27. E. 3. cap. 1. Rastal Title, Provision, & Premunire, fol. 326 placito. 3. and to observe the danger, which happeneth to those, which do sue in any other Court, to defeat, or impeach the Judgments given in the Kings Court, complaint was made unto Sigismund the Emperour, of offences in the Clergy the which were confessed, and a Bishop did then request him to begin with the Minorites; he answered him again, we will begin with the majorites; so the Sheriff hath here returned unto us the minorites, but we will have the majorites also; you by your Commission, cannot restrain any man from having the privilege of the Common Law Matthews and Robinson present, confessed the Warrant, and that they put their hands unto it, ignorantly, and therefore prayed the favour of the Court. Dodderidge Justice, we may consider this in your fines: you have here proceeded against the Law; for the statute is, that every man shall be particularly assessed, and you cannot do this upon whole Townships; for then you may charge one man with the whole fine, as here you have done. Coke, the assessment ought to be severally upon all; and so it is adjudged in Rookes Case, 5. pars. fol. 99. & 100. Dodderidge. Justitia non novit patrem, nec matrem, nec sororem, solam veritatem inspicit justitia; these which are present, are to be committed. Curia, as for their fines, we will be advised of them.

27 E. 3. cap. 1. &c.

Sigismund the Emperour.

Coke 5. pars f. 99. & 100. *Rookes* Case.

Nota, That Sir Anthony Mildmay, one of the Commissioners absented himself upon pretended sickness, Coke in 37. H. 6. a Precipe quod reddat was brought against one. Judgment given against him by default, sickness will not excuse him, so here, this shall not excuse Sir Anthony Mildmay, but if he will not come into Court, an Indictment shall be drawn against him, upon the Statute of 27. E. 3. capite 1 for that this is an offence without President, for the Commissioners to commit one to Prison, without Baile, or mainprise, untill he do release a Judgment given for him in this Court, the whole Court agreed in this.

57 *H.* 6.

24 E. 3. cap. 1.

TERMIN.

TERMIN. PASCH.

12 *Jac. B. R.*

Hill Plaintiff, against *Hanks* Defendant.

Entred Pasch. 11. *Jac.* B. R.

Rott. 143.

IN an Action upon the case, for a Trover and conversion of his Goods, of such a quantity of corn; the Defendant pleads, and justifies the taking, at such a place (S.) at Lichfield, as Bell-man there by the custom, to take out of every bag holding a bushel, and no more, a pint, and if it hold more, then a quart; and shews that he was chosen Bell-man, and tempore quo he did take the same, as by the custom it belonged to him so to do, and lays the taking in one place, by the Custom, and the conversion in another place, and so justifies, upon this Plea the Plaintiff demurrs in Law: It was urged for the Plantiff by Weston and Davenport, that the Plea was not good: The questions are three. Two touching the form of the Plea. And the third, Touching the validity of the custom, as it is pleaded, 1. The Plaintiff declares upon a Trover and conversion of his goods, at such a place the Defendant justifies the taking as Bell-man; his Plea here, is no more than the general Issue; and this appears by 9 H 6. fol. 11. a. in Trespass, for breaking his Close, and carrying away of twenty Load of Timber; the Defendant, as to the breaking of the Close, pleaded, that the Plaintiff leased the same to him at will, by force of which he entred; and as to the carrying away of the twenty load of Timber, he pleads that one A. was seised of the twenty load of Timber, and of the Close, made B. his Executour, and dyed; and that B. did give him the twenty load of Timber, and takes a Traverse, absque hoc, that he did take away any of the Plaintiff's Timber; this there adjudged to be more than the general Issue, and with this agrees, 22 H. 6. fol. 36. and 33. H. 6 fol. 56. Second point, that he ought here to have traversed the place of the taking, it appears 19. H. 6. fol. 48. that transitory matters may be laid where the party will, with this agrees 32 H. 6. fol. 1., 8 H. 6. fol. 10 & 14 H. 6. fol. 22. 3. As to the Custom here pleaded, the same is not

An Action upon the case for a Trove and Conversion. 1 Ro. 2. 1. 1 Ro. Abr. 44. 561. Mo. 835. 2. Inst. 221.

9 H. 6. f. 11. a

22 H. 6. f. 36. 33 H. 6. f. 56. 19 H. 6. f. 48. &c.

is not good, being against the Law. 1. In respect of the party who ought to pay this, and so the same is unreasonable; his Office is to sweep the Market, and to repair the Streets and for this he is to have as before is expressed, and this to have whether the party do sell or not, and therefore this custom is unreasonable, and against the Law: Also in the Plea, it was urged, that the same was good, this being in a Trover and Conversion, and the Defendant by his Plea entities himself, and shews, that elegerunt quendam officiarium, but doth not shew, that such a one to be so elected, was an ancient Officer; as touching this, see the Old Book of Entries, fol. 3. b. in tit. Action upon the Case, the pleading of the Custom for Granage; he pleads here, Quod debito modo electus, but doth not shew how, (S) By the Bailiffs and Citizens, 6 & 7 E. 6. Dyer fol. 80. placit. 60. Custodiam parci de Stowe, was granted unto one, with a Fee of 3 l. out of the Rents, Issues and Profits of the Manor of Stowe, he ought to shew for what cause he was to have this Fee; so here in this Case, he ought to have shewed that he was to have this ratione officii, but this he hath not here so shewed: Jehu Webs, Case, Coke 8 pars, fol 46, 47. touching this, 8 E. 3. fol. 55, 56. there cited, the Case of the Beadle of a Hundred, ratione inde, he here saith, pro labore suo, to have this: For the Defendant it was urged by Coventry, and George Croke, in answer to the three matters moved. 1. Whether this be a good Custom or not, 2. Whether any Traverse ought here to have been. And 3. Whether this Plea here doth amount unto a Not Guilty, or not. 1. That this is a good Custom, and whether the party sells, or not sells, this is not material, he is to have his duty as an Officer; and this warranted by 9 H. 6. fol. 45. in the Case of Tole, good by special Custom, although he doth not sell; and 21 H. 7. fol. 16. a. & 18 Eliz. Dyer fol. 352. placito 27. the Custom for Granage, and if the Custom be good in these Cases, why not good here in this Case now in question, being of the like quality. 2. Touching the Traverse, the Court at the first have over-ruled this, that no Traverse here needs to be, and that the Conversion is the point of the Action not the Trover; here the Defendant hath well justified the taking and that by a Customary Interest to himself derived. 3. Whether this Plea here amounts to the General Issue, or not: As to this, the special Plea here is good, and here needs no Traverse to be taken: in a Trover and Conversion, it is not requisite to shew that they were the Plaintiffs goods, at the time of the conversion; here it is laid, that they were the Plaintiffs goods, it is sufficient for the Defendant to confess, that once there was a property in the Plaintiff; this may be resembled to the case in 5 E. 3. fol. 3. in a Replevin brought against one, for ten cast of Herrings, the Defendant shews that they were cast upon his Land by the Sea, and that he hath Wreck, and so justifies the taking, and this ruled to be a good Plea, 14 Eliz. fol. 307. the Case of Fines: In an Action upon the Case for a Hauk, the Defendant pleads, that after the Hauk was lost, the same came first to the hands of one Jefferies, who sold the same to one Rowley, who gave it to the Defendant, adjudged the Plea in Bar sufficient against the Plaintiff; so here the Defendant confesseth that these were the goods of the Plaintiff, but shews how they came to him: As to the exception taken, because he doth not shew that this was an ancient office; this he ought not to do as this Case is, for the taking is not here laid to be, rat one officii, but by reason of the custom; the Defendant doth not claim this here ratione Officii, but by custom. In the cases before remembred, there the claim was ratione officii: and therefore it ought there to be averred, that the same was an ancient office, but here the Belman is shewed to be an officer, removeable at the will of the Citizens, and this is here alledged to be the Custom of the place; and this is not as an office, neither is he here a permanent officer, but as the Scavenger; he doth not justifie here as an officer, as ratione officii to have so much, but by reason of the Custom, he is to have it, the Defendant here hath pleaded more than he needed to have done; for if he had said, debito modo Electus, this pleading had been good, here a good issue might have been taken, that he was not Belman, so that here is a good plea, and Justification, and the Plaintiff had no cause to demurr;

Old Book of Entries fol. 3. &c.

6 & 7 E. 6. &c.

9 H. 6. f. 45. &c.

5 E. 3. fol. 3.

14 Eliz. Dyer, fol. 307.

mur; and so judgement ought to be given for the Defendant. Coke chief Justice, experience hath made this matter clear, that the taking is Local, but the conversion is transitory; clearly, and without any colour if the custome here be good, he may then take, and convert where he will; conversion is the point, and the trover is but the inducement to the action, he sheweth here, that he hath not converted the goods of the Plaintiff; but his own proper goods, when he conveys to himself a propertie, and after converts; if this custome hath a reasonable commencement, this is not then to be defeated, they which do repair Bridges, and Cawseys, may have toll by prescription; and so for murage, and pontage, the King may grant by his Letters patents, to have a charge, and imposition laid, but this ought to be pro bono publico, and also proportionable, and so is 3 E. 3. if for murage, or pontage, to have an imposition, assessed upon the subjects, because they have the benefit of it; and in pleading of it the best way is to say so, Consuetudo villæ; and not to lay this by way of prescription, but by way of custome, the office of a Belman is removeable, by 27. liber assisar; if one collect money, for a tax of a Town, he is to be indicted, for not imploying of it to the publick use, so here in this case, if he gathers this, and doth not perform with it, what he ought to doe, on his part, he ought to be indicted for it, and this is very clear, and so it is in the case of all treasurers of Counties; if they do not perform the trust in them reposed, but do misimploy what they have so received, they are for this to be indicted at the King's suit. At this time, the court did incline, that the custome as it is here alledged is good, upon the book of 21 H. 7. fo. 16. the custome for the Major and commonalty of Gloucester to have toll, of every Boat which passeth the river that runs by the town; a good custome; Coke, the conversion here is the point of the action, Curia, we will be better advised of this case, before we give our positive Judgements herein, Coke chief Justice, we have now but broken the case, but by this, we have almost broken the back of it; and as touching tolls there is a remarkable note in Statham's abridgement title Tolle placito ultimo. Molendinarius de Matlock, tollavit bis, eo quod ipse audivit Rectorem de eadem villa dicere, in dominica Ramis Palmarum, Tolle, Tolle, this Matlock is in the County of Darby; and so without saying any more in this case, at this time, the same was adiourned, till the next term, to hear the opinion of the Judges herein. Afterwards (S.) Termino Trinit. 13 Jac. B. R. the court was moved again for their Judgement herein. Coke. The arguments of Judges was first instituted for a three-fold reason, the first, for satisfaction, the second, for instruction, and the third for pacification. First, for satisfaction, and this in a double manner. First, for satisfaction to the Counsel in the cause; and secondly, to give satisfaction to the clyents, hearing the reason of the Judges inducing them, to their opinions. Secondly, for instruction, and this also in a double manner. First, this serves for instruction, to the Judges themselves, they being by this, put in remembrance, of their books: and secondly, for the instruction of Students, such arguments, being to them as commentaries, upon, and of divers Statutes, and book cases. Thirdly, for pacification, and this in a very great manner; for by these Arguments at large, doubts are upon good and mature deliberation determined, and suits ended, and so by these arguments the certainty of the Law, well known, and certainty in all things, is the Mother of repose; and these are the three causes of solemn Arguments by the Judges: As to the Case here now in question, here is a custom alledged, and this with a consideration, (S.) The Bell-man to look unto the sweeping and the paving of the Streets, and for this his so doing, he claims to have of every Bag of Corn, if it contains a Bush.l, then to have a pint, and if more, then a quart, and this he claims to have by the Custom there used: As to the Body of this Custom, it is a very plain case, that this Custom here is a good Custom, and the Plaintiff here by his Demurrer hath confessed the custom, and this is also here laid, to be so used, time out of mind, the case in 18 Eliz. Dyer. fol. 352, the Custome for Granage in London,

3 E. 3.

27 Assisar.

21 H. 7. fo. 16.

Termino Trin. 12 Jac. B. R, &c.

Three reasons for the arguments of Judges.

18 Eliz. 2. Dyer fo. 352.

don, claimes to have the twentieth part. Liechfield the Sixtieth part, and whether sell or not sell; without all question, this is good, by the custome; the great matter here in this case is, whether the plea of the Defendant amounts unto the generall issue of Non culp. or not, clearly the Plaintiff ought to have the property, when the conversion is laid to be, and it is a plain case, that the property doth remaine, notwithstanding the Trover, the words in the Action, upon the case for a Trover, are, & ipse sciens bona & catalla, to be the Plaintiffs, in usum suum proprium convertit, & disposuit; this is the point, and this Case here varyes from the cases which we have adjudged here before; the question in Law here is, whether this Custome here pleaded, be good, or not; the Jurors will shew very little favour to these customes for tolles; but the Rule is, ad quæstionem facti non respondebit jurisperitus, ad quæstionem juris, non juratores; this was Shuttleworths case, a Woman being possessed of certain goods, lost them, afterwards she took Shuttleworth to husband, who with his Wife, brought a Trover, and conversion for these goods; upon this Declaration, the Defendant demurred in law, the property which the wife formerly had, by her taking of Shuttleworth to husband, was now vested in him by the Law, and then he could not joyn his Wife with him in the action, and for this cause it was adjudged against Shuttleworth the Plaintiffe, who was a great Lawyer, joyned his Wife with him, in the action, which he ought not to have done; and the Declaration being brought unto him (in other names) for his advice therein, he himself drew the demurrer to the Declaration, because he joyned his Wife with him, in the Declaration, there is a Proverbiall speech, From the Devill, the Dutchy, and Dunnington fee, I pray thee good Lord, deliver me (Dunnington fee) where many extortions were used. I am very clear of opinion, that the custome here is good, and it is also the more reasonable, because it is here in his plea expressed, that he had paved the Streets, and if the custom be good, then the taking is good, and if the taking here be good, then by this the property is in him, and not in the Plaintiff, and to no Trover to be brought by him. Dodderidge, the Custome here is good, the property is not altered by the taking, and this was one Martins case here, the opinion of Popham chief Justice, and of the Court, where one took a load of Hay, of anothers, and mingled the same with his own Hay, and the Court inclined, that he might take as much again presently. Croke and Haughton Justices, so was there another case here, one did take the corne of another, and mingled the same with his own corn; the other may presently take his own corn again, because this was so done, of his own wrong, and it was pleaded, that he took most of his own corn again. Coke, I do somewhat doubt of this case, for he cannot take his corn in Withernam, and he cannot doe wrong, because the other hath done wrong. As to the exceptions taken to the plea
1. in barre. 1. Because it is not shewed, that they were seised in fee of the Mannor, at the time of the election; as to this, the same is shewed, very apparently, for it is shewed, that they, their predecessors, and all those, whose estate they have in the Man-
7 H. 7. f. 3. nor, have used to elect, this is good, and sufficient. Dodderidge, In 7 H. 7. fol. 3. an Action of trespasse brought, for cutting down, and carrying away of certain trees; the Defendant pleads, that long time before, &c. I. S. was seised of the place where, and of this enfeoffed the Plaintiffe, to the use of one Alice, by force whereof Alice was seised, and did give the trees to the Defendant, by force of which gift, he did cut down the trees, and carried them away. It is there said, that though he shews, that the Plaintiffe was once seised, to the use of Alice; this shall not be intended so still to continue, unlesse it be so shewed; and therefore, it is there held by the Court, that he ought to say, that at the time of the gift, the Plaintiffe was seised to the use of Alice, and so it is there held, that if one alledges a feoffment, he is to say, that the feoffer was seised, at the time of the feoffment, and so of a grant of a reversion, that he had this, at the time of the grant, and so in the pleading of an Attornment, that he was tenant at the time of the Attornment, and so of a grant of goods, that he had them at the time of the grant. Coke, A Bar, if it be

be good to a common intent, this is sufficient, to say here, that this is not an ancient Office, whereas it is said, that now, and before the trespasse; they, their Predecessors, and all those, whose estate they have, have used to elect such an Officer, this is very apparently good, (by the said, —— and duely elected; this is matter sufficient to shew unto us, that he was thus elected by the Bailiffs, and it is laid in facto, that he was Bel-man, elected, per prædictos Ballivos, & cives, this is clearly good, and it had been likewise good, if he had said, that he was Bell-man for the time being, generally, this the Custome; and he needs not to shew, how he was elected, so in case of an Abbot, or a Bishop, not to shew how elected; but here it is, that he was elected, per prædictos Ballivos, & cives, and this makes the matter of his election, to be very cleere, here this is laid, and no more, then the Custome doth allow of; the Plaintiffe here might have traversed, absque hoc, that he was Bell-man, but the Plaintiffe, by his demurrer here, hath confessed, and agreed so much, that he was Bell-man at the time of the taking. In a Barre, a common intent is good, in Declarations, there ought to be a certain common intent. Estoppells are to be certain to every intent; here he was a Bell-man elected, per prædictos Ballivos, this Bar here is good and sufficient. We all agree in this, the Barre to be no more then a Non culp. it rests here, upon the taking, if the custom be good; but the Countrey Jurors will not find for the Custome. Croke, the point and question here is, whether this custom here laid, be good, or not? whether there be any falsitie in the plea, if so, then the best way had been, to travers this, but if it be insufficient, in the point of pleading, then to demurre upon it; here the custome, as it is laid, is good, and here is also quid pro quo, and so by this the same is reasonable, and the Lay gents. have no knowledge of this; here the Plaintiffe had no cause to demurre, but by this he hath confessed all, and so Judgement ought to be given against him. Dodderidge. 3. Exceptions have been taken to the Bar. 1. For not alledging, that they were seised of the said Manor, at the time of the Election, if not, then they had no power, to make the Election, and so the plea not good, the Plea in Barre here is good, this notwithstanding, it is here shewed, that they were seised in fee of the said Manor, and that they, and all their Predecessors have used to elect, and they being so seised, tempore quo, the pleading here is good, for when once he alledges seisin in them of an estate of inheritance, by the intendment of Law, this shall be said, still to have continuance, if the contrary be not shewed, by the other side, to this purpose is 7 H. 7. fol. 3. but here the Defendant hath alledged sufficient seisin, both before, and after the election, and so the Plea is good, &c. exception, that the election here is not well pleaded, the pleading is quod debito modo electus, this is well pleaded; for that debito modo electus, this goeth not onely to the form of the election, but also to the power of the Electors, which power they could not have, if they were not seised of the Manor, at the time of the election; and this matter will bring the election it self into question; here it is in case of a Barre, and if the same be good to a common intent, this is sufficient, here they have a fee-simple by intendment, & debito modo electus, goeth to the power of the Electors, and so good, as to the other matter, because he doth not say, that he took it, ratione officii, but it is said, that he took the same, ratione inde, and this is good, as to the last exception, it is very plain, that he hath a property, in the corn by him thus taken, he may well then convert the same, and he hath here a property, if the taking be lawfull, and if the custom here be good, then is the taking lawfull, and the conversion justifyable, and so in this case, here is a good Barre pleaded, the Custom good, and the taking, and conversion justifyable, and Judgement to be given against the Plaintiff. Haughton, the barre here is good, though he doth not say, it was antiqua villa, if so used, this exception not materiall, for it cannot be time out of mind so used, unless that the Town had been of so long continuance here, if so used time out of mind, to have a Bell-man elected, he needs not to shew, the manner how, as the manner of the Consecration of a Bishop, needs not to be shewed, but concurrentibus his, & debito modo, this is good, and sufficient, and he needs not to shew the

2. 3. 7 H. 7. fol. 3. 4.

manner and Circumstances of the election, as to the point of seisin, he hath shewed this very plainly, and sufficiently; this is very well alledged; the most material exception is, because that he doth not shew here the taking to be ratione officii, he having this here, as an Officer, but he shews here, that time out of mind, such a Bell-man hath used to sweep, and to pave the street; and in consideratione inde, & pro labore suo, he was to have so much, and this being so shewed by him, doth amount unto as much, as if he had said, he took this ratione officii, for of necessity, the same ought to be so taken by him. As to the pleading also, he is not to plead Non culp. if the matter may prove doubtfull to the Jury; but to plead a special Plea; otherwise it is, where the matter is plain and familiar to the Jury, and well known unto them, as to a seisin, and a dying seised, here the Plea in Barre is good, and the matter well pleaded, the Custome good, and so Judgement to be given for the Defendant. Coke, as to the exception, for omitting (ratione officii) this hath been well answered, here when he sheweth, the Bell-man to take so much, he sheweth that he was elected Bell-man, & pro labore suo, took so much, and not ratione officii, he is to pave, and to sweep, and to be the Cryer; these are the titles of the Bell-man. As to Prescription, and Custome, this difference is to be observed; a Prescription ought to stand upon reason; but a Custome cannot have commencement, but by Parliament, and not by grant, as Burrough English, and Gavelkinde, no reason being to maintain these, but onely by Act of Parliament, and so the whole Court clear of opinion, that the Barre was good, and so likewise the Custome here; and so by the Rule of the Court, Judgement was given for the Defendant, and so entred, quod querens Nil capiat per Billam.

Judgement for the Defendant, *&c.*

Murrey Plaintiff, against ——

Defendant.

Action upon the case for words.

IN an Action upon the case for scandalous words, upon Non culp. pleaded, a verdict was found for the Plaintiffe, It was moved for the Defendant, in arrest of Judgement, that the words are not actionable, the words were these, spoken by the Defendant to the Plaintiff (S) thou art a Knave, and hast laid in wait to kill me, and hast hired one Wilkinson to kill me. Coke and Haughton, these words are not actionable, for here was onely an intention to doe it, insidiator is nothing; what what if he had said he had killed him, and he is still living, this had been nothing; and as for the Lady Cockeins Case, cited in Alle's case, 4 pars. fol. 16. b. my Lady Cockein offered to give poyson to one, to kill the Childe in her body, this was an odious fact, but if this case were now to come in question, I should be very well advised of it; if the words were these, you have murdered I. S. and yet he is living, these words are not actionable, and so was Doctor Poes case; You would have killed me, and we all over-ruled these words, not to be actionable in the C B. another case was remembred, He set upon me to rob me, in the high-way, and had done it, had not my Horse the better escaped with me. Coke & Haughton, here was an act laid to be done, and so for this cause, the words were actionable, but otherwise it is in this principal case here, where there is no act laid to be done, but onely an intent, and the purpose, or intent of a man, without any act by him done, is not punishable by the Law, and so in this principal case, here being onely an intent, but no act done, in pursuing thereof; and therefore clearly, these words are not actionable, and accordingly, the Rule of the Court was, Quod querens Nil capiat per Billam.

The Lady *Cockeins* case, *&c.*

Dr. *Poes* case.

Judgment *quod querens Nil capiat per Billam.*

Penson

Penson Plaintiff, against *Cartwright* Defendant.

IS a Prohibition to the Court of Requests, moved by Whitlock, for that they are not there to meddle with, or determine matters of Legacies; here a man by his Will in writing, did devise a certain Legacy in money, and he afterwards said to his Executors, I have by my Will given such particular Legacies, and I would have you to encrease the same, to such a summe; this in the Civil Law, is termed Commissum fidei, and by Sir Daniel Dun, this is held a good Legacy. Coke chief Justice. the Parson de Salt Ashes case, in 2 H. 4. fol. 10. a good case to this purpose; a Prohibition out of this Court there granted, this Court takes Conusance of the Proceedings in all other inferior Courts, and will grant a Prohibition, if they do encroach one upon another. 8 H. 6. fol. 10. if an Ordinary will sue for a thing, within the Diocesse of another, he is to be prohibited by this Court, notwithstanding they cannot here hold Plea of it. Dodderidge, if the Court there do erre in their decrees, we are not here to meddle with this. 2 H. 4. fol. 10. is a very good case, the Popes Legate, not to exercise any authority here, there is mention made of a Duplicate. It is to be considered, whether or no we may prohibite them in the Court of Requests, for holding plea there, for a Legacy. Coke, we may very well doe this here, if they of this ought not to hold plea there, notwithstanding that we cannot here hold plea of it; the King may examine, and reforme their Decrees there, sicut ferrum, acuit, ferrum, sic homo hominem; and we here may well prohibite other Courts, from holding of plea, of such things, of which we here cannot hold any plea; and as touching this, if the County Court, or Court Baron do hold plea, of a matter, being above 40 s. we may here prohibite them, though we cannot of this hold plea here, as to the duplicate in 2 H. 4. this is onely a Duplicate power, we here are to take Conusance of all other inferior Courts. Dodderidge, it is to be considered, whether for this Legacy, there be any remedy to be had in the Spiritual Court. Croke, if they will encroach upon the Jurisdiction of other Courts, and so will by this draw the matter, ad aliud examen; we are here to correct this, for that this Court here corrects all errors, and proceedings, in other inferior Courts. Coke, if a Codicil be by word, they in the Spiritual Court are to compel them, to add this unto the Will; if any ordinary remedy be to be had, for this special kind of Legacy, they are not then to hold any plea of it, quæstio juris, to be tried by the Judges, a quæstio facti, by the Jury, and by their Judgment there, they will draw the matter, ad aliud examen. See the Statute of 4 H. 4. capite 23, a good Statute for this, the Court clear of opinion, that nothing is there to be determined, if by any means the same may be ended by the Common Law, by the rule of the Court, a Prohibition was granted.

A Prohibition to the Court of Requests. 2 Cr. 345. 351.

2 H. 4. fol. 10, &c.

8 H. 6. fol. 10.

2 H. 4. fol. 10.

Statute 4 H. 4. cap. 23.

Prohibition granted.

Nota, by Coke chief Just. in case of Priviledge, if one hath the Priviledge of this court, he is not to be sued in any other court, but he is onely here to be sued in Custodia mariscalli, and so if an Attorney of this Court be sued, by the book of 1 H. 7. f. 12. if an Attorney sue by Bill in B. R. the bill to abate, because that no Attorney is there of record, of his attendance necessary, otherwise it is in the C. B. for there, he which is Attorney of record, shall have priviledge to plead by bill. But it appears by the Records in the Tower, before the time of King H. 7. that Attorneys here of this Court, were of Record; An Attorney here, was then called Clericus, our Attorneys

Nota case of Priviledge.

1 H. 7. fol. 12.

Recorda Turris, before K. H. 7.

neys here, are not to be sued in any other Court, and it appears by the Roule of 12 H. 3. in the Tower, that in every terme, Rolls were here made of Warrants of Attorneys, and it appears by 31 H. 6. that if any one be committed, by any of the Judges of this Court, and being so in Custodia mariscalli, any one may now commence a sute against him, being thus in Custodia. Man Secundary informed the Court, that he had examined the Records in the Tower, and that they were so, as before is remembred.

12 H. 3.
31 H. 6.

The KING, against *Cramlington.*

An Indictment for a rescous.

2 Cr. 287. 345. 473.

Register.

Indictment good, &c.

BEing Indicted for a Rescous, Davenport took exceptions to quash the same, 1. To the return of the rescous, which ought to be as certain as a Declaration, it wants these words, vi & armis, or manu forti, this Writ also varies from all the Presidents: also the place where the rescous was made, ought to be expressly and certainly shewed, which is not here done, and this is not to be taken by intendment. Coke, where the Arrest was, there was also the rescous done, and this by intendment to be so; and this ought not to be so certainly laid, that the rescous was made, ibidem: also it is good here, without vi, & armis, in the Writ of Rescous in the Register, there is vi & armis, but here the Indictment is good without it. Dodderidge, this word, Rescussit, implies this to be done with force; the Court clear of opinion, that this Indictment of Rescous was good, and the partie endicted by the Court, was fyned for the same.

Henry Vale Plaintiffe, against *Field* and *Wilkinson.* Defendants.

An *Ejectione firme.*

2 Cr. 340.
1 Ro. 2. 21.
2 Ro. Abr. 620.

IN an Action of Trespasse, and ejectment, brought by Vale the Lessee of Robert Arden, tryed at the Barre by a Jury of Warwickshire, for the triall of the title of the Manor of Parkehall, in the County of Warwick. Robert Arden being seised of the Manor of Parkhall made a Lease unto Vale the Plaintiffe, for triall of his title, the Defendants claymed under a lease made by Sir Robert Darcy, upon opening of the evidence to the Jury, the case appeared to be this, that Edward Arden, being seised in fee, of the Manor of Parkhall, in consideration of the marriage of Robert Arden his son, and heir apparent with the daughter of Justice Corbet, and of 1200. l. given and paid for a marriage portion by his Indenture, did Covenant to stand seised of the said Manor, to the use of himself for life, and afterwards to the use of his Wife, for life, so long, as she shall live sole and unmarried, and afterwards to the use of the said Robert Arden, and his Wife, and of the heirs of his body begotten; after this, the said Edward Arden was Attainted, and his Lands forfeited to the King; and the title of Darcy was as a Patentee of the King, upon the evidence, several questions did arise, the chief question was, whether the Land now in question, and whereof the lease was made to the Plaintiff, was parcell or not parcell, of the Manor of Parkhall, if not parcell, then the same belongs to Sir Robert Darcy, who hath all the other Lands, by Patent, but onely the Manor of

of Parkhall. Coke chief Justice, by the Book of 43 E. 3. if a villein be a Leassee, for the life of another, the Lord enters, it is there held, that the Lord shall not be punished in an Action of wast, for wast by him done, but the Law is otherwise, that he shall be punished, for wast, so shall an occupant be, as it hath been adjudged; so if tenant, pur auter vie, be attainted, the King grants this to another, the Grantee shall be punished in wast, and yet he comes in, in the post; and so of the Lord of a villein, and an occupant; afterwards the Jury gave a verdict for the Plaintiffe, the Lessee of Arden. It was then moved for the Defendant, in Arrest of Judgement, that the venire facias here was not well awarded. And for this, the case was, the lease was made, apud Cudworth, of the Land lying in parochia de Cudworth prædict. the venire facias was, de Vicineto parochiæ de Cudworth. It was urged that this was a mis-tryall, and the venire facias here not well awarded, the Lease was made at Cudworth, this to be tried by a venire facias of the same Parish, which lies in Cudworth onely. It was answered, that here is no mis-tryall, but the venire facias here was well awarded, (prædicta) here is such an averment, as that of necessity, it must be so taken, that Cudworth the town, and Cudworth the parish is all one, and if so, then be the venire facias of the one, or of the other, it shall be good; but if the Parish be of a larger continent then the town, then otherwise it will be. Mich. 43 & 44 Eliz. B. R. between Wright and Whittington. In an Ejectione firme, the lease there, whereupon the Tryall was had, was made: apud Abington, of Land lying in Burgo de Abington prædict. the venire facias was, de vicineto burgi, de Abington prædict. and this tryall affirmed here to be good, and the venire facias to be well awarded, for (prædict.) makes this, by intendment of Law, to be all one. Another like case there was, here a lease made of a house called Dogetts, and of Land at Denham, in parochia de Denham prædict. the venire facias was, de Denham, error brought, and assigned for error, because the venire facias was not De parochia de Denham, but resolved, that Denham, & parochia de Denham prædict. the same is all one by intendment of Law, and good the one way or the other. Denham, there the Town, and so here, Coke, the prædict. here makes this all one, Cudworth the Town, and Cudworth the Parish, in the Declaration here, it is not in parochia, generally, but with a prædict. the venire facias here De parochia generally is good. At another time, this matter was moved again. Coke, misera servitus ubi jus est servus, there is no mis-tryal here, but the venire facias was well awarded, and no Judgement before given will any wayes crosse this; a Case there was in the C. B. a man was bound to pay so much money, in the South-porch of the Parish Church of D. he pleads payment of this in the South-porch, of the Parish Church of D. and doth not say in the Parish of D. but of D. prædict. the venire facias was De parochia Ecclesiæ parochialis de D. if a town be laid to be in a Parish, there the venire facias to be of the Town, not of the Parish, this is a sure maxime to be observed, that the venire facias is always to be, from that place, which is most certain, and a town is more certain then a Parish, which may contain divers Towns. A Precipe quod reddat, de manerio de Dale, the venire facias shall be de Dale, because a Manor may extend it self further, and to generall, it shall be drawn here to a more particular place in Cudworth, which is to be intended the Town, the whole Court, agreed herein, and that it is not here to be intended (as it was objected) that there were more towns in this Parish, unlesse the same be so shewed to be by the other side, and we are here to judge upon the record, which proves the Town and the Parish to be one, and this is also after a verdict. Coke, I have viewed all the Presidents, and none of them doth impugne this, and more Towns shall not be intended; and if the venire facias here was of the town, or Parish, this good both wayes. Dodderidge, if no other Town be in the Parish, then both of them are of one, and the same extent. Croke Justice, if by any thing it appears to us, that there were divers Towns, this would then be material, but no such matter here appears; here was no mis-tryall, but the venire facias was well awarded. Haughton, the venire

43 E. 3.

Mich. 43,44. Eliz.B.R.&c.

The case of *Denham.*

venire facias here was well awarded, upon the reason before alledged, of the prædict. which is a special averrment, that there was but one Town in the Parish, and in common speech, it shall as well be called a Parish, where there is but one town in it, as where there are divers Towns within the same. Dodderidge, the case before remembred doth much differ from this case now in question, there the Town was of one name, and the Parish of another, but here both of them are of one and the same name with a prædict. and therefore to be intended to be of one and the same extent, the Manor of Dale in Dale, the venire facias is to be de Dale. Coke. It hath been said, that the Parish here is more spacious then the Town, if it were so, then the venire facias was not well awarded, but it doth not appear unto us to be so, by the record upon which we are to ground, and give our Judgements; so the whole Court ageeed cleerly in this, that here was no mis-tryall, but the venire facias was well awarded, and so by the rule of the Court, Judgement was entred for the Plaintiffe, but execution to stay, till the next terme, because the ground was sown with corn, and having a Decree, and long possession, therefore he to have the corn, and so Execution to stay, onely for the Corne, till the next Term.

Judgement for the Plaintiff.

Selby Plaintiff against *Carryer* Defendant.

An Action upon the case for words. 2 Cr. 345. 585. 1 Ro. Abr. 47. 1 Ro. Rep. 22.

In an Action upon the Case, for scandalous words, spoken by the Defendant, of the Plaintiff, and upon Non culp. pleaded, a verdict was given for the Plaintiff. Hen. Finch, for the Defendant, moved the Court in Arrest of Judgement, that the words were not actionable. The words were these (S) that the Plaintiff was a Bankrupt Knave. Coke, cleerly these words are scandalous, and well Actionable; for here are two nownes; and so if the words were, A Traytor Knave, these were well actionable, for here are two nownes, otherwise if the words were, a trayterous knave, and so spoken in the adjective, there not actionable, because there, the adjective word, hath reference to the substantive; and so is the difference; the whole Court agreed cleerly herein, that the words were actionable, upon the difference before mentioned, and so by the rule of the Court, Judgment was given and so entred for the Plaintiff.

Judgement given for the Plaintiff.

Rowland Egerton Plaintiff, against *Edward Egerton* Defendant.

In a Prohibition to the Prerogative Court. 2 Cr. 346. 1 Ro. 2. 21. 2 Ro. Abr. 315. 358.

In a Prohibition prayed to the Prerogative Court, to prohibite them there from proceeding in the Probate of the Will of Sir John Egerton, who made his will, and thereby disposed of all his personal, and real Estate; the ground whereupon the motion was made for a Prohibition for the whole, was this, in regard the purpose was, to have a tryal at Law, as touching the validity of the will, and whether it be a Will, or no Will; for it is supposed to be the Will of Edward Egerton, to whom

whom, by his Will he hath given all his Land, and also all his personal estate, and so hereby he hath disinherited his right heir, and hath by this his Will, given nothing at all to any of his Grandchildren; and that if they should be suffered to proceed there, and to prove the Will, and to allow of the same there, as a good will for his personal Estate, this would then be a very great evidence, to induce the Jury, upon a tryal, to pass for the Will, when they see the same proved, and allowed of, in the Spirituall Court, for a good will, and this so done there, by way of prevention, and to prejudice the tryal, which is after to be here in this Court; and therefore by way of prevention, of this prejudice which may happen, by proving of this Will there, a Prohibition was prayed for the whole. It was farther shewed, that as to the personal estate, the Daughters of Sir John Egerton, had taken Letters of Administration, out of the Prerogative Court; against this it was objected, and strongly urged, that this Land, so by this Will, conveyed, and given, unto Edward Egerton, was onely such Land, which before, by the said Edward Egerton, having no issue, nor any heir, of his name, to inherit this, for namesake onely, was by him conveyed unto, and setled upon, the said Sir John Egerton, and his heires, but that this was onely so done, upon special trust, and confidence, the which, according to the said trust; he had now reconveyed the same to him again, by this his last will.) To this, answer was made, that the same was an absolute conveyance, without any trust at all, and by this his Will, he hath not onely passed these Lands (so formerly conveyed) unto him, but also all his other Lands, generally in any place; and so by this his Will, he hath wholly disinherited his right heir; if this Will do prove good. Coke chief Justice, this is a very great Case, and a strange, such a Will to be made, by a man of so great Wisedom, Understanding, and experience, and whose house, and name, hath been of so great continuance, and estimation, for one of his Ancestours, did marry with one of the 4. Esquires of the body of the Prince, to be with him always, in furore belli, and of whom he is lineally discended, and now by this his Will, to devise, all his Lands of Inheritance, unto another, and also all his personall Estate, and not to remember in his will any of his Children, but by this to disinherit his right heir, and for what cause he should so do, is not known. As to the motion now made, to have a Prohibition for all, where the Will contains Lands and goods; the like Case was between Egerton and Breerton, where there was a Probate of the will, before the Prohibition prayed; this Probate not void, but remains good, notwithstanding Land be also contained in the Will. When I was Attourney Generall, there then was a Case of the like nature, as this case now here is, as touching a Will made, both of Land, and goods, with whom I was then of Counsel, and moved here for a Prohibition for all, which was granted to me, which Case I have reported in the Sixth part of my Reports, fol. 23. Pawlet, the Marquis of Winchesters Case, the eldest son of the Lord of Winchester, married the Daughter of the old Lord Treasurer, he had a base son, and by his Will, he devised all his Lands and Personal Estate unto his base son, and for the Prohibition, I then alledged, that he was not of sound and perfect memory, at the time of the making of his Will; and for this cause I moved to have a Prohibition, for the whole, in regard that the will did concern Land, and the Testament also concerned goods, which are mixed together in the Will; and if they should proceed there, it would be prejudicial unto the trial here. For if he were of sound memory, at the making of the Testament, he could not then be De non sane memorie, at the time of making of the Will; both of them being made at one and the same instant of time, and the Common Law is to determine who shall be said to be De non sane memorie, at the time of the making of his Will, for Land; and for this cause the Prohibition to be generall, the which was, Una voce concessum; by Popham chief Justice, and by the whole Court; and afterwards to be remanded thither again, as to the personal estate; also Will, or no Will; this is to be tryed here; and by 44 E. 3. this is traversable notwithstanding, the Testament be proved there, Dodderidge Justice, this is very strange, the sute as touching the Probate of the Will, is there depending,

Coke 6. pars. fol. 23. &c.

44 E. 3.

depending, and yet before this be determined, they there have granted Letters of Administration to the Daughters of Sir John Egerton, by which act, they have there, in a manner, disallowed of the Will. Coke, we may here well grant a Prohibition, for both, when both are in the Will; for that they there ought not to prevent the Proceedings of the Common Law; in Cases of necessity, the Law allows of a Probate there, because that after this, the Executours may have an Action, but not before, but where a Will doth contain in it Land, and goods, a Prohibition shall not be granted here for the whole, in the generalty, but in such a special Case if it be alledged, that the party who made the Will, at the time of the making of it, was De non sane memoriæ; there a Prohibition shall be granted for the whole clearly; but otherwise it is in other Cases, in the generall, so that in some cases the Court may grant a Prohibition for the whole, and in some Cases not so, but quoad the Land, and this is left to the discretion of the Judges; and so in Cases of necessity, as this Case now here in question is by way of prevention, of the probate of the will there, the which will be an evidence to a Jury, upon a triall here to make them find for the Will, if it be proved there, and affirmed to be a good Will and so then, if this be a good Will for part, it shall be good for all which is therein contained; for the preventing of which, a Prohibition is here to be granted for the whole, and afterwards, to be remanded thither again, as to the goods, but such a Prohibition is not to be so granted in all Cases, where the will doth contain in it a disposition both of Lands and goods; for then this should tend to hinder all the Proceedings there, in the Ecclesiastical Court, which is not to be so granted, but in very special cases onely: but a Prohibition in such Cases, generally, is to be onely quoad, the Land; but in the Case here now in question, being so special a Case, and a Case of necessity, and such a Case, as deserves as great favour as can be for the upholding of a great house and Family; A Prohibition is here to be granted for the whole; and so by the Rule of the Court, a Prohibition was granted for the whole, both for the Land, and goods, and that after the triall here had, then the same to be remanded again to them, as to the goods.

Prohibition granted by the Court for the whole

Osburne Plaintiff, against *Makeburne* Defendant.

A Writ of Errour to reverse a Judgment in a *Formedon.* 2Ro.Rep.22.

IN a Writ of Errour to reverse a Judgment in a Formedon, 12. years since in the C. B. the Writ was between such and such, in quadam loquela; Errour to reverse the Utlary, and in this the Writ doth not shew, in what Action, the Judgment was given, but between such, and such, in quadam loquela. of 6 Acres pasturæ, in &c. ad grave damnum. Coke, this Case is a Phænix, but prima facie, the Writ of Errour here is not good, & captio juris, sometimes est digitus Dei. the whole Court clear of opinion, that it ought always to be shewed, in what action, the Judgment was given; and therefore for this omission here, the Writ of Errour is not good; and so the Rule of the Court was Quod cassetur breve de errore.

The Writ of Error quashed.

Wickes

Wicks Plaintiff, against *Jordan* Defendant.

IN a Writ of Errour: Nota, That after Judgment given against him, he sowed the Land, and afterwards brought a Writ of Errour to reverse the same Judgment, and in this the Judgment was affirmed; the Court was moved for the Plaintiff in the Writ of Errour, that he might hold and enjoy the Land, until he had cut the Corn; the Court answered, this is against the Law, and we cannot so order this, as if a Widow woman, a Copy-holder, who is to enjoy the Land, durante viduitate; if she sow the Land, and afterwards takes a Husband, she shall lose the Corn, and the Lord shall have it; and so is Olands Case, Coke 5 pars, fol. 116. and so by Coke, Dodderidge, and by the whole Court, Judgment was affirmed, and that he which did recover, should have and enjoy the Corn.

A Writ of Errour.

Coke 5 pars fol. 116. &c.

Judgment affirmed.

Blithman Plaintiff, against *Martin* Defendant.

IN an Action upon the Case for a promise, upon Non assumpsit pleaded, a verdict was given for the Plaintiff: It was moved by John Moor for the Defendant in arrest of Judgment, that the assumption here made by the Defendant unto the Plaintiff, is against the Law, and so void, and the Plaintiff had no cause of Action; hereupon the Case was this, Ellis servientem ad clavum, took one Holeman, and having him in execution, did deliver him over to Blithman the Plaintiff, being the Gaoler, ad Custodiendum in salva Custodia; upon this, John Martin the Defendant came unto him, and made him this promise, grounded upon this consideration; that in consideration that Blithman the Plaintiff, would suffer Holeman, which he had in execution for the Debt of one Spark, ad largum ire, &c. the said Debt not being satisfied, that then he promised to give him such a sum of money, and for which the Action was here brought; this consideration is against the Law, and therefore void; as touching this, it appears Coke 10. pars, in Beaufages Case, in Case of Sheriffs, what Bonds and Conditions of Bonds shall be void upon the Statute of 23 H. 6. cap. 10. and Trin. 9 Jac. it was so adjudged here in this Court accordingly in the like Case; to this now here in question, the Court inclined to be of opinion against the Plaintiff. Coke. Et tota Curia, the promise here was, in consideration that Blithman should let the said Holeman, being in execution, to go at liberty, or to Escape (the Debt not being satisfied) that then he would pay him so much; this promise here is clearly void, the same being grounded upon a consideration, which is against the Law, and so the Plaintiff here had no cause of Action. Haughton Justice. The like Case to this was formerly so adjudged in the Court of C. B. when I was Sergeant there, the whole Court agreed herein clearly, that this consideration was against the Law, and so the promise

Action upon the case for a promise. Yelv. 197. Godb. 150.

Statute of 23 H.6.c.10.

Judgment *quod querens Nil capiat per Billam.*

mise grounded thereon was void and the Plaintiff by consequence had no case of Action, and therefore the Rule of the Court was, Quod querens nil capiat per billam.

Ellis Plaintiff, against *Wallis* Defendant.

A Writ of Errour to reverse a Judgment in a *Formedon.*

If a Writ of Errour to reverse a Judgment given in a Formedon, which was brought of a Croft, and of other Closes, parcels de, &c. The Errour assigned was, that a Formedon lieth not of a Croft: The question moved, if the Judgment be to be reversed, whether it is then to be reversed, quoad the Croft, or for all. Coke. A Formedon lieth not of a Croft, but an Assise doth well lie of it; by Benlose, 23 Eliz. this Writ of Formedon is breve adversativum, or breve adversarium: Also the Judgment here for this Errour is not to be reversed, quoad the Croft; but for all, quia est breve adversarium: The whole Court clear of opinion that this Judgment is erronious, and so the Rule of the Court was, the Judgment to be reversed for the whole.

Judgment reversed for the whole.

Sherland Plaintiff, against *Heaton* Defendant.

Trespass for an assault and battery. 1 Ro.Rep.55. Godb. 251.

In an Action of Trespass, for an Assault and Battery, upon Non culp. pleaded, a Verdict was found for the Plaintiff. Goldsmith for the Defendant, moved the Court in Arrest of Judgment, that the Declaration here was not good, the same being in this manner (S.) Quod cum, the Defendant, whereas it ought to have been & quod ipse, and so in Trespass; but otherwise in an Ejectione firme, or in an Action of Debt upon an Obligation, or in an Action upon the Case; in regard that quod cum is no direct affirmative, but onely by way of inducement whereas the same ought to be a perfect and direct affirmative: In an Ejectione firme one cannot have this without a Lease, and therefore Quod cum, such a one demisit ejecit, this is good; so in an Action of Debt, quod cum & tamen non solvit, this is good. Coke. All is one, and the Declaration in this manner is good, and in the affirmative in both. Dodderidge. The Declaration here is not good, and the difference will be this, where the thing for which the Action is brought hath continuance, and where the Action is brought for a thing done and past: In an Ejectione firme, there the Lease hath still continuance, and there such a Declaration, with a quod cum, is good, because in the affirmative: the ejectione firme is not properly by reason of the Lease, but by reason of the Ejectment; but otherwise it is, where the thing for which the Action is brought, is past, as here in this Case for the Battery; here the Declaration ought not thus to be with a quod cum. Coke. All is one, but howsoever yet by the Statute of 36 E. 3. cap. 15. Declarations not to be avoided for form, if the same hath sufficient substance in it, as it hath here in this Case: The whole Court, we will in this Case be lead by Presidents, and therefore for this purpose, Man Secundary, was by the Court appointed

Statute of 36 E.3. c.15.

pointed to search for Presidents, who answered that there were divers presidents to be found in it, and so for this time it was adjourned to be moved again: Afterwards, (S.) Termino Trin. 12 Jac. B. R. this matter was moved again, and the former exception taken to the Declaration insisted upon, the Declaration being with a quod cum, such a one did assault and beat him; it was urged, that this Declaration in this manner, with a quod cum, is not good, for that this being in an Action of Battery, is but rehersal; in the Commentaries, fol. 128. Buckley against Rice Thomas: In the first exception to the pleading, being with a licet electus & nominatus; where this shall be in the affirmative, and where not, Trin. 37 Eliz. Rott. 349, Shrieve and Bridgeman: In Trespass for an Assault and Battery Judgment given for the Plaintiff in the C. B. a Writ of Errour brought here, and the Errour assigned, for that the Declaration was with a quod cum, as in this Case here; and it was adjudged here in this Case, that the quod cum was onely rehersal, and not any affirmative that he was beaten, as the same ought to be laid in the Declaration, and so for this cause the Judgment was reversed; so here in this principal Case, the Declaration is not good, being with the quod cum, there being by this no affirmation of any battery, and the quod cum will in no wise aid the same. Haughton. This quod cum here is very improper, and the Declaration not good. Dodderidge Justice. The quod cum here doth presuppose some other matter to follow, which is not here. Croke. There ought to be some dependence and consequence upon the quod cum, this is no direct affirmation of the battery, as ought to be in the Declaration, and so the same is not good. Dodderidge Justice. This Declaration with the quod cum, is very senseless and imperfect, prima facie, this seems to be an allegation that there was a Battery, this is but a very imperfect allegation that he was beaten; this was formerly moved before Coke, who was then of opinion, that the Declaration was good: The whole Court were of opinion clearly, that the Declaration was not good, but desired to see presidents in this Case, they all conceiving that in this Declaration there is no affirmative proof of the battery by the quod cum. Man Secundary informed the Court, that he had two presidents directly, in point adjudged such a Declaration to be insufficient, being in this manner, as here with a quod cum. Croke. If the Declaration here had been, quod cum, he was in pace domini regis, the other did assault and beat him contra pacem, this had been good, for here is a good Relative to the quod cum, which always presupposes some matter subsequent, to be depending upon it, which is not so here, and therefore the Declaration here not good; and so the Rule of the Court was against the Plaintiff, that the Declaration here was not good, Et quod querens nil capiat per Billam.

Term. Trin. 12 Jac. B. R.

Plowden's Commentaries f. 128. *&c.*

Trin. 37 Eliz. Rot. 349. *&c.*

Judgment against the Plaintiff, *&c.*

Nota, by Coke chief Justice. That Decrees in the Court of Requests, are like unto the Laws of the Medes and Persians, subject unto no Reversal for Errour, and so for this Reason they are not there to intermeddle with any matter which concerns the Common Law; if they do, they are then to be prohibited, for at the Common Law erronious Judgments given in one Court, are by Writs of Errour to be reversed by another Court; and so by this means the party can sustain no manner of prejudice, having his proper remedy in all cases at the Common Law, to help and to relieve himself, but otherwise it is upon Decrees pronounced in Courts of Equity.

The reason of prohibiting proceedings in Courts *&c.* *Ante.* 197.

Charles

Charles Crook Plaintiff, against *Avery* Defendant.

Action upon the case for words.

IN an Action upon the Case, for scandalous words spoken by the Defendant of the Plaintiff, upon Non culp. pleaded, a Verdict was given for the Plaintiff: It was moved for the Defendant in arrest of Judgment, that the words were not Actionable: The words were these spoken by the Defendant of the Plaintiff, being a Merchant, (S.) Mr. Crook came into Cornwall with a blew coat on his back, but hath now gotten together a great quantity of Wealth, by trading with Pyrats, cousening in the tale of Pilchers, and by extortion: These words, Super quoddam colloquium de prædicto Carolo propellavit: It was urged, that these words are too general, and so not Actionable. Coke chief Justice. The best man in the world may Trade with Pyrats, the best Merchants of England may have such Trading, but this was unknown unto him. 2. Cousening in the Tale of Pilchers, this goes to Merchants, and this is onely by mis-telling, these words not Actionable. 3. He hath extorted, Extortion is Colore officii, these are very bad words; and do sound in slander, but we are not to give too much way to such Actions upon the Case, for any words, unless there be express authority for the same, or very apparent slander by the words spoken: In the time of King Henry the first, and in part of King Edward the third, there were no Actions upon the Case of words, nor Assumpsits, but these have very much increased of late times, too much way not to be given to them. Dodderidge. These words, as they are laid in this Declaration, are not Actionable, they being too general; they ought also to be express words, and scandalous, and not so by Implication: The whole Court agreed herein, that these words are not Actionable, and so the Plaintiff ought not to have his Judgment, and therefore the rule of the Court was, that Judgment should be stayed, Et quod querens nil capiat per billam.

Judgment stayed. &c.

Fox Plaintiff, against *Prickwood* Defendant.

A prohibition to the *Marches* of *Wales*.

IN a Prohibition to stay proceedings before the Lord President and Council, in the Marches of Wales, the Case appeared to be this: A man being seized of Lands in Fee-simple, makes a Lease for life, and afterwards levies a Fine of all his Lands, with an Indenture to lead the uses of the Fine, and this was to the use of J. S. for 15 years, and afterwards to the use of himself for life, with a power, by a Proviso therein, to himself to make Leases for 21 years, or three lives in Possession; the Question moved to the Court was, whether by this power he may make Leases, during the continuance of the first Lease for 15 years or not, but onely after the same ended: The Court was clear of Opinion, that he might

might well make Leases presently in possession, by this his power, and that this power doth Issue out of the whole Estate; and that the first Lessee shall have the Rent reserved, during the 15 years limited to him, and that this is a present power reserved unto him, and he is not to stay the Execution thereof, until the remainder doth come unto him in possession: This Case, as touching this power, being questioned before the Council in the Marches of Wales, by a Bill there preferred, to have a stay of the Execution of the power to make Leases, during the Fifteen years, he having executed the same, by making of a Lease during the continuance of the 15 years; hereupon a Prohibition was prayed, and granted by the Court, if cause were not shewed to the contrary; this appearing now to be the true state of the cause, Geo. Croke moved the Court for stay of the Prohibition to the Marches of Wales, in regard that the 15 years are not as yet expired, and that this is matter which rests in point of equity: The whole Court clearly agreed in this, that this term of 15 years is presently subject unto the power, by the Proviso of him in remainder, to make Leases for years, and so this is a matter at the Common Law, and therefore the Prohibition here was well granted, and so ought to be allowed of. Coke chief Justice. By this Proviso here, he hath power to demise the said Lands for 21 years, or three lives presently, and the 15 years are subject to be charged, by this power so reserved; he may by this his power, make Leases presently in Possession, but not in Reversion: The sole Point here considerable is, Whether he hath power by this Proviso, to make Leases presently in possession, or not, and the determination of this, doth rest merly at the Common Law, and therefore the Lord President and Council, in the Marches of Wales, by their Instructions, have no power at all to meddle with the determination of this matter; and so by their Sentence there, to take away the effect of this power by reason of the continuance of the first Lease for 15 years, and therefore they having no power at all, any ways to intermeddle with this; and if they do act any thing herein, this which is so done there by them in this Case, is in the Judgment of Law, coram non judice, and therefore a Prohibition in this Case, to stay their farther Proceedings, ought to be granted; and so by the Rule of the Court, a Prohibition was granted.

A Prohibition granted *per Curiam.*

Stone Plaintiff, against Sir *Rich. Grubham* Defendant.

IN an Ejectione firme, a Tryal at the Bar for Title of Land, upon which Tryal, and upon the Evidence, divers questions did arise: The first Question which did arise, was, Whether the Ejectione firme here did lie or not, wherein the Case appeared to be this, Tenant for years makes a Lease at Will, the Tenant at Will is ejected, Whether the Tenant for years, for this Ejectment of his Lessee at will, may have an Ejectione firme. Coke. clearly upon a possession in Law, a man shall never maintain an Ejectione firme, but he ought to have an actual possession; and therefore where the Lessee at Will, or Tenant for years is ousted clearly (and so it hath been ruled) that the Tenant for years, for this Ejectment of his Lessee at Will, cannot have an Ejectiode firme, without his actual possession at the time of the ejectment; and so if Lessee for years be the remainder for years, the Lessee for years is ousted, his term expires; clearly the remainder for years cannot have an Ejectione firme, upon the former reason, that he had no actual possession at the time of the Ejectment, 22 E. 4, fol. 37. a, upon the same reason in case

An *Ejectione firme* Tryal at the Bar. 1 Ro. Rep. 3.

22 E. 4. fol. 37. a

case of a surrender of a term, before the same began. Another point was moved in this Case, touching a Lease for years, upon which this Tryal now was; and as for that, the Case was, Robert Cassey, who was possessed of this Lease, and of divers other Chattels, makes a gift of all his goods and Chattels, reals and personals, remaining and being about his capital Messuage, or elsewhere within the Realm of England; Whether these words shall carry the Lease for years he had of Rownton, or not. Coke, and Dodderidge Justice. By these words (S) And all other my Goods and Chattels elsewhere; by these words, the Lease for years of Rownton doth well pass: Richardson urged these words elsewhere, to have this construction to be elsewhere, other then at Rownton. Coke. This is not material, for without all question this Lease shall pass, but I will not over-rule this, it shall be specially found: It was then moved, that notwithstanding this gift so made, as before by him, unto Sir Richard Saltingstone, and to Sir Samuel, yet the said Cassey still continueth the possession, and so this was fraudulent: As to this, Coke, If a man do Morgage his Land, and yet still continues his possession, no disseisin is wrought by this, and so was Winnington's Case; if it was an absolute Conveyance, and a continuance in possession, afterwards this shall be adjudged in Law to be fraudulent, for this hath the face of fraud, but otherwise it is, as it is here in this Case, where the Conveyance was onely conditionally, as upon payment of money, there the Interest doth not pass absolutely, but upon a future condition, for the Gift was before, upon condition of the payment of such a sum by the said Sir Richard Saltingstone: As to the fraud, Dolosus versatur in universalibus; but when the Conveyance is Conditional, continuance in possession after this shall not, in the Judgment of the Law, be said to be fraudulent, and this is very clear; and as to the value of the Lease, this is not at all material: As to the matter of fraud, the same ought to be fraud at the beginning, for that subsequent fraud will not make this conveyance to be fraudulent clearly; the whole Court agreed herein. Coke. If a man hath any intention to evade out of the Statute of 13 Eliz. cap. 5. whatsoever he shall say afterwards, will not any ways salve and amend the matter, but the same shall be fraud, and be within the Statute, and that secrecy is a great badge of fraud, but yet no concluding proof; the whole Court agreed herein: It was then demanded (by reason of an Objection made) in whose custody the Lease was, after the Gift: It was answered, and so proved, that the same was always after (and untill the Assignment made unto one Weston) in the Custody of Sir Richard Saltingstone, to whom the Gift was made. Coke. If the same had afterwards continued in the cosiody of Cassey (who made the gift) then the same would have been clearly fraudulent; but in regard that the contrary is here proved, it shall not be adjudged to be a fraudulent conveyance within the Statute; the whole Court agreed herein.

Wimington's Case.

Statute of 13 Eliz. c. 5.

Sir *Jerrom Boes*, against the Bishop of *Durham*.

A *Quo Warranto* against the Bishop of *Durham*.

IN a Quo warranto, why he claims to have bona & catalla Felonum, and of such which stand mute: It was shewed, that this was a County Palatine, and hath Jura regalia, and so by the reason of this he claims to have these. It was urged, that by the grant of omnia bona, & catalla felonum, he shall not by this have the goods of him which standeth mute. Coke. In case of grant, he shall have but

but the goods of Ordinary Felons; otherwise it is in case of a County Palatine, who holds tam libere per gladium, prout Rex coronam, and so the Bishop of Chester doth hold his County Palatine, tam libere, &c. and he shall have all these by prescription, he hath jura regalia, and so all these, (S.) bona & catalla felonum, and the goods of those which stand mute, and they have Courts for this; but one cannot prescribe to have Goods of Felons, nor of Traytors, because that prescription is onely for matter in fait, but he may prescribe in the County Palatine, by 12 Eliz. Dyer, fol. 289. and so by consequence, he shall have all these as incidents unto a County Palatine, and this is a plain Case, and the Bishop here is not to be called in question for this, in a Quo warranto, to shew his Priviledges; the whole Court agreed herein against this Quo warranto.

12 Eliz. Dyer, fol. 289.

Gilpin Plaintiff, against *Shine* Defendant.

IN an Action upon the Case for scandalous words, upon Non culp. pleaded, a Verdict was given for the Plaintiff: It was moved in Arrest of Judgement, that the words were not actionable; the words were these spoken by the Defendant of the Plaintiff, He would have robbed me, and robbed me of my Dagger, and took it from me. Coke. Et tota curia; these words were clearly actionable, and by the Rule of the Court, Judgement was entred for the Plaintiff.

Action upon the case for words.

Judgement for the Plaintiff.

Parker Plaintiff, against *Kemp* Defendant.

IN a Prohibition, upon a Libel in the Spiritual Court, where the Suit was for Tithe-apples, in discharge of which, he pleaded there an award, which was, that he was to pay so much for the Tithe; pleads the Arbitriment there, the which Plea they refused, thinking this to be void; upon this, a Prohibition prayed. Coke. We will not grant a Prohibition in this case; so in a Suit there for a Legacy, if payment of the same be there pleaded, which is not sufficient, the payment is tryable there, by 1 R. 3. fol. 4. When the Original begins in Court-Christian, although that afterwards a matter happens in Issue, which is tryable by our Law, yet this shall be tryed there by their Law: As if one do sue there for a Horse to him devised, the Defendant there pleads, that the Devisor did give this Horse unto him in his life-time, this is tryable by our Law, yet the same shall be tryed there: In the same manner it is, where the Original doth begin here, the same shall be tryed here by our Law, as in a Quare Impedit, able, or not able; if it were otherwise, they should there try nothing, this is belonging to them; but if they will there draw the matter, ad aliud examen, as upon proof of a Deed, they judge otherwise then we do: As in case of a Lease for years to be made, they hold the same to be traditione, or void; and so a grant of Goods, to be delivered,

A Prohibition unto the Spiritual Court upon a Suit for Tithes.

1 Ro. Rep. 12.

ſtvered, or not good: If they will judge in Common Law matters, otherwiſe then we do, there in ſuch caſes we will prohibit them: That which we call Orders they amongſt them do call Acts: The Court all clear of Opinion, that this Plea of the award there pleaded, and by them refuſed, no ground for a Prohibition, and ſo by the Rule of the Court, a Prohibition was denyed.

Prohibition denyed *per Curiam.*

Babington and his Wife Plaintiffs, againſt *Matthews* Defendant.

An Action of debt upon the Statute of 2 E. 6. cap. 13. 1 Ro. Rep. 13.

IN an Action of Debt, upon the Statute of 2 E. 6. cap. 13. for not ſetting out of Tithes; upon Nil debet pleaded, a Verdict for the Plaintiff: It was moved in arreſt of Judgement, that the Declaration was not good; the Husband claimed theſe Tithes in right of his Wife, and in his Declaration, avers the like of his Wife; Exception taken, becauſe he doth not ſhew in his Declaration how he hath the ſame; anſwer was made, and Man Secundary informed the Court, that to ſay generally, Poſſeſſor, Occupatur, Firmarius, or Proprietarius, is good and ſufficient pleading, upon the Statute of 2 E. 6. which gives the Action to the Proprietor, and ſo it hath been here divers times adjudged. Coke. A man ſhall never make unto himſelf a title by a que eſtate, unto a thing which lieth in grant, as to a Rent: Another Exception was moved to the Declaration, becauſe it is not therein ſhewed, this Grant to be by Deed, whereas the thing it ſelf cannot paſs without Deed, and therefore to have mentioned the Deed in the Declaration. Coke and the whole Court, this Declaration is good, notwithſtanding this Exception, becauſe this is but an Inducement to the Action, and ſo by the Rule of the Court, Judgement was given, and ſo entred for the Plaintiff.

Judgment given for the Plaintiff.

Hopton Plaintiff, againſt *Baker* Defendant.

An Action upon the caſe for words.

IN an Action upon the Caſe, for ſcandalous words, upon Non culp. pleaded, a Verdict was given for the Plaintiff: It was moved in Arreſt of Judgement, that the words were not actionable, being to general, the words being ſpoken by the Defendant of the Plaintiff, and were theſe, (S.) He hath couſened the Town of D. of ſo much money. George Croke for the Plaintiffe, that the words were Actionable; it is laid in the Declaration, that he had received divers ſums of money for the Town, and hereupon the Defendant ſpake the words, and ſaid, He hath beguiled and deceived the Town in his Accounts of 4 l. and ſo hereby drawn him into matter of deceit in his Office, and ſo into perjury. Coke. We are to give no more regard to ſuch words, then to the winde, in hoc verboſo ſeculo: For one to ſay of a Baily, you have made no true account, theſe words are not actionable. Dodderidge. A man may make an untrue account againſt his will. Coke. By this you will take away all Actions of Account: If one ſpeaks theſe words of another

another, You bought Land, when you cousened the Town in your account, these words not actionable clearly; also it doth not here appear in the Declaration, that he was sworn to give up a true account, we will not give any way to such Actions upon the Case for words, unless that you can shew us a Judgement in point, or that it doth plainly appear unto us, that the words are scandalous. Dodderidge. The words (S.) Cousened the Town, innuendo, the Inhabitants of the Town, so that you will have this to be so by a Figure. Coke. So one did say that he would pay his Debts with a Figure, (S.) Pars pro toto. Croke & Haughton agreed herein; so the whole Court agreed clearly in this, that the words are not actionable, and so the Rule of the Court was for the Defendant, Et quod querens nil capiat per Billam.

Judgement *quod querens Nil capiat per Billam.*

Harrison Plaintiff, against *Mitford* Defendant.

In an Action upon the Case for a promise, upon Non assumpsit pleaded, a Verdict was found for the Plaintiff: It was moved in Arrest of Judgement, that the Declaration was not good, the promise being for to save the Plaintiff harmless, cum inde requisitus esset, and no special request laid in the Declaration, as there ought to have been: The whole Court agreed clearly in this, that for this cause the Declaration is not good; for as this Case is, being a promise to save harmless; a special request ought to have been in the Declaration, and a Licet sæpius requisitus, will not here serve, and this verdict will no ways aid or avail the Plaintiff; otherwise it would have been, if the promise had been to have paid a certain sum of money, cum inde requisitus esset, there a licet sæpius requisitus: Non soluit will be good, without laying any special request, and so is the difference agreed by the whole Court; and that this Declaration, for want of a special request laid, is not good, and so the Rule of the Court was for the Defendant, Et quod querens nil capiat per billam.

Action upon the case for a promise.

Judgement *quod querens Nil capiat per Billam.*

The Lord of *Lincoln* Plaintiff, against Sir *John Townsend* Defendant.

In an Action of Debt upon a Bond, the Case appeared to be this, Sir John Townsend was bound to the Lord of Lincoln for the payment of Money, upon the sale of Land made unto him: An Action of Debt was brought against him, he appeared in Trinity Term by his Attorney, and imparls untill Mich. Term, then he appears in proper person, and confesseth the Action; upon this, the other hath his Judgement to recover against him, the Lord of Lincoln cancelleth the Bond: After this Recovery, and cancelling of the Bond, Sir John Townsend brings a Writ of Error, and by this reverseth the Judgement, for default of a Warrant of Attorney, for that he ought to appear. 1. Either by Attorney, or else in proper person; and for this Error which was so certified to be, the Judgement was reversed: Now the Lord of Lincoln being without remedy, having cancelled the Bond, and Sir John Townsend had the Land, and took the

An Action of debt upon a Bond.

profits thereof, but had no good assurance thereof made unto him, therefore upon a motion made to the Court, and by the assent of Counsel, ambarum partium, the Rule of the Court was this, That Sir John Townsend should bring 200 l. into Court, for the Lord of Lincoln; and that he, upon payment of this Money, should make a good and sufficient assurance unto him of the Land: And the Rule was further, that if he did not bring the money in Court, at the time appointed, according to the Rule of the Court, that then an Attachment should be granted against him.

Nota. Nota. By Coke chief Justice, That a Counsellor is called in pleading, homo Consiliarius, & in jure peritus; if an Attorney, he is called Attornatus, and so he may justifie, but to be a Solicitor to another, he cannot for this justifie, if it be not for his Master; for none can be a Solicitor-General in all Courts, but onely for the King; As touching this, there is a Case, 19 Eliz. Dyer, fol. 355. Ouleys Case, who was Solicitor to the Countess of Kent, and there brought his Action upon the Case, for moneys by him disbursed, for the business of the Countess.

3 Cr. 159, 160. 1 Leo. 179. 255.

Jones Plaintiff, against *Cross* Defendant.

Entred Trin. 11 *Jac.* B. R. *Rott.* 366.

A Writ of Error.

IN a Writ of Error, to reverse a Judgement given in an Action of Debt upon a Bond, to which the Defendant pleaded in Bar, Non est factum, and found against him to be his Deed, and upon this the Judgement was entred, Quod sit in misericordia, whereas it ought to have been, Quod capiatur, Tota curia; this is a clear Error, and for this Error, by the Rule of the Court, the Judgement was reversed.

Judgement reversed.

Huxley Plaintiff, against *Harrison* Defendant.

A Writ of Error to reverse a Judgement in the C. B.

IN a Writ of Error, to reverse a Judgement given in the C. B. against him for 200 l. Errors assigned, the case appeared to be, that Ralph Harrison had the Judgement against him, and after the Writ of error brought, and error assigned. Ralph Harrison dyed intestate, and Richard Harrison took Letters of Administration, a scire facias brought against him, ad audiendum errores (the Plaintiffe in the Writ of Error, had a release from him.) Richard Harrison the Administrator, appeared here, and afterwards gave up his Letters of Administration unto one Humble, upon this the Court was moved, that the Scire facias might be granted to the Administrator generally. It was urged, that Humble being now the Administrator,

2 Cr. 401. 1 Ro. R. 23. & 386. 1 Ro. Abr. 335. Mo. 852. n. 1161.

ministrator, the Plaintiffe in the Writ of Error cannot plead the release of another against Humble, and he supposed that this release was gained by Covine from Richard Harrison, and the Plaintiffe in the Writ of Error, who had the release, supposed that Humble had got the Administration by Covine. Man Secondary, being demanded by the Court, how the Presidents in this Case were, who answered, that the Presidents were both wayes; that the Scire facias might either be administratoribus, generally, or else tali administratori, both ways used, and good; afterwards the Scire facias, ad audiendum errores, upon the former writ of Error, was brought against a Person, certain that was Administrator. The whole Court agreed in this, that the death of the Defendant, in a Writ of Error, doth not abate the Writ of Error, but he may have a Scire facias against another, ad audiendum errores. But otherwise it is, where the Plaintiffe in the Writ of Error dyes, there the Writ of Error shall abate, and then a new Writ of Error ought to be De recordo, quod coram vobis residet; the Court was then moved that the Scire facias might go generally to the Administrators, Dodderidge. Let the same goe according to the Presidents, Man Secondary, made answer, The Presidents are both wayes, either to name such a one Administrator, or generally to the Administrators. Dodderidge Justice. to have the Scire facias, against a person certain, as Administrator, this may be fraudulent, for so he may bring the Scire facias against one, who is not Administrator, and may obtain a release from him, and so this shall be very mischievous, the better, and safer way therefore is, to have the Scire facias, against the Administrators generally, otherwise any man may be stript of his just and due debt; the Court agreed herein, and so accordingly, the Scire facias was to the Administrators generally, ad audiendum errores, and as to the release, before mentioned, the matter was afterwards moved again. Term. Trin. 14 Jac. B. R. and as to this release the case then appeared to be, that Huxley brought his Writ of Error to reverse a Judgement given against him in the C. B. for 200 l. Huxley being in execution upon the Judgement had against him, removed himself hither by a Habeas Corpus; and in this Writ of Error manucaption was taken, for him to prosecute the Writ of Error, cum effectu; and if the Judgement be affirmed, then he to pay the principall, and if he do not pay, then his manucaptors to pay, afterwards, after this writ of Error brought, and manucaption taken, and before Judgement affirmed, a release was made to him, and the bailes, of all actions, Executions and Demands; the Judgement, was afterwards affirmed; the money not paid by Huxley the Principall; upon this, a Scire Facias was prosecuted against the manucaptors, who in Barre pleaded this release, as before made, in manner and forme, and whether this release should be a good barre to the Scire facias, was the question, the same being made, after the Writ of Error brought, and before Judgement affirmed. It was urged, that this was no Barre, being made before any thing was due; for here the Baile is lyable, onely with a (S.) Judicium affirmetur; the release was made, to Huxley, the principall party, and to his bailes, the Scire facias, against the bailes, who plead the release. Tr. 4 Eliz. Rott. 1207. C. B. put in Hoes case, Cok. 5. pag. fol. 71. adjudged, that by a release, of all Actions, suits, and quarrells, a Covenant before the same be broken, is not by this released; because that then there was not any cause of Action, nor any certain dutie before the Covenant broken; and agreeing with this, it was also Hill. 40 Eliz. in B. R. between Hancocke and Field, and so was Hoes case, Coke 5 pars, fol. 70. In an Action of Debt by Hoe in B. R. Phelix Marshall was baile for the Defendant afterwards, and before any Judgement given, the Plaintiffe did release unto Phelix, all Actions, duties and demands; afterwards judgement was given against the Defendant, and upon his default, a Scire facias issued out against Phelix Marshall, the baile, who pleaded this generall release, and upon a demurrer, adjudged this release to be no barre to the Plaintiffe, for that the words of the Baile, are conditionally. (S.) Si contigerit prædictum defendentem, the Debt and dammages, to the Plaintiffe, minime solvere aut se prisone Mareschall. ea occasione non red-

Note the difference where the Plaintiff in the Writ of Error dies, and where the Defendant, as to the abating of the Writ.

Term. Trin. 14 Jac. B. R. this case moved again.

Trin. 4 Eliz. Rot. 1207, &c.

Hil. 40 Eliz. B. R, &c.

reddere; so that there cannot be by the Baile any certaine duty, untill Judgement be given, before which (none can tell to what sum the Debt, and Dammages will amount, the recognizans of the Baile, being general, is to be reduced unto a certaintie by the judgement, and not before. Coke, Harrison recovered against Huxley 200 l. in the C. B. A Writ of Error brought here, the party brought hither by a Habeas Corpus, and here, for him, manucaption taken, to pay the Debt, Si affirme, if it be affirmed, it may be released, to the surety, if he had released the Debt, all the Proceedings are released, if he had pleaded the release here by Harrison to Huxley; if by your own Act, it is now become impossible to be performed, when the Release hath discharged the Debt, how can the Baile pay the Debt, which was discharged by the release, and if the Principall do render his Body, the Baile is by this discharged. It was urged for the Defendant, that the original Debt is by this release discharged, as to the Principall, the Scire facias here sets forth the Judgement in the C. B. it doth not appear in the Scire facias, that Huxley was delivered out of Execution, the release made unto him, being in execution, and so by this the debt is discharged, Coke, if a man hath the body of one in Execution, comes here by Writ of Error, by Habeas Corpus, manucaption taken, the Body by this is discharged, but not the Debt, for he may afterwards offer his body again, and so by this, to free and discharge his baile, the Body is not taken absolutely, but quousque, the Debt satisfyed, as it was urged, and by 20 Assisarum placito 7. a man hath a Statute or Recognizans, sueth out execution upon the same, he hath the Land in execution, quousque, the Debt paid; Afterwards the Conusee doth release the Debt; by this the Execution is discharged; so here in this principall Case, the Body is answerable for the Debt, quousque paid, if the duty be once discharged, the Body shall be also discharged, which is onely charged for this. Coke; when Manucaptors are taken, traditur in ballium, he is then to be out of Prison. Dodderidge, In Felix Marshalls Case, the Release was made to the Baile, in the Case remembred, here the Release was made to the Principall, and to the Baile also, when the principall part is released, the Debt by this is gone. Coke in the C. B. they enter a certain summe, but here an uncertaine, and therefore in the one case, the release is good, in the other not; the Debt is not gone, as to the principall, by this bailing, but it remains a Debt still, and he may render his body again, and discharge his Baile, as appears by 14 H. 7. fol. 9. the Court was clear of opinion, that by this release, the Debt is discharged, and that this being thus pleaded by the Baile in Barre to the Scire facias, is a good plea, by the opinion of the whole Court, but they would not at this time over-rule the same; the parties perceiving the opinion of the whole Court, did rest satisfyed therein, and the matter never moved again.

20 Assisar. placito 7.

The release pleaded by the baile in barre of the *Scire facias*, a good plea by the whole Court.

Tipling

Tipling Plaintiff, against *Pexall* Defendant.

Entred Hill. 11 *Jac.* B. R. Rott. 274.

The Case was upon a Misnomer of a Corporation, being the Corporation of Ship-wrights, the Company of Ship-wrights of Redderiffe, were Incorporated, by the name, of præfecti & gardianorum Naupegorum. De Redderiffe. Coke chief Justice. Nauticarum, this is a name known for Ship-wrights, and not Naupegorum, the Company of Ship-wrights of Redderiffe, in the County of Sussex. Coke, they are to shew, how a speciall supplicavit shall be directed to them, the opinion of Manwood chief Baron, was this, as touching Corporations, that they were invisible, immortall, and that they had no soule; and therefore no Subpœna lieth against them, because they have no Conscience nor soule; a Corporation, is a Body aggregate, none can create soules but God, but the King creates them, and therefore they have no soules; they cannot speak, nor appear in Person, but by Attorney, and this was the opinion of Manwood chief Baron, touching Corporations.

A misnomer of a Corporation.

Nota, That the Writ was here directed, Præfecto, & gardianis, & sociis. and in this varyed from their Name of Incorporation, and therefore for this misnaming of the Corporation, by the Rule of the whole Court, the Writ was held to be bad.

The Writ ruled bad for the misnomer of the Corporation.

Nooth Plaintiff, against *Wyard* Defendant.

Entred Hill. 11 *Jac.* B. R. Rott. 1016.

In an Action of Debt, brought for Rent, the case appeared to be this, a Lease for years was made to the Defendant, rendring Rent; afterwards, the reversion of this was granted, to the Plaintiffe, and to his Wife; the Tenant for years attorns, the Term ended, and for Rent areere, the Plaintiff alone brought an Action of Debt; and whether this Action so lyeth by the Plaintiffe alone, without joyning of his

1 Ro. r. 52. An Action of Debt for rent by the Husband alone.

his Wife with him, they having a joynt estate in the reversion, was the Question. Haughton, this is an incurable fault; for he having this onely in right of his wife, although the terme be ended; before the Action brought; he ought to have joyned his Wife with him in the Action; for it hath been agreed, that if the terme had continuance, he ought to have joyned his Wife with him in the action; and the ending of the Terme here, before the Action brought, makes no difference at all in the case; but that he ought to joyne his Wife with him in the action.

Termin. Trin. 12 Jac. B. R. &c.

Note, That at another time (S.) Termin. Trinit. 12 Jac. B. R. this matter was moved again. It was urged, that here the Action is brought by him as an Assignee, and therefore he ought to joyn his Wife with him in the Action, for that he is not an Assignee alone, but with his Wife, and so he hath herein fayled, in his conveyance, and to this purpose is the case in 13 E. 3. Fitz. title voucher placito. 119. and 7 E. 4. fol. 15 & 18 E. 4. fol. 2 & 15. Where they shall joyn in the Action, and where not. Coke, the Action here brought by the husband alone for arrearages of Rent, is well brought in Debt for the arrearages of Rent, before the coverture, and which he hath in right of his Wife, in this case, he ought to joyn his Wife with him in the Action; otherwise it is, if the Action be brought for arrearages of Rent, growing due, during the Coverture, in this principall case here, clearly, the Action is well brought by the husband alone, without joyning of his wife with him; and this Case of the Rent, doth very much differ from a duty due unto the husband, in right of his Wife, by a contract, the which, if he doth not recover, during the Coverture, the same is then quite lost, but otherwise it is of a Rent, for that this remaines, and survives to the husband. Haughton, notwithstanding the reversion, was here granted, to the husband, and wife; yet the Action here brought by the husband alone, for this rent, is well brought, and no difference there is at all, where they are Assignes of the reversion, and where they are Lessors, as to the bringing of the Action of Debt, for the rent, the sole, and principall matter considerable here is, whether the husband here, hath such an interest in him, as that he may bring an Action for this Rent, onely, in his own name, or not, here as an Assignee, he may sue for this Rent alone, and this he may so doe, in regard of the nature of the thing, which is by him to be recovered, the same being a sum in grosse, and this is the true reason, why he may bring this Action, in his own name, without joyning of his Wife with him; and not upon the reason grounded, upon the nature of their estate, which was jointly made unto him, and to his Wife; and the thing to be recovered, being the rent, the which the husband alone is to have, and the same ought to come into his purse, and no difference there will be at all, where the husband, and Wife, are joynt Lessors, and where they are joynt purchasors, all is one, as to the bringing of the Action for Rent; here the husband sues alone, not in regard of his estate, with his Wife, but in regard of the thing, to be by him recovered, being the rent, the which he is onely to have, and so this action here brought by the husband alone, for this rent, without joyning of his Wife with him, is well brought, and so he ought to have his Judgement. Croke agreed herein, that the Action of Debt here brought by the husband alone, without his Wife, for arrearages of rent, is well brought. Dodderidge, the Action here brought, by the husband alone, for this rent, is well brought; but if he had here brought this Action of debt for the rent, as assignee, by an assignment made to him alone, whereas the reversion was assigned unto him, and to his Wife, joyntly, this then had not been good, but as the Action is here brought generally by the husband alone, the same is well brought, without joyning of his Wife with him, in this Action: and he ought not here to shew himself to be an assignee; and so the whole Court agreed clearly in opinion, that this Action of Debt, here brought, by the husband alone, for this rent, without joyning of his Wife with him, is well brought; and so the Rule of the Court was, Quod Intretur Judicium pro querent.

13 E. 3. Fitz. Tit. &c.

Judgement given for the Plaintiff.

Nota

Nota, by Coke chief Justice. When I was in the C. B. it was there resolved by us all, by Walmesly, Warbirton, Foster and my self, una voce, That a common recovery against an Infant was but as a common assurance, upon which a use may be averred, and a forfeiture of an Estate for life, and that this not to bind or hurt him. *Nota.*

The KING, and the Earl of *Exeter.*

JErmin moved the Court for the Earl of Exeter, to have those Fines, which were assessed upon the Commissioners of Sewers, for acting contrary to their Commission, and he claimed to have these fines by force and vertue of a grant he had by Letters Patents from the Crown, his Letters Patents were read in Court, by which he was to have the Amerciaments of all his Tenants and Residents imposed in Curia coram nobis in Cancellaria, coram nobis in Banco, in Scaccario, & coram nobis & concilio nostro. But had not these words in his Patent, (S) coram nobis, generally; yet he prayed to have allowance of these his Letters Patents, and of these Fines. Coke. It appears by the book of 29 Assisar. that coram nobis, generally; this to be intended, to be in this Court, and he hath not these words in his Patent; coram nobis in Cancellaria, this is onely in the Chancery, coram nobis in banco, this is for the C. B. & coram nobis & concilio nostro, this is for the Star Chamber. And notwithstanding these here that were fines are your Tenants, yet there is no colour for you to have these Fines, so imposed upon them for misdemeaning of themselves in their Office; and these words in your Patent, of Tenentes & Residentes, will no ways at all aid or avail you, without special words; and though you had in your Letters Patents these words, coram nobis, generally for this Court, yet you cannot have these Fines, by these words (S) to have omnia amerciamenta tenentium suorum & residentium, for this is a plain case, that by these words you cannot by this claim have any other amerciaments but such as are imposed upon them, onely in respect of their Tenancies, and Residencies; but not such Fines and Amerciaments as are here imposed upon them, in respect, and by reason of their Office or Commission; but for you to have these Fines, you ought to have such words in your Letters Patents (S) to have such Fines imposed upon them, as on Sheriffs, or otherwise, by reason of their Office or Commission. And so the same had been good, but not otherwise, the whole Court agreed with him clearly in this, and therefore by the Rule of the Court, these Fines were disallowed unto him.

The claim of the Earl of *Exeter* to have Fines imposed by Letters Patents. 1 Ro. 2. 20.

29 Assisar.

The Fines disallowed unto him by the whole Court.

Nota, That upon a private Conference by the Judges with Yelverton the Kings Solliciter, upon the dissolving of the Parliament, which was in this Term suddenly dissolved, and so nothing done. Coke chief Justice, touching Parliaments it appears by 33 H. 8. Brookes Cases. fol. 52. placito 228. Plowdens Commentaries, fol. 79. in Partridges Case. aud 33 H. 6. fol. 17, 18. what shall be said to be a Sessions of Parliament, and what not; that every Session, in which the King doth sign Bills, is a day, and a Parliament by it self, and that there can be no Roll without a Session, no Parliament without a Roll, and no Session without the Royal Assent. *Nota.* Upon the dissolving of the Parl. 33 H. 8. *&c.*

Barnes Plaintiff, against *Cary*, and *Barker* Defendants.

Entred Mich. 11. Jac. B. R. *Rot.* 191.

An Action upon the case for an escape. 1 Ro. 2. 47. Mo. 834. Stat. of 13 Eliz. c. 7. of Bankrupts.

IN an Action upon the Case for an Escape, the Case appeared to be this, one Visor was indebted to the Plaintiff, and to divers others, and became a Bankrupt, the Plaintiff, and the others, to whom he was indebted, complained to the Lord Chancellour, and procured from him a Commission, upon the Statute of 13 Eliz. capite 7. touching Bankrupts. Upon a Tryal in this Case, it passed for the Plaintiff. Coventry moved the Court in Arrest of Judgment, that the Declaration here was insufficient, and that for divers reasons: 1. The Commission here is mispleaded, and therefore by this Commission, the Commissioners had no warrant to meddle with the Bankrupt, or with his goods; the power of the Lord Chancellour is not here well pleaded; which power of his, in granting of such commissions, is onely ministerial; he being to have his Authority from the King.

4 Eliz. Dyer fo. 211, 212. pl. 33, &c.

4 Eliz. Dyer fol. 211, 219. placito 33. upon the Statute of 28 H. 8. capite 15. by which it is ordained, that a Commission, to hear and determine of Piracies, shall be awarded to the Admiral, and others to be named by the Chancellour; the Lord Keeper, there being no Chancellour, may grant this Commission, for that this is no Judicial Act, but done by him, as an Officer, and for the necessity of Justice, also, here in this Case, the Statute is not, that the Chancellour, to have authority, but onely to name; here it is pleaded, that the Chancellour did give power, and so this is mispleading; but if this had been here well pleaded, yet a just cause ought to have been shewed, for the commitment of the party; it is onely shewed here, that he did refuse to make answer unto certain Interrogatories, but it is not shewed, what the Interrogatories were; this doth not appear in the Declaration. It is also shewed, that the Commissioners committed him, untill he should conform himself; and that he being in the custody of the Gaoler at Bristow, suffered him to escape, before the Debt satisfied; and it doth not appear that he was committed for this, but onely for his not conforming of himself; and so, as this Declaration is, he had no cause to have an Action upon the Case, for this escape, the Declaration being throughout insufficient. Coke. As to the 1st Exception, if it be so, the Declaration is not good; for this is a regall Prerogative of the King, to give such a Power, and the Chancellor cannot, the Roll was seen, and the same was, dedit potestatem & authoritatem, this is not good, for the Lord Chancellor cannot doe this, but onely the King, and his power is derivative, being derived from the King, but he hath no such power to grant in this manner of himself, as being the Lord Chancellor; but the Record hath it in these words farther, (S) that the Lord Chancellor, vigore statuti, & juxta formam statuti fecit Commissionem quandam sub magno sigillo geren. dat. apud Westmonasterium, &c. & per eandem Commissionem & speciales Commissionar. dicti Domini Regis nominavit, ac de- eis plenam potestatem & authoritatem juxta formam statuti, and so this be- so, the same is to have a reasonable intendment, that by the Commission thus n granted, they have authority juxta formam statuti, and this clearly to be

be intended, to be so by the King, and so the Declaration good, notwithstanding this exception taken, which was very colourable; but considering all the words together, as they are in the Declaration, so the same is good, and well pleaded. As to the other exception, to the incertaintie of the Interrogatories, this is no good exception, the Declaration is good, and he ought not to shew therein what the Interrogatories were, for this is also laid to be juxta formam statuti, and so good, as to the other matter moved, (S.) that he ought to have shewed, that he was worth so much; this is not to be shewed, but is to be so intended; as to the last exception, this is not material; for that, the loss of the Plaintiff grows by reason of the escape, which intitles him to his Action; and it is shewed in the Declaration, that he was sub Custodia, and then suffered to escape, which is the ground of the Plaintiffs Action; the first Objection here was most colourable, but it being here laid to be vigore statuti, this makes it good; Also these Allegations in the Declaration, are so expressed, but by way of inducement onely unto this Action, which is brought onely for the escape, and so to be recompensed for the damage by him thereby sustained; but it had been the more formal pleading, to have nominated, and expressed, that the King, Dedit potestatem, & auctoritatem, &c. but as it here is, being that the Lord Chancellour, juxta formam statuti dedit potestatem, & auctoritatem, &c. this pleading is good, and sufficient in substance; the whole Court agreed with him herein, that the Plaintiff here, for this escape had just cause of Action; being damnified thereby, that the Declaration is good, the exceptions thereunto well answered; and so by the Rule of the Court, Judgment was given, and so entered for the Plaintiff.

Judgment given for the Plaintiff.

Sir *Christopher Heydon* Plaintiff against *Godsole* and *Al.* Defendant.

IN a Writ of Error in Parliament, to reverse a Judgment in an Assise. The Parliament being dissolved, Winne moved the Court now to have execution, according to the former Judgments. Coke chief Justice. this was no Parliament, because that no Bill passed, nor any Royal assent; this was onely but an inception of a Parliament, if any assent, or disassent, there had been to any Bill, then this should have been said, to be a Session; and then a Roule of this, was to have been made; also it is not to tried by a Jury, whether there was a Parliament or not? In 2 E. 4. the Parliament was by Supersedeas revoked, or discharged, and this was upon the coming in of Enemies,, and so in ancient time, as in the time of King E. 2. the Parliament discharged by Proclamation, and by a Writ of Supersedeas, and this was upon the coming in of the Scots, but all the Bills did then stand in their force, to be revived again at the next Session of Parliament. As to the execution, upon the former Judgments; the same ought now here to be granted; the party hath been long delayed; and this being in an Assise, which is festinum remedium, after Judgment delayed by a Writ of Error, these are unconscionable Proceedings; execution clearly ought now to be granted, for the Record was never removed, the whole Court agreed herein, that execution here ought now to be granted; and so by the Rule of the Court, execution was granted, if better cause not shewed to the contrary. No cause was shewed, and so the Rule stood absolute.

A Writ of Errour in Parliament, this dissolved, execution prayed.

2 E. 4. King E. 2.

Execution granted by the Rule of the Court.

Price Plaintiff, against *Mascoll* Defendant.

Entred Mich. 11. *Jac.* B. R.

Rott. 250.

In a Prohibition upon a *modus*.

IN a Prohibition to the Spiritual Court, upon a Libell there for tythes, in his Declaration, sets forth five several prescriptions for a modus decimandi, there pleaded, in discharge, and not allowed of, and for this cause a Prohibition prayed demurrer to this Declaration. G. Croke prayed a Consultation, for that all the prescriptions set forth in the Declaration are bad; the question was for the tithe, arising in the Parish of Woddam-Water, in the County of Essex; The 1. Prescription was this to be discharged of tithe herbage, for barren cattel, in the Parish and out of the Parke kept, and imployed onely for husbandry, and maintenance of his Land, within the Parish, and so for other young Cattel kept for this purpose, cum valerent; and in the interim, it is laid, that he had no other profit of them, and in regard that he was to have his tithes out of the profits of the land manured by these cattell, and therefore for tithe herbage of them, in this regard, he prescribes to be discharged; this prescription here, is not good, the same being too general, and trencheth to the impoberishing of the parson, if he shall have no allowance for barren cattell, the second prescription is also bad, being this, that if he kept milch-kine or Ewes, he prescribed to pay at Lammas day, 9. Chaeses, this is not good; and for fatting cattel, to pay nothing: upon this there was a Case. Mich. 37. Eliz. between Doctour Lewis and Gilborne, where the prescription for a modus decimandi, was this, that in regard he paid for Milch-kine so much, (S) i. d. he prescribed to be discharged of the tithe of milch-kine, and also of all other dry Cattel, this was there held to be contrary in it self, for a modus for one kind, to be discharged, of another kind; and therefore this prescription held not good, and for this cause the same was disallowed, another Case there was, which was a Lincolnshire case, 38 Eliz. B. R. between Sherington and Fleetwood, where the prescription was to pay so much for milch-kine, and Ewes, and for this to be discharged of tithes, for them, and for all his dry Cattel; this was here adjudged to be a bad prescription, and so here in this principal case, this prescription not good, and as touching Customes, Littletons Rule in his Chapter of burgage, is to be observed being this (S) that Consuetudo ex certa causa rationabili usitata, privat' communem legem, so that every Custome ought to be reasonable; but here the 9. Chaeses, to be in discharge, for the milch-kine, and also for all his other dry cattel, this is a bad custome and unreasonable; the third prescription here is laid for shorne sheep, to pay for this the Tenth fleece, and to pay no other tithe for the agistment of any sheep, and for this cause the prescription is not good; for that he here prescribes to pay no more, than he ought, de jure to pay, and so not good; also it is not here averred, that these sheep or kine, were there kept, nor that he had any kine or sheep, for which he ought to pay; and therefore the prescription not good; the fourth prescription for the latter crop of meadows, out of the Park, this is no other, but to pay this which he ought to pay, and by this to be discharged of that which he ought to pay, being the Mesture, and so not good, the Fifth Prescription touching the Furzes and

Woddam-water Parish, in the County of *Essex*.

1. 1 Ro. 2. 38. 62. 176.

2.

Mich. 37. Eliz. *&c.*

38 Eliz. B.R. *Sherington* & *Fleetwood*.

Littleton of his chapter of Burgage.

3.

4.

5.

and Broome, the libell is, he took 60. loads of Broome, and paid no tithe for it, the prescription, in discharge of this was, that the land by this being brought into tillage, and so by this the Parson to have tithe corn, which should be of greater value for him; and that the Broome was but of small value, and given away to the poore for pulling of it up; and therefore he to have no tithe of this broom, but it is not averred, that the broom so taken, was for this purpose; and therefore not good, neither is it averred, that this was converted into tillage, in the libel it is shewed, that this broom was rooted up, every yeare, but doth not shew, that it was so done for this purpose, to convert, and turn the same into tillage; neither is it averred, that this Land was barren, nor that the same was converted into tillage; and so the Prescription not good, and therefore prayed a Consultation; against this it was urged by Davenport, that these severall prescriptions are good; As to the 1. touching barren cattell, that were kept, to be imployed in husbandry, and because with them the Land is tilled, and they make the encrease, for that tithe corn and hay, commeth of the labour of the Beast, and therefore this is a good prescription. Hill. 8. Jac. C. B. Rott. 1109. Cokes Book of Entries. fol. 459. in Baxter, and Hopes Case; that for the payment of tithe corn, and hay, to be discharged from payment of any thing, for all his young cattell, kept and bred up for Agriculture, a Prohibition upon this was granted; and a consultation could never be obtained, the reason because that Husbandry cannot be without Cattell; and therefore not to have tithe of them; and upon that record, no Consultation was granted, there is also some speech, of the discharge of the after crop, for the rewine grass; as touching this also there was a Case, Hill. 4. Jac. B. R. Rott. 411. Cokes book of entries fol. 460. Bartlet against Long, a case touching tithe wood, a modus decimandi pleaded in discharge of it; the second Prescription for Lactage, this is good, as it is set forth, for principiorum non est ratio, if the Custome be not unreasonable, it is then good; he would have Herbage of milch-kine, and milch-sheep, and for calves also; for this, to have 9. Cheeses payd him on Lammas Day, in consideration of the tithe of milch kine, and milch Ewes, and for barren Cattell; he to have these Nine Cheeses, although he makes but Ten Cheeses, or but Nine Cheeses in all; he is to have 9. so that this tithe is here well satisfyed, with a collaterall thing, and so good. The third prescription for sheep, to have the Tenth Fleece. F. N. B. & Register fol. 52. no tithe for agistment of Land, in respect of the Cattell which feed there. The fourth Prescription for the after-grass, in consideration that every one shall preserve primam tonsuram, by which the Parson shall have the better tithe, and therefore to be discharged of the after crop, for the tithe of it, and this is called (rewine) this is good, for by this, the Parson hath the greater benefit; the Fifth and last prescription, is not merely to be discharged of the tithe Broome, but if he hath barren Land, overgrown with Broome, and at his proper costs and charges, he roots this up, and converts it into tillage, to pay no tithe of this; the Custome is qualified, this to be converted, the same yeare, or the next, into tillage, and so this is not generally to be discharged of tithe broom; and so the prescription here is good, and prayes that the Prohibition may stand. Coke chief Justice, these severall prescriptions here, are laid to be time out of minde, and upon these the Council of the other side hath demurred; to demurre upon such matters, is a very desperate kind of practise, and I would never have done so, but to joine issue upon the Customes, and first to try whether there was such a Custome or not? and if it be found so, then afterwards, to demurre upon the validity of this in Law. As to the Custome for barren Cattell, which are for the Plow, or for the pale, no tithe is to be paid, for the Herbage of them, and this is cleare, and so is Lynwood, animalia fructifera, & sterilia, these exempted from tithe, and this very cleare; and so the whole Court agreed with him in all this; that for barren Cattell, bred and kept to be imployed in husbandry, for their agistment, no tithe to be paid, (unless it be averred, that they were by him fatted, and sold away.) Coke, the Abbat of Colchester, had the Parsonage impropriate, per

1.

Hil. 8. Jac. C. B. Rot. 110. &c.

Hil. 4. Jac. B. R. Rott. 411. &c.

2.

3.

F.N.B. Reeister fol. 52.

4.

5.

yet the Vicar had the tithe Lambs; and in one year, the Vicar had but one Lamb, and the Abbat would also have this Lamb of him, whereupon the Vicar did write these two verses unto the Abbat. (S.)

Velleribus centum gaudes, cum lacte bidente,
Nec reputas magnum tuleris nisi pauperis agnum.

Statute of 2 E.6.cap.13.

The nine Cheeses here, are as well for the one, as for the other. As concerning the broom this is tithable, notwithstanding he converts the land into Arable, if the Statute of 2 E. 6. cap. 13. do not help him. Haughton and Croke, clearly, the Broom is tithable. Coke. It was Farringtons Case, if wood be stocked up, and the Land converted into Arable, it was adjudged here, that of this wood tithe should be paid for this Land is fructifera, and therefore to pay tithes; but if you would be discharged from payment of tithes, for this, you ought then to averre, and prove this to be sterilis, under-wood, and that you have stocked up all, to make way for the Plow; otherwise tithe to be paid of this, and so of other great woods. And so this Case was adjourned unto another time. Afterwards Termin. Mich. 12 Jac. B. R. this matter was then moved again. Coke. Notwithstanding the demurrer to the Declaration be bad; yet if the Declaration upon the Prohibition be not good, a consultation is then to be granted, and this is warranted by a Judgment given, Mich. 35 Eliz. between Knightley and Spencer, that if the Declaration upon the Prohibition be bad, then a Consultation to be granted. Here the 1. custome not to pay any tithe, for barren Cattel, imployed for the pale, or for the Plow; or for young Cattel, but the minor is here omitted, for it is not shewed, that these cattel were such, and so not good, and therefore for this, a consultation is clearly to be granted, the whole Court agreed herein, for a Consultation as to this, the second Custome, no tithe to be paid for fat Cattel, because to pay nine Cheeses on Lammas day in discharge of tithe of milch-kine, and fat Cattel, but doth not shew, that he had any milch Cow, or that he paid any Cheese at all; and so not good, and therefore a Consultation granted for this by the whole Court. Coke. If he pays money for a modus decimandi, he may sue for this, though it be not alledged that it was paid, there is a difference between fructuosa, & sterilia animalia, not to have Tithe in both kinds.

Term. *Mich.* 12 Jac. B. R. this matter moved again.

Mich. 35. Eliz. *&c.*

A Consultation granted, *&c.*

A triall at the Barr. *&c.*

Nota, that afterwards on another day, by a Jury of Essex, the prescription for the modus was tryed at the barr. Coke. if there hath been a prescription for a modus decimandi, if this modus be not paid for a certain time, yet clearly this doth not alter the prescription for this modus, but he may pay it when he will. Also if there was a prescription time out of mind, for a modus decimandi, for land, when it was a Park, this prescription shall have continuance clearly, for the payment of this modus onely, after that such a Park be disparked, and converted to another more profitable use: the whole Court agreed with him herein; the Jury upon such directions as the Court gave them, went together, and returning gave a Verdict for the Plaintiff, in the Prohibition, against the directions of the Court, and contrary to all their evidence, insomuch that the Court said unto them, that they never heard of so ill a Verdict, they having no proof at all for the Prescription, for the modus decimandi; but for the tithe to be paid in kind, and therefore the Court said that it should be tryed again by another Jury, and would give the party no costs in this case.

A Verdict for the Plaintiff, but against the direction of the Court.

Marsham

Marsham Plaintiff, against *Jolley* Defendant.

IN an Action of Debt upon a Bond, a verdict given for the Plaintiff, and Judgment: A Writ of Error brought to reverse the Judgment, the Error assigned, because the Bond was Sexiginti, whereas it ought to be Sexaginta. Coke. False Latin will abate a Writ, but will not vitiate a Deed; the Court agreed herein, and by the Rule of the Court Judgment was affirmed.

A Writ of Errour to reverse a Judgment in Debt. 1 Ro. 2. 47. 2 Cr. 338. 2 Ro. Abr. 147. 10 Co. 132, 133.

Jourden Plaintiff, against *Denny* Defendant.

IN a Writ of Error; to reverse a Judgment given in the C. B. the Error assigned was, because Judgment was there given against a dead man, the Defendant dying after the Nisi prius, and before the day in Bank: It was urged, that the day of the Nisi prius, and the day in Bank, are all one, and to warrant this was cited, 40 E. 3. fol. 38. placito 12. that the day de Nisi prius, and the day in Bank, is all one in Law; and that the Defendant hath no day to answer or to plead any matter, nor is yet demandable, and 35 H. 6. fol 58. and 21 H. 6. f. 10. an Action of Trespass brought against three, the one of them appears and pleads to Issue, the others make default: At the day of the Nisi prius in the Countrey, upon the Tryal of the Issue, a verdict was given for the Plaintiff, and 100. l. damages; the Jury sever the damages; the Writ returnable, ad utas, of St. Michael: The Plaintiff prays his Judgment, the Court will advise of the damages; the Plaintiff in the interim dies, the question whether this death should hinder the Judgment held, it should not: The Defendant came in Court, and shewed the death of the Plaintiff, and so prayed that they would not proceed to Judgment. Fulthorpe to the Defendant, you are not demandable now at this day, for you have no day in Court, and therefore you can have no Plea, but onely what you do and say by way of Information, ut amicus curiæ and not otherwise, and that which you do alledge, they are to be matters apparant to the Court, but not matters in fait; here the default was in the Justices the which shall not turn the Plaintiff to any prejudice, also the Judgment is to have relation to the day in Bank, at which time he was living, and according to this purpose, there was a Case, Pasc. 36 Eliz. Lewis & uxor, against Smiter, in Battery, & 28 Eliz. between Isely and Pelham, where death happened in the interim, between the day of the Nisi prius, and the return in Bank. Coke. There will be a difference in case of the death of the party, where the Judge is to take the Conusance, and where it is before any Conusance, as in Case of a Fine, 1 Mar. Dyer, fol. 90. Varneys case, that is not to be assigned for Error, which is against the Office of a Judge, as appears by 7 H. 7. fol. 4. a b A man shall not be received in any Case to alledge any thing contrary to that which one doth, as a Judge, as not to assign for Error; that the Justices of the C. B. did not give the Judgment, but the Clerk

A Writ of Errour to reverse a Judgment. 4 E. 3. fol. 38, &c. 35 H. 6. fol. 58, &c. Pasch. 36 El. &c. 1 Mariæ, Dyer fo. 90. &c. 7 H. 7. 4. a b

Clerk entred this, or that no Juror was sworn, or that the Jurors gave a Verdict for the Defendant, and the Judges gave Judgment for the Plaintiff, for this is contrary to that which they do as Judges: It appears by the 1 Book of Assises placito 32. if Judgment be given against a dead person, this is not void, but to be reversed by a Writ of Error; for there ought to be a Court, a Plaintiff, and a Defendant: Nominatim, this not to be avoided by averment, but by a Writ of Error, otherwise no man should be sure of a Fine, or another Judgment here, at the Nisi prius day, a day is given in Bank; the Nisi prius is by Act of Parliament, not by the Law, the King not bound by this: Here a Judgment was given against a dead man, this cannot be pleaded, nor any Audita quærela to be had, and therefore ex consequenti this being Error, to be reversed by a Writ of Error; the Judgment given in the C. B. shall not relate to the day of the Nisi prius, but according to the day in Bank; and if death do happen, mean between the day of the Nisi prius, and the day in Bank; if Judgment be given, this is clearly erronious. Croke. A matter which is against the Record it selfe, is not to be averred as the death of the party at the time of the Fine levied; otherwise of death happening before the Proclamations had. Haughton. The Judgment here is erronious for this Error, the reason of this is, because the Judgment is not true, the same being given at the day in Bank against such a one, and there is no such person, he being dead before, and so the Judgment is clearly erroneous. Coke. Against a Fine, not to aver that the party was dead before, nor that the same was taken by Attorney, but in proper person, for that this is against the Office of a Judge, and therefore this, in such a case, not to be assigned: The Court was all clear of Opinion, that this Judgment being given against a dead man, is erronious, and to be reversed, and so by the Rule of the Court for this error the Judgment was reversed.

8 Assisar. pl. 22.

Judgment reversed *per Curiam.*

Nota, touching the beginning of Trinity Term. 12 Jac. 1614. 1 Ro. Rep. 29.

Nota, That the first day of this Trinity Term was St. John Baptist day, being a day in it selfe, non dies juridicus, and yet all the Courts in Westminster Hall did sit the same day, the same being contrary to the directions and observations of all the Almanack makers, by whom the same was set down, not to begin till the next day: Upon this, Coke, All the Almanack makers are herein very much deceived; for true it is, if this day do happen in the Term, then this is not dies juridicus, and the Courts do not then sit on this day: But the true reason of this, and wherefore we do now sit here on this day, is worthy to be known and observed, which is this, because the Statute of 32 H. 8. cap. 21. made for the Abreviation of this Term, makes the full term to begin yearly for ever after on the Friday next after Corpus Christi day, which day this is; and so this day by Act of Parliament is made to be dies juridicus, the same day being not so in it selfe before, and this is the true reason that we do sit here this day in Court, otherwise we ought not to sit here untill the next Friday; for this Act of Parliament hath made this Term to begin upon the Friday, and so hath made this day, when it so falleth out, to be dies juridicus.

The Statute of 32 H. 8. cap. 21.

Brook, tit. Adjournment, *&c.*

Nota, Brook tit. Adjournment, placito 35. That anno 1556. St. John Baptist day happened upon the Wednesday, which ought to have been the last day of the Term, therefore it was adjourned, usque diem Jovis proxim. because that Feast was not dies juridicus, therefore the Judges did sit die Jovis, and did not lose that day.

Whistler

Whistler Plaintiff, against *Lee* Defendant.

Entred Mich. 11 *Jac.* B. R.

Rott. 222.

IN a Writ of Error to reverse a Judgement given in Abington Court, there held by ancient Custom, in an Action upon the Case upon a promise; upon Non assumpsit pleaded, a Verdict and Judgement given for the Plaintiff; and to reverse this Judgement, a Writ of Error was brought, and the Record certified: It was urged by Davenport for the Plaintiff, in the Writ of Error, that the Judgement is erronious; it is laid, that this Tryal and Judgement, was at a Court held before the Mayor, Bayliffs, and Burgesses of Abington, by custom; they have no such Court, no such Prescription, and therefore the Plaintiff, in the Writ of Error, not to be concluded by this Judgement there so given; they ought to have here expressed more particularly, how they held their Court, whether by Custom, or Charter, this being an inferior Court; and this is warranted by 22 Assisar. placito 64. For affirmance of the Judgement, it was urged, not to assign for Error that which is against the Record, and this appears by Windsors Case, 7 H. 4. fol. 39, 40. 8 H. 4. fol. 15. 20. 9 H. 4. fol. 1. 10 H. 4. fol. 7, 8. and 7 Eliz. Dyer, fol. 234. Doctor Bonners Case, the difference is between inferior and superior Courts; inferior Courts are to certifie how they do hold Plea, not to assign for Error, that there was no such Custom, for this should be the way to draw all such Judgements into question, which is not to be allowed. Coke. Abington is an ancient Corporation; the action there was, an Action upon the Case upon a promise, and upon Non assumpsit pleaded, a Verdict and a Judgement was there given for the Plaintiff: A Writ of Error brought, and this upon the title of the court, that it is too generally expressed, being time out of minde, that they had no power to hold this Plea, that they had no such custom there. 1. It is a very plain and a clear case, if an inferior court holds plea, virtute literarum patentium, or virtute consuetudinis: If a Writ of Error be brought upon their proceedings, they are to set this down in their Certificate, how they hold Plea; if they hold Plea virtute literarum patentium, the same is to be brought and shewed by a Certiorari; but otherwise it is, if they hold Plea by Custom, for this is not of Record to be shewed, but that they, time out of minde, have so done, clearly they are not to assign this for Error, that there was no such custome, for the same is not of Record, for Prescription is but matter in fait, and is not to be tryed but by the Countrey; they are not to assign for Error, matter which is against a Record as appears in 1 Mariæ, Dyer fol. 90. in Varneys Case, not to assign for Error, matter which is against the Record, and certification of the Justices, as after a Fine there levyed by Mary and her Husband, not to assign for Error, that Mary dyed after the Conusans, but before this was certified or ingrossed, (S.) the 25 of March, which was before the Teste of the Dedimus potestatem, for that this is against the Office of the Judge, which is not to be assigned for error, and so is 7 H. 7. fol. 4. a b. allow it here that they had Jurisdiction to hold Plea by Patent,

1 Ro. r. 53. 2 Cr. 359. A Writ of error to reverse a Judgement given in *Abingdon* Court, *&c.*

22 Assisar. placito 64.

7 H. 4. fol. 39, 40, *&c.*

1 Mar. Dyer, fol. 90, *&c.*

tent, upon view of the Patent, it is not so contained therein; then they intitle themselves by Custom, what if the case were so, it would not be much material: but prima facie, this Writ of Error lieth here for another matter, not yet moved, the Writ of Error here brought, is to reverse the Judgement there given; this doth affirm that they have a Court, and to alledge now for Error that they have no Court, is contrary to the Writ of Error it self, Curia nostra secundum consuetudinem: Assignes for error, that they have no Court, no Prescription, if they usurp their Jurisdiction, and so no Court, but yet no Error; and it is Coram vobis in Curia, if they have encroached a Court, yet it is a Court, so if no Court, then no Error. Dodderidge. You have here admitted this to be a Court, and the same to be held, secundum consuetudinem, and then you do assign for error, that there is no such Custom, whereas in some cases they may gain a Jurisdiction, by way of incroachment: The Court was clear of Opinion against the Writ of Error, and the Errors assigned, and for the affirmance of the Judgement, but for this time without saying any more of this, Curia advisare vult: Afterwards, Termin. Mich. 12 Jac. B. R. this matter was moved again, and the Court clear of Opinion against the Writ of error, and the errors assigned, and so by the Rule of the Court, the Judgement was then affirmed.

Mich. 12 Jac. B. R. *&c.* Judgement affirmed *per Curiam.*

Bartholomew Plaintiff, against *Belfield* Defendant.

Entred Trin. 11 *Jac.* B. R. part 1. Rott. 924.

1 Ro. r. 36. 2 Cr. 332. 1 Ro. Abr. 766. A Writ of error to reverse a Judgment given in a *Formedon* in Discend.

IN a Writ of Error to reverse a Judgement given, 40 Eliz. in a Formedon in the Descender, upon a Recovery by default upon this, a Writ of error brought by the Heir of him against whom the Recovery was had, against whom the Defendant pleaded, the Fine levyed, with Proclamations by his Father, and five years past: Upon this Plea, the Plaintiff demurred in Law, the matter of the demurrer, touching the manner of the pleading of this plea in Bar, whether the Conusee to plead this, or not, Davenport. The point in Law assigned for error, is, that in the Declaration the Tenant did appear per Doiley, attornatum suum, omitting of his Christian Name, and so there was no Warrant of Attorney, 9 E. 3. placito 67. the last Case, the difference between the bringing of an Attaint, and a Writ of error: An Attaint lieth against him which recovered, and against the terre Tenant, but a Writ of Error lieth onely against him which recovered, and then a Scire facias shall be granted, versus tenentem, 7 Assiar. plac. 5. An Attaint brought upon a Verdict in a Writ of Entrey sur Disseisin, and because the party against whom the same was brought, was not Tenant the day of the Attaint, nor at any time after the Writ was abated, per agard; and by 47 E. 3. fol. 8. b. Danbeys case, in a Writ of error: By Ingleby Justice, a Writ of error is always maintainable against him which was party to the Judgement, or his Heir, although that he had nothing in the Land, so that the Suit is onely maintained against him, by reason of the privity of bloud; and the party to try the errors, but

9 E. 3. placito 67. *&c.*

47 E. 3. fol. 8. *&c.*

but not the Tenancy. Coke. As to this, (the Law is so clearly:) It was then urged, that by 20 Eliz. Dyer fol. 363. the want of a Warrant of Attorney is a good error, but here he is not the party that can plead it, Coke 3 pars fol. 4. a in the Marquess of Winchesters Case: It is there agreed, that in no case he in the Reversion or Remainder, which was not made party to the first record by voucher, shall have a Writ of Error by the Common Law, untill after the particular Estate determined, for then they are to have the Land; but if made party to the record by aid, prier, resceit or voucher, then they shall have a Writ of Error presently, during the life of Tenant for life, because they are made parties to the Record; but now by the Statute of 9 R. 2. c. 3. they shall have a Writ of Error, as well in the life time of the Tenants, as after their death; and so by this it appeareth, that the party to the Record is enabled to plead in Bar. Coke. This is a Case of very great consequence, there was a Case which was Ninean Menvils Case, who was attainted of High Treason; by this his Wife to have no Dower, till by the Statute of 1 E. 6. cap. 12. and so being barred, a Fine was afterwards levied of this Land with Proclamations, and the five years past; afterwards the Heir brought a Writ of Error, and reversed the Judgment of the Attainder: The Wife by this shall be restored to her Writ of Dower, as it was resolved, for she had no means of reversal, but resolved that she should have her right accrued unto her, by the reversal of the Attainder, and accordingly she had this: But if any one hath Land so hanging upon a Recovery, and afterwards a Fine of this Land is levied, and five years pass, this shall now clearly be a perpetual Bar, and he shall have no Writ of Error upon this Recovery, though it be erroneous for to reverse the same: The second matter in this case is, who is to plead this: As to this, the Heir is to plead this, quoad errores, the Heirs are parties to the Record, the Heir shall plead a Release: In Actions reals and personals, he shall plead any thing in Bar of the Writ of Error, he shall plead in nullo est erratum, without calling of the Tenant unto him, he is the sole party, and principally concerned; a Fine to be levied to the vouchee, Tenant in privity, and then he may plead any thing which goes in bar of this, which makes him privy: Here the Heir may well plead, notwithstanding he hath nothing in the Tenancy, for here, in regard that the Law hath made him Tenant unto the Writ of Error, he may plead a Release of Actions, and why then shall he not be suffered here to plead the Fine: Attaint goes to the terre Tenant, and a Writ of Error to him that is privy, here he may well plead any thing which goes in bar of the Writ of Error, and so here he pleads the Fine levied, and the 5 years past, and without the terre Tenant this is good: As to the other matter alledged, (S.) Post judicium, & superinde seisinam habit, this superinde ought to be intended to be after the Judgment; also the Statute of 27 Eliz. cap. 5. of Demurrers, will much aid this Case: I do not commend this manner of pleading, for it had been more orderly and formal pleading, to have pleaded, that after the Judgment intravit, & fuit seisitus, and levied the Fine; here the Heir is the proper person to plead to the errors, he is the onely party to the error, and therefore he may well plead any thing which goes to the destruction of the Writ of error thus brought. Haughton. The Judgment here ought to be given against the Plaintiff in the Writ of error; the Statute of 4 H. 7. cap. 24. the words of this Statute do much satisfie me, a Fine with Proclamations to be a final end, and to conclude; but it is not said where, but necessarily it is to be the right, and to the Land, and the Action also, this is necessarily to be so; in the Statute there is afterwards a saving for the right, therefore an Action is within the Body of the Law; here he hath right of Action by the Writ of Error, and this Law hath now made this Fine a perfect conclusion of the Action, the Law also makes him the right party against whom the Writ of Error is to be brought, and therefore by this Fine pleaded against him, he is to be bound by the Law; the Writ of error is to be brought against the Heir, and he by Plea to conclude the Plaintiff in the Writ of error, notwithstanding that he is not Tenant of the Land, as well as if he have

Coke 3 pars, fol. 4, &c.

Statute of 9 R. 2. c. 3.

Statute of 1 E. 6. c. 12.

Stat. of 27 El. cap. 5.

4 H. 7. c. 24.

the release of the party, he may well plead this in Barre against him. Dodderidge agreed herein, the sole matter considerable here is, who is to plead this fine here in Barre to this Writ of Errour, as to this, if the Defendant here be privy to the error, whether he shall plead this which goes in Barre of the Writ of Error; he may well plead this and that for these reasons, where divers defendants are for several Causes, each of them may plead by himself in barre that matter which belongs unto him, here he who pleads this, is the sole party to the Action, he which is terre tenant shall plead, that he levied a Fine to another, to the use of him and his heirs. It is a Rule to be observed, that every man who is party to an Action, may very well plead any thing which goes in barre of the said Action, and this is plain, the terre Tenant is not party to the Writ of Error, but he is afterwards to be called in by a Scire facias, if it be an error in fait, or in Law, he is to make answer unto it, it is most proper for him, and it lieth properly in the mouth of him, who is party to the Writ, to plead this matter which goes in Barre of the same, by this Writ of Error he is to recover the Land, if no fine had been levied thereof, and therefore this is to be pleaded, and there is no party which can more properly plead this, than the Defendant; here he is privy to the 1. judgment, and a party to the same; and none can more properly plead this, and there is no evasion from this. Croke agreed herein. First, a fine is a Barre, and binds the right, it binds the right of Action, Constat here, De re, & constat De persona, who is to plead this, the Defendant here may well plead this clearly, this being a Fine, and a fine being the highest assurance that can be, and therefore much favour is to be given unto it, the same being a conveyance made for the setling and quieting of mens possessions. Coke. If he might plead here a release of Actions reals, in the same manner, and for the same reason, he may as well plead this Fine levied as before, and the same a good barre to this Writ of Error, and so the Rule of the whole Court was, quod querens nil capiat per breve suo de errore.

Judgment for the Defendant, &c.

Winchcombe Plaintiff, against *Pigot* Defendant.

Entred Trin. 11 *Jac.* B. R. *Rot.* 566.

An Action of Debt upon a Sheriffs bond for appearance.
1 Ro. Rep. 39.
11 Co. 26, 27.
2 Ro. Abr. 29.
Mo. 10. 28. 36, 230, 301, 547, 619, & 835.

IN an Action of Debt upon a Bond generally (being bound to the Sheriff for appearance) the Defendant pleaded, Non est factum, by reason of some new interlining in the Bond, (S) Vicecomit. Oxon.) being interlined. George Croke, for the Plaintiff, that the Bond is good; this interlineation notwithstanding; here this is a Bond made to the Sheriff for appearance, in which case, if he had not named his name of Office, it had not been good, but yet he himself cannot plead to this, Non est factum. Coke. If I have a Bond, and another interlines something in this; this shall not avoid the Bond: if one be bound to me by my name of Edward Coke miles, and afterwards he interlines and puts this in (S) chief Justice of the Kings Bench; this shall not make void the Bond, no more shall this interlining here; for in no case, where I have an Interest by reason of a Bond, my Interest shall not be taken away from me, and avoided, without my assent unto the same:

same: If Winchcombe, nuper Vicecomit. be interlined by a stranger. Haughton Justice, I do not see how this Bond can be avoided, by the Act of a stranger, without the assent of the party himself, to whom the Bond was made, when as he himself did not put this Interlineation in, but the same so done by another; and these words also thus interlined not material. Tratman for the Defendant, though these words are not material, yet this interlining shall avoid the Bond, 14 H. 4. fol. 18. Briefe de Dette, was brought upon an Obligation, by J. T. Grocer of London, and Grocer of London was interlined in the Obligation; this addition of the Obligor shall vitiate the Bond. 3 H. 8. Kellaway fol. 162. placito 2. & fol. 164. placito 7. the Case of Mills, where one was bound to him in a single Obligation, 10 mille markes, the Obligee writes a condition upon the back of the Bond, for the Obligor to enfeoffe him of his Manor de A. before such a day, and this so done after the sealing, and delivery of the Bond, whether this shall make the Obligation void, this case there argued at large. Coke. I agree this, and so is 19 H. 8. Tratman, 9 Eliz. Dyer fol. 261, 262. placito 28. à die confectionis, added, in a Lease, though the words, added in a Bond, be not material, yet this shall make the Obligation void, for that after the addition, it is not the same bond which the Obligor sealed; and therefore to this he may well plead, Non est factum, after this alteration of it, though this be so done without the privity of the Obligee, he shall be by this prejudiced, because the Obligation of right doth appertain to the Obligee, and he at his peril ought to keep the same safely, without any rasure, or interlining, and to this purpose is 14 H. 8. fol. 27. by Brook. Mich. 40, & 41. Eliz. there was a Case between Markam Plaintiff against Gunstone Defendant, where an Obligation was made, by Mr. Blake, the Scrivenor, by the name of the Town, and the party, but the addition was afterwards inserted by a stranger, and the Bond adiudged void for this cause, 36 H. 8. Dyer fol. 59. in Debt upon a bond, the Defendant pleaded, Non est factum, they were at Issue upon this, and before the day of appearance of the Enquest, the Rats did eat off the Seals of the Bond, by the negligence of the Clerk, in whose Custody the same was; the Judges there did charge the Jury to find that this was the Deed of the Defendant, at the time of his Plea, and that they should give a special Verdict, and so they did, so that the party at his peril ought safely to keep his Deed without any rasure or interlining in the same, after the sealing, and delivery thereof, for if a stranger gets the Deed, and doth cancell it, this makes the Deed void, and of no force, and with this agrees Coke 5 pars fol. 119. Whelpdales Case, where it is said, that in all Cases, where an Obligation was once his Deed, and afterwards, before an Action brought, it becomes no Deed, either by rasure, addition, or other alteration of the Deed, or by breaking of the Seal, he may safely plead Non est factum, for at the time of the plea it was not his Deed. Coke chief Justice. This is a very plain case, and a plain difference, and there is no book against it, and the opinion of Brook is good Law, where the bond was 40 l. and the same after made 20 l. he cannot have an Action upon this Bond; and so in the Case where the Rats eat off the Seals: whosoever it is that cancels the Bond, this is not material, if it be cancelled, then no Action can be brought upon it, but the difference will be this, where the rasure is in a place material, and where not, here it is onely in the addition, it would much differ, where rased in the summ, or cancelled, (though not known by whom) no Action can be brought upon it. If I have a Bond, and after sealing and delivery the parties name is rased, this rasure shall vitiate the Bond, a stranger here onely puts in the name of the Sheriff, (S) Vicecomit. Oxon. notwithstanding this the Bond remains good, and his Plea of Non est factum not good. Coke. You ought to have demanded Oier of the Bond to him sealed by the name of (Winchcombe) without (Vicecomit. Oxon.) this being omitted, if you had demanded Oier of the Bond, you might then well have pleaded this Plea, but now it doth not appear when these words were put in. Doddridge. When there is an alteration of the Bond, by the rasure or interlining, and this in a place, that is material (by whomsoever this is done)

14 H. 4. f. 18.

3 H. 8. Kellaway f. 163. &c.

19 H. 8.

9 Eliz. Dyer fo. 261, 262. pl. 28.

14 H. 8. fo. 27. Mich. 40. &c.

36 H. 8. Dyer fol. 59.

Note the difference touching *rasure* in a Bond.

42 Eliz.

done) this is not materiall, but the Obligation by this shall be avoided, and the reason of this is, for the negligent keeping of the same. 42 Eliz. an Action of Covenant was brought upon Indentures of a Charter party amongst Merchants (they being by Covenant to pay at the arrival of the Ship, so much for fraught, one of them pays his part, and then cuts off his seal, this makes the Indenture void against all the others, and so it was adjudged; but here in this principal case, this interlining is not at all material, the same being but an idle surplusage, but yet this may be made to be material. Haughton. In this case he shall not avoid the Bond this way; but agreed to that which hath been said, that if the Bond had been rased, or interlined in a Summ to be paid, this shall vitiate the bond, but not as this Case here is. Coke chief Justice. 12 H. 4. A Monk may be a Disseisor; this the onely Case in the Law for it, he is not capable to be a Purchaser, and----yet he may be a Disseisor, if two or three Monks enter, and keep another out of his Possession, an Assise lieth against them for this: Dodderidge. By 13 H. 8. a Monk may be a disturber in a Quare impedit, if one commands a Monk to enter, and to disseise another to his use, who does so, nothing is by this setled in him.

Coke. If one commands him to enter, and he doth so, this shall settle the Land in him that commands him so to doe; as to the case remembred of the Charter party; if one seal be cut off, this shall make void the whole; this is clear, the whole Court agreed in this, that if the Defendant here had demanded Oier of the Bond, and it had appeared to be the Bond of the Sheriff, taken by him as Sheriff; this would then have made it void, and the Statute of 23 H. 6. capite 10. is no generall Law; and so the Rule of the Court was, that the Action here brought by the Plaintiff was well brought, and that this rasure shall not avoid the Bond, for the Court shall take it to be as an ordinary Bond, and not as the Bond of the Sheriff, by him taken as Sheriff, and so by the Rule of the Court, Judgment was given for the Plaintiff.

Judgment given for the Plaintiff.

Suckerman and *Coates* Plaintiff, against Sir *Henry Warner* Defendant.

Entred Mich. 11. Jac. B. R. *Rot.* 135.

A Prohibition upon a Suit in the Spiritual Court for Tithe Hay. 1 Ro. 2. 53. 252.

In a Prohibition, upon a Suit in the Spiritual Court for Tithe Hay, in discharge of which it was shewed that the Abbot of Saint Edmonds Bury was seised of the Manor of Milney, of which Manor these Lands now in question are parcell, and that the Abbot held these for himself, his Tenants, Commoners, Farmers and occupiers, discharged of Tithes, untill, and at the time of the dissolution, that afterwards by Letters Patents, the same Mannor, and Lands came unto Sir Henry Warner, who sued there for Tithes, and so prayed a Prohibition. Sir Henry Warner to this pleaded in Barre, and shewed, that Suckerman and Coates the Plaintiffs, and all those who had the said house, had Land, and used to have Libertatem falcandi, to make Hay onely, and takes a travers, absque hoc, that they

they are Tenants, Farmers, or occupiers of this Land, out of which he demanded tithes, the others reply, that they put in their cattel, and did also mowe the same, and so concluded with a per quod, they were occupiers of the Land, and so to be discharged of payment of Tythes, for the same, & petunt quod hoc inquiratur per patriam, upon this Replication, Sir Henry Warner demurred in Law, the Plaintiffe joyned in demurrer. It was urged, that the Replication here was good, and the Declaration good, but the Barre bad, and a perfect issue joyned, if the Declaration be good, and the Plea in Barre, and the Replication both bad; the Plaintiffe shall have Judgement upon the Declaration; 33 & 34 Eliz. between Hales and Smith, in an Avowry, the Avowry good, the Barre bad. Judgement given for the Avowant, and the Judgement given, Coke 4 pars. fol. 83. b. in Southcotes Case, doth warrant this, and 7 E. 4. fol. 31. a. b. Tilly, and Woodyes Case. For Sir Henry Warner. It was urged, with an admittance, that the Farmer and occupier under the Abbot, ought not to pay Tithes; but he which comes in as a Commoner ought to pay Tithes; here they were neither Farmers, nor Occupiers under the Abbot, it is here shewed, that Coates was seised of the ancient House, and of 2. Acres, and that he used to cut Hay for fodder, this is a kind of a Commoner; here he did cut Hay, and upon this the Libel was for tithe hay, and the same Plea was for Suckerman, that he was seised of an ancient House, and that he, and all those who had this house, had libertatem falcandi, absq; hoc that discharged of tithe, the barre here is good, and they are not within the Priviledge to be discharged of tythes, for that they were neither Farmers, nor occupiers under the Abbot, he pleads, that he put in his Cattell, and cut Hay there, and concludes, per quod fuit occupator, this Plea is not good. Coke, he which takes any thing as a profit appzender, is not Tenant, nor occupier, if he takes the profits, he is to pay tithe; here the Abbot of Edmonds Bury was seised of the Manor of Milney, this Locus in quo, parcell of the Manor, certain Tenants were to have common three Loads of Hay, the Abbot was seised of the soyle in his demesne, the Abbot pro se firmariis, tenentibus, and occupiers of those closes, to be discharged of tithes, here these persons sued, are not within this Prescription of discharge, to be discharged from payment of Tithes; a Prescription in this kinde, is to be taken strictly, because the same is to barre the Church from having of Tythes; here it is pleaded that they were to have libertatem, or potestatem falcandi, as appertaining to their free hold, whether such a one shall be said to be tenant, farmer, or occupier under the Abbot, is the question, pleads, that he entred, and put in his Cattell, per quod fuit occupator, this is no good pleading clearly; for this is but a conclusion of his, and it doth not appear unto us here, that he was Tenant, Farmer, or occupier, under the Abbot, and so not to be discharged of tithes. Dodderidge & Haughton Justices, agreed with him herein, and that this per quod, is repugnant in it self, and a plain and clear Departure. Dodderidge, you do not here pursue your Prescription, for the discharge of tythes, you have but onely jus falcandi, the Court cleere of opinion, that the Barre here was good. Haughton, if the Abbot prescribes in discharge of Tythes, this shall not be extended unto Commoners here, the barre is good. Curia agreed all in this, and that the Replication is not good, and so by the rule of the Court, a Consultation was granted.

33, 34 Eliz. *Hales* and *Smiths* case.

Cook. 4 pars. fol. 83. a. b. *Southcotts* case.

7 E. 4. fol. 3. a. b. *Tilly* and *Wodyes* case.

A consultation granted *per curiam.*

Nota, by Coke chief Justice, clearly, That Fishmongers may well justifie the buying of Fish, if they sell this again at reasonable rates, but if they buy and sell again at unreasonable rates, then they shall be taken to be within the Statutes of Ingrossers; and so it shall be also of Malsters, if they buy and sell again, at unreasonable rates, they shall be within the Statutes of Ingrossers; if they do impose upon these their Commodities, great prices at their pleasures, they shall then clearly be taken to be Ingrossers, and be punished for the same.

Nota, as touching *Ingrossers*, who said to be an Ingrosser.

Kennycott

Kennycott Plaintiff, against *Bogen* Defendant.

Entred Trinit. 11 *Jac.* B. R.

Rott. 473.

Yel. 198. 4 In. 30. A Writ of Error to reverse a Judgment in Trespass.

IN a Writ of Error, to reverse a Judgement given in the C. B. in an Action of trespasse brought for taking of his goods; the Defendant by way of justification sets forth the generall custome of the Land for the taking of Prisage for the King, and shews that Sir Thomas Waller was, and is chief Butler to the King, and that he was then at the time of the taking, his Deputy, and he took the goods, the Wine for Prisage for the King, and so in this manner justifies; the Plaintiff replies, De son tort Demesne, and takes a travers with an absque hoc, that there was any such custom to take prisage for the King, and so an issue was joyned upon the Custome, and found against the Custome, that there was no such Custome, and Judgement given accordingly, and upon this a Writ of Error here brought, supposing that this ought to have been tryed by the Judges of the Common Law, and not by a Jury, by the Countrey; and if by a Jury, this being a general Custome, those of Exeter, where the triall was had, were not fit persons to try this Custome, and so the triall errontous.

Term. *Mich.* 8 Jac. B. R. *Kennycott* against *Bogen.*

Note, that this Case for the taking of Prisage was formerly in another Action, and between the same parties, argued Termin. Mich. 8. Jac. B. R. where Kennycott was Plaintiff against Bogen in a Trover and Conversion of certain goods, where he pleaded in Barre, the generall Custome of the Realme, for Prisage for the King, and shewed that Sir Thomas Waller, was chief Butler to the King, and that he at the time of the taking, was his Deputy, and so justifyed the taking of the Wines, to this Plea the Plaintiff there demurred; divers exceptions there taken to the plea; 1. It was shewed, that he ought to have Prisage of all the Wine laden beyond sea, and unladen here; he shews that the same was laden beyond sea, but doth not shew, that it was unladen here, and it ought to be all unladen, but this is not so shewed in the plea. A second Exception he shews, that of every ship laden beyond sea, he ought to have for prisage, 1. Tunne, before the mast, and another behind the mast, but doth not shew in his taking, that he took them in this manner, he ought to have shewed, the manner how they were taken. 3. Exception, the Plaintiff saith, that the Defendant did take the goods, and converted them to his own use, the Defendant pleads, that he took them to the use of the King, but doth not travers the conversion to his own use. A Fourth exception in his Plea, he sheweth that he took the same, as lawfull Deputy to Sir Thomas Waller chief Butler to the King, and doth not shew how he was his lawfull Deputy, which he ought to have done; for the Defendant, it was answered, that the plea was good, as to the first Exception, because he doth not shew that the ship was unladen, 'tis true, this is not shewed, but it is sufficient, to shew how the fact was; for he did unload 11. Tonne, and a half at one place, and 9. at another place, and the King hath no right to the Prisage, till 10. are unloaded, and that so he took both together for the

the King at the first place; the King is to have two of twenty. To the 3. Exception, where the Conversion is confessed, and justifyed; there needs no Travers. As to the Fourth Exception, if he took here as his servant, and by his command, this is good; here he did this as his Deputy onely, and a Deputy claims not any thing in his own right, and therefore he needs not to shew how he came to be his Deputy, but if he had taken this as an Assignee, there he conveys an interest to himself, and there he ought to shew how he was an Assignee; but here in this case, he had nothing to do, but as a servant, and therefore his Plea here is good, without shewing how; here all was unloaden, half, (S) 9. at one place, and 11. the other half at another place; this being thus shewed, is good, and sufficient to entitle the King unto two Tun, per curiam.

Flemming chief Justice, If load twenty Tuns beyond Sea, and brings them hither, as soon as he comes, and opens the Ship, makes his sale, and this entered in the Merchants Book, and then breaks the bulk, he may then presently take the Prisage for the King, (S) one Tun before the Mast, and another behind the Mast, and this he may well take, before the Ship be unladen, wheresoever he breaks the bulk first, there he may presently take the Prisage for the King, and he is not to follow him to any other place, to attend his unloading, but he is to take the prisage for the King presently, at the first place where he breaks the bulk of the Ship, and here he brought 20. Tuns from beyond Sea, 9. of them he unladed, he may presently take two Tuns for Prisage for the King.

Williams and Yelverton Justices, agreed with him herein, otherwise it may be very prejudiciall to the King, and this way the King may be deceived. The whole Court agreed herein clearly, as to the matter of the conversion, the Defendant ought not here to Travers this, for he hath shewed, and conveyed by his Plea, a good and sufficient Title, to himself for the King; and if any deceit be used by such a subject, as to take this to his own use, he is then to be punished for this by the King; for that this belongs to the King, the whole Court agreed all in this, and that the Plea in Barre was good.

Williams Justice, Here it is matter in Law, whether he may here seize or not; he may this doe for the King, and not to travers this; as to the point of Deputy, I somewhat doubt of this, he is not to be made a Deputy, but by writing, and therefore this ought to be shewed, how that by such a Writing, he was made his Deputy; here the pleading is, that he did this, as lawfull Deputy to Sir Thomas Waller, and also per ejus preceptum, & sufficiens deputatus existens & per ejus preceptum, took the same; the Court overruled this, and all the other exceptions, that the Plea in Barre was good, and that the Plaintiffe had no cause to demurre, and so by the Rule of the Court Judgement was given, and so entered for the Defendant, & quod querens, Nil capiat per Billam.

Williams Justice, doubted of the matter of Deputy, and of the pleading of the same, that he ought to have shewed, how he was made his Deputy; but the rest of the Judges all against him in this. This Judgement being thus given against the Plaintiffe, he did afterwards in the C. B. bring this Action of Trespass, as before, and issue joyned, and tried upon the Custom for Prisage, and upon triall found no such Custome to be; and upon this the Writ of Error here brought to reverse this Judgement, that this Custome was not well tryed, being tried by a Jury, whereas the same should have been tryed and determined by the Judges of the Common Law, and if by a Jury, yet not by a Jury of that place, at Exeter, where the same was tryed. It was urged for the Plaintiffe, in this Writ of error, to reverse the Judgement, that this should not have been tryed by a Jury, and that it appeareth, Coke 9. pars fol. 30. b. 31. a. 6. in the case of the Abbot de Strata mercella; that matters in Law, ought to be tryed, and determined by the Judges of the Law, as matters in fact, are to be tryed by the Jurors, here the matter in question, is matter in Usage, and this is a generall Usage, for the taking of Prisage for the King, an ancient Usage, and the ancient Law of the Land. 21 H. 3. Fitz. title prerogative

Judgement for the Defendant, *& quod querens Nil capiat per billam.*

Coke 9. pars. fol. 30, &c.

21 H. 3. Fitz. tit. prorogative pla. 26.

rogative placito. 26. Nota, quod Lex Angliæ, & consuetudo ejusdem est, quod a quibuscunque alliis feoffatus fuerit, dum tamen a domino rege aliquo tempore feoffatus fuerit, pro tenement, quod tenetur per servitium militare, Quod Dominus Rex habeat custodiam omnium terrarum, & tenementorum tam de feoffamento allorum, quam de feoffamento proprio, and this so was agreed by the whole Court cleerly, and so adjudged accordingly, by this it appears, that this ancient Custome, is taken for the Law of the Land, and the same is to be tryed by the Judges of the Law, and not by a Jury, as here in this Case it was, and it appears in Plowdens Commentaries, in the Case of Mynes, fol. 310. that Royal Mynes by the Law belong unto the King, and to have a Jury to try matter in Law, as they have done in this Case, this is Error.

Plowdens Commentaries, 310. case of *Mynes*.

Coke 9. pars. fol. 75. b. 76. in Combes case, That a general usage, which is so per totam angliam, this is the Common Law, as for a Copiholder to surrender, or to make a Lease for one year, without License, this de communi jure, he may do, and this general usage, is the Common Law. 1 Jac. in B. R. Dane Plaintiff, against Medhurst, in an Action upon the Case, brought for the killing of a mastive Dog; the Defendant pleads a special plea, (S) that he was a Warrenner, and found this mastiffe in his Warren, killing of his Conies, and therefore he killed him, and shews the general usage of Warreners to do so, and this was here adjudged to be a good Plea: and a good Justification upon this general usage, to be so throughout the whole Realme. As to the main matter here of Prisage, this is an ancient duty, due unto the King; this taking of Prisage is an ancient duty, and Revenue, belonging to the Crown of England; at the Common Law, if the Law gives a right to a thing, it also gives a fitting remedy to come unto the same. And this appears, Coke 5. pars, fol. 12. a. In Saunders Case, if a man hath Mynes occult within his Land, and leaseth his Land, and all mynes within it, here the Lessee may dig for them; for that quando aliquis aliquid concedit, concedere videtur & id, sine quo res ipsa, esse non potest, and with this agrees, 9 E. 4. fol. 8. It appeares by the Statute of 15 E. 2. Rastall title estreats, fol. 147. touching the forme of the estreats into the Exchequer, by the King's chief Butler, of the provision by him made of Wines, and likewise of Prisage by him taken, and this so continued, till the same was farmed out, in the time of King H. 7. and H. 8. Term. Mich. 6 E. 3. fol. 291. 292. placito 50. old print. the Archbishop of Yorks case in a Quo warranto brought against him, for taking of Prisage, and his claime thereunto, where it is said, that Prisage is an ancient duty, and revenue in the King, as King, and the Butler of the King, is to certifie the estreates into the Exchequer of the same, so that by this it appeareth, that this is matter of Law, and of the King's Prerogative, and this triable by the Court, by the Judges, and not to have an issue joyned upon it, and therefore the triall of this by verdict, is Error, and so to be reversed. 21 E. 3. fol. 46. the Prior of Mertons Case, which seems to make against this, but doth not, the Prior there joyned issue upon the Custome, that there was no such Custome, this was tryed by Verdict, and found against him, upon this a Writ of Error was brought, and the Judgement affirmed; but this was a speciall, not a generall Custome, and for his advantage, and therefore not to be reversed, but here it is otherwise, being a generall Custome, or usage to have this prisage for the King; But admitting that this matter was triable per pais, then it is to be considered, whether they of Exeter were to try this, 21 E. 4. fol. 10. 17. & fol. 36. b. an Obligation fait, dated beyond Sea, in a triall it is to be laid, that it was made at some place within the Realme; here it appears to you generally, this Prisage to be paid, and taken for the King.

Coke 9 pars. fol. 75, 76. *Chambers* case.

1 Jac. B. R. *Dane* against *Medhurst*.

Coke 5. pars. fol. 12. in *Sanders* case.

Stat. of 13 E. 2. *Rastal*. fol. 147.

In temps H. 7. & H. 8. prisage farmed out.

Mich. 6 E. 3. fol. 292, *&c.*

21 E. 3. fol. 46, *&c.*

21 E. 4. fol. 10. 17. & 36. b.

Croke. This Prisage is an ancient Duty, which the King usually hath had.

Dodderidge. Prisage is an ancient Duty, which the King hath alwayes had, if there be 20 Tun, or above in the Ship, the King is then to have for his Prisage one Tun, before the Mast, and another behind the Mast, and this is a generall Law, by which he is to have this, afterwards, as appears by the Statute, De Customa magna, the King did grant for to pay but two shillings for Prisage. And so this

this case was adjourned for further Argument. Afterwards, Term. Mich. 12 Jac. B. R. this Case was moved again, the same being, that Kennicott brought an Action of Trespass in the Court of C. B. against Bogen, for his wrongfull taking of two Tuns of White-wine. Bogen to this pleaded, that long time before the King, time out of mind, was to have Prisage, which was alwayes answered, to the King and to his Farmors, in this manor (S) of every 10 Tun, one Tun, and of every 20 Tun 2. and shews, that the Plaintiff brought, infra portum de, &c. a ship with 20 Tun of wine, and did there unlade the same, and that he, as servant to Sir Thomas Waller, chief Butler of the King, for the Prisage of the King, for him did then take the said two Tuns of Wine; the Plaintiff replies, De injuria sua propria, absque tali causa, upon this they went to issue, and triall, a verdict, and Judgement given against the King, and upon this a Writ of Error now brought to reverse this Judgement, this being matter of Law, and so not to have been tried by a Jury. Term. Mich. 21 Jac. B. R. &c.

Yelverton sollicitor of the King, that which is the Custome of England, is not to be tryed by a Jury. 8 E. 4. fol. 23. in trespasse for digging his ground, the Defendant shews a Custome in defence against the enemies, to make trenches and Bulwarks, this custome is the Common Law, and is not to be put in Issue to be tried by a Jury, because it is the Law of the Land; and with this agrees 29 H. 8. Dyer. fol. 37. in Maleverers Case, and 21 H. 7. fol. 27. b. so in this Case here, this Custome alledged for the Prisage, is the Law of the Realme, and therefore the same not to have been put in issue, this is the Law of the Exchequer, to resort unto the Records of the Exchequer, to see there what Prisage is due unto the King, in 5 and 6 E. 3. the manner of taking Prisage (S) one before, and the other behind the Mast; if this be matter in Law, then the triall of this by a Jury, is error; that this is matter in Law, 21 E. 3. fol. 46. Fitz. title error placito 65, and Brook title Customes placito 21. a particular Custome is the Law of that particular place, but not of the whole Realm; but a generall Custome, or usage of England, is the Law of England, and this is not to be tried, and determined by a Jury. 34 H. 8. Brookes cases, fol. 57. placito. 255. Brook title customes placito 59. Custome per totam Angliam, is the Common Law of the Land, and such a Custome is not triable by a Jury; so here, this Custome, or usage for Prisage, is the common Law of the Land, and the same ought not to have been so tried by a Jury, and this being thus tried, the same is error, and for this error, the Judgement is to be reversed. 8 E. 4. fol. 23. 29 H. 8. Dyer. fol. 37, &c. 5 E. 6. E. 3. 21 E. 3. fol. Fitz. tit. error. placito. 65. &c. 34 H. 8. Brooks cases. fol. 57, &c.

Coke. The King hath this his prisage by prescription, and by 5 & 6 E. 3. it is a thing against common right. 5 & 6 E. 3.

Dodderidge. The matter here considerable is, whether this matter be here issuable, or not: Earle, or not Earle, is triable by the record, but if he will put this upon an issue, and so will try this, this then is good, and sufficient, being thus tried; and so it is of Land in ancient demesne, this is to be tried by the Record of Domesday Book. Yet if he will put this in issue, and try it, the trial is good, the matter here is, whether this Prisage be such a Prerogative, which belongs to the King, the which, a Jury is not to try; if this be belonging to the King, as in the right of his Crown, or if he hath gained this from the Subject, by prescription, this is the sole point here considerable in this Case, if this be a Prerogative Royall in the King, as in the right of his Crown, the Judges then are to take notice of this, and not to suffer this to be tried by Jurors.

Coke. It is very evident, and cleare, that the King hath this but by prescription; it appeareth by 5 & 6 E. 3. that the Bishop, and the King hath this by Prescription. Purveyance is for the King's houshold, and if the King will grant this over to another by Charter, this is not good; here they prescribe to be discharged of Prisage, it is a very hard matter to prescribe against insignia Coronæ, I never read of a discharge made unto any one of the payment of purveyance, purveyance is due unto the King, by the Common Law of the Land, but prisage is not so, but by prescription, it is a plain and a cleare case, that one shall not be suffered to traverse, 5 & 6 E. 3.

verse, or otherwise to try whether purveyance do belong to the King, or not, but Prisage is by Custom, and no Stranger is to pay Prisage, and we ought to maintain the Kings Charters in this kinde, as well by the rule of State, as by the rule of Law: Englishmen pay Prisage, and Strangers pay Butlerage; Merchants pay Butlerage (S) Two shillings for every Tun, this two shillings granted unto Merchants-Strangers by Charter, so that they are not to pay this: Charta Mercatoria, a good Record worth knowing.

Yelverton Solicitor-General, there is no Judge but well knows what Prisage is, (S) One Tun to be taken before the Mast of the Ship, and another Tun behind the Mast.

Coke Chief Justice. This is a true difference, a Stranger shall pay Butlerage, but not Prisage; and an Englishman shall pay Prisage, but not Butlerage; and a Citizen of London shall pay neither of them: This matter here is well traversable, for it is against the Law of the Land, for a Stranger is not to pay Prisage, since the Charter of King Edward the first, made 4 E. 1. granted to Strangers-Merchants, that they should not pay Prisage.

Yelverton Solicitor, By the Common Law they are to pay it.

Dodderidge. By the Common Law the King is to have Prisage of all generally, but the Charter of 4 E. 1. doth discharge Merchants-Strangers from the payment of it, in liew of which, they grant two shillings a Tun for Butlerage.

The Judgement neither reversed nor affirmed, &c.

Coke. We do not know how we can reverse this Judgement thus given, and so, without saying any more, this case was further adjourned, but not moved again afterwards; the parties perceiving the opinion of the Court, ended the same between themselves, the Judgement being neither reversed, nor yet affirmed.

Fowler Plaintiff, against *Seagrave* Defendant.

An Action of Trespass, &c.

IN an Action of Trespass, Nota, per Coke chief Justice. When a man claims a Warren, infra omnes terras dominicales, he cannot extend this into the Land of Free-holders; for when any one claims a Warren by Charter, he cannot clearly inlarge this beyond the Charter, but he ought to take the same, as it is expressed in the Charter, and not otherwise; otherwise it is, where he claims the Warren by Prescription, and this is the difference, the Court agreed with him herein.

Selby Plaintiff, against *Wilkinson* Defendant.

An Action of debt upon a Bond.

IN an Action of Debt upon a Bond of 200 l. upon Oyer demanded; the condition of the Bond was, to pay 100 l. to the Plaintiff on his Marriage day; the Money was not paid, and for default of payment, the Action was brought, to which the Defendant pleaded in Bar, that he had no notice given him of his Marriage day,

day, so that the only point was, Whether in this case notice ought to be given the Defendant by the Plaintiff, of his Marriage day, or not, before his Action brought, or whether at his peril he is to take notice of it himself. Coke, and the whole Court agreed herein, that no notice of the Marriage day was here to be given, but that at his peril he ought to take notice of it; so is 18 E. 4. fol. 18. Coke, 8 E. 4. fol. 1. is no Law: If I devise Land to my Daughter, in which devise I also enjoyn her to pay 100 l. to another, on the day of his Marriage, no notice is in this case to be given to her of the Marriage day, but yet this is somewhat more doubtfull then the principall Case here in question is, being bound to pay it: The Court was clear of opinion, that no notice was here to be given, that the bar of the Defendant not good, and so by the Rule of the Court Judgement was given for the Plaintiff.

Judgment for the Plaintiff.

Daly Plaintiff, against *Fryar* Defendant.

IN an Action of Debt upon a Bond, being entred into to the Sheriff, for the appearance of another here in Court, at a day certain, at which day the party did not appear, but two days after he did appear; upon this his appearance, being moved for the party to have this appearance now allowed of, and so to have a discharge of his Bond: The Court was clear of Opinion, that this appearance, though after the day, is yet to be allowed of for a good appearance, and the same to be a sufficient discharge of the Bond, for that the whole term is but as one day in Law; and so for this reason the appearance was allowed of by the Court, according to the Presidents and Resolutions accordingly, both in this Court, and also in the Court of C. B. and so by the Rule of the Court, the appearance was allowed of, and so entred, and the Defendant to be discharged of the Bond by him entred for the appearance of the other.

An action of Debt upon a Sheriffs Bond for appearance.

Appearance recorded, and the Sheriffs Bond discharged.

A Case concerning the Hundred of *Witherley*.

IN a Writ of Error to reverse a Judgement, given upon the Statute of Winchester, for Hue and Cry upon a Robbery: The Error insisted on was this, Because the Hundred, Quoad captionem, & spoliationem, were found culpable: The whole Court agreed this to be no error, for it shall be taken, and so intended, that they were guilty as to the charge, but not as to the spoiling, and so by the Rule of the Court, Judgement was affirmed.

A Writ of error. The Hundred of *Witherley*. Judgement affirmed.

Keisar

Keisar Plaintiff, against *Tyrrel* Defendant.

An action upon the case for an escape.

IN an Action upon the Case, brought against the Sheriff of N. for an Escape, upon Non culp. pleaded, all the speciall matter was found, and shewed to the Court, which was this, That a Capias did Issue to the Sheriff to take one (John) which was by a wrong Name; the Sheriff returns a Non est inventus, and upon this a Testatum issued out to him, and therein named him by his right name; upon this the Sheriff took him, and had him in execution, and afterwards suffered him to escape.

Haughton. If the Sheriff do arrest one, and hath him in execution, be the Proces by which he was taken, erronious or not, if the Sheriff suffer him to escape, he shall be charged with this escape, though he was erroniously taken in execution: The whole Court agreed herein, and that the Sheriff is answerable for this escape, notwithstanding the first Capias was by a wrong name, for he was taken, and suffered to escape; hereupon Non culp. pleaded, the speciall matter was found, and shewed that the first Capias was by a wrong name, yet the Court clear of opinion, that he being taken, and in execution by his right name, though the first Capias was not right, the Sheriff shall be chargeable for this escape clearly, and so by the rule of the Court, Judgement was given for the Plaintiff.

Judgement for the plaintiff.

Hawkins Plaintiff, against *Parker* Defendant.

1 Ro. 2. 52. An Action of account.

IN an Action upon an account, the Case appeared to be this: The Defendant, by his Deed, did acknowledge the receipt of 100 l. from the Plaintiff, to be imployed by him in Merchandize, and covenanted at his return, to give unto him a sufficient account of this, and of his bestowing of it: Upon his return, the Plaintiff brought against him this Action of account: The Defendant pleaded, that at his return he tendered an account unto the Plaintiff, the which he refused, 28 H. 8. Dyer, fol. 20. C res Case was cited; the Case of Pruens, That a man may have an Action of Debt, Covenant or Account, upon the Receit.

Dodderidge. Though there is here no word of Account, yet in this Case here, upon this his receipt, the Plaintiff may well have an Action of Accompt, for the Covenant doth not take away his Action of Account: The Court was clear of opinion, that the Action of Account did well lie against him at his return, for that this is not taken away by his Covenant, and so by the Rule of the Court, Judgement was given for the Plaintiff.

Judgement for the Plaintiff.

Sambern

Sambern Plaintiff, against *Sambern* Defendant.

IN a Prohibition, to stay Proceedings in a Suit in the Spiritual Court, where the Case was this: Upon a Will Nuncupative, by which the Testator devised his Land to be sold, and the Vendor to dispose of so much of the Money to one, and of so much to another, for which money a Suit was begun in the Spiritual Court, for the staying of this Suit, a Prohibition was prayed. A Prohibition to the spirituall Court.

Dodderidge Justice. We may grant a Prohibition to the Spiritual Court, in case of a Nuncupative Will, the validity of which, is onely upon the proof of Witnesses, if this contain matter of conveyance, and disposition of Land.

Coke. Where a man devileth his Land to be sold by I. S. and so much of the money to be disposed of by him to one, and so much of the money to another, this is not within the Jurisdiction of the Spiritual Court, for them there to hear and determine this, but this properly belongs to the Common Law: The reason of this is, because that this is issuing out of Land; otherwise it is where a man devileth, that his Feoffees shall sell his Land, and that the money shall remain in their hands to pay Legacies withall; then in such a Case for this, a Suit is properly to be there in the Spiritual Court, but not in the first Case, because there it is meerly temporal: If the devise was, that they should sell the Land, and bestow the money to such for him, this is tryable at the Common Law; otherwise where it is that his Feoffees shall sell, and the money to remain in their hands to pay Legacies, this is triable in the Spirituall Court, this being clearly Testamentary, and this is the difference; the whole Court agreed with him herein, and so in this Principal case, by the Rule of the court, a Prohibition was granted. A Prohibition granted *per Curiam.*

Hookings and *Hart* Bail for *Callis* the Principall.

NOta, That in this case a Judgement in Debt was given against Callis, who was the Principal Debter, who was convicted of Burglary, and in Custodia for the same; a Capias ad satisfaciendum issued out, a Non est inventus returned; upon this a Capias, and a Scire facias against Hookings and Hart the Bail, being his Sureties, who pleaded this matter of Attainder, the Conviction of Burglary, thereby to free and discharge themselves from the said Judgement, against Callis the Principall. *Nota.* The baile pleads the conviction of the principall of Burglary.

Haughton, Dodderidge, and Croke. If one be condemned for Felony, Indicted and Attainted, and this upon his own Confession, and afterwards he procures his pardon; this Attainder of his, shall not be used as a shift, to oust and defeat others from their just debts, the which shall not be taken away by this Attainder, the whole Court agreed herein clearly, and that this plea, by the bail, of the Attainder, and conviction of the Principal of Burglary is not good, nor shall avoid their satisfying of the Judgement had against the Principal, and so this their Plea ruled void by the whole Court. The plea of the Bail ruled to be bad.

The

The KING against *Cox.*

An Indictment for a forcible entry.

IN an Indictment for a forcible entry, George Croke took Exceptions to quash the Indictment, for that in the conclusion thereof, (manu forte) & contra coronam, & pacem regis, is omitted, the Indictment being (fortitudine, & potentia magna, but no manuforti also, because the same was taken before one Justice of Peace onely; also it doth not appear upon what Statute this Indictment was taken, there being two Statutes: The whole Court clear of opinion, that the Indictment was not good, and so by the rule of the Court, the same was quashed afterwards, (S) The last day of the Term. Paul Croke moved this Error by way of exception to the like Indictment, for a forcible entry, upon the Statute of 8 H. 6. because he did not conclude this to be contra pacem, and moved for a Writ of Restitution, which the Court would not grant, being the last day of the Term.

Indictment quashed, *per curiam.*

Genner Plaintiff, against *Lucking* Defendant.

Entred Hill. 11 *Jac.* B. R. Rott. 499.

An Action of Covenant for plowing land not lately plowed.

IN an Action of Covenant, the same being brought for Plowing of Land, which was not Nuper laid down for Pasture, contrary to his Covenant.

Haughton. If I sell unto one all my Lands (Nuper) in the Tenure and occupation of *I. S.* if they were in his Tenure twenty years before, these Lands shall be said to be Nuper, in his Tenure and occupation, and shall well pass.

Dodderidge. The onely question in this Case is, what number of years shall be said to be (Nuper) laid down, whether the number of 10 years shall be said to be Nuper, the Covenant being, Quod arrabit, &c. such Lands as were Nuper, laid down for Pasture.

Haughton. The Covenant is, that he will not Plow up the Uplands, which were not lately plowed; the Plaintiff here ought to lay a certain breach, or the Action of Covenant doth not here lie, and this he hath not here so done: What construction shall be made of this word (Nuper) is to be considered in some case, 14 years shall be said to be Nuper, as in the case of sale of Land, Nuper in the tenure and occupation of I. S. 20 years before in his tenure shall be said to be Nuper; the whole Court agreed in this, that the Plaintiff here ought to have laid a certain breach of covenant, (S) that he had plowed up Lands, and shewed what Lands which were not Nuper, arrable Lands, contrary to his covenant; and this he hath not here so done, and without this so shewed, he can have no cause of Action, and so the Declaration being defective herein, the Rule of the Court was, Quod querens nil capiat per Billam.

Judgement for the Defendant, *quod querens Nil capiat per Billam.*

Doctor

Doctor *Alphonso*, and the Colledge of Physitians in *LONDON*.

NOta, That as touching this case of Doctor Alphonso, which concerns the colledge of Physitians in London, who committed him for practising of Physick, was brought to the Bar by a Habeas Corpus; the Return was read, the same upon the reading appeared to the court to be insufficient, no cause being therein shewed for his commitment; John Moor moved the court for time to amend the Return.

Exception to a Return upon a *Habeas corpus*.

Dodderidge. Clearly the Return here is not good.

Haughton Justice. The Censors by the Act are to commit him, if they do finde him to be faulty, here they have committed him, but not shewed wherefore they did this in their Return, and so the Return not good; The court was clear of opinion, that the Return here was bad and insufficient.

Dodderidge. As to the motion made for the amendment of this return, matter of form meerly in a Return is amendable, but not matter of Fact, which goes in justification of the Imprisonment and Fine.

Haughton. If he do practice ill again, then you shall do well to make a better Warrant for the commitment of him, we will doe all the right we can to the Colledge, but this their Return here is bad, and without all defence.

Dodderidge. They are very well directed in Doctor Bonham's case, Coke 8. pars, fol. 114. in what manner they ought to make their return: Here we all agree in this, that the return here is clearly insufficient, and therefore by the rule of the court, Doctor Alphonso was bailed until the next Term, then to appear again, the court conceiving this to be the best for him, for that if the court should discharge him for the insufficiency of the return, then they would presently take him again, and commit him, and then would amend their return, and make it better; and for this cause, for the good of the Doctor, by the rule of the court, he was bailed, but not absolutely discharged of his Imprisonment.

Coke 8 pars, &c.

The Doctor by the Rule of the Court, was bailed.

Duport Plaintiff, against *Wildegoose* Defendant.

Entred Mich. 11 *Jac.* B. R. Rott. 202.

IN an Action of Debt upon a Bond, the Defendant pleaded, that the same was for performance of Covenants, in certain Indentures made between them, but doth not plead, Hic in curia prolat. the Indentures, for this omission, it was urged that the plea was not good, according to 21 H. 7. Kellaway, f. 71. plac. 12. In an Action of Debt brought upon a Bond, the Defendant pleaded that the same

1 Ro. 2. 20. An Action of Debt upon a Bond. 21 H. 7. f. 71. &c.

was

was Endorsed, upon condition that if he performed certain Covenants, contained in Indentures between them; in this case the Defendant shall be enforced to shew the Indenture, otherwise he shall not be received to plead performance of the Covenants, and for that he is privy to the Indenture.

Coke. This is a clear fault, and without defence, for he ought here to have pleaded in this manner, to have shewed the Indenture, and to have said, Hic in curia prolat. this exception to the Plea is unanswerable; the whole Court clear of opinion, that the Plea is not good, and so the rule of the Court was, Ideo intretur Judicium pro querent, but with a Cessat Execution, untill the Court should better advise of the execution.

Judgement for the Plaintiff, *&c.*

Duport Plaintiff, against *Wildgoose* Defendant.

An Action of debt upon a Bond.

IN an Action of Debt upon a Bond, for not performing of an award, the case appeared to be this: there being some differences between the Plaintiff and the Defendant, they did refer themselves to the Arbitrement of one John Scott, who did Arbitrate the Defendant Wildgoose, to pay such a sum of money unto Duport the Plaintiff; and also he did award Wildgoose, to give security for the payment of this money to the Plaintiffe, for this the award excepted against as not good.

Coke. This arbitrement, as to the awarding of security to be given by Wildgoose to the Plaintiff, for the payment of this money awarded unto him, to be paid by the Defendant, is a clear void award, for the Arbitrator by his award, cannot enforce him to give security to the Plaintiff, for the payment of this money unto him; but the Defendant, who is to pay this money, may by his own assent give security to pay this, but not to be enforced so to doe by the award; the whole Court agreed herein, and for this cause the rule of the Court was, Quod querens nil capiat per Billam.

The rule of the Court, *Quod querens nil capiat per Billam.*

Duport Plaintiff, against *Wildgoose* Defendant.

An Action of debt.

IN an Action of debt upon a Bond, wherein Duport recovered against Wildgoose, and had sufficient surety with him for the debt: Upon this Recovery, a Capias issued out against Wildgoose the Defendant, and the same returned, and before it was Filed: A Scire facias issued out against his sureties, one of the sureties, for his discharge, did suggest an Action against Wildgoose the Principal, and had his Body here in Court, and being here in Court, to discharge himself of the suretiship, did move the Court, to have Wildgoose the Principal delivered in Execution, for the Debt of Duport, and in discharge of himself, in regard that if he should die before the next Term, he could not plead this to the Scire facias, but he should be then charged with the Debt; and so this being not to be denyed unto him, being

ing but a Surety, therefore according to his Prayer, Wildgoose the Principal was, by the Rule of the Court, committed in execution for the debt of Duport: But note, that Duport did not intend to pray the Body of Wildgoose, to be committed in execution for his Debt, though present in Court, but his purpose was, to have had his surety in execution for the same; and for this cause the surety perceiving so much, and by way of prevention, did bring the body of Wildgoose the Principal into the Court, and for his own discharge, prayed to have him committed in execution for the Debt, and this to be in exoneratione of him, being his surety; and this being conceived to be just and reasonable, was so granted unto him by the Court, and Duport the Plaintiff was enforced by the Court, of necessity, to pray the Body of Wildgoose, to be by the Court committed in Execution for his Debt; and so he did, and by the rule of the Court, Wildgoose was so committed accordingly: This by way of observation, how a surety may discharge himself from the Execution.

The principal in Court at the prayer of the Surety committed in execution, and the Surety discharged.

Laik Plaintiff, against *Emme* Defendant.

An Action by an Executor against another, &c. Stat. of 4 Jac. cap. 3. &c.

An Action brought by the Plaintiff, as Executor of I. S. against the Defendant, and upon the Tryal the Plaintiff became Non-suit. Hyde moved the Court to have costs for the Defendant, the Plaintiff being Non-suit, upon the Statute of 4 Jac. cap. 3. where in any Action brought, after appearance of the Defendant, if the Plaintiff be Non-suited, or a Verdict pass against him, the Defendant to have Judgement to recover his costs.

Coke and the rest of the Judges, in this manner answered, That according to our former Rules, the Defendant in this case is not to have costs within this Statute, for that this Statute hath reference to a former Statute, made in the time of Queen Eliz. where in case of an Executor Plaintiffe, and becoming Non-suited, no Costs shall be given to the Defendant: And so (as Man Secundary informed the Court) hath been the constant course, and so hath the Opinion been of all the Judges here before this time, because that by the former Statute, in such a Case the Defendant was not to have costs, and so not to have any costs by this latter Statute of 4 Jac. cap. 3. which hath reference to the former; and so by the rule of the Court, the Plaintiff in this case being Non-suited, not to pay any costs to the Defendant.

The Plaintiff an Executor being Non-suited, not to pay costs, *per curiam.*

Sir *Thomas Waller* Plaintiff, against *Hanger* Defendant.

An Information for Prisage, *&c.* 3 Bulst. 1. 1 Ro. Rep. 138. Latch. 261. Calth. 33. Ante 134. Mo. 832.

If an Information for Prisage, the Court was moved in this case, that Sir Thomas Waller the Informer was dead, and therefore prayed that the Information might cease, and no further proceedings to be had therein, the Informer being to have part herein.

Coke. If the Attorney-General for the King informs against one, and this matter proceeds unto a Demurrer; afterwards, hanging this, the King's Attorney

ney dies, this Demurrer doth not die with him, but this shall proceed and go on; but if one do informe for the King (as any one may so doe) if a Stranger informs for the King, and dies, hanging this Information, the King being party to the same, this Information, by the death of the Informer, shall not fall to the ground; upon such an Information for the King, the Judgement here is to be, Ideo consideratum est per curiam, quod dominus Rex recuperet, and this is clear, and therefore here in this case, notwithstanding that Sir Thomas Waller doth informe here as an Officer, and joyns in the Demurrer himself, and in his own name, yet the Judgement in this case is to be given by the Court, not for Sir Thomas Waller the Informer, but for the King; and therefore, notwithstanding that this case hath been argued here before by the Judges, in which Argument, they were divided in Opinion, (S.) Two against two, yet in regard that three of the Judges now in Court have not argued this case, therefore this case ought now to be argued here again, and according to this, by the rule of the Court, a time was given for the argument of this case here again at the Bar, Quod nota.

The death of the Informer not abate the information, time given by the Court for Argument.

Spring and —— Plaintiffs, against *Barret* Defendant.

An Action upon the case for a Trover and conversion.

In an Action upon the case for a Trover and conversion for certain Goods, upon Non culp. pleaded, a verdict was given for the Plaintiffe.

Winn moved the Court in arrest of Judgement, for the Defendant, that the Action is brought by two Plaintiffs, for converting of their goods, hanging which suite, and before Judgement, one of the Plaintiffs dies; this matter moved in Arrest of Judgement.

Coke. This is no cause at all to Arrest the Judgement, for they were the goods of both of them, and by the death of one of the Plaintiffs, the goods, and also the Action for the goods, survives unto the other; the whole Court agreed herein, that this death of one of the Plaintiffs is no cause to arrest the Judgement, and therefore the Rule of the Court was, quod intretur judicium pro querente.

Judgement by the Court for the Plaintiff.

Simpson Plaintiff, against *Powell* Defendant.

An action upon the case for a Promise.

In an Action upon the Case for not performing of a Promise upon Non assumpsit pleaded, a Verdict was found for the Plaintiffe.

Hedley, Moved the Court in Arrest of Judgement, for that there is no good consideration set forth in the Declaration to raise the Promise, the Case appeared to be this; a Statute was acknowledged by the Defendant for the performance of certain Covenants contained in an Indenture of Demise by the Plaintiff, made unto him, amongst which Covenants, one was, That he should not assign over the Land to any one, the which Covenant he had broken, by assigning of his Lease over; and so by this the statute came to be forfeited, the Defendant then in consideration, that the Plaintiffe would forbear to sue him upon the said Statute, so broken by the assignment, he did assume, and promise to pay him so much, the which he hath not paid, upon this the Action brought by the Plaintiffe, and a verdict

dict for him against the Defendant. It was urged in Arrest of Judgement, that there was no consideration to raise this promise, in regard that the Statute doth not appear to be forfeited; for it is not here shewed, in the Declaration, by what conveyance he had assigned over his Estate, being onely laid generally, that he had assigned over his Estate, but doth not shew how; and so in consideration, that he would not sue a Statute (being not forfeited) he promised to pay him so much, and so this is no good consideration.

Coke. This is clearly a good Consideration, and the Declaration good, notwithstanding all which hath been objected against it; for this is so laid in the Declaration, but as an inducement onely to the Action, and in consideration that the Plaintiffe would delay a suite he had against the Defendant, he should promise to pay him so much, this is a good consideration, because he hath a benefit by this; the Court all agreed with him herein, and that the Plaintiff needs not to shew, what Estate was conveyed over, nor yet how, or by what conveyance the same was assigned over, for that this allegation, is but as an inducement to the Action.

Coke. Here you have promised, in consideration, that the Plaintiffe would not sue you, upon this your Statute, being forfeited, to pay him so much Money, for which payment, in an Action now brought against you, you ought not now to resort to this, as to say that the Statute was not forfeited, in regard the Plaintiffe hath not shewed specially, by what conveyance this was assigned over; but generally, that it was conveyed over; for that your promise to pay the Plaintiff so much, if he sues you not upon the Statute for breach of Covenant, this is a direct admittance by your self, that the Statute was forfeited; and his forbearance to sue this, was the ground of your promise; the Court was all cleare of opinion, that the Declaration and consideration in the same expressed, is good; that the Plaintiffe had just cause of Action, and so the Rule of this Court was, quod judicium intretur pro querente.

Judgement by the Court for the Plaintiffe.

Tompson, Plaintiff, against *Withers*, Defendant.

IN a Writ of Error to reverse a Judgement given against him in the C. B. the case appeared to be this, Withers claiming a Lease for years under I.S. who was tenant for life, commenced a suite against Tompson, and had a verdict, and Judgement; a Writ of Error brought to reverse this Judgement, and for Error assigned, that the Declaration was not good; the Action being brought by him as a Lessee, of a Tenant for life, and doth not in his Declaration averre the life of the Tenant for life his Lessor; it was urged, that the Declaration was good, For it is therein set forth, that he had a Lease for years, made unto him by I. S. Lessee for life; and that he was, and still is possessed; and this is good without any other averrment of the life of the Lessee for life, and so is 13 & 14 Eliz. Dyer. fol. 304. placito 52. the life of a Parson Lessor, not expressly averred, but by implication, and this good, as to say, Quod fuit, & adhuc est seisitus, and this held to be good, and sufficient, and so in this case.

A Writ of Error, to reverse a Judgment in the *C. B.*

13. 14 Eliz. *Dyer.* fol. 304. placito 52.

Coke chief Justice, This clearly is a good and sufficient averrment by implication, of the life of the Lessor, it is here set forth, that the Lessee was, and still is possessed; and therefore the Lessor must of necessity be living, otherwise he could not be possessed; the Court agreed with him herein, that this is no Error, here being a good and sufficient averrment by implication, of the life of the Lessor; and so by the Rule of the Court, Judgement was affirmed.

Averment of life by implication.

Judgement affirmed *per Curiam.*

The

The KING against *Underell.*

Noted, touching the arresting of Felons, and the trial of them.

NOta, by Coke chief Justice, (and herein the Court agreed with him,) that if one did carry Latrocinium along with him, he might then be arrested in one County, and carried into another, for that this is Felony in all Counties; but if one be arrested in one County, upon the suspition of a Felony, done, and committed in another County: he may then be carried before a Justice of Peace, in the said County, where the Felony was done, and to be there tryed; and this so was done, in the Case of one Underel.

The KING against *Phillips.*

An Indictment Stat. of 31 Eliz. cap. 7 Cottages. *Pro habitatione* not shewing that any dwelt in it. Indictment *per curiam.*

WHo was Endicted for the building of a Cottage, pro habitatione, contrary to the Statute of 31 Eliz. capite 7. exceptions taken to quash this Indictment, the same being for building a Cottage, pro habitatione; and it is not shewed, that any one did dwell in it; the Court clear of opinion, that the Indictment was good and sufficient, the same being onely for the building of the Cottage.

Pole Plaintiff, against *Godfrey* Defendant.

Entred Pasch. 12 *Jac.* B. R. Rott. 627.

Cro. Ja. 351. 12 Co. 128. 1 Ro.Rep.63. Mo. 835. 1 Ro.Abr.92.

IN a special Action upon the Case, brought by the Plaintiffe, against the Defendant, being a Procurator, for not summoning of him, which he ought to have done, by reason of which, he was excommunicated, and whether this Action lieth against him for this, or not, was the question; It was urged, that this Action lyeth not in this Case, for this Reason, that an Action upon the Case lyeth not, but where the Plaintiffe hath received a Temporall wrong, and dammage, which here he hath not, by this Judgement of Excommunication had against him.

George Croke for the Plaintiffe, the case here is in a speciall Action upon the case, for the false return, sentence was there given, for costs, and praces upon this awarded to the sommer for to warne the party, who did it not, and so by reason of this his neglect, he was damnified, and this is the cause of the Action, which is a good and a just cause.

Coke

Coke chief Justice. If a Somner, or an Apparitor do make a false return, by reason of which, Excommunication follows to the party, in these cases, an Action upon the Case well lyeth, without any question, because he hath no remedy for this in Court-Christian, for that no dammages are there to be given unto him; by 18 H. 6. a Prohibition shall be granted, for that they are not to hold Plea unless it be for reparations of the Church, and by 10 H. 6. f. 21. placito 68. Fitz. tit. Prohibition, placito 3. & Brook tit. Prohibition placito 19. if one brings an action of trespas here, and is after sued for the same matter in Court-Christian, a prohibition granted; so that if one be wronged there, he shall have his remedy for this at the common Law clearly, and that by a special action upon the case; for he can for this wrong, have no remedy there, and therefore he is to have his remedy here, and for this excommunication which thus happened to him, by reason of the false return, or for his not summoning of him, there is no question, but for this, he may very well have this his Action upon the Case, but the matter of the greatest doubt is this, the suite there in Court-Christian, being alledged to be, in quadam causa defamationis, and doth not specially shew the cause what it was, as he ought to have done, and so is 22 E. 4.

18 H. 6. 10 H. 6. fol. 21. placito 68. Fitz. prohibition, plac. 3. *Brook* tit. prohibition. plac. 19.

22 E. 4.

Dodderidge Justice, the Question here is, whether this Action upon the Case lyeth against such a spiritual Officer, or not? an Action upon the Case is called actio magistralis, and in such Actions, where they shall lie, and where not, this rule is to be observed, where there is, damnum, & injuria, offered unto one, there for this he may well have his Action at the Common Law, and these are the grounds to be observed, in bringing of Actions upon the Case. Where there is no remedy for any dammages in their Court, in such a case, for wrong there done unto him, he shall have his Action at the Common Law, otherwise the Law should be in this very defective; an Action upon the Case, well lyeth against a Spiritual Officer. If a man presents his Clark to a Benefice, who is admitted, and Instituted, and a warrant granted to the Officer for his induction, who doth refuse; an Action upon the Case well lyeth for this, as appeareth by 7 E. 4. fol. 21. 8 E. 4. fol. 14. & 17. and yet he hath remedy there in the Spiritual Court, by complaint there made; and this is a stronger Case then this Principall case here is, and therefore a fortiori, in this case here, the Action upon the Case well lyeth, for this Action well lyeth against an Officer of the Spirituall Court, where he hath no remedy for the wrong there done him, as to the manner of it, whether the Court hath Jurisdiction of the cause or not, the Officer hath here made a false return, and in this he hath misdemeaned himself, and therefore an Action upon the Case well lieth for this.

7 E. 4. fol. 21. 8 E. 4. fol. 14. 17.

Croke Justice. By this he hath here brought him in crimen contumaciæ, and he hath susteined very much dammage by this, and he hath no remedy there for this, to repaire himself, and for this cause he may well have this Action here. As to Actions upon the Case, sometimes the quality of the person alters the case, as to the having of such Actions, the party peccant, is there punished, pro salute animæ, but not pro damno, here the Action, as it is brought by the Plaintiffe, well lyeth, and he ought to have his Judgement.

Haughton Justice, agreed herein, that the Action well lyeth; here is a wrong done unto the Plaintiffe, and for this he ought to be remedied here, there being no remedy for him, there in that Court. If the Case was for a matter of Non fesans in the Ecclesiasticall Court, no Action upon the case lyeth for this, as for not making of a return, where no dammage is sustained. I agree, the Case remembred, for refusing to induct a Clark, being presented, admitted, and instituted, that an Action upon the case well lyeth for this Non fesans, but yet, this is not so generally to be taken; but for this wrong, done to the Plaintiffe in this case, his Action upon the case well lyeth. As to the manner of the Action, as it is here brought, and set forth in the Declaration; the Court ought to have Jurisdiction, or the Action upon the case lyeth not; for then all is coram non judice, and the subsequent Excommunication is void; the matter here considerable is, whether this be here sufficiently laid, or not?

Coke.

Coke. If all the proceedings there had been coram non judice, no Action upon the case could then have been maintained, for if he had Declared there per appellationem, for forceable taking of his goods, in an Action of detinue, all this is coram non judice, and if he be excommunicated in this case, no Action upon the case lyeth upon this Excommunication, for any false return made in such a Case by any Officer there, but here the Declaration is, pro legitimis expensis, & sententia legitima upon this given, as it is agreed; and therefore the Action is well brought, and so is 8 E.4. 23 H.3. amongst old Mr. Agards Records, in a Prohibition, where one sued for a Lay fee, whereas he ought to sue for Tythes, and these belong unto the Ecclesiasticall Conusances, the other there surmiseth, a modus decimandi; there it is said, this is for a lay fee: adjudged, that he had well done, for to bring a Prohibition, for that it was as a Plea, de laico feodo, they may sue there for money, and therefore a Prohibition lies, 8 E. 4. if one sues for tithes in kind, or for a lay fee, when he hath a modus decimandi, whether for this an Action upon the case lyeth, Is somewhat to be doubted, he cannot sue there for a modus, if they have not Conusance of it. I agree, that an Action lyeth against the Archdeacon, for he is the spirituall Sheriffe, because the Minister is spirituall, but the thing is temporall. I agree, that for a Non fesans of a spirituall matter, no Action upon the Case lyeth, but otherwise it is, where the party doth receive a wrong (as it hath been observed) but be it for a misfesans, or for a Non fesans, if no damnage by this doth come unto the party, no Action upon the case then lyeth for this, neither shall the party have any Action upon the case against the Archdeacon, nor yet against the Archbishop, for refusall, &c. but a Quare Impedit, also no Action upon the Case lies for suing in the Ecclesiastical Court, pro laico feodo, where there was a modus decimandi, for refusing to induct, by the Archdeacon, an Action upon the Case lies, for untill this be done, he cannot make a Lease, nor yet can have any of the temporal profits of the land, which is a wrong to him, and therefore for this cause, an Action upon the Case lyeth, he is not excommunicated there, but onely a Warrant to denounce the same, and then he is excommunicated. Dodderidge agreed with him herein.

8 E.4. 23 H. 3. Mr. *Agards Records.*

Coke. By 5 E. 3. the Judges of the Common Law, are Judges of the Excommunication, this Court here hath a superior power, there is no Judgement there given of excommunication, but process onely there awarded to denounce this. In this principall Case, the Court all agreed, that the Plaintiffe, for this wrong by him sustained, had just cause of Action, that the Action upon the case here, was well brought, the Declaration good, and so the Rule of the Court was, Quod judicium intretur pro querente.

5 E 3. Judgement given by the Court for the Plaintiffe.

Haulsey Plaintiff, against *Carpenter* Defendant.

Entred Trin. 12 *Jac.* B. R.

Rott. 1005.

2 Cr. 359. An Action of debt upon a Bond.

In an Action of Debt upon a Bond, upon Oier demanded, the condition appeared to be, for the payment of Childrens portions, when they married, or came to their

their full age of 21 years. In an Action of Debt for non-performance, the Defendant pleads, that he had paid the same, cum, & quam cito, they came unto their full age, generally, without shewing how, upon this Plea.

George Croke demurred in Law, because he hath not shewed in his plea, when they came to their full age, and when he paid the same, the payment being to be upon request.

Coke. This Plea here is not good, for the cause alledged, generally, a Plea is not so strictly to pursue the condition, every Plea, which is not issuable, is bad. 22 E. 4. fol. 25, 26. Sir James Harrington's case, if a man be to make unto another a good and sufficient release, in an Action of Debt brought, he pleads, that he hath done this generally, this is no good Plea; but he ought to shew how, that so it may appear to the Court, whether the same be good, or not, and so is 22 E. 4. fol. 15. and fol. 40, 41. in the Lord Lisles case, it is a good Rule to be observed in Demurrers, alwayes to shew the cause of the demurrer, as here the same is expressed.

22 E. 4. fol. 25, 26 Sir J. Harrington's Case.

22 E. 4. fol. 15. & fol. 40. 41. the Lord Lisles Case.

Dodderidge. If there had been a day certain set down in the condition, then to plead payment, secundum formam, & effectum chartæ, this had been good, but not as here the Plea is, the time being uncertain, and therefore he ought here to have shewed in his Plea the time when they came to the age of 21 years, and when he paid this money, this ought to have been certainly shewed in the Plea, that so upon this, issue might have been taken, he ought to have shewed who made the Will, and how he hath performed the same, that so this may appear judicially to the Court, whether well performed, or not; the Court was clear of opinion, that the Plea here was not good; and so by the Rule of the Court, Judgement was given for the Plaintiff.

Judgment given for the Plaintiff by the Court.

Nichols Plaintiff, against *Catsey* Defendant.

In an Action upon the Case for Words, upon Non culp. pleaded, a verdict was given for the Plaintiff.

An Action upon the case for words.

George Croke moved the Court in Arrest of Judgement, that the words, as they are laid in the Declaration, are not Actionable, the case appeared to be this; the Plaintiffe layes in his Declaration, that he did exercise himself in facultate emendi, & vendendi, that the Defendant did speak these words to the Plaintiffe (S) Thou art a Bankrupt, and I have many witnesses for it. It was urged, that the Declaration was not good, because he hath not shewed wherein, that he was a Merchant, he ought to set forth in his Declaration, that he was mercator.

Coke chief Justice, this is after a verdict found for the Plaintiff, which is dictum veritatis, and therefore to arrest a Judgement, in such a case, there ought to be good and sufficient matter shewed; it shall not be here intended, as it hath been alledged, that he used this faculty as a servant; but as it is here alledged in the Declaration, it is well, and sufficient; the whole Court agreed herein: another matter moved, that he ought to averre, what goods he had sold.

Coke chief Justice, & tota Curia, this is not at all materiall, the whole Court agreed herein, that the words, as they are laid, are actionable, and the Declaration good, and so the Rule of the Court was, Quod judicium intretur pro querent.

Indictment *per curiam*, for the Plaintiff.

Challoner Plaintiff, against *Petworth* Defendant.

A habeas corpus.

UPon the motion of Yelverton Sollicitor-generall, for stay of Execution, the case appeared to be this. A Judgement was given for the Plaintiffe at Bristow, execution taken out, and the goods of Petworth were attached, and this was in a suite between them, for composition, and a contract for Iron; the motion was, for stay of Execution, untill a Writ of Error, here brought, be determined, the which should presently be tryed, and if it then appear to be against him, the whole money shall be paid, and prayed a Habeas Corpus for the body of Petworth.

Coke. We have no power here to hold Plea of Foraine attachment, because we cannot here doe Justice therein; a Habeas Corpus, most commonly being prayed, and granted, are the subterfuges, to avoid the doing, and Execution of Justice; we may grant a Habeas Corpus, though there be no suite here; but yet the granting of this is in the discretion of the Judges, we may hold Plea of this, but I will grant more Procedendoes, then Habeas Corpus, because that very much hurt happens to the subject, by the granting of Habeas Corpus, they being chiefly obtained for matter of delay; we cannot here in this Case ayde you by the Law, but take your Writ of Error, for you have no other remedy; there is no greater Injustice oftentimes done, then happens by the granting of these Habeas Corpus, the whole Court agreed with him herein; by the Rule of the Court a Habeas Corpus was granted, but they would doe nothing to stay execution.

A habeas corpus *per Curiam.*

Fisher Plaintiff, against *Young* Defendant.

An Action of trespass by an Executor.

IN an Action of Trespass, the Case appeared to be this, a man made his Will, and made the Plaintiff his Executor; an Administration was granted to the Defendant, who took the goods into his hands, the Plaintiff being Executor, proves the Will, and afterwards brings this Action of Trespass against the Defendant, for taking of these his goods, and this by reason of the relation of the probate, by which it is a will, and he executor from the time of the death of the Testator.

Coke. And the whole Court clear in this, that the Action of Trespass here brought, well lyeth, without all question; an Executor shall have an Action of trespass, vi & armis, before seisin, because that he hath a property, being made Executor, the Court clear of opinion, that this Action of Trespass well lyeth, otherwise an Administrator may trice any Executor, by getting the goods into his hands before probate of the Will; and so by the Rule of the Court, Judgement was given for the Plaintiff.

Judgement for the Plaintiff.

Anfield

Anfield Plaintiff, against *Feverhill* Defendant.

IN a Prohibition moved for by Noy, the case appeared to be this, the Plaintiffe gave in Evidence at a Court-Leete against Feverhill, that he was a drunkard, upon this he libelled against him in the Spirituall Court; upon this, a Prohibition was prayed, and granted by the Court, for that no Action upon the Case lies against one for prosecuting a matter against another, in the ordinary way and course of Justice, and so is Cutler, and Dixons Case, Coke 4. pars. fol. 14. b.

A Prohibition. 1 Ro. Rep. 61.

Coke, 4 pars. f. 14, *&c.*

Coke chief Justice, and the whole Court agreed herein, for that otherwise, men shall be terrifyed from proceeding in the legall course of Justice against another, for proceeding in this manner clearly, a man shall never be troubled, or vexed in any other Court.

Coke. If one comes to us at the Assises, and Petitions to us against one, and to have the good behaviour against him, he shall never be troubled by an Action brought against him, for this again. 26 H. 8. in Spilmans Reports, a man gave evidence in a Court-Leet, against one, that she was a Scold, upon this she libelled against him in the Spirituall Court, and for this a Prohibition was granted. For a man shall not be punished by way of Action, upon the Case, or otherwise, for prosecuting a matter against another, by a legall way, and course of Justice; in this principall Case, by the Rule of the Court, a Prohibition was granted.

26 H. 8. *Spilmans Reports*

A Prohibition granted *per curiam.*

Freeman and *Uxor* Plaintiffs, against *Freeman* Defendant.

IN an Action upon the Case for a promise, the case appeared to be this. Upon a motion in Arrest of Judgement, upon a Non assumpsit, and a Verdict for the Plaintiffe. It was urged, that the Action here brought, did not lie, for that there was no good consideration set forth in the Declaration, to ground the promise upon; and for this the Case was, that the Defendant, in consideration that the Plaintiffs wife, when she was sole, would take the Plaintiffe to her Husband, he did promise to assure unto her such an Estate in Land, for her life, for a Joynture, accordingly, she did take the Plaintiffe to her Husband, and for not performance of the Promise, they did bring this Action upon the Case.

1 Ro. Rep. 61.

1 Ro. Abr. 593.

An Action upon the case for a promise.

Coke, and the whole Court, this is a good Consideration, to raise the promise; and so if one say to a Chyrurgeon, cure such a one, and I will pay you for the Cure, or deliver to such a Merchant so many Cloathes, for which, if he doth not pay you, I will; though the party promising, hath no benefit by this, yet this is a good consideration, and the party liable to an Action upon the Case for the same.

Coke. If an Act be to be done to another, at my request, of which I am to have no benefit, yet for this I shall be chargeable, in an Action upon the Case; so if I do say to another, deliver so much to such a one, and I will pay you for it, by this I am

Judgement for the Plaintiff *per curiam.*

chargeable, and this is a good consideration, to charge me with my promise, though no benefit at all by this redounds unto me, the Court cleer of opinion, that in this principall Case, the consideration was good, and so by the Rule of the Court, Judgement was given for the Plaintiffe.

Codner Plaintiff, against *Dalber* Defendant.

Entred Hillar. 8 *Jac.* B. R. Rott. 979.

An Action of Debt upon a Bond.

IN an Action of Debt, upon a Bond, upon Oier demanded, the condition of the Bond appeared to be for the saving of the Plaintiffe harmless, being Baile for the Defendant; to this Action of Debt thus brought, the Defendant pleads, quod libere, & absolute exoneravit, à prefato bailio, upon this Plea, the Plaintiffe demurred in Law, because he did not shew, how he had saved him harmless.

Cook chief Justice, For the Defendant to say by way of Plea, Quod libere, & absolute, he had discharged him, this clearly is not good, for he ought here to shew coment, so that the Court may iudge of the sufficiency of the Discharge, the Court all agreed herein, that the Plea was not good, and so by the Rule of the Court, Judgement was given for the Plaintiff.

Judgement for the Plaintiff *per curiam.*

Lovet Plaintiff, against *Faulkner* Defendant.

Entred Mich. 11 *Jac.* B. R. Rott. 264.

An Action upon the case in nature of a Conspiracy.
2 Cr. 357.
Lat. 30.
1 Ro. Rep. 109.
2 Ro. r. 237.
1 Ro. Abr. 112. 3.
9 H. 7. fol. 9.

IN an Action upon the Case, in the nature of a Conspiracy brought by the Plaintiffe against the Defendant, for falsely accusing of him of High Treason, before the Justices of Gaole Delivery. In his Declaration it is laid, quod falso, & malitiose, &c. ad generalem gaolæ deliberationem, he did there accuse him of High Treason, and whereof he was then before them, legitimo modo acquietatus. Exceptions taken to the Declaration, that the same was not good.

George Croke, That the Declaration is good by 9 H. 7. fol. 9. If Justices have power, of Gaole delivery, and of Oier and Terminer, they may then well make their stile as they will. 3 Mariæ Brook title Commissions. placito 24. the Commission

missions of Gaol delivery, and of Oier and Terminer, are several Commissions, & Brookes Cases, fol. 103. placito 474.

Coke chief Justice, when you say, ad generalem gaolæ deliberationem; there the Sessions being before such, which have another power, and Commissions, not to be intended to be the same. Justices of Goale Delivery, may meddle with the triall of Prisoners there, being in prison; but Justices of Oier, and Terminer, are not to meddle with Indictments, taken before another; unless they have also a Commission of Goile delivery. I never yet did know in case of High Treason, and for the prosecution thereof against one, any Writ of Conspiracy ever brought, there is no case in the Law for this, but all the Presidents are pro Felonia; High Treason concerns the Person of the King; and there is no Book in Law, to warrant the bringing of such an Action for a Prosecution, pro proditione; also Justices of the Peace, are not to meddle with matters of Treason; no colour there is for the Plaintiffs maintenance of this Action here brought. It had been a hard and a strange thing, if the Powder Traitors, for the prosecutions against them, might have had Writs of Conspiracy in case of High Treason, there was never yet seen any Writ of Conspiracy, ante proditionis, such a President, neither I, nor yet any other ever as yet did see; no Writ of Conspiracie lyeth, unless there be two Conspirators, and as to this, there is no difference, between this, and the case of Felony; but this Writ of Conspiracie, is not allowable for a Prosecution in case of high Treason. Knight and Jeroms case, was the first case, of an Action upon the Case brought for a Conspiracie, and in that case it was Ruled, that the Writ of Conspiracy lieth not, but in case where two do conspire; and if onely one, then an Action upon the case, in the nature of a Writ of Conspiracy lyeth; this is the first Case here now brought, of this nature, ad generalem gaolæ deliberationem, if it be not expressed in the Declaration, quod Legitimo modo acquietatus, no Writ of Conspiracy, nor yet any Action upon the case lyeth. 3 Mariæ. *Brook* tit. Commissions, *&c.*

Dodderidge Justice, the title of the Court here is not good, they ought to have been named Justices, of Gaole delivery; this is to be observed for a sure Rule, that in all cases, where a Writ of Conspiracy lieth, there being two or more which did conspire, and if but one, then an Action upon the case, in the nature of a conspiracy lyeth; here the Declaration is not good, because it is not shewed therein, that they were Justices of Gaole delivery.

Haughton and Dodderidge, & tota Curia, every one, by his Oath of Allegeance, is bound to discover Treason, and to have one punished for this, by an Action upon the Case in the nature of a Writ of Conspiracie, to be brought against him; this should be very hard; no Action upon the Case lyeth against one, for preferring of a Bill in the Star-chamber against him, in a legall course, à multo fortiori, no Action upon the case, for Conspiracy lyeth in case of prosecution against one for High Treason, and we will not give way to a President, to make a new president in this case, and so the Court inclined to be all clear of opinion, that no Action upon the Case did lie, in this case; but by the whole Court, the Declaration here for the exceptions taken unto it, is not good, because it is not therein averred, that they were Justices of Goale-delivery, for Justices of the Peace have not power to proceed in matters of High Treason, and so the Declaration not being good, for this cause onely the Rule, and Judgement of the Court was, quod querens Nil capiat, per billam. Judgement for the Defendant, *&c.*

Nota, that the like case was, Termin. Hill. 22 Jac. B. R. Smith Plaintiffe against Crawshaw, and others Defendants. Entred Trin. 21 Jac. B.R. Rott. 651. An Action upon the Case for Conspiracy was brought, for conspiring to endict the Plaintiffe, for speaking of treasonable words, words which were High Treason upon Non culp. pleaded, a verdict was given for the Plaintiffe. It was moved in Arrest of Judgement, that no Action upon the Case lieth in this case being for matter of High Treason; this Case was then long argued, and after great debate, 1 Ro. 2. 258. Term. Hill. 22 Jac. B.R, *&c.* Ben. 152. Latch. 79. Cro. Car. 15. Jones 93.

bate, the Court inclining to be of opinion for the Plaintiffe, that the Action did well lie, and that there was no difference, as to this, between the case of Treason and of Felony; this was not then adjudged, but the same was then adjourned for the Court to be better advised therein, afterwards, (S.) Termin. Pasch. 1 Car. Regis B. R. this matter was then moved again; and the court was then clear of opinion, that the Action upon the Case did well lie.

Term. Pasch. 1 Car. regis. B. R, &c.

And by Dodderidge Justice, If a man calls another Traitor, an Action upon the Case well lyeth for these words; a fortiori, an Action upon the Case, in the nature of a Conspiracy, for procuring him to be endicted for the speaking of Treasonable Words, and acquitted; and the verdict here hath found all this to be so done, malitiose, and therefore the Action well lyeth; it was further at this time adjourned over, and no Judgement given in it; but afterwards (S.) Termin. Mich. 1. Car. Regis. B. R. this matter was moved again, and long argued, and debated, and by all the Judges clearly resolved for the Plaintiffe, that the Action did well lie; and by the Rule of the Court, Judgement was then given for the Plaintiffe.

Term. Mich. 1 Car. Reg. B. R. moved again, and Judgement was given for the Plaintiff.

Simpson Plaintiff, against *Sotherne* Defendant.

Entred Hill. 7. *Jac.* B. R.

Rott. 679.

2 Cr. 376. 2 Ro. Abr. 791. 795. Godb. 264. An Action of trespass and Ejectment, a speciall verdict. 1 Ro. 2. 109.

If an Action of Trespasse, and Ejectment upon Non culp. pleaded, a speciall Verdict was found, and upon the speciall verdict, the case appeared to be this (S) Ric. Simpson, being a Copiholder of Inheritance in Fee-simple. 43 Eliz. did surrender these his Copihold Lands (jacens in extremis) unto the Lord of the Manor, in manus domini dicti manerii. Habendum, after his death, ad opus & usum, of the Infant then being in venter sa mere, and that if such Infant dies without heire, within age, or before marriage, then he surrenders these Lands, to the use of one John Simpson, and his Heires, according to the custome of the Manor (being his Brother.) Richard Simpson the Coppyholder dies, afterwards Joan the Infant, with which his Wife was with child, was borne, the which Joan dyed within age; the question now was, whether John Simpson the Plaintiffe should have this Coppyhold Estate, according to the second surrender, or Elizabeth Spinke, (under whom the defendant claimes) who was found to be heire to Richard Simpson, the Coppyholder, who made the Surrender, and also unto Joan the Infant, who was dead.

Term. Pasch. 22 Eliz. *Clampes* case.

Coke chief Justice. Clampes Case, which was in Termin. Pasch. 23 Eliz. will overrule this case in this principall case here, the Surrender was, in manus Domini. Habendum after his death, to the uses before mentioned, and so was Clampes Case (onely without any Habendum) in the like manner (S) a coppyholder of inheritance, surrendred his Copy-hold estate, in manus Domini manerii, and this was also to the use of an Infant, in venter sa mere, after his death, there questioned, whether this Surrender was good, or not? reserving thereby unto himself a lesser estate then he had before; this was after adjudged to be void, if it had been in another conveyance, and by the same reason also, it shall be void in case of a Surrender of a Coppyhold estate; and so was it adjudged in Clampes Case; and so

so for this time, this case was adjourned to be argued, and further debated upon, afterwards, (S.) Termin. Hilar. 12 Jac. B. R. this Case was moved again, and argued by Harris, and by Hutton Sergeant for the Plaintiffe, and by Coventry, for the Defendant. It was urged for the Plaintiffe, that he should take by the second surrender, for that the limitation by the Surrender, to the use of an Infant in venter sa mere, is a mere void limitation, as to the first part, the issue in venter sa mere, takes nothing by this surrender, because then not in esse. 13 Eliz. Dyer. fol. 303. placito 50. A devise to an Infant in venter sa mere, this devise is not good, by all the Judges but Whiddon, and the Infant being after borne, shall take nothing by this devise, 11 H. 6. fol. 12. to the same purpose, for that such an Infant is not capable of an Estate, notwithstanding that Charters may be detained for such an Infant; this case here, being in case of a custome, may be compared unto cases of contingent uses; if a man makes a feoffment in fee, at this day, to the use of himself, and his heires, and when such a thing shall be done, then to the use of another, and his heires, this is good, and the use shall well rise, as appears in Whitlocks Case. Coke 8. pars. fol. 69. 70. as when I. S. shall marry, or come to his age of one and twenty years, then to the use of another, and his heires, this is good by way of limitation of a use. As to Copyhold land, this doth very much differ from land, at the Common Law; this may be surrendred by one to the use of his Wife; but not so at the Common Law, by any way for the Husband, to make such an Estate to his Wife, unless it be by way of Use; this may be exampled unto the Case of a Will, or Executory devise to one, without an Estate precedent, as in Plowdens Commentaries, fol. 344. in Bret, & Rigdens Case, an Estate by will limitted to one in tail, the remainder to another, if there be no such Person, as the first in the limitation; yet good to the other, as Coke 8. pars. fol. 94, 95. in Mannings Case, that Estate may be made good by Will, which cannot be made good any other way; as appears by William Cordells Case, put in Mannings Case, fol. 96. which Case was argued, Pasch. 36. Eliz. B. R. for the Plaintiff, was cited, 16 Eliz. Dyer. fol. 330. Clatches Case, & Mich. 32. & 33 Eliz. Wellock and Hammonds Case, cited, Coke. 3. pars. fol. 20. & 21. in Borastons Case, for the Defendant, it was urged, that this surrender thus made, in manus domini manerii, to the use of an Infant in venter sa mere, and his heires, and if he dies without heire, before his age of 21. years, or marriage, then he surrenders this to the use of John Simpson his brother, and his heires, this is a void surrender in Law, a devise may be good by Custome, to an Infant in venter sa mere, by 9 H. 6. fol. 23. but not upon the Statute of 32 and 34 H. 8. for there the devise ought to be to a person in esse, this conveyance by Surrender, may be compared unto conveyances at the Common Law; here the surrender cannot take effect, in the life of the parties, and therefore void; if a man makes a Feoffment in Fee, and livery within the view, if he enter not, in the life of the parties, this shall be of no effect. Coke 2. pars. fol. 55. in Buckler, and Harvis Case.

Term. Hill. 12. Jac. B.R, &c.

13 Eliz. Dyer. fol. 403. placito. 49, &c.

Mo. 177. 637.

Coke 8. pars fol. 69, 70, &c.

Plowdens Commentaries f. 344, &c.

Coke. 8. pars. fol. 94, 95; &c.

9 H. 6. fol. 23.

Habendum, from a day to come, this is not good, in case of a Free-hold, which cannot operate, to begin in futuro, and a man cannot reserve a lesser estate to himself then he had before; so it shall be also in case of a Surrender of a copyhold Estate; this manner of surrender here is not warranted by the Rules of Law, nor yet by any Custome, so the Plaintiffe here, hath no title at all, and the Defendant is heire to both; to the first copyholder, which made the surrender, and also to the Infant which dyed; the first surrender here is void; but admitting the same good, yet the second surrender to the use of John Simson is void. 1. This surrender here is meerely void; the Habendum here being, from the time of his death, to these uses; and this cannot stand good by the Rules of Law; and here is no particular Custome found, to warrant this, and so the same remaines to be judged, and determined by the Rules of the Common Law; and the Common Law, doth adjudge such

Coke 2 pars. fol. 55, &c.

Hegge & Crosses Case Mich. 33. & 34. Eliz. &c.

such a manner of conveyance to be void, and so is Hegge, and Crosses Case Mich. 33 & 34 Eliz. cited in Buckler and Harris's case Coke 2 pars. fol. 55. b.

Coke chief Justice. Clampes case was this, a Copyholder surrenders his Copy-hold Estate, after his death, to uses; adjudged to be a void surrender; for as in case of freehold, not good, being made to begin at a day to come, so likewise shall it be in Case of passing of a Copyhold Estate, by way of surrender; but this principall case may peradventure somewhat vary from Clampes Case, there he surrendred after his death to the Lord, to uses; but here, in this case now in question he surrenders to the Lord, Habendum after his death, to the use, &c. As to the surrender here, made to the use of an Infant in venter sa mere, this is meerly void, it is then to be considered, whether this limitation be void or not? A Copyholder saith, I surrender my Copy-hold Estate, and if my Child which shall be born, dies before his age of 21. years, that then my Brother shall have this, this clearly may be good enough; and so without any farther debate at this time, the same was adjourned over farther to be debated.

Term. Mich. 13 Jac. B.R. &c.

Afterwards Termin. Mich. 13. Jac. B. R. this case was moved again.

Haughton Justice, A surrender with a Copyhold Estate, to the use of another is a Conveyance, and a man cannot make a Conveyance to begin upon a contingencie, no case there is of this; and here this is meerly a conveyance, and not a case of a devise for by a devise it may be so.

Croke Justice. By devise such an Estate might be made, but not so as here it is, in point of a Surrender, which cannot be good, the Defendant here hath a double title for himself, to this Copy-hold Estate.

Dodderidge Justice, here in this Case, if by the Rules of Law we can doe it, we ought then by these Rules of Law, to uphold, and make good, the intent here of the parties, here we do see, and perceive what the intent of Richard Simpion was, who made the surrender, and this is the duty of the Judges to do, ut res magis valeat quam pereat, and this they are to do, propter simplicitatem Laicorum, it is to be here considered, whether by surrender of a Copyholder of his Estate, this may so be done, which cannot so be done by the Rules of the Common Law. Plowden's Commentaires in Bret and Rigdens Case: If a man makes a Lease for so many years, as his Executors shall name, after his death the Executors do name, yet this is not his Lease now, because it was not his Lease in his life-time: a surrender made to the use of his last Will, is good clearly, here the Copyholder surrenders to the Lord, and interpretation of this may be made, it may be present, and yet to have a future effect; this passing by way of surrender, doth answer no other conveyance in the Law; in this case nothing doth stirre, , or is granted here unto the Lord, he being onely as an Instrument, to transferr this Estate over unto another; Clampes Case, which hath been remembred, doth much trouble me, for if that case was so adjudged, that no surrender could be from a day to come; if this was so, then this will overrule this Case here now in question; but otherwise I should doubt of it, for my part, and therefore I will see, and peruse Clampes Case.

Plowdens Com. Bret & Ridgedens Case.

Clampes case.

Croke. Here, if the Surrender had been to be guided by a Will, then it had been good; Posito, that the Daughter here had been born in his life time, and took an estate, and so might have a present Estate in her vested, this might make a difference.

Haughton. The Lord here is used, but as the meanes, and instrument to convey this Estate over unto another, this Case falls upon the Rules of Law, that one cannot pass a Copyhold Estate, to begin, from a day to come, nor yet upon a Contingency; no more than a freehold at the Common Law, he cannot surrender, thus to begin in futuro, at a future time.

Dodderidge. This is petitio principii; If this Surrender be but a conveyance, then I agree this to be so; and that the Lord here doth neither take nor give any thing; the onely point here is, whether this may be so established, and made good

good by the Lord or not. If a Copy-holder surrenders his copyhold of Inheritance into the hands of the Lord, to the use of J. S. paying of a 100 l. to his Executors, within such a time after his death, he to whose use this Surrender is made, takes by force of this presently. I take this Surrender here to be good, till I see Clampes Case to the contrary.

Haughton and Croke Justices, (absent Coke) That this Surrender here in this principal case clearly, is not good. This matter was afterwards moved again.

Coke. The meaning of Richard Simpson, the Copyholder, who made the Surrender, appears to be, that John Simpson should have the Copy-hold land, if the same had been lawfully conveyed unto him: First the Surrender here is to be examined, and the validity thereof, in regard of the manner of the same; this Surrender here is double, 1. to the use of an Enfant in venter sa mere, and if the Enfant dies before full age, or marriage, then to the use of John Simpson, his brother, and his Heirs; this is a mere void Surrender, and so is the second Surrender, which is idle; the death here is but the inception of this Estate to pass by the Surrender, and this is void in it self; this goes to the root of all, for out of the Surrender these uses do arise; An Enfant in venter sa mere, cannot take an Estate presently. As to this point, whether one fee simple may depend upon another. I will not now deliver any opinion, as touching this, having been heretofore here adjudged; and the same Judgment afterwards in a Writ of Error affirmed in the Exchequer Chamber; but I will not now say which way; if this had been here done by a good conveyance, it had been well, an Enfant in venter sa mere, may take, there is an apparent possibility of him to be; and this is not like the case of the Corporation of Imbroiderers in London, where a lease for life was made, the remainder to the Corporation of Imbroiderers of London, whereas there was no such Corporation at the time of the Lease made, but afterwards they were made a Corporation, this remainder thus limited, was adjudged to be void; A lease for life made, the remainder to William the Son of J. S. whereas he had no such Son, this a void remainder; and so it is if a lease for life be made, the remainder to the heirs of J.S. whereas there is no such J. S. this is a void remainder; but if there be such a J. S. the Heir may well expect; but the best and sure way it is, to devise to one for life, the remainder to an Enfant in venter sa mere, and so this is good, but not by the first devise, to such an Enfant in venter sa mere, this cannot be good. Pasch. 23 Eliz. Clampes Case, which was this. A Copyholder of Inheritance surrenders his Copyhold Estate in manus Domini Manerii, to the use of another after his death (but without any Habendum,) and this was adjudged to be a void Surrender, for that he could not thus doe, to reserve unto himself by this way a particular and a lesser Estate than he had; but in this principal Case here, the same is with an Habendum after his death, to the uses as aforesaid; and this is all one, with Hegge and Crosses Case, before remembred, which Case I argued, and it was this, Hegge made a Lease to Crosse, to have and to hold, after his Death, to him for his life, and made livery, It was urged, that this should take effect by the premisses.

Pasch. 23 El. *Clamps* case.

Wray chief Justice, and the whole Court clearly, it shall not. Judgment is to be given upon the whole matter, the whole frame and composition of this grant is merely void, and so this Lease was adjudged to be void; here in this principall case, the Surrender is not good; it is like unto an Attornment, if the one or the other dies before Attornement, it will not then be good, for there ought to be a perfection of the thing, in the life of the parties, here in this case, the very foundation of all is bad; here it is to an Enfant in venter sa mere, this is not good by an immediate Surrender. It is God that makes heirs, and here Eliz. Spinke is found to be heir unto both, (S) to the Enfant which is dead, and also to John Simpson: here his meaning was very apparantly, that John Simpson should have this Copyhold Estate. If it had been here by way of Remainder to an Enfant in

venter sa mere, this had bœn good, but not so here in this case, which is a very clear and strong case against the Plaintiff.

Croke Justice. As the case is here found, the Surrender is very defective, and also repugnant; if the same had bœn well found, the Plaintiff then might have had it, but not as the case is now here before us.

Coke chief Justice. We all resolve the Law in this case, to be against the Plaintiff; but he may be aided by better proof in another Action, but not in this; the whole Court clear of opinion against the Plaintiff, and so by the Rule of the Court, Judgment in this case was given for the Defendant, & quod querens nil capiat per Billam.

Judgment for the Defendant, *&c.*

Sell Plaintiff, against *Facy* Defendant.

An Action upon the case for words. 1 Ro. Rep. 79. 1 Ro. Abr. 35.

IN an Action upon the Case for scandalous words, upon Non culp. pleaded, a Verdict was found for the Plaintiff: It was moved for the Defendant in arrest of Judgment, that the Declaration here is not good, in regard that he lays for the ground of his Action, a loss of his Marriage, by reason of the speaking of the words; he lays the same in this manner, Quod intendebat & conatus fuit, to have such a Woman in Marriage, and that by reason of the words spoken of him, recusavit, she did refuse to have him; intendebat, this is but onely to shew what his Intention was; he lays no communication of Marriage, and therefore the Declaration is not good, for that he ought to have laid, Quod colloquium habitum fuit de Matrimonio, but it is not so, and therefore not good.

Croke Justice. The words here are scandalous (being that he had a Bastard, or such like words,) if he had said, Quod recusavit, and had laid the motion of Marriage to her, this had bœn good, but not as it is here laid, with a conatus fuit, this is not good.

Haughton Justice agreed with him herein.

Dodderidge Justice. In an Action of Trespass, for beating of J. S. per quod servicium suum amisit, this is not good, if he do not lay it expressly that he was his servant: In this principal case, the Court was clear of opinion, that the Declaration was not good, but advised the Plaintiff to amend his Declaration, and to lay, quod colloquium habitum fuit, de Matrimonio, if the Declaration here had bœn good, that there was a speech of Marriage laid, then this hath been here adjudged, that these words are scandalous, per quod he lost his Marriage, this hath bœn here adjudged good, for a Man Plaintiff, as well as for a Woman; the words were, that he had a Bastard, or words to the same effect, per quod he lost his Marriage.

Haughton. If all the Women in this Town should say, hearing of these words, spoken of him, that they would not have him for a Husband, shall this be sufficient to give him cause of Action, by no means it shall not, but he ought to lay specially in his Declaration, that there was a motion of Marriage for him, and this ought to be certainly laid, and not by intendment, as here he hath laid the same to be, and then also to lay a refusal for this, and so a breaking off by reason of the words thus spoken of him, and being thus laid, the Declaration would then have bœn good, and the words actionable, but here this Declaration is not good, and so the Plaintiff ought not to have his Judgment.

Coke chief Justice. If a man be a Suiter to a Woman, and be in communication

cation of a Marriage, if another man slander him, we are to take Conusance of it; as if a Copy-hold be granted to a woman, tamdiu castè vixerit, of this we are to take knowledge; here it is laid Conatus fuit, this is not good, for in an Action upon the Case brought for slandering of his Title to the Manor of Dale, and lays in his Declaration, Quod intendebat, & conatus fuit, for to sell this, this is not good, but he ought to lay precisely, that he was in speech and communication for the sale of this; so here he ought to have done in this principal case, for if he had here left out (intendebat & conatus fuit) all the other words are nothing, and of no force; and these words being here in the Declaration, they are nothing, being onely in intendment, and not in act; but he ought to have laid here in his Declaration, an express Communication of Marriage, and this to have been effected, but for these words, Conatus fuit, is bad every ways, for a Jury cannot try this, but he ought here to have laid a certain communication of Marriage.

Croke. Conabatur it is individuum vagum, he ought to have laid, Quod colloquium habitum fuit, de matrimonio, conatus fuit, to sell his Manor, is not good, in an Action upon the Case brought for slandering of his title, but he ought certainly to lay, that he was in speech of sale of the same, and hindered by the words.

Dodderidge. The Plaintiffe hath failed here, in setting forth his wrong and dammage; for that intention is but the act of the mind, and this is to be taken divers wayes.

Coke chief Justice. Conatus, quid sit, non definitur in lege. The Court was all clear of opinion against the Plaintiffe, that the Declaration here was not good; and therefore they advised him, to begin his sute again, and to lay in his Declaration, an express colloquium de matrimonio; and a breach, or falling off, by reason of these words; but this Declaration, as it is, is too short, and not good, and so Judgement ought to be given against the Plaintiffe, and accordingly the rule of the Court was, quod querens Nil capiat per billam.

Judgment *Quod querens nil capiat per Billam.*

The Earl of *Suffolke* Plaintiff, against *Floyde* Defendant.

Entred Trin. 12. Jac. B. R. Rott. 1327.

IN an Action of Account, brought for Arrerages of divers summes of money against the Defendant, as his Receivor, and to render an Account; the Defendant pleads in Barre, that he never was his Receiver, and this is found against him, that he was his Receiver of 204 l. 18 s. to this the Defendant pleads, that he had disbursed this 200 l. by the command of the Earl of Suffolk, and over and besides this, he had disbursed so much more also in surplusage, and prayes to have allowance of that which he had expended, and laid out, more then what he had received, and prayed to have allowance of this before the Auditors that were to take the Account.

An Action of Account against one as his receiver. 1 Ro. 2. 87. 1 Ro. Abr. 599.

Coke chief Justice. By 1 E. 5. fol. 1. if one be charged in an Action of Account, as his Receiver, and he saith that he hath received it, and by his command afterwards he laid forth and disbursed the same for him; this he shall not plead in Barre, of the Account, but this shall be allowed unto him, upon his Account before Auditors, and this is very cleare; the whole Court agreed with him herein, and that

the Defendant could have no allowance, for that which he had disbursed, of his own head, above what he had received.

Coke. This is a plain, and very clear Case, that a Receiver cannot disburse for any thing more money, then he hath received, without speciall command so to do; by 42 E. 3. fol. 6. placito 21 & 46 E. 3. fol. 9. if one be charged as a Receiver, there he shall not have any allowance, for surplusage money disbursed by him, but otherwise it is, if he be charged as Baily, there he shall have allowance of this; if he had here pleaded, that he was his Baily, and so have demanded the Judgement of the Court, whether he should be charged as his Receiver, or as his Baily; for that as his Baily, he is to have allowance for his disbursements, though laid out without his command; but not so, being charged as his Receiver, and here he doth charge him, as his Receiver, and so to render him an Account, and this is so done purposely to ouste him from having of any allowance made him. In this case, the Court all agreed that the Defendant was to have no allowance made, that this his Plea was not good; and so by the Rule of the Court, Judgement was given, and so entred for the Plaintiffe.

42 E. 3. fo. 6. placito 21. & 46 E. 3. fo. 9.

Judgment given for the Plaintiff.

Chapman Plaintiff, against *Jane Barnaby* Defendant.

An Action upon the case for a promise.

IN an Action upon the Case for a Promise brought against Jane Barnaby, Executrix to her husband, upon Non assumpsit pleaded, a verdict was found for the Plaintiffe; and upon a motion in Arrest of Judgement, the case appeared to be this; the Plaintiffe had sold certain Wines to the Husband of the Defendant, which money being not paid, and the Plaintiffe having a purpose to sue the Defendant for his money, after the death of her Husband she acknowledged the Debt, and in consideration that the Plaintiffe would forbear her untill such a time, she then promised to pay him the same; that the Plaintiffe did accordingly forbear her the same time, and for not payment according to her promise the Action was brought, and a Verdict for the Plaintiffe. It was moved in Arrest of Judgment, that this Debt did grow due upon the contract of the Husband, and that she being his Executrix, made the promise to pay upon forbearance for a time, which is not good to charge her.

Coke Chief Justice; the Plaintiffe hath here laid in facto, that he had forborn her long; this is personal, and actionable, and by this her assumpsit, she hath made her self liable to be charged; it is the common case, that if an Executor makes a promise to pay the Debt of the Testator upon forbearance, he shall be charged in an Action upon the Case for his promise, if he do not perform it; and this is very clear.

It was divers times said by Wray chief Justice; that if an Executor (as before) doth promise to pay the debt of his Testator, that this is clearly a good assumpsit, and shall bind him to the performance thereof, and that it is not needfull (as it hath been now objected) to prove that he had assets; for if he had not, yet this his promise is good, and his having of assets, is not material, and he shall here be charged by his promise, though he hath no benefit at all thereby; as if one saith to such a School-master, teach such a one, and I will give you so much for

for your pains; this is a good promise, and shall bind him, though he hath no benefit at all by it; so if one do say to a Mason, build such a house, and I will pay you so much money for it, this is good; for the matter considerable in such Actions upon the Case for promises made, is not whether the party, which doth thus assume, hath, or is to have any benefit thereby, but onely whether the other, of whom the promise is thus made, hath any manner of prejudice by it; and the promise made upon this is the onely ground of the Action; here in this principal Case it is averred, in facto, that he hath forborn her, according to the Agreement, and that as yet she hath not paid the same according to her promise; the whole Court clear of opinion, that the Plaintiff hath just cause of Action, that the Declaration is good, and so the rule of the Court was, Quod Judicium intretur pro querent.

Judgment by the Court given for the Plaintiff.

Nota, By Cook chief Justice, a Bishop is onely to fell Timber for building, for fuel, and for his other necessary occasions, and there is no Bishoprick, but the same is of the foundation of the King; the Woods of the Bishoprick are called the Dower of the Church, and these are always carefully to be preserved, and if he fell and destroy this, upon a motion to us made here of this, we will grant a Prohibition, and to this purpose there was a great Case which concerned the Bishop of Duresm, who had divers Cole-mines, and would have cut down his Timber Trees, for the maintenance and upholding of his Works; and upon motion in Parliament concerning this, for the King, Order was there made, that the Judges here should grant a Prohibition for the King; and we will here revive this again, for there a Prohibition was so granted; and so upon the like motion made unto us in the like case, we will also for the King grant a Prohibition, by the Statute of 35 E. 1. If a Bishop cut down Timber Trees for any cause, unless it be for necessary reparations (as if he sell the same unto a Stranger) we will grant a Prohibition: And to this purpose I have seen a good Record in 25 E. 1. where complaint was made in Parliament of the Bishop of Duresm, as before, for cutting of Timber Trees for his Cole-mines, and there agreed that in such a Case a Prohibition did lie; and upon motion made, a Prohibition was then granted by the Judges of this Court, and the reason there given, because that this Timber was the Dower of the Church; and so it shall be also in the case of a Dean and Chapter, in which cases, upon this ground we will grant Prohibitions; the whole Court agreed with him herein.

Nota, what Timber a *Bishop* may fell. and for what purposes.

Marsh Plaintiff, against *Bentham* Defendant.

In a Writ of Error to reverse a Judgment given in the C. B. the Case appeared to be this: A Writ of Annuity was there brought, and a verdict for the Plaintiff, but the Jury did assess no damages; afterwards, and before Judgment, the Plaintiff released his damages, and then had his Judgment for the annuity onely; to reverse this Judgment, a Writ of Errour brought by Marsh, against whom the Judgment was given, and this onely assigned for Error, that the Jury finding for the Plaintiff, gave him no damages, which they ought to have done.

A Writ of Error to reverse a Judgment in the C.B. in a writ of Annuity. 11 Co. 56. a 1 Ro.Rep.81. 1 Ro. Abr. 760.

Coke.

Coke. In Trespass, Ravishment, de garde, valore maritagii, the Jury findes no dammages, the party shall not have a Writ to enquire of dammages, where the Jury are to find damages, if not, an attaint, there no enquest of Office: In an Ejectione firme, no damages found, but after the party doth release his damages, this is good, and this he may well doe; and this not finding of damages by the Jury, is not now to be assigned for Error, by the party who should have paid the damages.

Dodderidge Justice. 1. The defect here is in the verdict, but not in the Judgement, and this defect in the verdict, may well be aided by the party Plaintiff, by his releasing of the damages; the whole Court agreed in this, that the Plaintiff now could not assign this matter for Error, the same being advantagious for him, and for his benefit, so is Beechers Case, Coke 8 pars, and so the Rule of the Court was, Quod Judicium affirmetur.

Judgment affirmed *per Curiam.*

Bird Plaintiff, against *Astcock* Defendant.

Action upon the Case for a Trover and Conversion. 1 Ro. Abr. 567. 1 Ro. Rep. 79.

IN a special Action upon the Case brought by the Plaintiff against the Defendant, being a Carryer, a Boatman, for a Trover and Conversion of his Goods to him delivered, and they miscarryed: Two Actions by him brought, the one a Trespass, the other a Trover and Conversion: Upon a motion now made, the rule of the Court was, that he should proceed in one of the Actions onely, (S.) In the Trover and Conversion.

Coke. There was a Case resolved in the C. B when I was there, concerning Gravesend Barge, in which were a great number of Passengers; one there had a pack of great value, and of great weight in the Barge, there suddenly happened a very great Storm, and they were all in great danger, and were, for their own safety, enforced to throw out a great part of the goods, for the safeguard of their lives which were then in the Barge; amongst which goods, for the lightning of the Barge, this pack of Goods was thrown over: Afterwards, he which was the owner of this Pack, brought his Action upon the Case against the Bargeman, for these his Goods thus cast over; and we all there did resolve it clearly, that this being the Act of God, this sudden storm, which occasioned the throwing over of the Goods, and could not be avoided, and for this cause he recovered nothing; upon this reason is the Case in 6 Eliz. in Dalisons Reports, where one was bound to keep and maintain the Sea Walls from overflowing; if this happen by his negligence, this shall be wast, otherwise if it so happen by the Act of God suddainly, and so unavoidable; the whole Court agreed with him herein.

Alloe

Attoe & *Al'* Plaintiffs, against *Hemmings* Defendant.

Entred Trin. 10 *Jac.* B. R.

Rot. 969.

IN an Action of Covenant, the case appeared to be this, Thomas Taverner, 1 Jac. made a Lease for years unto Salisbury, who entred, and was thereof possessed: Taverner doth devise the Reversion unto Mary his Wife for her life, who grants this over to the three Plaintiffs for forty years, if she shall so long live: Salisbury Attorns, makes his Wife Executrix, and dies: In the first Indenture divers Covenants are contained, and upon which divers questions were moved: Salisbury in the first Indenture doth covenant to pay 37 l. Rent unto Thomas Taverner the Lessor, for non-payment of this 37 l. Rent, the Action of Covenant is brought, by an Assignee of an Assignee of the Reversion: It was urged for the Defendant, and these questions stirred. 1. The Lessee doth covenant in the Indenture of Lease, to pay 37 l. Rent yearly to the Lessor and his Heirs, whether in and by construction of Law this shall be said to be a Rent, or onely a summ in gross by force of the Covenant; that it should be a summ in gross, and no Rent, the words here being, That the Lessee Covenants, Grants, Condescends and Agrees with the Lessor to pay, &c. that this is no Rent, but an annual summ in gross to be paid: Reddendum, faciendum, solvendum, these are onely the words of the Lessor: Rent ought to be reserved by the Lessor, and also by apt words of reservation, and this on the part of the Lessor himself, which is not so here; in Plowdens Commentaries, fol. 131. in Bownings and Bestons Case, it is there questioned, Whether such a Covenant as here on the part of the Lessee to pay so much yearly, shall be in Judgment of Law, as a Rent, or as a summ in gross; in 26 H. 8. fol. 2. where the Vendee doth covenant to pay 40 s. per annum to the Vendor, there agreed this to be no Rent, but a summ in gross, and 10 Eliz. Dyer, fol. 275. the Lord Dacres Case, where the Lord Dacres did make a Lease of his Land and Stock to some Friends, who did covenant to pay 100 l. per annum to him and his Wife, his Heirs and Assigns, during the term; this there resolved to be no Rent to go to the Heir, but a Summ in gross to go to the Executors: so here in this case, being by way of Covenant and Grant merely, is a personal thing. 2. If this be no Rent, then whether the Assignee of the Land shall have this or not. And 3. Whether an Assignee of part of the Reversion, as in this Case the same is, the first Assignee for life assigns this for 40 years to the Plaintiff, if the first Assignee for life shall so long live, Whether this last Assignee may have an Action of Covenant; it was urged, that he cannot: It appears, Coke 5 pars, fol. 18. b in Spencers Case, what Assignees may have an Action of Covenant; and in the end of Spencers Case, resolved that the Statute of 32 H. 8. c. 24. extends unto Covenants, which touch or concern the thing demised, but not to collateral Covenants; 14 Eliz. Dyer, fol. 309. Winters Case, and Coke 5 pars, fol. 55. Knights Case, that a Bargainee of part of the Reversion, cannot take benefit of a Condition: For the Plaintiff it was urged, that this is a Rent-Service, and so incident to the Reversion; and when it is by way of Covenant by the Lessee, by the same Indenture, this is a good reservation; and they are all the words of the Lessor, as well as of the Lessee

An Action of Covenant, *&c.* 1 Ro. 2. 80. Ow. 151. 2 Ro. Abr. 449.

Plowdens Commentaries, fo. 131, *&c.*

Coke 5 pars, fo. 18. b *&c.*

Lessee, and all one, as if the words had been, that the Lessee should have the Land, and the Lessor the Rent, this had been good, and it is all one here in effect; and divers times, by the construction of Law, words spoken in one sense, and by one party, shall be taken in another sense, as a reverter, for a remainder; so here, by construction of Law, this shall be said to be a Rent-service, and no difference there will be, where the Lessee saith, that the Lessor shall have the Rent, and unto which the Lessor agrees, and where the Lessor himself saith so, by way of agreement, and to which the Lessee agrees, in Browning and Bestons Case, there is but one summ, but this case now here in Question is a stronger case; here it is expressed in the beginning of the Covenant. In consideration of the payment of the Rent hereafter mentioned, he did lease the same, so that this is by way of reservation, and so incident to the reversion, also this is not such a collateral summ, as is objected, it is not collateral to the Land, for it concurrs with the Land, for it is, that the Lessee shall have the Land, paying the same summ, so that it doth run with the land, and he which hath the reversion shall have this Rent; and this was the true intent and meaning of the Covenant. Also the Assignee of part of the Reversion shall have this; for if it be a Rent, and he covenants to pay it, either Debt or Covenant lieth for it, which the Assignee may have, if it was a summ in gross to be paid; there he must be an Assignee of the whole Estate, or not to have it, so is Winters Case, 14 Eliz. Dyer fol. 309. also it hath been adjudged, that an Assignee of part of the reversion is within the Statute of 32 H. 8. cap. 24. for the Statute saith, Any Grantee or Assignee shall take benefit of this; as touching the Objection, that it is not averred that Mary the first Assignee of the Reversion for life, was living, at the time of the Action brought, this is not needfull, the Law gives this Action, at the time when this Rent is behind, she was then living, but dyed afterwards; for this Rent so behind, in her life time, the Action of Covenant well lieth, she was living, when the Rent was behind, and so the Plaintiffs here are sufficiently intituled to have this Action of Covenant.

Browning and *Bestons* case.

14 El. Dyer, fol. 309, *&c.*

Coke chief Justice. This is as common as may be, that an Assignee of a Reversion for part, shall have the benefit of a Covenant, and so it is in Hill and Granges Case in Plowdens Commentaries, there is no great difficulty in this case, benigne interpretandæ sunt interpretationes ut res magis valeat quam pereat; here the Lessee doth covenant to pay to him, his Heirs, &c. so much yearly, would you now have this Rent to go to the Executor, it cannot so be, his meaning appears plainly to be, to pay this unto his Heir. Convenire is the agreement here of both parties, and here is actus cnotra actum, if he had said, I agree that you shall have such a rent, this had been a good rent, and should go with the reversion, and when I did read Browning and Beston's Case, being by Indenture, I did then take this clearly to be a Rent; as for the other point, I do hold it clearly, that the grantee of part of the Estate, being the Plaintiffs, shall take benefit and advantage of this Covenant here in Leonards case, in the C. B. it was adjudged, that a grantee for years of the Reversion, should take advantage of a condition, within the Statute of 32 H. 8. cap. 24. and it is very plain and clear, that such a Grantee may have an Action of Covenant at the Common Law, the old difference was between a Covenant personal and real; this appears in Spencers case, 5 pars fol. 18. where divers Cases are put to this purpose. As to the matter of averment, the Lease was made here by Mary Taverner, who had the Reversion for life, for 40 years, to the Plaintiffs, if she should so long live, with a Covenant for the quiet enjoying of it, Mary the lessor dies, the Covenant well lieth for the Rent behind in her life time; if a man maketh a Lease, reserving rent, Habendum, for many years, so that the reservation is placed before the Habendum, yet this is good, and the Judges by their construction, are so to martial the words, as to make it to be a reservation of the Rent, for the whole term; here the Plaintiffs have just cause of Action for this Rent, and this Action of Covenant here by them brought for the same, is well brought.

Browning and *Bestons* case.

32 H. 8. c. 24.

Coke 5 Pars, fo. 18, *&c.*

Dodde-

Dodderidge Justice. The Statute of 32 H. 8. cap. 24. extends the condition as largely as the Covenant, and a Lessee for years is within this Statute, to take benefit thereby; as to the averment, there is no question at all to be made of it, but if Mary the Grantor of the Reversion for years, if she should live so long; if she died after the cause of Action did grow, this death of hers shall not take away their remedy by way of Action, for that Rent which was due before her death, which is this Rent for which the Action of Covenant is here now brought: If one brings an Action, as the Assignee of J. S. will this abate the Action, to say that J. S. is dead, clearly it will not.

Haughton Justice, and the whole Court agreed with him herein, and that the Plaintiffs here had good cause of Action for this Rent, which was behind in the life time of Mary their Grantor, and for which Rent this Action of Covenant is here well brought by them; and so by the Rule of the Court, Judgment was given for the Plaintiff. Judgment *per Curiam.* for the Plaintiff.

Clifton Plaintiff, against *Oates* Defendant.

If a Prohibition to the Spiritual Court, in case of tryal of the validity of a Lease. Prohibition to the Spiritual Court, *&c.*

Coke chief Justice. The Civil Law will not allow of a Lease, unless that it have Tradition delivery, and therefore the same is not to be tryed there, but they are to be prohibited, because they will there draw the matter ad aliud examen; if an acquittance be there shewed, they may try this there, but no Feoffments or Leases, wherein our Law and their Law do differ, but there they are to be prohibited; here the one said there that he had a Lease, the other said that he had another Lease, this is triable there; but if they will go about to try there the validity of Leases for years, they are to be prohibited. 1 Ro. 2. 61. 2 Cr. 350. 1 Ro. Abr. 306.

Dodderidge Justice. The difference will be this, where a Temporal matter is the main thing, and where but accessarily, a matter at the Common Law comes there in question, upon a matter there triable, the original matter being merely Spiritual, and accessarily a Temporal matter happens in debate, this is there tryable, otherwise it is, where originally the matter is not there triable; there if they proceed, they are to be prohibited.

Coke. If one declares upon a Lease made to him by a Parson, who says he did not demise, but sues him for Tithes in the Spiritual Court, this matter of the Lease is tryable there, but here they are not to be suffered to try there the validity of Leases, for that they hold a Delivery to be made of Leases, as well as of Goods, or else the same is not good: Where the one claims by virtue of a former Lease and the other by a latter, this is triable here, and not in the Spiritual Court, the difference before remembred is to be agreed; in this case a Prohibition was granted per Curiam. A Prohibition granted *per curiam.*

Wright Plaintiff, against *Fowler* Defendant.

A Prohibition to the Dutchy Court.
1 Ro. 2. 71.
1 Ro. Abr. 382.
Mo. 836, 916, & 838.
Stat. of 4 H. 4. c. 23.
3 In. 123.
4 In. 86.
27 E. 3. c. 1.

IN a Prohibition to the Dutchy Court, for proceeding there in a matter, after a Verdict and Judgment at the Common Law, in an Action of Trespass.

Coke. After a Verdict and Judgment given in an Action of Trespass, this matter is not to be brought into any English Court; this restrained by the Statute of 4 H. 4. cap. 23. Eodem modo quo quid constituitur dissolvitur, here the Judgment was given in a Court of Record, and therefore the same is not to be dissolved in the Dutchy Court, nor yet in any other such Court; and so the Statute of 27 E. 3. cap. 1. in the time of King E. 1. a Quo Warranto was brought against the Earl Warrein, for claiming of certain Liberties, in which he disclaimed that he had no Warren, neither by Prescription, nor yet by Charter; afterwards he obtained a Charter for to have a Warren, infra terras domini cales, he cannot now enlarge this his Charter by Prescription, the Grant was in the time of King E. 3. The place in question was West-lin, an Action of Trespass against the Farmer of the King: where the King will proceed by Information, he ought to proceed in a Court of Record, not in the Dutchy.

Haughton agreed with him herein, and that it is a dangerous matter for a Court, which is not a Court of Record, to meddle with a Judgment given in a Court of Record; and no Decree was there ever made, in Case where a Judgment was given in a Court of Record.

No Prohibition granted, but ended between the parties.

Dodderidge. We are here sworn for to maintain the Inheritance of the King, as much as we can, and with all our power, but this is to be done duly, and with Justice by us done unto all, but not otherwise; the whole Court agreed herein, that in this case they were to be prohibited, but this being a great case, it rested upon a Curia ulterius advisare vult, the Court was never afterwards moved again herein, but the same ended between the parties.

Goldsmith Plaintiff, against the Lady *Plat* Defendant.

An Action of debt against an Administrator.

IN an Action of Debt brought against the Defendant, as Administratrix of, &c. who pleaded fully administred; the Court was moved to have her find Sureties according to the Statute of 3 Jac. cap. 8.

Coke chief Justice. This Defendant is not to find Sureties, upon this her Plea of plene administravit pleaded, for that she is not to answer the principal Judgment of her own proper goods, but for the damages onely; this Plea is no Bar, and it hath been formerly resolved in the C. B. when I was there, that neither an Executor nor an Administrator was within that Statute of 3 Jac. cap. 8. unless they pleaded such a plea, by which it appeared that they should be chargeable, to answer

Stat. of 3 Jac. c. 8, &c.

answer with their own proper Goods, this so appearing, then they should be within the Statute, and to find Sureties according to the Statute, but not otherwise: but if here in this Case sureties should be found, this would then change the Judgment of the Law, the which in this case here is conditionally, (with a Si habuerit) and if he should here find Sureties, you would then make the Judgment to be absolute; the whole Court agreed with him herein, and so ruled, that the Defendant here was not within the Statute of 3 Jac. to find Sureties, but was freed and discharged by the Judgment of the Court from so doing.

Judgment by the Court, &c.

Russel Plaintiff, against *Backhurst* Defendant.

A Prohibition upon a Suit for Tithe Under wood, in the Wilde of *Kent*.
1 Ro. Rep. 22.
1 Ro. Abr. 653.
Statute of 2 E. 6. c. 13.

IS a Prohibition to stay proceedings in the spiritual Court, upon a Libel there by the Parson, for Tithe of Under wood, by reason of a Prescription in non decimando, for the Wilde of Kent, this Wood growing in the Wilde of Kent. Henden moved the Court for this Prohibition, for these reasons. 1. A whole Countrey generally may prescribe in non decimando, in a particular place, and as a whole County may so do, by the same reason a particular person may. A Second reason, the Statute of 2 E. 6. cap. 13. gives life unto this Prescription, for this particular place and Precinct.

Coke chief Justice. By Linwood, a whole Countrey may prescribe in non decimando; and so is Doctor and Student, in his last Chapter, fol. 166. b. but it is with this Proviso, so that there is besides this maintenance for the Parson, otherwise the same is not good; the Statute of 2 E. 6. cap. 13. aids you not at all in this case, for a private man cannot in this manner prescribe: and to say that the Conqueror never conquered this place, this is but Historical and Apocryphal, for he was Conqueror by composition had: It is true, that in former time, long since this place was not Tithable, because there was no Wood there but great Timber Trees which were not Tithable; but these being now cut down, wasted and destroyed, by the Iron Mills in those parts, and as in many other places; now this place which was not tithable before, being now Under wood, and converted into Pasture, is now become tithable, and Tithe shall there be paid; and if waste and barren ground, for the which no Tithe hath ever been paid, if the same be now meliorated and converted into tillage, now by the Common-Law Tithe shall be presently paid for this, unless the same be within the Proviso of the Statute of 2 E. 6. of exemption from payment of Tithes for a certain time, after the melioration of the same, as appeareth in the Statute, otherwise Tithes shall be paid presently; no Tithes could formerly be paid here in this place, because there were onely great Timber Trees here growing, but now clearly they ought to pay Tithe for the Under woods, and this is the onely demand here; the whole Court was clear of opinion, that no prohibition should be granted here in this case, but that Tithe should be paid.

Coke. Will you allow the Parson here in this place Tithe Hey and Corn, and not Tithe Wood?

Dodderidge. By Linwood, and Doctor and Student, a whole Countrey may be discharged from payment of Tithes, but this at the first, of necessity, ought to have a lawfull commencement by way of Composition, or, &c.

Coke agreed with him herein, and said unto Henden, Shew unto us an ancient Writing, by way of a Composition for your discharge of payment of Tithes; the Statute of 2 E. 6. makes against you there, though no Tithe was ever paid,

A Prohibition denied *per Curiam.*

yet upon the meliozation of the Land, Tithes shall be paid presently, if the Statute had not been made; the Court all clear of opinion against the granting of a Prohibition, and so no Prohibition granted.

Geston Plaintiff, against *Buller* and *Serls* Defendants.

A Scire facias against the old Bail.
1 Ro. Rep. 64. Mo. 835. 2 Cr. 363. 1 Ro. Abr. 746. 7.
Coke 5 Pars, fo. 70. *Hoes* Case.

In a Scire facias, the case appeared to be this, One was Arrested at the Suit of the Plaintiff, in an Action of Debt, in an inferior Court at Yarmouth, and there the Defendants became Bail for him; the matter was afterwards removed by a Habeas Corpus into this Court, and new Bail here taken, afterwards this cause upon examination, was cast out of this Court, and a Procedendo granted to proceed in the Inferiour Court, and a Scire facias unto these Defendants, being the old Bail: The question was, whether this Scire facias here brought, lyeth against the old Bail or not. It was urged against the Scire facias, and Coke 5 pars, cited fol. 70. Hoes Case, where the nature of a Bail is described, where in an Action of Debt, and before any Judgment given, the Plaintiff doth release unto the Bail all Actions, Duties and demands; afterwards Judgment given against the Defendant, upon his default, and a Scire facias against the Bail, who pleads the Release, adjudged no Barre, upon the words of the Bail, being conditional, 32 H. 8. Brook, Title Mainprise, placito 96. a man arrested in London, found sureties to the Plaint, afterwards it came here by a Writ of privilege; afterwards a Procedendo came to proceed in London, this shall not revive the first Mainprise or suretiship, for that once discharged, and always discharged, 31 H. 8. Brook, Title Procedendo placito 13. & Brook, Title Surety placito 28. if a man be arrested in London, and finds sureties, afterwards he removes the body, and the cause by a Writ of Privilege, and is dismissed, the sureties are discharged, but contrary it is, if the Plaintife obtains a Procedendo, for that the Defendant did not prove his cause of privilege; for there in effect, he was always a Prisoner to the Franchise.

32 H. 8. Brook, tit. Mainprise, pl. 96.
31 H. 8. Brook, tit. Procedendo, pl. 13, &c.

Coke. When the matter is here by us rejected, and cast out of this Court, and a Procedendo granted, we by this, in a manner, were never possessed of the cause, and therefore the matter to remain, and be in the inferior Court, statu quo prius, and therefore clearly the first Bail is here revived, and the Scire facias well lies against them. But when the Record is removed hither into this Court, and the Court once allows of it, and is possessed of the cause, and so the matter recorded here, and new Bail taken, then clearly the first Bail is absolutely discharged, but as the case is here, it is as clear, that the first Bail is here revived.

Haughton. This is onely to shew cause, and when the cause shewed is here disliked of, and the matter is sent down again by a Procedendo, then the matter doth there rest statu quo.

Coke chief Justice. If the Bail be here recorded, and the term passed; the first bail is then clearly discharged; but if in the same term, we do here disallow of it, and send the Cause back again by a Procedendo, as we may well so doe, then the matter doth rest in the Inferiour Court, statu quo prius, and the first bail is revived.

2 Cr. 203. Yel. 120, 121.

Dodde-

Dodderidge. If the Bail be filed here, and taken off again from the Record, then it is no Record; the Case in 32 H. 8. before remembred, is to be understood, with this difference (S) where this Court is fully possessed of the matter, and the term be past, there the first Bail is absolutely discharged; but otherwise it is, where the matter is disallowed of by the Court in the same term, the cause being then in their breasts, either to allow or disallow of it, and when the Court doth disallow of it, then it is as nothing, and the first Bail is then clearly revived: And so in this principal case, the Court was all clear of opinion, that the first Bail here is revived, and so the Scire facias here well awarded against the old Bail, and accordingly, by the Rule of Court, Judgment was given, and so entred for the Plaintiff.

Judgment given for the Plaintiff *per curiam.*

Malcot Plaintiff, against *Dean* Defendant.

If an Action upon the Case brought by the Plaintiff against the Defendant, for refusing to seal a Bond tendered unto him, according to agreement, the case upon the agreement appeared to be this, (S) the Plaintiff, the Defendant, and another agreed to be bound in a Bond, to J. S. for the payment of so much money to him for a certain bargain of Wooll, at such a day, and by such a Bond, and in such a summ, as shall be agreed upon amongst them; the Plaintiff makes a Bond, joynt, and several, and tenders the same to the Defendant, to be sealed by him, who refuseth to seal the same, and upon this his refusal, the Plaintiff brings this Action; the sole Question being, whether by this agreement, a joynt bond ought to be made, and rendred, or whether it may be, a joynt, and several bond.

An Action upon the case for refusing to seal a Bond. 1 Ro. 2. 71. 1 Ro. Abr. 424.

Coke. When the agreement is, that he and two others shall be bound, in such a Summ as they shall agree; this is to be a joynt bond, and not to have been a bond joint and several, the relation goes to this which is certain, if he had here made a Bond, in which the Defendant sole was bound, and tendered this unto him to be sealed, this had not been good, therefore a joint and several Bond is bad also.

Dodderidge. Debt upon a Bond lieth not against the Heir, if not bound; the whole Court agreed with him herein, and that without all question, the bond here by this agreement, ought to have been a joint bond, and being here a joint and several bond tendered to him, to be sealed, he might well refuse so to doe, for it ought to have been a joint Bond; this being otherwise, the Plaintiff had no cause here of Action, and therefore the Rule of the Court was, Quod querens nil capiat per Billam.

Judgment *quod querens Nil capiat per billam.*

Willa-

Willamore Plaintiff, against *Bamforde* Defendant.

An Action of Trespass for taking of Hay.

IN an Action of Trespass brought, for taking away of his Hay; upon Non culp. pleaded, a Verdict found for the Plaintiff. It was moved in Arrest of Judgment, that the Declaration was not good, because he hath not pursued his Title made in the Declaration.

Coke. A man brings an Action of Trespass, for taking his Hay, and conveys unto himself a Title to it; this is more than he ought to doe; but he ought to have said generally, Quare fœnum suum cepit, without making of any title to it, and this is good; for if one, as Executor, brings an Action of Trespass, for taking of a Horse, whereas in verity, he never was Executor, this is clearly good; and his being Executor or not, is matter Frugatory, and it is surplusage for a Plaintiff, in his Declaration for Trespass done, to make a Title to himself in this. 7 H. 4. fol. 44. an Action of Trespass upon the Case brought, Quod Theolonium asportavit, & illud solvere recusavit; this is good, without making of any Title; and the first words are void, and surplusage, and the other good: for as the Rule is, utile per inutile non vitiatur; the Court clear of opinion, that in this principal Case, the Declaration is good, this Exception notwithstanding; for it is but matter of surplusage for a Plaintiff, to make a Title in his Declaration in trespass; and if he makes a Title, and doth not pursue it, or if his Title be not good, this is not material, being but matter of surplusage, and nugatory.

7 H. 4. fo. 44.

Dodderidge Justice. The Plaintiff needs not make any Title in an Action of Trespass, the same being a possessory Action; but if he do make a Title in the way of evidence, he ought then to pursue the same, and make it good; but he needs not to make any Title in his Declaration, saying that this Hay was for Tythe belonging to his Farm, which is more than he needed to have done; this is but surplusage, and so the Rule of the Court was, Quod Judicium intretur pro querente.

Judgment for the Plaintiff *per Curiam.*

Watts Plaintiff, against *Kempe* Defendant.

An Action of Trespass in a House and Close.

IN an Action of Trespass, for entring into a House, and into a Close. Sur Non culp. pleaded; the parties were at Issue upon one of them, but not for the other; a Verdict found for the Plaintiff. It was moved in Arrest of Judgment, because the Action was brought for two Trespasses, and but one put in Issue, and so for this matter of variance, the Plaintiff not to have his Judgment.

Coke

Coke. Two Trespasses are here laid, the Defendant pleads to issue, to one of them, but not to the other, and this to which he pleads is found against him, Judgment shall be given for that which is found, the whole Court agreed herein; and therefore by the Rule of the Court Judgment was given for the Plaintiff.

Judgment for the Plaintiff *per Curiam.*

Downes Plaintiff, against *Hackseby* Defendant.

If an Attachment upon a Prohibition, for proceeding in the Spiritual Court, in a suit after a Prohibition granted upon a modus decimandi.

An Attachment upon a prohibition.

Coke chief Justice. I have seen a good Record in the time of King E. 3. that if a Court doth proceed contrary to a Prohibition, that not onely an Attachment, shall be granted for the King, but a special Action upon the Case for the Party also, for this Prosecution thus against him, for that ubicunque est injuria, ibi damnum sequitur, to the party for the which he shall have his Action upon the Case, and Fitz. Nat. Bre. fol. 92. E. hath this Case; an Action of Trespass upon the Case brought by one having served one with a Prohibition, and delivered the same unto him, for that he, illud breve ibidem in luto projecit, & pedibus suis conculcavit; and contrary to this did prosecute his Suit, in eadem Curia Christianitatis, in contempt of the King, and to the dammage of the party, &c. the principal case here was, the Defendant libelled in the Spiritual Court, for Tythes in kind, a modus decimandi pleaded; and upon this a Prohibition granted; and afterwards he libells again there for these Tythes. A Recaption is by the common Law, if a man distrains once for Rent, and after he distrains again for the same Rent, which he ought not to doe, as appears by Fitz. Nat. Bre. fol. 71. E. here he libelled for Tythes in the year 1610. a modus decimandi pleaded, and a Prohibition granted, afterwards he libells again for Tythes in kind for the year 1611. this he may well do, being out of the first Prohibition, as estrepements, are to be taken strictly, so shall Inhibitions, he may well libell again for the same Tithes, but not for these, in the same year, and for which he was prohibited to sue; the whole Court, agreed in this clearly, that if he libelled the second time, for these Tithes in specie, for which before he was prohibited; if he do thus sue again, an Attachment lieth.

Record in temps E. 3.

Fitz. Nat. Br. fol. 92 E.

Dodderidge. For other Tithes, due for another year, he is not prohibited, but onely not to sue again for the same thing for which he was before prohibited; but as for any other Tithes, he is left at large to libell again for them, but not for those contained in the first Prohibition, and so the Rule of the Court was, that if the libell be for the same Tithes in the former prohibition that an Attachment be granted for this his contempt, and the party also to have his speciall Action upon the case for this unjust vexation.

The Rule of the Court for an attachment, *Si, &c.*

Coke. For this I can shew a very good and an ancient Record in the time of E. 3. this being a very great contempt of Justice, and of the Law, for him to libell again for the same thing in the Spiritual Court before prohibited; but if he libell for Tithes due in another year, or if it be in the same year, but for other Tithes, this Libell is good; otherwise it is, if he libell for the same Tithes, in the first libell, and Prohibition contained.

Trip. E. 3.

Fox

Fox Plaintiff, against *Whitchcocke* Defendant.

A Replevin. 2 Cr. 398. 1 Ro. 2. 68. 389. 1 Ro. Abr. 408, 422. Ow. 152.

IN a Replevin, upon the pleading, the Case appeared to be this, That George Fox being Lessee for 91 years, did covenant and grant, that he would not alien this Subpœna forisfacturæ, to any one, but to his Wife for her life, and afterwards, for the residue to one of his Children, or for such default, to a younger Brother: Three Questions did arise in this Case.

First, Whether this Covenant by the Lessee, that he would not alien, but (in such a manner) shall enure as a condition, and to have the force of a condition, or not.

Second, Touching the breach admitting this to be a Condition, when he once made a lawfull alienation, according to the condition, Whether this alienee be now at large to alien to whom he will, or shall be subject to this condition also, so that an alienation by him, contrary to the first Covenant, shall be a breach of the condition.

Third, Whether the acceptance of Rent by the Lessor (reserved upon the first Lease, after this supposed breach of the condition) Whether this acceptance of the Rent, shall bar the Lessor of his Entry for the condition, or not; this was argued several times, by Davis, Whitlock, and Harvey Serjeant, for the Defendant, and by Bridgeman, George Crooke and Coventrey, for the Plaintiff, in the several Terms of Mich. 12 Jac. B.R. Pasch. 13 Jac. B.R. and Trin. 14 Jac.

Mich. 12 Jac. B. R. &c.

First, As to the first point, it was urged, that this Covenant here by the Lessee not to alien, amounts unto a condition, and hath the force of a condition, this was clearly agreed unto by the other side, the Authorities cited being many, and direct in point; this controverted in 28 H. 8. Dyer fol. 6. and in Browning and Bestons Case, Plowdens Commentaries, fol. 132. 14 Eliz. Dyer fol. 311. 2 Eliz. Dyer fol. 169. Sir Richard Cromwells Case, 3 E. 6. Dyer fol. 66. 7 E. 6. Dyer fol. 79. 6 E. 2. cited Plowdens Commentaries fol. 159. in Throgmorton and Tracies, Coke 2 pars, f. 70, 71. Cromwells Case.

28 H. 8. Dyer fol. 6, &c.

Coke chief Justice. Here in this Case the Lessee doth covenant and grant, that he will not alien upon pain of forfeiture; this is a plain and clear Case, that this is a condition or defeasance, and that he by this hath a conditional and a defeasable Estate, and so is Dyer in three several places; and this is so without all question, especially this being in a Lease for years, which may as well determine by contract, as the same may begin thereby, and this is very clear.

Nota, The difference wherein the condition is for the benefit and where for the prejudice of the party.

2. Whether the Assignment here by the Lessee unto Edward Fox, having a Wife living, Whether this be a breach of the Condition, or not; herein it is first to be considered, Whether this condition shall be extended to go to any Wife, which he shall after have, or onely to his present Wife he then had: It was urged, that this shall go to any Wife which he shall have, and herein the difference will be, where such general conditions do tend unto the benefit, and where to the prejudice of the party: In the one case the same shall have a general construction, in the other not so; to this purpose is the Book of 39 H. 6. fol. 9. The condition of an Obligation was, that if the Defendant, and the Tenants of the Duke of York, should stand unto the Arbitrement of the Plaintiff, of all manner of Debates, that then &c. this doth extend but to the Tenants he had at that time, 21 H. 7. fol. 30. Pusetoes case, 27 H. 8. fol. 19. by Audlay; where the condition is beneficial, it shall have a large

39 H. 6. f. 9.

21 H. 7. f. 32. &c.

a large extent, but otherwise it is where prejudicial, 6 E. 3. fol. 31. & 14 H. 7. fol. 32. An Annuity granted to one by the Prior of D. untill he be promoted unto a sufficient Benefice by the Prior; this shall extend to any Prior, 15 H. 7. fol. 1. & 19 H. 6. fol. 9. A man doth devise that his Land shall be sold by his Executors, this shall extend to Executors of Executors, with this agrees 27 H. 8. fol. 15. in Dockwrays case, shall extend to all his Confrers; so here this condition not to be taken strictly to the Wife which he then had, but unto any Wife he should have.

6 E. 3. fol. 31. &c.
15 H. 7. fol. 1. &c.
27 H. 8. fol. 15.

Coke. The condition being, that he shall not alien but in this manner, to &c. by his alienation unto the first, he hath now an absolute Estate, and to his Estate no condition can be annexed, by the words of the first Covenant: It was then urged, that this alienation to Fox, was no breach of the condition, because he could not by Act executed, convey this unto his Wife; to this purpose is 15 E. 4. fol. 11. & 27 H. 8. fol. 27. a. b. and so this part of the condition is void and impossible, and therefore it shall stand good for the residue, as if the condition had been, that he should not assign unto any but to a moigne for life, and afterwards to a younger Brother; this is void, as to the first, but shall stand good as to the other part. It was objected, that this might be done by way of Devise, and that a Devisee is an Assignee within the Condition; to this it was answered, that a Devise is not comprehended within the words of the Condition; the restraint by the condition is, that he shall not alien unto any but unto his Wife for her life, and after to one of her Children; and for default of such, then to a younger Brother; that this word (Nisi) sets him at liberty to grant to those which are comprehended within the (Nisi) & residuum termini, to one of the younger Brothers.

15 E. 4. fol. 1. b. &c.

Third, This liberty was to be executed in futuro, then it is to be considered, Whether Edward Fox, the Assignee of George Fox the Lessee, shall be subject to this condition, by his Assignment over he shall be at liberty, and not subject to the condition, by Dumports case, Coke 4. pars, and by Leeds and Cromptons case there cited, fol. 120. a. a License dispencing with part shall be for the whole; that this word (vel) uni fratrum juniorum, gives him an election to alien to which of them he would; then out of the words of the Covenant, donationes, that is to be, inter vivos, by the first words of the condition, and the same not to be supplied by a Devise, 27 H. 8. fol. 15. in Dockwrays case, actus simplices, a man may do to his Wife, as to pay money to her, and the like, but actus civiles, not in criminal matters they are distinct persons, as the one shall not be punished corporally for the other: The last matter considerable is, Whether the acceptance of his Rent, shall bar him of his Entry for the condition: It was urged, that the acceptance should be no bar, because it is not pleaded that he did accept the Rent before his Entry for the condition; and by Pennants case, Coke 3 pars, fol. 64, 65. if he accepts the Rent of the Assignee, having notice of the Assignment, this shall bar him of his Entry for the condition; otherwise if he had no notice of it, if he accepts of the Rent, where no Rent is due, this is no bar, as if the Lease was before by him avoided; as to the pleading here, (being that he accepted the Rent of the Assignee) (Sciens) him to be an Assignee, this is not good, as it is resolved, Coke 4 pars, fol. 18. b. in Sir Gilbert Gerrards case, in an Action upon the Case, for that the Dog of the Defendant, had bitten the Cattel of the Plaintiff (ipse sciens canem suum ad mordendum oves consuetum) this is not good, for that the (Sciens) is not traversable, nor yet any direct allegation; and with this agrees 28 H. 8. Dyer, fol. 25. & 28 H. 6. fol. 7. in Cluns case, Coke 10 pars, fol. 128. that where a rent is reserved, at Michaelmas, or 28 days after, the Lessee hath an election, and if he pay it not at the Feast-day, then this is not due till the second day, and it shall then be as a reservation at the second day: Here in this Case, the rent was so reserved, and not paid on the Feast-day, but after the Feast-day, he accepts the rent before the second day, and so before any rent due, which is no bar.

Coke 4 pars, fol. 120. &c.
27 H. 8. f. 15.
Coke 3 pars, fol. 64, 65. &c.
Coke 4 pars, fol. 18. b. &c.
28 H. 8. Dyer, fol. 25, &c.
Coke 10 pars fol. 128. &c.

Coke. Many things are considerable in this Case.

First, It is a very plain case, that this Covenant and Grant here on the part of the Lessee, that he will not alien but to his Wife for her life, and after, &c. that this is a condition or defeasance, and by this he hath a conditional and a defeasible Estate.

As to the Second point, The condition being, that he will not alien to any one but to his Wife, &c. upon pain of forfeiture; by the first alienation, this party to whom the same is made, hath now an absolute Estate in him, and to his Estate no condition can be annexed, by the words of the first Covenant.

Thirdly, As to the pleading of the acceptance of the rent of the Assignee, with a (Sciens) this is not good; by 22 E. 4. fol. 40. a Plea not issuable, is not good, but this is here confessed, that the alienation was made, and so the matter of the (Sciens) is at an end.

Fourth, Then as to the acceptance, de redditu prædicto; as to this, when the matter in fait is doubtfull, as here in this Case it is, for it may be he entred after the acceptance, and it may also be that he entred before; in such Cases, unto inevitable averments, we must and will give way, so was it in Arundels Case here, and in the Earl of Salisburies case: Nuper Episcopus, this is a strong inforcement to the Court that he was dead, without any special averment; and this was a stronger case then the Case now here in question, for here it is impossible to have this to be redditus prædictus, if he entred for a breach before his acceptance; and as to the (Sciens) this is to no purpose, for he accepts this rent of him as an Assignee, the conditional Estate cannot be here added to the Assignee, for he by the Assignment made unto him hath an absolute Estate; if the Estate had been here made by the Lessee to his Wife for her life, and for the residue of the terme to his Brother, this then had been void as to his Wife, and good presently to his younger brother, and this is very clear; it is a difficult thing for the Lessor this way to avoid this Lease, being for 91 years, and so this was adjourned to another time, with directions to insist onely upon this, his acceptance (De redditu prædict) which is the chiefest matter, for without all question by this Covenant the Lease is conditional, and by this defeasible.

Arundels case &c.

Term. Pasch. 13 Jac. B. R. &c.

Afterwards (S.) Termin. Pasch. 13. Jac. B. R. this matter was moved again, and argued by Coventry and Whitlock, and the former points insisted upon, and by them much debated.

Coke. Clearly if the condition had been to enfeoff I. S. of Black-Acre, and I. D. of White-Acre, if he doth enfeoff I. S. of Black-Acre, this is not good unless he enfeoff the other also: It was urged, that a Devise may be applyed to the word assign, and within the meaning of the same, as 31 H. 8. Dyer, fol. 45. Parry and Herberts case, a Devise within the word of Assignment, and 14 Eliz. Dyer, fol. 309. Winters case, a Devise and Assignee within the Statute of 34 H. 8. of Wills, and if it may be performed in sence, it is sufficient, as 4 H. 7. fol. 4. If a man be bound to make a sufficient Estate to his Wife, for her life, there by Fisher he may make a Lease for a Moneth to a Stranger, the remainder to his Wife, and this is good.

31 H. 8. Dyer fol. 45. &c.
14 Eliz. Dyer, fol. 309. &c.
4 H. 7. fol. 4. &c.
Perkins, fol. 108. &c.

Coke. The opinion of Fisher in 4 H. 7. is no Law; also if a Devise be made to a Moigne for life, the remainder over this is a good remainder, as Perkins, fol. 108. plac. 567. But if a Lease for life be made to a Moyne, the remainder over both the Estates are void, by 9 H. 6. fol. 24. & Perkins fol. 109. placito 568. and Plowdens Commentaries, fol. 35. in Colethisa's Case. As to the Assignment, when the first who assigns is not restrained, the second shall not be restrained, if the condition was, that the Lessee nor his Assignees should not alien without License, if the Lessor do license him to alien to one, this first Alienee shall not be restrained from aliening afterwards, for without all question, discharge the condition as unto the first man, and the same shall be altogether discharged.

Dodderidge. As to the words of the Covenant, that he will not alien upon pain of forfeiture to any, Nisi uxori ejus durante vita naturali, and for the residue to one

one of his Children, vel uni fratrum juniorum, this is Discretiva sententia, & alternativa.

Coke. The sole Point rests upon the construction of this word (vel.)

Dodderidge. If this be a restrictive Clause, if doubtfull, then without all question we ought to make such a construction thereof, as shall tend to the upholding of the Lease, and this which is done not to be a breach of the condition.

Coke. If a Lease be made to one, if he and his Wife, or his Children, shall so long live; it was adjudged in Coxes Case, that this word, or this particle (or) as here it is, did dis-joyn all; when the (vel) as in this principal case here, comes in the end of the sentence; there, in Coxes case, the Lease was made to one for life, and the life of his Wife, or of his son, he and the son dyed, it was adjudged in both Courts in the C. B. and in this Court, that the Term should not be determined, but that the Wife should have and enjoy the same, and upon this reason onely, (S.) That the (vel) there dis-joyned all, and made it several; and so in this principal case here (as thus advised) I think the Assignee of the Lessee shall hold his Lease, this assignment here being no breach of the condition; and so this case was further adjourned, for the Court to be better advised herein. Coxes Case.

Afterwards, (S.) Termino Trinit. 14 Jac. B. R. this Case was moved again, and argued. Term. Trin. 14 Jac. B. R this case moved, argued and adjudged for *Fox* the Plaintiff and Assignee.

Coke. In this case I hold the Law to be clear, and without any question, that first this (vel) here, gives no election at all to the Lessee, to alien the whole entire term unto his Wife, or to one of his younger Brothers, but the first alienation ought to be to the Wife for her life, and the (vel) here shall be for the distribution of the residue of the terme, after the death of his Wife, then to his children, or for default of such, to one of his younger Brothers, this is to be of the residue of the term: And also in regard that he cannot make an alienation to his Wife, this ought, by construction of Law, to be such an alienation as he may make unto his Wife, and this to be by his Will, but not otherwise: Also there is no question to be made of it, that when he hath alienedto one, being a person within the limitation of the condition, that this Alienee shall not be afterwards bound by this condition, but he is now at large to alien and assign this to whom he will, he being not an Assignee within the condition to be bound by it, but this is to be intended of an Administrator, an Assignee in Law, and so it is resolved in Dumports 4 pars, before remembred; but there is another matter in this case, which makes it very clear, (S.) his acceptance of the Rent of the Assignee, (Sciens) knowing him to be an Assignee of the Estate, and so a bar of his Entry, and so without saying any more at this time, the whole Court agreeing with him herein, and therefore the rule of the Court was, that if better cause was not shewed by the Defendant, by a day given, that then Intretur judicium pro querente. Coke 4 pars, &c.

Coke. In this we go with the long continuance of possession, by vertue of the Lease so made as aforesaid.

Afterwards (S.) on the same day given, this matter was moved again, and argued by both sides, but principally to the point of the acceptance, that it was no rent, being accepted before it was due.

Coke. After Michaelmas, being the first day of payment, the Lessee also hath an election to pay his rent before the last day, if he will, or otherwise he may choose whether he will pay it or not, till the last day; and so is Cluns case to be understood, he may pay this rent on Michaelmas day in the morning, if he will, here if he pays this rent by their agreement, at any time before the last day of payment, this is a good payment, and shall be a good Bar in an Action of debt. Coke 10 pars fol. 128. &c.

Croke Justice. This acceptance is a good bar in Debt, if he receives the rent after the first day, and before the last day; or if the Lessor, after the first day, and before the last, doth release unto him, this is a good release, and a discharge of

28 Eliz.C.B. &c. the rent, and so was it resolved in 28 Eliz. in the C. B. in Eide and Tyrrels Case.

Coke. If the Lessee pay his rent three days after the Feast, afterwards, before the last day, the reversion is granted away, this Grantee shall not have the rent.

Barwicks Case. Coke. In Barwicks Case, here it was resolved that the rent was due the first day.

Dodderidge. All this proves directly that the rent was due the first day.

Coke. It is due the first day, at the election of the Lessee, but not otherwise.

Dodderidge. The Lessee, by his not paying of the rent the first day, hath not by this lost his Election, for he hath Election still at any time after, before the last day to pay the same, if he will; but this is the difference to be here observed, after his failure of payment of his rent the first day, he is not then compellable to pay this rent before the last day, but he may well pay the same, if he so will, and this shall be a good and a legal payment.

Coke and Dodderidge agreed Barwicks Case to be good Law.

Cluns Case. fol. 128. &c. Coke. The rent is debitum, the first day, but not payable on this day, unless the Lessee will, this being in his election: It was then urged by Serjeant Chibborn, upon Cluns Case, that after the first day is past without payment, it is not then due until the last day, as there it appears, fol. 128.

Dodderidge, If the Book be so, this was never our meaning in the argument of that Case, for we did then intend, that after the first day was past, without payment then it was not due till the last day, (S.) not due by compulsion of the Lessor, until the last day, but it is in the election of the Lessee to pay his rent before the last day, if he will, and the Lessor ought upon his tender to receive it and so we did then, and still do now so hold, at this time, the Court did all clearly agree this difference, that after the first day past, without payment of the rent, it is then in the election of the Lessee to pay this at any time he will before the last day, he may well pay this within the time, but he is not compellable by the Lessor to pay this until the last day this is the difference, and in this manner ought Cluns Case to be understood, and not otherwise (S.) that by such reservation after the first day past without payment, the Election should be taken from the Lessee (which is not so.) The whole Court agreed Barwicks Case for good Law, for there it was no reason that the Lessor should lose his rent, where the last payment was out of the term, and so the Court all agreed in this Case, that if there was a breach of the Condition by this assignment, yet the acceptance of the rent afterwards of the Assignee, is a good bar, and so the Plaintiff being the Assignee, hath a good title to this Lease, and therefore upon the whole matter the rule of the Court was, Quod judicium intretur pro querente.

Judgment for the Plaintiff, *per curiam.*

The

The KING against *Briggs.*

IN a Quo warranto, for him to shew by what Warrant he claimes to have a Forrest. He puts in his plea, and claimed to have a forrest & a Court of Swanny-motes, and this he claimed by a Charter granted in the time of King H. 2. (but shews it not.) Yelverton the Kings Sollicitor, moved the Court, that he might have sight of the Charters, by which he claimed the same.

A *Quo Warranto* for clayming a Forrest. Charter of King H. 2. 1 Ro. 2. 194. 2 Ro. Rep. 46. 189. Poph. 150.

Coke chief Justice. No Subject can have a Forrest.

Dodderidge Justice, agreed with him herein, and the reason of this is because that a Justice seat, is incident to a Forrest, and none can make a Justice in Eyre, but the King.

Coke. It is a chase, and not a forrest, being in the hands of a subject, a Swannymote Court, a subject may have, but no subject can have a Forrest, because none can make a Justice in Eyre but the King.

Dodderidge, Prince Henry, who is dead, had a Forrest granted unto him, with a power also to make a Justice in Eyre, and licence to keep Courts; and the Duke of Lancaster also had such a grant, with speciall Commission, to make a Justice in Eyre, for keeping of Courts.

Coke, To make a Justice in Eyre, and such like, these are Jura regalia.

Briggs here pleads a Patent, of King H. 2. and intitles the Earl of Shrewsbury; and shews the Charter (prolat. hic in curia.)

Yelverton, moved the Court for the King that he might have sight of the Charter, which the Court granted to him, because the Defendant claimes his Interest by it; the Charter being viewed, was to have a Forrest within twenty Manors, and he farther shewed the confession of Sir Francis Bacon then Attorney Generall, of the same; the Court upon this answered, that notwithstanding this Confession of the Attorney Generall, we will not yet give any Judgment in this Case, against the King; for no such Judgment, in any Case is to be given, as in this, the same being to be perpetuall.

Coke. Here is a Salvo, for the King, Salvo jure; the whole Court said; We will not here give way to such a Confession; but this matter shall be tryed.

Coke. If he have no allowance, for Justices in Eyre, this Charter is of no force.

Bridgeman. Here was no Usage, at any time, of any Forrest, nor of any Liberties of a Forrest.

Coke. Briggs, I think will relinquish this, and so this case was adiourned, for farther argument herein.

Afterwards (S.) Termin. Hillar. 12. Jac. B. R. this matter was moved again; and it was urged, that he claimed a Forrest by the Charter of King H. 2. the which he had shewed to the Kings Attorney Generall, and that he had satisfyed him therein.

Term. Hil. 12. Jac. B. R. this matter moved again.

Hutton Serjeant, Moved the Court to have Judgment for Briggs, upon the Confession of the Kings Attorney Generall.

Yelverton the Kings Sollicitor, informed the Court, that this Charter of King H. 2. being time out of mind, and no usage at all laid, to be in all this time, therefore Judgment is not to be given upon this Confession.

Coke. I have observed, that I was Attorney Generall, longer than any one hath been these 100. years, (unless it was Gerrard) and for a note worthy of observation, I never yet heard of an Attorney Generall of the King, to die in the time of his Attorneyship. As to the Confession here of the Kings Attorney, this will

will much satisfye us, for matters in fact, (if the same doth not concern the common Wealth) as if one be presented, for keeping of an Alehouse, without Licence, and the Attorney General doth confess, that it is an Inn, yet we will have this tried: and for other common matters in fact, we will give credit to his confession. But as to matter in Law, his confession shall not binde us; and this difference I have here often learned.

Dodderidge. These 500 years, this Charter hath had no allowance, nor any manner of usage of this Forest ever had as yet, by force of this Charter, and since the time of King H. 2. many a cold wind hath blowen, and many Forests have been since disforrested, and if he cannot shew some manner of usage of this, he cannot have it.

Coke. A common Person may have a Chase, but not a Forrest, for he cannot make a Justice in Eyre, and therefore no common person can have a Forrest; but he may have a nominative Forrest, and Swanymotes.

Dodderidge. Pickering Duke of Lancaster, had a Forrest in his hands, but was not able to make Justices in Eyre, (unless by speciall Commission) and so had the late Prince Henry.

Coke, Agreed with him herein.

Croke Justice. By the Statute of Charta de Foresta, omnes Foresta videantur and many of them were disforrested.

Coke and Dodderidge. A Swannymote Court, doth not make a Forrest; but a Justice-seate onely makes it.

Coke. That which cannot have commencement, but by Charter; this ought to have allowance within time of memory, by matter of record; but if by prescription, he may stand upon it, and this is cleare; and so this was adjourned till a further time, to have the Record in Court, and to be Argued.

Term. Hil. 12. Jac. B. R. this matter moved again.

Afterwards (S.) Termin. Pasch. 13 Jac. B. R. this matter was moved again, and it was shewed for Briggs, that King H. 2. was seised of Cleeve, which extended it self into 21 Townes, and by his Letters Patents 30 H. 2. did grant this Forrest unto Richard Clifford; afterwards the same came to the Earle of Shrewsbury, and so by mean Conveyances, the same came to Oliver Briggs, who dyed seised, and from him the same did discend, and came unto Humphrey Briggs, the now Defendant, in the Quo warranto, who pleads all this matter, the which plea, the Kings Attorney General hath confessed to be true.

11 H. 4.

Bridgeman, Notwithstanding all this prayed Judgement for the King; upon the insufficiency of this plea, by 11 H. 4. the court ex officio ought to give Judgement for the King, in a Quare impedit, where a title appears for him, though shewed by a Stranger; a fortiori here in this case, where it is by the shewing of the Party himself. It was urged, that the plea of the Defendant was insufficient, and that for two causes. 1. The Grant is void, and not to be pleaded, being out of time of memory, in the time of King H. 2. which cannot be tryed; also a grant of H. 2. not pleadable, if he shew not an allowance of the same in Eyre, this appears Coke 9. pars. fol. 27. b. 28. a. b. in the Case of the Abbot de Strata Marcella, but admitting the grant good, if the King grants a Forrest, nothing doth pass by this, but the soyle, no liberty, they are magnalia corona, and not to be transferred, in such a manner to a subject. The Earle of Lancaster hath a Forrest, but no book of it: The Duke of Lancaster and Durham have jura regalia, and in this regard have a Forrest, but not any other subject; and therefore his title here is insufficient, he claimes here a speciall kind of Forrest afterwards, the Defendant disclaimed in all the Courts, but in the Swanymote, and attachments, but as to this, the same is repugnant, because he doth first claim here a Forrest, and then all these, ex consequente, and so here appears no title for the Defendant, and therefore Judgement ought to be given against him for holding of these Liberties so long, without any Warrant, or power so to doe.

Coke 9 pars. fol. 27. b. 28. a. b. the Abbot *de strata Marcellas* case.

Coke.

Coke. If you have a Charter, before time of memory, you cannot plead this, without shewing some allowance of it in Eyre, if the same be of things granted, in point of Charter; but of things in point of prescription, there you need not to shew a Charter, but in such a Case, usage time out of minde is sufficient; as for Leets, Wrecks, and Strayes, prescription for them is sufficient; but yet, if neither he, nor any of his ancestors ever had them, but he claymes them by a Charter granted in the time of King H. 2. and shewes forth this Charter, this is not good, because this Charter cannot be pleaded; if the King hath a Forrest, and grants this unto a Subject, this grant is not merly void, but he by this grant shall have a Chase, but no Swannymotes. 26 Liber Assisarum, fol. 131. placito 60. the case of the Honour De Pickering, to which a Forrest was appendant, the King grants the Bailiwick, to one in fee, rendring rent, and after grants the Honor, with the appurtenances, to Edmond Countee de Lancaster, &c. If the King grants a Forrest to one, and also grants unto him, that he shall make a Justice-seate; here he shall have a Forrest, by such a speciall grant, with this expression in his Charter, but not otherwise, a man may have a Chase by prescription; but if it be by Charter not good.

26 Liber. Assisar. fol. 131, &c.

Dodderidge Justice, Demanded whether he pleads this Charter, pro lat. hic in Curia, and sealed, It was answered, that he did so. Dodderidge. The Earl of Oxford had such a Charter of the grant to him, to be Chamberlain of England, in the time of King H. 2. and this onely under seale, and no other, that ever I have seen.

Coke. Officers of the Forrest, Verderours, Regardours, &c. and divers other things, are incident to a Forrest; the liberty of a Chase, comes of a free Warren, the Statute of Charta de Foresta, reaches unto Forrests made by H. 2. he may here plead the Charter of William the Conqueror, or of William the Confessor, as well as this of King H. 2.

The Stat. of *Charta de Forresta.*

Dodderidge. This is a very strange Case, that a Confession should be here by the King's Attorney Generall, he having no other conveyance to shew for this his clayme, but onely this Charter of H. 2. a Forrest here this cannot be, for he hath waived all the Principall Courts of a Forrest, as view of Regardors, before a Justice-seate; the Swannymote, and Attachments do not make a Forrest; the last Prince Henry had two or three Forrests.

Coke. The Attachment and Swannymote Courts are onely to present Agisters, Regardours; the Justice in Eyre, is to do nothing of himself, but upon their presentments, by speciall words, the King may passe a Forrest to a subject; but no man of himself, can make a Chief Justice, without a Justice-seate, the Court of Swannymote, and Attachments, is but of small, and to little purpose; and I do very much marvail at this Confession, the like to which I did never hear, he claymes here a Forrest, and a Chase within it, and a Chase he cannot have, clearly without a Prescription, and so a day was given unto him, to shew his Charter to the Court.

At another day Sir Francis Bacon the Kings Attorney Generall, did recite the Case, and said unto the Court, that between these (S.) ubicunque fuerimus in Anglia, & Attornatus generalis, there is some affinity. In the time of King H. 2. the first Charter was granted of this Forrest, and there have been divers Charters of confirmation since; and Briggs here, conveys title to himself under the title of the Earl of Shrewesbury, two Acts of Parliament have been made, the one in King E. Fourths time, and the other in King H. 8. that a subject may have a Forrest, but not a Justice-seat, for this is Regal, but it is a Forrest, and hath Swannymotes. I have been very ill used in this Case, to have this put on in this manner; after that I have made a Confession, of the claime, and no Kings Attorney hath been used so for these 500 years; and I will hereafter take a course, that I will not be so used again. I have two Powers in me, the one of Prosecution, the second of Non prosecution, and of these two I do not know which of them is the greater

greater, the second is daily by the King's speciall directions to me, whether in such cases I shall proceed for him, or not, here in this case I have entred for the King a Non pros. and confessed the plea, will you now have a Judgement for the King, when as he himself will relinquish it.

Coke. A Non Pros. this is to be entered, but we will be advised of the Judgment. It is a plain case, that Judgement ought to be given for the King, if one claimes a thing time out of minde, and doth not shew any usage of it, Judgement ought here to be given for the King; and it doth not appear here unto us, any confirmation to be made; the plea here is, hic in curia prolat. the Charter in the time of H. 2. I never did see but one of them in my time, if the King had granted, totam illam forrestam nostram, shall the Patentee have this, unless he have a warrant to make a Justice-seate, he shall not have it, but onely a Chase, and so it hath been twice adjudged, that he shall not without speciall words: A Swannimote, without a Justice seate, is nothing, of no force at all.

Dodderidge. You cannot, nor ought you to confesse, but onely matters in fait, and this may be good, but your confession is of no force, for matters in Law.

Coke. You confesse, this is ministerall, but we are to give Judgement, and this is judiciall. Curia. The Non pros. shall be entered, and we will be advised of the Judgement.

Fitz. Nat. Br. fol. 241. A.

Coke. The statutes for Nisi prius shall not binde the King, unless that the King, or his Attorney, will give way unto it, as appears in Fitz. Nat. Bre. fol. 241. Letter A. and so it was when I was Attorney, and this is very clear, and so by the Rule of the Court, this matter was further adjourned till the next terme, to have the Charter brought in Court, in the mean time the same rested upon a Curia ad visare vult. afterwards (S.) Termin. Hillar. 17 Jac. B. R. this case was moved again, and then long argued touching the validity of the Charter pleaded, by Mr. Jenkins for Briggs.

Term. Hil. 17 Jac. B. R. this case moved again and argued.

Dodderidge. Without all question, a subject may have a Forrest, but the same then ought to be, by other words than are in this Charter; but when you disclaim in a Justice-seate, farewell then to your Forrest.

Mountague chief Justice. A Forrest hath such immunities which are prerogatives royall; and this is the reason why a subject cannot have a Forrest, but a Chase; the Statutes which make mention of Forrests, they are but Nominall, not reall.

Dodderidge. A Justice-seat, the chief subject of a Forrest; the Court all clear of opinion, that one cannot have a Forrest without a Justice-seate, for that this is the chief thing that makes a Forrest.

Dodderidge. By apt words a subject may have a Forrest, as to have a Justice-seate.

Mountague. He cannot have a reall Forrest, but onely nominall, for the liberty of wilde beasts; the Abbot of Whitbey, in a Quo warranto brought against him, did claime to have a Forrest; search into all the Presidents, of Quo warrantoes, whether any one did ever Justify, by way of Plea, to have a Forrest, you shall finde none; ancient Charters are to be taken according to ancient usage; the whole Court clear of opinion, that upon his Disclaimer here in a Justice-seat, Judgement must needs be given against him, for the Forrest. For that he cannot have a Forrest without a Justice-seate, and so the same was by the Court adjourned to another time, for further Argument herein, and the same not moved again. Perceiving how the opinion of the Court was against Briggs, upon his clayme, and Disclaymer.

Adjorned, but no Judgment given. Yet the opinion of the Court against *Briggs.*

The

The KING against Sir *Anthony Mildmye.*

Upon an Indictment for a Premunire, upon the Statute of 27 E. 3. capite 1. for a high contempt, being one in the Commission of Sewers for the County of Northampton, for committing of one William Hetley to prison, without Bail, because he would not release a Judgement he had against some of their Officers, for distrayning of his Cattel. Sir Ant. Mildmye, having gotten his pardon of the King for this.

An Indictment upon the Statute of 27 E. 3. &c. 1 Ro. rep. 190.

Harvey Sergeant moved the Court to suffer him to plead his pardon by his Attorney.

Coke chief Justice, We will not here meddle with the pardon, but we will ayde you, by another way, we will estreate the fine imposed upon him, into the Court of Exchequer, and there he may plead his pardon, the which Court, is the proper Court, and center for all such matters; afterwards, (S.) Termin. Pasch. 13 Jac. B. R. this matter was moved again, touching Sir Anthony Mildmye, who was the chief in the Commission of Sewers, and did not appear in Court, according to the warning given him, and therefore by special directions of the Court, an Indictment was drawn against him upon the Statute of 27 E. 3. cap. 1. for a Premunire for his illegal acting as a Commissioner, and committing one to Prison, without baile, because he would not discharge a Judgement given for him in this Court, against some of the Commissioners Officers, and he being fined for this his offence, procured a pardon from the King, and now moved the Court again, by his Counsell, for the allowance of his Pardon, the Pardon was read, and viewed by the Court.

Termin. Pasc. 13 Jac. B. R. &c.

Statute of 27 E. 3. cap. 1.

Coke chief Justice. These are the words of the Pardon, (S.) Omnes, & singulas transgressiones, offensiones, & contemptus, he being in a Premunire, the King doth pardon and release all contempts. Whether by this Pardon the Judgment in the Premunire is released, by the Judgement in the premunire, and for his contempt, he is to lose his Lands, goods, liberty, and to be out of the King's protection (which is the worst of all, before the Statute of 5 Eliz. cap. 1. any man might have killed one, being attainted in a premunire, as appeareth by 24 H. 8. Brookes Cases, fol. 9. placito 53. So that this is a contempt with a witness: he demanded, whether by this Pardon, of contempts, and offences, a premunire be pardoned, or not; because that by the Judgement, it shall be done with him, as with an enemy of the King. Divers Presidents there are in the time of King E. 3. Of such manner of Pardons, we have now here singled out Sir Anthony Mildmye, because he would never appear here before us, so that we might have fined him for his offence, as we here did the rest; this is a good and a leading Case, of which all are to take notice; the case here being, that Hetley brought an Action of trespass here for taking of his cattell, in this he recovered, and had his Judgement, afterwards Sir Anthony Mildmye, and the rest of the Commissioners of Sewers, summoned him before them, by their orders, checked him for what he had thus illegally done, and committed him to Prison, without baile, untill he would release and discharge this Judgement, which offence is a Premunire, as to the words of the pardon, contemptus, offensiones, & transgressiones; these are onely the words, in all the Presidents of former times, and this, the King hath been pleased now to pardon, when Judgements are given here, the matter then ought to be

Statute of 5 Eliz. cap. 1. &c.

to

to be in peace, the same not to be avoided, but by Error, or Attaint; but the King hath now pardoned this great offence, and so the pardon was read in Court, and he prayed allowance thereof; the Court, after some advice given him to be more careful for the future, and to take heed of running into such high offences, allowed of his pardon.

The Pardon allowed of *per Curiam.*

Bradstone, against the High-Commission COURT.

Bradstones Habeas Corpus and the Return. Mo. 840. 3 Bul. 109. 1 Ro. Rep. 110. 1 Ro. Abr. 305. Stat. of 2 H. 4. cap. 15. Mich. 5 E. 4. B.R.Rot.143. *&c.*

IN a Habeas Corpus, Bradstone being committed by the High Commission Court, for not giving of Alemoney to his Wife, was brought into Court, by the Warden of the Fleet, upon a Habeas Corpus granted, the return of the Warden of the Fleet was read, the same being, that for Causes Ecclesiasticall, and by force of the Statute of 2 H. 4. capite 15 he was detained in Prison till cause shewed; and for Adultery. It was urged, that the cause of his refusall was, because he feared to be intrapped by them, in his Oath; having entred into a Bond to Doctor Edwards, not to use his Wife otherwise than well.

Coke chief Justice. There was a famous Case, and it was John Kesar's Case. Mich. 5 E. 4. B. R. Rott. 143. Markham being then chief Justice, B. R. Kesar, the Executor of John Kesar, was sued by Isabel Stevens for a Legacy given unto her, by Kesar, upon this suite Kesar was excommunicated, and afterwards, walking in his ground, and viewing of his Corne, how it growed, and came on, he said, that he was excommunicated by man, and not by God, for he thankt God for it, that his Corne did yet grow as well as any of his neighbours in the Parish, upon this, the High Commission Court did summon him before them, for using these words, and did commit him for Heresie, upon the Statute of 2 H. 4. capite 15. he was brought hither by a Habeas Corpus, and by Markham and the Court, he was here bailed, for that his saying so was no Heresie. 10 H. 7. fol. 17. a. b. & 18. where one who dwelt in the Parish of Saint Dunstone, said, that he ought not by the Law of God, to pay his tithes to his Curate; for these words the Bishop of London did commit him, this depended, untill 14 H. 7. and upon his Action of faux Imprisonment brought, it was adjudged, that this was out of the Statute of 2 H. 4. cap. 15. for that upon this Statute the heresie ought to be in a fundamentall matter of faith; otherwise they are not to commit any upon this Statute. As to this Case here of Alemoney, for this clearly the High Commission Court, are neither to fine, nor yet to imprison. And as to his being bound unto them in a Bond, they cannot examine him upon Oath, on Articles, thereby to make him to forfeit his bond, and therefore he ought not to answer to them herein, and this was one Gowens Case, here in the time of Wray Chief Justice, and he had a Prohibition granted, and it was there resolved, that in such a case he ought not to answer. In this principall case Bradstone was bailed by the Court.

Statute of 2 H. 4. c. 15. 10 H. 7. fol. 17, 18.

Dodderidge. For what cause should they take such a Bond to themselves, will not a sentence there serve their turn?

Coke. The Case in 14 H. 7. before remembred, is not in the book at large; but, Mr. Brownelow the Prothonotary of the C. B. did shew this record to me, that it ought to be apparent matter of Heresy, otherwise they are not to imprison

prison, upon the Statute of 2 H. 4. capite 15. the Court of Requests do use to take Bonds, to bind men to perform the Orders of the Court, but here, we do not so, nor in the Starre Chamber, for then the party should be double charged; no ground they have for taking of such Bonds, this is an unreasonable usage. 2 H. 4. cap. 15.

Coke then said unto Bradstone, being bailed till the next Term, I say now unto you, as Markham did unto Kesar; go unto the Bishop of London, and submit your self unto him, and use your Wife better hereafter. *Bradston* was bailed by the Court.

Glanvile Plaintiff, against *Courtney* Defendant.

IN an Action of Debt upon a Bond, for not payment of Money for certain Jewels that were sold, a verdict, and judgement here given for the Plaintiffe, the Defendant preferred a Bill in the Chancery, and there obtained an Order for stay of Proceedings at Law, and for some contempt in not performing of the Order, Glanvil was committed to the Fleet, and brought hither by the Warden of the Fleet, upon a Habeas corpus. An Action of Debt upon a Bond. 1 Ro.r.2.111. 219. Mo. 838. 2 Cr. 343. Hob. 115. 1 Ro. Abr. 381.

Coke chief Justice. I dare say, that this Order was not made by the Lord Chancellor, nor by the Master of the Rolls, which now is, after a Judgement given here. Termin. Pasch. 5 E. 4. B. R. Rott. 35. an Action of trespasse was brought against Simon Moore at Canterbury; one William Nase appeared for Moore, a recovery was had of 400 l. 13 s. 4 d. A Writ of Error brought here, and the Judgement affirmed, the Defendant afterwards went into the Chancery, and there complained, resolved here, that they ought not there to meddle with this matter, but they are to go to the Parliament, and to have remedy there, and if they there find, that the Judgement was obtained by fraud, they may then there avoid the Judgement, but not in Chancery; and Termin. Mich. 39 & 40 Eliz. Thomas Throgmorton Executor of Sir Robert Throgmorton, against whom Sir Moyle Finch had a Judgement in the Court of Exchequer, upon a demise made of the Mannors of Runston, &c. purchased by Sir Moyle Finch, who in an Ejectione firme, had Judgement, and the same affirmed, in a Writ of Error, afterwards the other exhibited his Bill in Chancery, for relief in equity, supposing this to be upon a Morgage, that he had delivered the money to his servant, for to pay for the redemption of his Land, and that he run away with the money, and that he tendred the same again; to this Sir Moyle Finch pleaded his recovery, Judgement and affirmance of this Judgement in a Writ of Error; and demanded whether after all this, they would there examine this matter again, this case was then referred to all the Judges of England; and I then argued the same, the Counsell said, that they would not there shake the Judgement, but would onely bridle the corrupt minde of Sir Moyle Finch; In this Case, it was resolved, that if he had matter in Law, and also in Equity, if he will first go to the matter in Law, that afterwards he shall not resort unto his matter of Equity, and this was clearly so resolved by all the Judges; but how this case here is, we yet know not, we will not suffer our Judgements to be shaken, in other English Courts, the Lord Chancellour hath now said in the Chancery, that he will not meddle there, in matters, after Judgements given at the Common Law; we will baile the party here, till the next Terme. It appears not here unto us by the returne, Termin. Pasc. 5 E. 4. B. R. Rot. 35. Trespass against *Moore*. Term. *Mich.* 39 &c.

for what cause he was committed, Whether for any contempt or otherwise. We will alwayes protect the Law of the Land, and so by the Rule of the Court, Glanvil was bailed till the next terme, but he presently to pay the Warden of the Fleet, for his Lodging and Dyet.

Term. Trin. 13 Jac. B. R. &c.

Nota, that afterwards, (S) Term. Trin. 13 Jac. B. R. this Case of Glanvile was moved again, who being bailed by the Court, was presently after his delivery taken again, and committed to the Fleet, by the Lord Chancellour, brought then again hither to the Barre by a Habeas Corpus, and the return read, the same being, that Commissus fuit 7 May, 1615. per mandatum prænobilis viri Thom. Elesmore, dominum Cancellarium Angliæ, & hæc est causa, A day was given, for the mending of this return afterwards.

19 Eliz. John Nichells case. *Habeas corpus.*

Coke chief Justice. We have all agreed, this return to be bad, and insufficient, and we are led unto this by a President, in the time of the Lord Keper Bacon, terminis terminantibus, which was 19 Eliz. being John Nichells Case, upon a Habeas corpus; granted in the time of Wray chief Justice here. Upon the return, the Warden of the Fleet did return in this manner (S) Certifico quod commissus fuit 16 Februarii, & per Nicholaum Bacon Custod. magni sigilli Angliæ, & hæc est causa, and upon this returne, he was discharged, & traditur in ballium, and so here, by the Judgement of the Court, the Warden of the Fleet was discharged of him, and Glanvil committed to the Custody of the Marshall, and bailed, till the next terme, according to the resolution of the Court, and this direct President in point.

Glanvil bailed again, *per Curiam.*

Butler Plaintiff, against *Fincher* Defendant.

Entred Trin. 12. *Jac.* B. R. *Rott.* 438.

An Action of trespass and ejectment. 1 Ro. 2. 229. 1 Ro. Abr. 829.

IN an Action of Trespas, and Ejectment; upon Non culp. pleaded, the Jury found a special verdict, and upon the verdict, the case appeared to be this. The Deane and Chapter of Worcester, were incorporated, by the name of the Deane and Chapter, of the Cathedrall Church of CHRIST, and the blessed Virgin Mary of Worcester; they made a Lease for life, by the name of the Deane of the Cathedrall Church of CHRIST, and of our blessed Lady the Virgin, of Worcester, and the Chapter thereof; habendum, from the day of the date, and made a Letter of Attorney to one to make Livery, secundum formam chartæ, the Attorney makes Livery the next day after, the Jury finde the Lease for life, made the 25th day of, &c. and that the livery by the Attorney was made; post vicessimum quintum diem predictum, the chief point considerable, and insisted upon in this case was, whether this Lease thus made, and executed, was good, or not.

Bridgeman

Bridgeman for the Plaintiff (who claimed under this Lease) that this Lease was good; In this case, it is first to be considered, whether here be any materiall misnomer of the Corporation, or not; and then, whether this Livery, thus made by the Attorney the day after, be good, or not. As to the misnomer of the Corporation, here is no materiall misnomer, and this is proved by 11 Eliz. Dyer, fol. 278. where the Incorporation was by the name of the Deane and Chapter, Ecclesiæ Cathedralis sanctæ & individuæ Trinitatis Carliensis, they made a Lease by the name of Decanus Ecclesiæ Cathedralis sanctæ Trinitatis in Carlisle & totum capitulum, de Ecclesia prædicta (individuæ) omitted, and this there held to be a good Lease, notwithstanding this variance, which is not in the substance of the name, and this is over-ruled, Coke 10. pars, fol. 124. a. b. in the Case of Linne Regis; to be no material variance, to avoid a Lease. As to this matter of the misnomer, and variance, being from the name of the incorporation, the whole Court over-ruled this, that the Lease was good, notwithstanding this variance, being no variance in substance. As to the second point, whether this be good, in regard that the Livery was made by the Attorney the day after, if the same had been made the first day, then the Lease had been void clearly, as appears Coke 2. pars fol. 55. in Backler, and Harvies case, and Coke 5. pars fol. 94. b. in Barwickes Case, and that for these two Reasons, 1. That because an Estate of Free-hold cannot begin, in futuro. A second Reason, if this should be good, then the Lessor should have a particular, and a lesser estate, then he had before, in the Land, and that by his own act, and without any donor, which shall not be, for the great inconvenience of it; but by making of this Livery, the day after, all this inconveniency is avoided.

11 Eliz. Dyer fol. 278. placito. 1.

Coke 10. pars. fol. 124. in the case of *Linne Regis.*

Coke 2. pars. fol. 55. *&c.*

Bracton well saith, Charta est vestimentum donationis, in 1 H. 5. fol. 8. Land was given to a man, and to Margery his Wife, by a deed, and to the heirs of their two bodies begotten, and makes Livery, here although the name of the Wife was Margaret, yet the grant is good, and the Wife, and the heires, shall be inheritable by force of the taile, the reason, because the Livery makes the Estate, and not the Deed; for that Livery of seisin, and the making of it, is principally to be regarded. Mich. 38. & 39 Eliz. in the C. B. Rot. 620. Browne, & Tyrreys Case, a man dyed, being seised of land, held of the King, having an heire. It was found by a false Office, that he dyed without heire, the heire afterwards tenders his Travers to the Office, and hanging this, he makes a Feoffment in fee of this land; and a letter of Attorney to make Livery, afterwards upon the Travers, it was adjudged for him, and the Attorney then made Livery, this was adjudged in the C. B. to be good, and yet at the time of the feoffment, and letter of Attorney made, he had but a right, and so by this Case, it appears, that he takes by the Livery, and from the time, of the Livery made; here by the Livery, the day after, the estate doth then begin presently, otherwise it would have been, if he had made livery, the first day, the Livery being made operates onely, at the same time, that the Estate, in judgement of Law hath his commencement, and so by this no Free-hold, is to passe here in futuro, and this is onely the reason, given in Backler, and Harvies Case, and in Barwickes Case, that such a Lease made to begin à die datus, is void, because that a Free-hold cannot passe, to begin in futuro, but the Estate of Free-hold here is not to begin in futuro, but presently, by the Livery made here, the Deed passeth nothing, but all passeth by the Livery; for in a Lease for life, or a Feoffment, the livery carries the Estate, and this is principally of force, and all which doth passe, passeth by this. As to the Objection, that the Attorney here hath authority to make Livery onely, Secundum formam Chartæ: and if he makes this Livery the first day, it had not been good, and it shall be a great inconvenience that the Attorney should have such a liberty and election to make this Lease good or void, meerly by his act: As to this, it is no inconvenience, because this is now all one as if it had been done by the Lessor himself, he having a general Warrant to do this, 11 H. 7. fol. 13. a. A Letter of Attorney to I. S. to make livery of seisin

1 H. 5. fol. 8. Mich. 38. & 39 Eliz. C.B. *&c.*

11 H. 7. fol. 13. a.

to

to J. D. or to J. N. if he makes livery to the one or to the other of them, this is good, so that he hath here election given unto him; he hath election to make livery when he will, and is not compellable to make it within any time certain; he is here to make it secundum formam, & effectum Chartæ, this relates to Estates, and to other things requisite, and to be directed by the Deed; and secundum effectum Chartæ, this is the essence of the Deed, to have the Deed to be good and effectual; and if the Lessor himself had made livery of the same next day after, this had been good, so it shall be also, being then made by his Attorney; upon the reason in 9 H. 7. fol. 26. Qui per alium facit per seipsum facere videtur, and so this Lease being good, Judgement was prayed for the Plaintiff: This Case was by the Court adjourned unto a farther time for argument, with directions given by the Court to the Plaintiffs Counsel, to mend the speciall Verdict, there being onely an Indenture found, but no Lease.

Term. Pasch. 13 Jac. B. R. &c. *Coke* 2. pars. fol. 55, *&c.*

Afterwards, (S.) Termin. Pasch. 13 Jac. B. R. this Case was moved again, and long argued.

Coke Chief Justice. As to this Livery made by the Attorney, Whether this shall make the Lease good, of this I will be better advised, for it is not in the power of the Attorney to make this Lease good, Buckler and Harveys Case, 2 pars, fol. 55. Tenant for life, the remainder over makes a Lease for years, the Lessee enters, the Tenant for life grants tenementa prædicta to C. Habendum from Michaelmas next ensuing, for life, the Lessee Attorns after Michaelmas, this Grant is void, because that a Free-hold cannot begin in futuro, and the Grant being void at the beginning, the Attornment after Michaelmas shall not make this good to pass the Reversion, for Quod ab initio non valet, tractu temporis non convalescet, and as there it is not in the power of the Tenant by his Attornment, after the Feast, to make this Grant good, which was void before; so here in this Case, it is not in the power of the Attorney, by his Livery of seisin made after the day, to make his Lease good, which in it self was void, so that hereby this Lease is not made good, the time here of the making Livery of seisin, is not material, the Letter of Attorney is for him to make Livery, secundum formam Chartæ, the Lease being, Habendum, à die datus; if he makes Livery two or three days after, all is one, but the very pinch of this Case stands upon the Fabrick of this Deed; and this is void clearly, for a Free-hold granted, ought to begin presently, and not in futuro, 30 E. 3. fol. 31. the last Plea, it is there put for a Rule by Mombraie, that when a Warrant was made, to make livery of seisin, according to the force and effect of a Deed, the which Deed, in Law, is of no force or effect, sequitur, that the Livery made upon this Deed, is altogether void; as a Reversion granted for life, from Michaelmas next, the Tenant attorns after Michaelmas, this is not good; but I will not deliver herein, as yet, any absolute Judgement the one way or the other, as positively to say, that this Lease is either void or good.

30 E. 3. fol. 31. 6. &c.

The Lord *Dacres* his case.

The Lord Dacres his Case to this purpose was a good Case, which was this, (S.) William Lord Dacres, being seized of Land in Fee, made a Feoffment in Fee unto Thomas and Leonard Dacres his sons, upon a condition to make a Feoffment over to one Parson Dacres, and to one Middleton, all the Deeds were ready to be delivered, the Deed of William and of his Feoffees, unto Parson Dacres and Middleton, but it so happened, that before William had delivered his Deed of Feoffment, unto Thomas and Leonard, that they had delivered their Deed unto Parson Dacres and Middleton, with a Letter of Attorney to one to make Livery; afterwards William delivers his Deed, livery was then made by vertue of the Letter of Attorney. It was adjudged in this case, that this livery was void, because that at the time of their Feoffment, they had nothing in them to pass; for if a man makes a Feoffment in Fee, and a Letter of Attorney to one to make Livery, before he himself hath an Estate to pass, adjudged by all the Judges, such a Livery made, to be clearly void.

Dodderidge

Dodderidge Justice. It shall not be in the will and power of an Attorney, to make this Lease good or void; if the very Fabrick of the Deed be void, the Attorney cannot make this good: It is therefore to be examined, if such a Lease made for life, to begin at a day to come, be a good Lease or not; if the Lessor himself makes Livery afterwards, this shall be good from the time of the Livery: A Disseisee may make a Feoffment, but when he makes a Letter of Attorney to one to make Livery, where he himself hath no Estate, this is not good, for he hath neither jus in re, nor ad rem: If a Lease be made, and sealed in the Forenoon, à die datus, the same day is exclusive; and if a Lease for years be made, à die datus, he ought to prove his Entry the day after the Lease made; if a Lease be made, 1 Maii, à die datus, this is to begin 2 Maii, if this be delivered 1 Maii in the Fore-noon, or in the After-noon, it is not good, for Quod ab initio non valet, tractu temporis non convalescet.

Coke. Finis unius diei, est principium alterius, & eo instante, that the one day ends eo instante, the other begins, why therefore shall it not be intended to make this Lease and Livery good; that he made the Livery in the very same instance of time, as the first day did end, for the one day ends and the other begins all at one instant, and so to be made good by such a favorable construction, ut res magis valeat, quam pereat, and this especially, when no time of the Livery made is found in certain, and if it were made in this manner, it shall be good, it appears in Shelley's case, 1 pars, fol. 106. where the Feoffees enter before the birth of the Issue, and where after. Coke 1 pars, fol. 106.

Dodderidge. If a Lease for life be made, and dated 1 Maii, à die datus, and this delivered 2 Maii, with a Letter of Attorney to make Livery, who makes this the said second day, this is good, for the Deed is one thing, and the Delivery another, & à die datus, this which is in the Deed datus, is the time of the Delivery, wherefore shall not this be so intended.

Coke agreed with him herein, if it had been so, but it is here found, that he delivered this the first day, but if he had delivered this Deed which purports the Lease; the second day when the Livery was made, this had been good; but why shall not this be so intended by a reasonable intendment, ut res magis valeat &c. that the Livery was made by the Attorney, the last instant of the first day.

Haughton Justice. This shall not be so intended, the Jury not to be charged with an incertainty, all shall be one to them, if the Livery was made in the forenoon, afternoon, or in the last instant of the first day, they do finde this Deed the same day.

Dodderidge. This is merly a matter in fait, and therefore not to be taken by such an Intendment, to be done at such or at such a time.

Coke. If any thing will avail to make this Lease good, it must be this or nothing: It is well said, Ad quæstionem facti non respondent juris prudentes, ad quæstionem juris, non respondent juratores.

Dodderidge. Here the incertainty is merly in a matter in fait, Whether the Livery was made in the forenoon, afternoon, or in the last instant of the first day, and therefore this is not to be taken by us by Intendment one way or other.

Coke. The Statute of 13 Eliz. cap. 10. is made in such a manner (other than Leases for 21 years, or three lives) from the time that any such Lease or Grant shall be made, so they were deceived in this in Parliament, the day there excluded; we will here make this Lease good, if by any means we can. Statute of 13 Eliz. cap. 10. Leases.

Dodderidge. As to the Statutes remembred, you are to refer this clause unto that to which it ought to be referred, and so by this to make all well to stand together, and this is to refer the same unto Leases for years, not for life.

Coke. When we have done all we can for you, in maintenance of this Lease by Intendment, yet this will still remain a very doubtfull case (but we do all of us agree

agree in this clearly) that when the Fabrick of the Deed is void in it self, the Letter of Attorney, to make Livery upon this, is also void, and that it is not in the power of the Attorney, by any act of his, to make this Lease good, as is proved by the Case of 30 E. 3. fol. 31. before remembred.

Dodderidge. If a Lease for life be made, Habendum à die datus, with a Letter of Attorney to make Livery, secundum formam Chartæ, this is to be the next day, for this is as much as if he had said expresly, that he should make Livery by force of this Letter of Attorney the next day, for this is forma Chartæ, and then the Livery is to be made, because the first day here is exclusive: But notwithstanding this, that the Court put all these cases, and all these ways used, and constructions made, to make this Lease good, if by any way it might so have been; yet they said, that when they have done all they could doe in this, yet this would remain to be a doubtfull case; but the whole Court did strongly incline, that this Lease here now in question is not good, yet for further advice and argument, the Court adjourned this Case to a further time.

Termin. Trin. 13 Jac. B. R. &c.

Afterwards (S.) Termin. Trin. 13 Jac. B. R. this Case was moved again, and argued, the Court clear of opinion, that this Lease is not good, and there is nothing in the Verdict found to help it.

Coke. If a Lease for life be made 1 Maii, to begin 3 Maii, and Livery then made by one by a Letter of Attorney, this is not good, because a Free-hold is not to expect the beginning afterwards; and this is clear here, the Lease being made for life, à die datus, is not good.

Dodderidge. The date of the Lease is one thing, and the delivery of it another thing.

Coke. If the Lease be bad in it self, it is not then in the power of the Attorney by his Livery, to make this good; if this Lease was delivered after the first day, then clearly the Grant is good, the whole Court agreed in this, but herein the Verdict is defective, the Jury having not found the certain time when the Lease was delivered, and therefore by the Rule of the Court, Quia juratores se male gesserunt in veredicto suo dando, therefore a venire facias de novo to be awarded; but as this Case appeared to the Court, upon this special Verdict thus found, the Court was clear of opinion, that the Lease was not good in it self, nor could be made good by any Livery made by the Attorney, and that the certainty of all things might appear, and be better found upon a new Tryal; a venire facias de novo was therefore granted by the Court, for a new Tryal to be had in this Cause.

A *venire facias de novo* granted.

Isaack Plaintiff, against *Clark* Defendant.

Entred Trin. 11. Jac. B. R. Rott. 1100.

Action upon the case for a Trover and conversion. 1 Ro. 2. 125. 126. Mo. 841. 1 Ro. Abr. 5. Ow. 131. Sty. 188.

IN an Action upon the Case for a Trover and Conversion, the Plaintiff counts that 9 Februarii, 6 Jac. he was possessed of a Bag of Money, and that 12 Februarii, in the same year, he lost the same; that the last day of the same February, this

this came to the hands of the Defendant, and that he the same last day of February, did convert this to his own use, for which Conversion, the Action was brought; upon Non culp. pleaded, the Jury found a special verdict, they finde that one Rich. Adams, did recover against one Lewis, in the County Court, 40 l. 13 s. 4 d. for damages; upon this, a Capias ad satisfaciendum issued out against Lewis, and a Return made of Non est inventus, by Clark the Defendant, Serjeant of the Mace; upon which, a Writ of fieri facias issued out against Watkins, one of his Pledges, to be executed upon his Goods, and upon this three Buts of Sack taken in Execution: Isaac the Plaintiff being there present, and to stay the sale of these three Buts of Sack so taken, by vertue of this Writ, the said Purse, and 22 l. in it, then and there did pawn, and leave in deposito in the hands of Clark, to the intent and purpose that he should keep the same, usque 13 Martii, next ensuing, being the Court-day, and this onely as a pledge for the re-delivery of the said three Buts of Sack unto Clark, upon his request, if Watkins in the interim did not obtain from Adams to spare the levying of this Execution; the Jury finde no request made, nor that Watkins had procured the sparing of the Execution, but they finde the request made by the Plaintiff of the Defendant, to deliver the Purse with the money in it, and his refusal so to do; and so do conclude, that if upon the whole matter the Court shall judge this to be a Conversion, then they do finde the Defendant culp. but if they shall adjudge this to be no Conversion, then they finde the Defendant Non culp.

Haughton Justice. In this case Judgement ought to be given for the Defendant, there being no cause here for the Plaintiff to have this money, there is no conversion here, nor is there any Trover in the case; the matter upon which this Action is grounded, is not the Trover, but the Conversion to his use, this is the Trespass; as this case here is, if there had been a conversion, the Action would have held, though no Trover; here he came to these Goods by Bailment, by 8 E. 4. fol. 3. in a Detinue of Charters, the Bailment is traversable; and so is 27 H. 8. fol. 13. & 12 E. 4. fol. 11. and many times in Detinue or Trover the Bailment comes not in question, nor is material, if the Conversion be Actionable: As to the Verdict here, the Jury finde nothing of the Trover, because he came unto the Goods by Bailment, and therefore Non culp. as to this; but though the Action is here brought for a Trover and Conversion, and no Trover in the case, because he had the goods by Bailment, yet if there be a Conversion, the Court shall judge upon this: If a Detinue be brought for a Pledge, it is a good plea to say that these goods were pledged for a sum not paid, and this is warranted by 21 E. 4. fol. 19 & 80. If goods are pledged for a debt, in an Action of Debt brought, it is a good plea, to say that he hath a Pledge for it: Here in this Case, the Pledge is to be delivered upon the re-delivery of the three Buts of Wine, upon request, the buts of Wine were not delivered; in the fieri facias, he doth not say that they were pledged in the same cause, yet this is good, and it shall be intended to be so; the fieri facias here was lawfully executed, he did take and seize them lawfully, it is not found that he left them in his possession. 1. To Seize. 2. To Sell: These are the two parts of the fieri facias; the Money here was delivered to be kept till the next Court should be, as a Pledge for the three buts, Super requisitionem, of Clark the Serjeant, Whether of necessity he ought to make his requests, to enable him to hold the Pledge, that he ought not; he pawns the Money for the delivery of the goods such a day, Super requisitionem, he hath not lost his goods by this, here the Serjeant had seized these goods, notwithstanding he hath by this no property, as owner of them, yet he hath a property so far, as to have them to be delivered, and so to be sold according to the fieri facias, and this power which he hath to sell, is a good cause to have them delivered unto him; this Pledge here was, pro deliberatione, they are not delivered, therefore now the interest in the Pledge, which the other had, is not determined, although no request was by him made, yet

8 E. 4. fol. 3.
27 H. 8. fol. 13.
12 E. 4. f. 11.
21 E. 4. fol. 19 & 80.

he hath an Interest in the fieri facias to have them delivered unto him, so that the request here is not material, as to determine the Interest in the Pledge, but he ought and may well keep the same, till the delivery of the three Buts, that so execution may be made. As to the second point, here is no sufficient cause or ground for an Action of Trover by the Plaintiff, it is onely found, that he did request him to deliver this Money, and that he refused to do it, and so much is in every Action of Detinue, contradixit, & adhuc contradicit, this is the point of the Action of detinue, but this is not conversion; he may require him to make delivery thereof in one place, and the goods may be in another place, shall this Denier here be a Conversion, it shall not. but of necessity there ought to be some use of it, to make a Conversion; if he keeps this in his Chest this is no Conversion; the Denier here, is but the not doing of an act, and this shall make no Conversion; and if the Denier here of itself be no Conversion, here is then no presumption for us, to adjudge that he hath converted the same; and for this my opinion, I rely upon that which is said, Cok. 10 pars, fol. 56, 57. in the Chancellor of Oxords case, that this Denier is a good evidence to a Jury, prima facie, to prove the Conversion, and therefore it shall be presumed that he hath converted this to his own use; but upon the speciall Verdict, no matter is found, upon which the Court may adjudge any Conversion to be, and upon the reason there given, and to this purpose was Sir Edward Willipoos case; here this Denier is no conversion, but onely Evidence to a Jury, so that the Plaintiff here hath no cause to have the money to him delivered, because the three Buts were not delivered. for which the Money was left and deposited by the Plaintiff as a Pledge: And secondly, because this Denier onely, without any other matter found is not of itself a Conversion; and so upon the whole matter, Judgement ought to be given for the Defendant.

Coke 10 pars, fol. 56, 57. &c.

Sir *Edward Willipool's* case.

Dodderidge Justice. In this case, these things are considerable.

1. What Action this Plaintiff here shall have, and whether this verdict will maintain his Action; whether he is here to have an Action of Detinue, or an Action upon the case.

2. If an Action upon the case, then whether an Action upon the case for a Trover and Conversion.

3. And if so, then whether here be any conversion found, or not: For the first, he may have an Action upon the case, as this case here is, but not an Action upon the case for a Trover and Conversion, but a special Action on the case, upon his case; but if he might have an Action upon the case, for a Trover and conversion, then I should hold that here is a good and sufficient conversion found, and therefore it is good advise for all Councellors to shew unto their Clyents their proper Actions, which they are to have suitable to their cause of complaint; and as the same shall require: As to the Action of Detinue, the nature of this is to be considered. This Action implies property in the Plaintiff, and no other can have this Action, and this appears by 6 H. 7. fol. 9. and F. N. B. fol. 138. 2. The thing detained ought to be certain as appears by F. N. B. fol. 138. in a Detinue for money delivered, if it be out of a Bag, the Action lyeth not, because that no certain property can then be known, and the ground of this Writt, is to recover the thing it self, in hoc individuo, if it may be had, and if not, then damages for the same, as appears by 17 E. 3. fol. 45. 18 E. 4. fol. 23. 1 R. 3. fol. 4. 1 E. 3. fol. 5 the Jury is to finde the value of every thing detained, if the thing it self cannot be had again then the value thereof is to be found; and so is 3 H. 6. fol. 4. 11 H. 7. fol. 5. 21 H. 7. fol. 77. b. in Kelaway, the ground of this Action is the Detinue, maintainable against Executors; if goods are delivered to Husband and Wife, no Action of Detinue lieth against them both for these, but against the Husband alone, by 38 E. 3. fol. 1. and the reason of this is, because the Wife cannot detain, and the ground of the Action is the Detinue where, upon Bailment, or by

6 H. 7. fol. 9.

17 E. 3. f. 45. &c.

3 H. 6. fol. 4. &c.

38 E. 3. fol. 1.

by casual means, the same comes to their hands, and the same is detained, but their Denyer makes no conversion in detinue, in the Writ it is said, and still detinet; this is no conversion, but with circumstance it may be a conversion, so long as the privity of the bailment remains, no Action upon the case can be brought, as appears by 43 E. 3. fol. 30. a. in point in an Action of Trespass, the Defendant pleads to the Action, and saith, that the Plaintiff delivered the goods to him; there it is said, that so long as the privity of the bailment remains, no Action of Trespass lyeth, and so is 2 E. 4. fol. 5. but where the same is determined by the tortious act of the Defendant, there this shall make a conversion, and an Action upon the case well lyeth, 12 E. 4. fol. 8. If a man delivers to another, a Horse to ride to York, if he rides on him to Carlisle, an Action well lyeth, the reason is, because that he by his wrongfull act hath now destroyed the privity of the first bailment, by doing contrary unto it; with this agrees, 2 H. 7. f. 11. 18 E. 4. fol. 23. 21 E. 4. fol. 76. b. 12 E. 4. fol. 13. a. the Lord Verseys case. 28 H. 8. Dyer fol. 22. 5 H. 7. fol. 16. 27 H. 8. fol. 27. 21 E. 4. fol. 19. a. & 80. b. In detinue of a box sealed up with Writings, brought by an Abbot and Counts, that the Defendant did finde the box of Writings; the Defendant saith, that the Predecessor of the Abbot did deliver the box and Writings to him in pledge for 100 s. the which One hundred shillings came to the use of the House, and that if he would pay the 100 s. he was ready to deliver the box, and this adjudged to be a good Plea, but the doubt was, this being in an Action of detinue, and declares in a Trover, Whether this Plea be good, without a Travers taken to the Trover, which was the matter alledged in the Writ of detinue, 33 H. 6. fol. 26, 27. If a man delivers Writings in a box to I. S. and he doth lose them, an Action upon the Case lyeth, if he abuse them, and so it shall be if the privity of the bailment be determined, an Action upon the Case lyeth, 29 Lib. Assisar. placito 28. goods are pledged to one for the loan of money, and after they are stollen, he refuseth to deliver them, F. N. B. R. fol. 86. C. in Trespass: If one borrows money, and delivers a pledge for it, if he after offer the money, and requires his pledge, and he refuseth to deliver the same, an Action of Trespass upon the Case lyeth, in the Old Book of Entries; Action upon the Case in Gage, fol. 8. and in Trespass, fol. 667. Trespass for a Pledge: Two Presidents for this, so that he may have an Action upon the Case; then it is to be considered, whether this Action here be an Action upon the Case, or not, that it is not, but he ought to have a special Action upon his case, as appareth by 4 E. 6. Brook Action upon the case, placito 113. in an Action upon the case, the Plaintiff lays; Quod cum possessionatus fuit, of such goods, as of his proper goods, & illa perdidit, and that the Defendant, Invenit, & in usum suum proprium convertit; the Defendant pleads, that the Plaintiff did gage them to him for 10 l. Per quod ipse illa detinet pro dictis 10 l. prout ei bene licuit absque hoc quod illa convertebat in usum suum proprium prout, There it is questioned, Whether he ought to travers the Trover, but the bar there held good, no Trover and conversion to be where he comes to the Goods, by delivery of the party himself, the reason of this is, because he hath the possession by a lawfull delivery of the party himself, and therefore no Trover and Conversion lieth; the Bailment and Trover is traversable, upon a special plea to travers the Trover, upon a special matter in detinue, as where the Goods were delivered in pledge, as appears by 12 E. 4. fol. 12. 27 H. 8. fol. 13. 21 E. 4. fol. 19 & 80. 31 E. 3. Fitz. tit. Bar. placito 258. 46 E. 3. fol. 30. 22 E. 4. fol. 6. 5 H. 7. fol. 1. 21 H. 7. fol. 13. so that here an Action upon the Case he ought to have, but this is to be a special Action upon the Case, and that according to his special matter, but not upon Trover and Conversion.

43 E. 3. f. 30. a.
2 E. 4. fol. 5.
12 E. 4. fol. 8.
2 H. 7. f. 11. &c.
33 H. 6. fol. 26, 27.
29 Lib. Assis. placito 28.
F. N. B. R. fol. 86. C.
Old Book of Entries.
Action upon the case, &c.
4 E. 6, &c.
12 E. 4. f. 12. &c.

As to the power of the Serjeant, this is not at all material what power he hath, but the matter here considerable is, if the money be to be delivered back again, if there be no stay of the Execution procured, or request to have the money, the Serjeant may then do his Execution upon the Buts of Sack; the Bailement of the

money here was conditional, the money was delivered untill such a day in certain: As to the Conversion, whether here be any or not, is the question: I agree, that a Denyer to deliver, doth not in every case make a Conversion, as in detinue there is a Denyer, Et adhuc detinet; but when an Action is framed by one upon his Case (as here it is) a Denyer will make a Conversion: I do much reverence the Judgements of our Predecessors, Hill. 37 Eliz. B.R. Rot. 460. between John Æston and William Saker, the Executors of John Pepper, who was possessed of certain Goods, &c. which came to the hands of one Richard Newman, Saker dyed, Æston survived, and brought his Action; Defendant pleaded Non culp. for part, and found Non culp. and for the other part, that they came to his hands by Trover, and that the Defendant knowing them to be the Goods of the Testator, being requested, did refuse to deliver them; Judgement there given for the Plaintiff: This was the point in Law, being in an Action upon the Case for a Trover and Conversion, the Jury did finde the refusal, and adjudged for the Plaintiff, that this was a Conversion, and upon this Judgement I ground my Opinion: In some cases a Denyer shall not be said to be a Conversion, as in detinue no Conversion; the Action is brought for the Detainer, but if he doth lay a Trover and Conversion to his charge, a Denyer there will make a Conversion, but distinguendum est; I rest and rely upon the Case in the Chancellor of Oxfords Case, Coke 10 pars, fol. 56, 57. where it is said, that this Denyer is good evidence to a Jury, to satisfie their consciences that this is a Conversion; this shall be good Evidence to a Jury, prima facie, that he hath converted the same untill some other particular matter appears, by which this is no Conversion: I agree Thimblethorps case of the Beam of Timber lying on the ground, being requested to deliver this, and refused, but did not remove the same from off the Land, onely he denyed to deliver it, this is no Conversion, for it lay there still, as before, after the denyal to deliver it; and so it shall be of a Sow of Lead, he which hath right to have it, demands it, the other denies to deliver it, if it be found, that it lies there still after the denyer, this shall be no Conversion; but where it is altogether uncertain, and cannot appear that he hath made any Conversion, but onely a Denyer, there this is good Evidence to a Jury, and direction to the Court (if other matter do not appear to the contrary) that this shall be a Conversion for shall we say that this is good to a Jury, and afterwards to adjudge contrary to this our selves; this not to be so done, especially when it is as this case here is: The Conversion here is a matter which lyeth in secret, and for what intent will he deny to make delivery of this, if it be not to make a private use of this to himself. Also here this is in the case of money, and you can never prove any express Conversion of this, for that one mans money is not to be known from anothers, and where the nature of a thing in demand, makes a man to fail of his proof, there the Law will supply this: to this purpose is 3 E. 3. Fitz. Coron. placito 323. In an appeal of Robbery, against one who took from him certain sacks of Corn, and prayed to have restitution of his Corn.

Finchden there demanded, if the corn was still in the sacks, or not, for if out of the sacks, it would be very hard to make restitution, and there he restored according to the value of the Corn; and with this agrees, 7 E. 6. Brook tit. Restitution, placito 22. this was so at the Common Law, and not upon the Statute of 21 H. 8. cap. 11. which gives Writs of Restitution to the party robbed: and it was before here agreed in this Court, that a man shall have Restitution, notwithstanding the property is not known, but he shall have like in value, and where there is a defect of proof, the Law shall supply this; and so it shall be here in this Case, the Law shall say that he hath made use of this money, for that he hath here denied to deliver it, and so where the defect of proof ariseth out of the nature of the thing it self, there the Law shall supply this defect, by 27 H. 8. no detinue shall lie for money; the Plaintiff here hath mistaken his Action, and therefore in this Case Judgement ought to be given for the Defendant.

Hill. 37 Eliz. B.R. Rot. 460. &c.

Coke 10 pars, fol. 56, 57, &c.

3 E. 3. *Fitz. Coronæ placito*, 323.

7 E. 6. Brook tit. Restitut. placito 22. Statute of 21 H. 8. cap. 11, &c.

Croke

Croke Justice. Judgement ought to be given in this case for the Defendant, in regard that the Plaintiff here hath no cause of Action; this money here, which was thus bailed, or pledged, ought not to be delivered untill the three buts of Sack are delivered; again, this here which is posterius, is to be made prius, the buts of Wine to be delivered to the Serjeant before, and he then is to deliver the money, and this is last to be done; and this is no more, but that the Serjeant is to have a discharge of the Debt and Execution, or a Delivery to him of the three buts, to doe Execution upon, and all this to be done before he is to deliver the money that was pledged, otherwise it should be very prejudicial to him; this money thus delivered, is pignus to the Serjeant for his security, and this he ought to keep untill he be satisfied of the Debt, or delivery of the three buts, and this is mortuum vadium to him which doth pawn this, if he performe not what is by him undertaken, the Pledge then is dead, as to him; here an Action upon the Case for a Trover and Conversion, is brought by the Plaintiff, for the not delivery of this Pledge, the Debt not being discharged, and this ought to be first done, and the Serjeant here ought not to make any demand to have Delivery made unto him of three buts of Sack; a bare denyal shall not make a Conversion, neither shall there be any Conversion so long as the privity of the bailment remains; but destroy this, and then otherwise it shall be; the Baylee here is as a possessor bonæ fidei, to make a Conversion, there ought to be a pertinacy, and also a contumacy in the manner of the Denyer, (S.) contradixit, & adhuc contradicit; we are to see and to examine when the wrong begins to the party, the wrong begins by the Denyer; by this Denyer, he is possessor malæ fidei, by this Denyer the privity of bailment is altogether destroyed, if they are bona peritura, as sower Wine, Corn musty, this Denyer keeps the party from his Possession, and this is a wrong.

Littleton in his Chapter of Rents, saith, That a Denyer shall make a Disseisin, if it be so in real things a fortiori, it shall be so in personals; one shall never have an Action of Trespass, vi & armis, where the party comes lawfully to the possession, but an Action of Trespass upon his case he may have: Here in this case, the condition annexed unto the Pledge is not performed; and untill performance of which, the same is not to be delivered, and so the Plaintiff hath no cause of Action, Judgement is therefore to be given against him.

Coke Chief Justice. In this case, the Judgement ought to be, quod querens Nil capiat per billam. Divers things in this case are considerable, here is an Action upon the Case brought upon a Trover, and conversion; the Jury finde, that these goods came to his hands by bailment; this Action upon the Case is a magistrall Action, he ought to comprehend his case, in the action upon the Case, he comes to these goods, by the privity of bailement; the second point considerable, is what he is to recover, in the Action upon the Case, whether any thing in special, or the whole value, and in this, the third thing, whether the property be changed, by the Judgement, and execution, the property is changed; the fourth thing considerable is this, a man findes my goods, if he remove the possession, whether he shall then be chargeable, or not; the fifth and last matter is touching the conversion, and whether here be any Conversion in this case, or not. As to the first matter, the Plaintiff here declares upon a Trover, the Jury finde that he came to the goods by bailment, here if he pleaded Non culp. he should be charged; if there be two Joynt-tenants of goods, they lose them, they shall both joyn in the Action, but if one do bail the goods, he onely shall have an Action upon the Case, and this is warranted by 43 E. 3. fol. 21. 4 E. 2. Fitz. tit. Attaint, placito 67. & Fitz. N. B. R. fol. 118. H. and the difference will be between an Action grounded upon a bailment, and where upon a Trover; bailment makes a privity, if one hath goods, as a bailee, where he hath onely a possession and no property, yet he shall have an Action for them: In pleading, when this is made materiall, the bailment

4 E. 3. fol. 21. &c.

may

may be traversable: But in a Trover and Conversion, not to Travers the bailment, but the Conversion, this being the point of the Action, Whether guilty or not; the Judge is not to look unto the bailment, if you can lay and well prove a Conversion, which is the chief point of the Action; here you may have an Action upon the Case for a Trover originally, and not detinue upon special pleading, this may be made material, but not upon a Not-guilty pleaded. 2. What thing is to be recovered in an Action upon the Case, the value of the thing is to be recovered, but not damages for the detaining; if he be barred in Detinue, he shall be barred in an Action upon the Case, as appeareth by 12 E. 4. fol. 13. & 2 R. 3. fol. 14, 15. Brook tit. Action upon the Case, placito 110. Action sur le Case, quod assumpsit soluere 10 l. to the Plaintiff, for 5 s. ei solut. the Defendant saith, that the Plaintiff before brought an Action of Debt for the same sum, in which the Defendant did wage his Law, by which the Plaintiff was barred; this held a good Plea, by Bryan chief Justice, so that a Recovery, in what Action you will, shall be a bar in the other; he which hath property shall recover damages, for that pretium succedit, in loco rei, as Bracton: In Debt upon a promise, he shall recover all the Debt; when a man doth finde goods, it hath been said, and so commonly held, that if he doth dis-possess himself of them, by this he shall be discharged, but this is not so, as appears by 12 E. 4. fol. 13. for he which findes goods, is bound to answer him for them who hath the property; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them, for at the first it is in his election, whether he will take them or not into his custody, but when he hath them, one onely hath then right unto them, and therefore he ought to keep them safely; if a man therefore which findes goods, if he be wise, he will then search out the right owner of them, and so deliver them unto him; if the owner comes unto him, and demands them, and he answers him, that it is not known unto him whether he be the true Owner of the goods, or not, and for this cause he refuseth to deliver them; this refusal is no conversion, if he do keep them for him, 2 R. 3. fol. 15. a good case to this purpose, there may be a Trover and no Conversion, if he keep and lay up the Goods, by him found, for the Owner: It is the Law of Charity, to lay up the Goods which do thus come to his hands by Trover, and no Trespass shall lie for this; but where one takes goods, where there is no such danger of being lost, or findes them before they are lost, otherwise it shall be; and in such a Case, every not-delivery of them is a refusal in Law, and the Issue to be upon the recusavit; he which findes goods, by his denyal to deliver them, by this for him to be a Trespassor, I utterly deny, for when possessio est vacua non fesans shall not make a man to be a Trespassor, no Trespass for this, vi & armis: In the 6 Carpenters, 8 pars, fol. 146. ruled there by all, that non fesans, shall not make the party which hath authority or license by the Law, to be a Trespassor; if one doth bail goods to another to keep, and to deliver them upon request, if it be found that he required the delivery of them, and he to do this refused, no trespass, vi & armis, lieth for this, because it is but a non fesans; and if a Distress be taken, and a tender of amends made, and this refused, no Trespass, vi & armis, lieth for this, because this is onely a non fesans, which shall never make a man to be a Trespassor: If a man findes goods, an Action upon the Case lieth, for his ill and negligent keeping of them, but no Trover and Conversion, because this but a non fesans; and so in the 6 Carpenters Case, he shall not be punished in Trespass, for not paying for his Wame, being but non fesans; but if a Distress taken be abused, he shall be then punished in Trespass, and so the difference is, that mis-fesans, but not non-fesans, shall make one a Trespassor; and so is 12 E. 4. fol. 8, 9, & 13. If one have goods by Trover, in some case he may deliver them to one who is not true owner of them; if I baile goods to one, and he bails them to another, I cannot have an Action against the second bailee, this is a Trover in Law: the ancient form of the Count in detinue, is observable, where the

12 E. 4 f. 13. &c.

12 E. 4. f. 13.

2 R. 3. fol. 15.

Coke 8 pars, fol. 146. b. &c.

12 E. 4. fol. 8, 9, & 13.

the same is upon a Bailment, and where it is upon a devenerunt ad manus: A man bails goods to one, who bails them over to another, he may here have a Detinue upon the Bailment against the first Baylee, and also he may have an Action of Detinue against the second Baylee, upon a devenerunt ad manus, by 12 E. 4. fol. 11, 12, 13. and 33 H. 6. fol. 27. so that the Action of Trover is but an invention; a Trover is in fact, and in Law. 12 E. 4. fol. 11, 12, 13.

1. When a man comes to them by charity.
2. When by devenerunt ad manus.

And a man may count either upon a devenerunt ad manus generally, or specially, per inventionem, and one may at this day declare upon a devenerunt ad manus, but the latter is the better, (S.) To be per inventionem, 7 H. 6. fol. 22. for this, 9 H. 6. fol. 58. and the Old Book of Entries, fol. 209. this is the most certain, and the better count. If two bring an Action of Detinue for goods, and both of them declare upon a Bailment, they shall not interplead; if one of them doth charge him upon Trover, and the other upon a Bailment, here they shall interplead; the difference will be between a Trover in fact, and in Law, when the Goods are bailed over, this is a Trover in Law; but when a man hath goods, per inventionem, this is a Trover in fact; upon several bailments, they are not to interplead, as appears by 19 H. 6. fol. 3. 9 H. 6. fol. 17. 7 H. 6. fol. 22. 4 E. 4. fol. 9. 12 E. 4. fol. 12. The next matter considerable, is the Conversion, and what shall make a conversion; as to this, there ought to be an Act done, to convert one thing to another, and whether a denyer onely shall make a conversion, by this you will confound all form, for then, this way, every Action of detinue shall be an Action upon the Case, upon a Trover, because there is a Denyer; if this should be so, there would be a double conversion (S.) A Denyer and a request; in no Case you shall have a man to be a Trespasser upon the case, without some Act done; If one doth pledge Oxen, Utensils, or deliver money; if he require them, and the other doth refuse to deliver them, an Action upon the Case sur Trover lieth, to make him a Trepasser, 33 H. 6. fol. 27. Maltaes Case: If one do finde Goods, the owner demands them, he refuseth to deliver them, an Action of detinue lieth, and not an Action upon the Case (in usum suum proprium convertit, & disponit) these are the words that make a Conversion; and therefore it shall be very absurd, if every Denyer should be said to be a Conversion; the party makes a request to have his goods, the other doth not deliver them, it should be a hard case, to make him by this to be a Trespasser, and subject unto an Action upon the Case for a Trover and Conversion, onely by his Denyer to deliver them, being demanded, but there ought to be some other act done by him, to make him thereby to be such a Trespasser, as that in usum suum proprium convertit, & disponit, but upon a bare refusal to deliver the goods, being demanded, no Action upon the Case, sur Trover & Conversion lyeth for this, Mich. 26 & 27 Eliz. B. R. between Matthew and Stratsam: An Action upon the Case, upon a trover and conversion, upon Non culp. pleaded, the Jury found the Defendant guilty, they found the Trover, the Request, Demand and Refusal, and found him guilty of the trover and conversion, but they found no place where the conversion was; this was tried here in this Court, when I was at the Bar, and the Court did rule this to be no conversion, if it were, because there was no place found where the conversion was made, and for this cause the Plaintiff could not have his Judgement, so that this is very material, and of necessity to be found for the maintenance of the Action; if one findes a Bond, or other writing of another, who demands this, the other refuseth to deliver the same, shall he now by this recover all the value of the Bond, he shall not, for by this finding he had no property in the Bond, but this remained in the other; and this is not like unto the Case of a House, this is no conversion of the bond, but he may have an Action of Detinue for this: It ought also to be further alledged, that he did conceal this, for that a refusal onely to deliver the same, being demanded, (without some other Act by him done) shall not make a con-

7 H. 6. fol. 22, &c.
19 H. 6. fol. 3, &c.
33 H. 6. f. 27.
Mich. 26, 27. Eliz. B. R. &c.
2 Len. 75. c. 100.
2 Len. 22.
Cro. Eliz. 79.
Gouldsb. 89, 90.

conversion, and so it was here adjudged, for he ought to lay the conversion, by his concealing of it. I agree, that in some Cases a Denyer to deliver the same, shall make a Conversion, as if it be of money, which cannot be known from other money (as if it be out of a bag) thereupon his refusal to deliver the same, being demanded, for this an Action upon the Case for Trover lieth, but if it be for money in a Bag, there, upon his denyer, no trover lyeth, but an Action of detinue, as it was resolved, Pasch. 24 Eliz. in the Exchequer, in the Case of one Wilkins, 11 H. 4. fol. 46, 47. a good Case to this purpose: An Action of detinue for Charters, the Plaintiff counts upon a devenerunt ad manus, if he cast them away, so that they perish, an Action upon the Case lies against him for this, so that I cannot see how that a bare denyal of a thing detained, shall make a Conversion: Thimblethorp's Case, a Lessee, at the end of his term, leaves a timber log on the ground, afterwards he demands it, a denyal of this, without some other act done, shall not make a Conversion of this, if he doth not remove this, and so makes some other special conversion; (legere) in one sense is to gather, if upon Evidence to a Jury, there a denyal is good Evidence to prove a Conversion, but if he saith that he had locked it up, and brought it into the Court, here stabitur presumptioni donec in contrarium probetur; this is no Conversion, if the contrary be not proved; if a Deed, purporting a Feoffment, be brought before any Judge in Tryal, made forty years before, and the possession gone continually with the Deed, this is good evidence to a Jury to finde with the Deed, 1 H. 8. a Charter of Feoffment made, and ever since possession continued; this may well be given in evidence to a Jury, but not good in pleading, for no Judge dares say to a Jury, that if no livery was made, that yet this is a good deed, 28 H. 8. Dyer, fol. 22. placito 135. in Cores Case, by Spilman and Portman: If a man bails Plate, or Money, no Action upon the Case lieth upon this Bailment, upon a refusal, request being made; here he is serviens ad clavum, not ad legem, he did not know whether the condition was performed, or not, so this refusal is good evidence to a Jury, but no good conversion in Point of Law: As to the Verdict and the Exceptions taken to it, which have been well and truly taken, (de inventione, & conversione) they finde the Defendant guilty, and upon the whole matter he is not guilty, de inventione, for they do finde, Quod pignoravit; Herein I agree in Opinion, that this finding of theirs is not material, ad questionem facti, the Judges not to answer, Ad quæstionem juris, non juratores, as Bracton, Commentaries in Amy Townsends case, fol. 111. Juries are to meddle with matters of Fact, but not with the matter here of a conversion, being matter in Law, this is onely to be determined by the Judges: I agree also in this, that untill the three Buts of Sack are delivered to him, the Plaintiff is not to have his money: It is also to be observed, the matter of form, (S.) Præceptum de fieri facias, being in an inferior Court, and not Breve de fieri facias; yet this is good, but it ought not to be so, but in the interim, the fieri facias, by effluxion of time, incurs the time past which was limitted unto him by the said Writ, for to seize and to sell, and therefore it is now impossible for the Serjeant to have the three Buts of Wine again, but if his power had remained, then to have had them; but yet he is to have the money pledged for them, untill he hath the three Buts delivered unto him, but here he cannot have them, and therefore he is to keep and to detein the money for his satisfaction, and therewith to satisfie the Execution; so that in this Case we do all of us agree in this, that prima facie, a denyer upon a Demand, is a good evidence to a Jury of a Conversion; but if the contrary be shewed, then the same is no conversion, and so the Judges all agreed in this Case, upon the whole matter to them appearing, for the Defendant, and against the Plaintiff, that he had no just cause of Action, and according to this, the Judgement of the Court was pronounced, and so entred, Quod quærens nil capiat per Billam.

Pasch. 24 Eliz. &c. 11 H. 4. fol. 46, 47.

28 H. 8. Dyer, fol. 22. &c.

Bracton. Commentaries, &c.

Judgement for the Defendant, &c.

James

James, and *James*.

Prohibition to the Spiritual Court. 1 Ro. Rep. 123.

ELiz. James, the administratrix of her late husband, was called in before the Ordinary to make an account for the goods and personal estate of her husband, she there pleads, that Richard, her late husband, 9. Jac. omnia & singula bona & catalla sua, in vita sua, rite & ligitime concessit, cuidam Eliz. James, filiæ predict. Richardi, and that she had these in her Custody for her Daughter, the which Plea they did there reject, and refused to receive the same, but notwithstanding this her plea, they would there proceed to sentence against her; upon this a Prohibition was prayed.

Coke chief Justice. The Ordinary by the Laws of the Land may call Executors to an account, and this so appears by 9 E. 4. fol. 47. b in the Cardinal of Canterburies Case, that of common right the Ordinary ought to see, that the will of the dead be performed, and that none ought to meddle with the goods, but the Ordinary, or those which are admitted by him (S) Executors, by probate of the Testament, or Administrators, and they to render an account to the Ordinary, and to this purpose is 7 H. 4. fol. 18. b and the Statute of 31 E. 3. c. 11. for the granting of Letters of Administration by the Ordinary; upon which the Observation of Lynwood is, that this was, consensu magnatum, but not by the Common Law: touching proceedings there, the difference will be, if a gift be there pleaded, they are there to try whether there was such a gift or not, in 1 R. 3. fol. 4. a by Hussey chief Justice, When the original ought to begin in Court Christian, and there it begins; although afterwards, some thing happens in issue, which is triable by our Law; yet this shall be triable by their Law; but if they will there judge upon this grant in question, contrary to the Rules of the Common Law; and according to their Law, they are then to be prohibited; for by their Law, such a gift as is pleaded is not good, if there be not traditio, and without such a delivery, such a grant is utterly void, but we here deny this to be so, our Law being contrary herein to them, for such a gift we hold to be good without any such tradition; also by their Law a man may well grant a thing in Action, which we deny clearly to be good by our Law; and therefore if they shall adjudge upon a gift, contrary to the rules of the common Law, then we will here prohibite them; here they refuse to receive this plea of the gift, for peradventure there was no delivery of the Deed.

9 E. 4. f. 47. b in the Cardinal of *Canterburys* case.

7 H. 4. f. 18. Statute of 31 E. 3. c. 11.

1 R. 3. f. 4. a

Dodderidge Justice. The Ordinary ex officio Judicis, calls the party to an account for the goods of the intestate, and this properly and onely belongs to him as Ordinary so to do, and as to this account, what is here pleaded, nothing, but she had the goods, but answers nothing at all to the goods she had recovered, which she ought here to have done, so that debts should have been paid with them.

Coke. I agree this to be so, as to these goods, but yet this is a good plea by her there, quoad hoc individuum, and as to this, they ought not there to have rejected the Plea; but they have here rejected her Plea as to all.

Dodderidge. This is no Plea at all, no answer to these goods which she had recovered.

Coke. If this plea here be for such things as are assignable, this Plea is then good, but not, if the same be for other things, as for things in action, the Court clear of opinion, that he could not assigne over the things in action, as obligations, for these ought to remain, for payment of the Debts.

Dodderidge. This is a Plea in Barre of the account, which is not any barre at all.

Coke. There are no Auditors assigned for the Account.

Dodderidge. If she there had made such an account (S) as that quoad such things, they were given by the Intestate in his life time unto Eliz. his Daughter, and to have made answer to the rest, if they would not then accept of this plea there, but reject the same, they ought to be prohibited; but if she for these refuse to make any account, because they were given to another before, and being in her Custody, this her Plea of the gift in barre of the Account, is not good; also she is called to make an account for all the goods, she ought therefore to answer to all.

Coke. But quoad hoc, as to these particular goods, thus given by the intestate, the Plea is good, and if they reject this Plea for these goods so given, they ought to be here prohibited.

At another day this Case was moved again.

Coke. The Case was this, the Widow, Administratrix, made an Inventory, and in this she put in all the goods which her husband had, and herein she did mistake her self, and did put in some goods, which her husband, the intestate, had given away, and disposed of in his life time to a younger Child, in the Account she shewed unto them a Deed of Gift, made by the Intestate her Husband of these goods in particular to his Daughter, they being in her custody, and this Plea of hers, as to these goods, they did there reject, we will in this case prohibit them, as to those goods, but not as to any things in Action. It is the part of wise men (to make deeds of gift, in their lives, and this I have learned of Sir Thomas Bromley, who said that he would not trust his goods and estate to the disposal of such Courts, which had so many Distinctions, and Appeals from their sentences, but he would therewith trust his good friends, and would have divers named in trust, for the disposition thereof, and so by this way, he would settle the same in his life time; which was a good and sure way.

Dodderidge. Their Accounts are not like our Accounts at the Common Law.

Croke. It is here to be considered, whether they do there endeavour to examine the validity of this gift, or not.

Dodderidge. This deed of gift is there pleaded in barre of the Account.

Coke. We ought here to prohibite them as to this.

Dodderidge. We ought also to know the reason, for what cause they rejected this Plea; the Court all agreed (Dodderidge excepted) that in regard this deed of Gift was there pleaded before sentence given, for their rejecting of this they are to be prohibited as to this which is contained in the Deed of Gift.

Dodderidge agreed with them herein for a Prohibition to prohibit them, as to this, with an exception of debts; but time was given, to have a Civilian, to shew cause to satisfie the Court, wherefore they had there rejected this Plea, and in default of this, the Prohibition to stand; but no such cause was after shewed; and so the Prohibition per Curiam to stand.

A Prohibition granted.

The

The KING and *Goldesborow*, against *Whider*

Defendant.

IN an Information, exhibited upon the Statute of 5 E. 6. cap. 14. for Ingrossing of Corn, divers stacks of Corn, and it is by this word (Cumulus) the certainty of this ought to appear, for the quantity thereof, what this (Cumulus) is, for by this Non constat curiæ, upon this Information, for what he should be found guilty, by 7 H. 4. fol. 30. In an Assise of rent, the quantity of Land ought to be shewed, out of which the rent is issuing.

Information for Ingrossing corn upon Stat. of 5 E. 6. c. 14. 7 H. 4. f. 30. *Cumulus* uncertain. 1 Ro. Rep. 134.

Coke chief Justice. I never yet did see an Information in this kind, but for so many loads of Corne, or quarters of Corne, but never with this word (cumulus) being altogether uncertain, for the same might be a heap thrashed, or in shocks, but most properly when thrashed, here it is altogether uncertain, quædam portio terræ, not good for uncertainty, 11 H. 4. and so of an ejectione firmæ, for a ridge of Land not good, being uncertain, for that in some Countries a ridge of Land is more, and in some Countries less; Also a detinue lieth not, de uno cumulo, So Indictment can be, de uno cumulo tritici, pretii, this is not good, for incertainty.

Dodderidge. There cannot be a good barre to this Information, this Information here is framed upon a penal Law, and therefore the certain quantity of Corn Ingrossed ought to appear to the Court; and it was never heard, to have an Action brought for an heap of salt.

Haughton Justice. An ejectione firme brought de uno clauso, vocat. Green-Acre, is not good.

Coke. We have adjudged this to be bad for incertainty; Præcipe quod reddat viginti libratas terræ, in ancient time this was good; but now Explosa est illa opinio, for the same ought to contain certainty, or not good, because of the Habere facias possessionem; and therefore certainty ought to appear, or not good; the whole Court clear of opinion, that the Information here was not good, for the incertainty in it.

Information not good for Incertainty.

Wilson Plaintiff, against *Welsh*

Defendant.

IN an Action of Covenant brought by the Plaintiff, as an Assignee, for not levying of a Fine according to the Covenant; the Case appeared to be this, Sir W. Welsh, being seised of a Manor, and did sell this, and his two Messuages, unto one Arderne, who assigned this unto Wilson; the Vendor in the Indentures did Covenant to levy a Fine, for further assurance, the Assignee tendred the Notes of the

A Covenant for not levying of a fine. 1 Ro. Rep. 103, 117.

fine unto the Defendant; he refused to doe this, upon which refusal the Action brought; the Defendant by Plea shews all the matter, and that he was seised of the Manor of Wraynams in the County of Buck, and of two Messuages, and that he sold the Manor of Wraynams, and all his tenements in the said Town, and did covenant to levy a Fine of, &c. and that afterwards he did purchase two other Messuages there, and the Plaintiff tendred unto him the notes of the fine of four Messuages to be acknowledged by him, the which he refused to doe, and takes a travers, absque hoc, that at the time of the bargain and sale he was seized de prædictis Tenementis integris, as the Plaintiff had alleadged in his Declaration (S) that he was seised of the four Messuages, and so the onely point and question in this case was, whether the Defendant was bound by force of this Covenant to acknowledge the fine, according to these notes, in manner and form as they were tendred unto him.

George Croke, For the Plaintiff, that he ought to acknowledge the fine, according to these Notes tendred to him, and that this his Plea in Barre of the Action of Covenant is not good, to say that he had but two Messuages at the time of the bargain, but he ought to levy the fine of all according to the notes, this being but for further assurance, and no prejudice hereby to come unto him, for notwithstanding he acknowledgeth the fine of all the four Messuages, yet the bargainee shall have no more by this, than what was bargained and sold unto him. Coke chief Justice. Without all question he is not bound by this Covenant to levy a fine to him of all his Land, but onely of the land sold unto him.

George Croke Urged, that he ought to levy a Fine of the whole, but in effect, this shall operate to no more than what was bargained, and to that land onely comprised in the bargain and sale, and more than this shall not pass; the Fine here is but a conveyance and assurance, according to the intention of the parties, and to this purpose is Taverners Case, remembred, Coke 2 pars in Cromwells Case, fol. 76. b if A. having 10 Acres in Dale, and B. hath 10 Acres in the same ville, A. levies a Fine to B. of 20 Acres, and B. grants, and renders 20 Acres to A. in Fee, A. by this shall not have the 10 Acres of B. unless that there be for this some special agreement between them; otherwise the Conusee shall not render more than he doth receive; so if one doth covenant to levy a fine of all his Lands, which he hath by discent of the part of his Father, he hath 10 Acres of the part of his Father, and 10 Acres of the part of his mother, he levies a fine generally of all his lands, nothing doth pass by this fine but the 10 Acres he had of the part of his Father.

Coke 2 pars, fol. 76. b *Taverners* case put in *Cromwells* case.

Coke 3 part. fol. 77. Fermers Case, If Tenant for life, or for years be of land in Dale, and of 10 Acres also in Fee-simple in Dale, doth bargain and sell all his Lands in Fee, having 10 Acres in Fee, and 10 by Lease, and levies a fine of 20 Acres; this is good onely for 10 Acres, for the fine shall relate unto the bargain and sale, and the quantity of the Land not material in fines. The whole Court agreed Taverners case to be good law.

Coke 3 Pars, fo. 77. *Fermers* case.

Dodderidge Justice. In these two last cases, the Conusors had not any more, of which they could levy a fine.

Coke. If he had said, that he being seised of two Messuages, bargains and sells these, and covenants to levy a fine upon request, and afterwards he doth purchase the other two Messuages, and after the bargainee tenders to him, a Fine of four Messuages, this had been good; and he ought to acknowledge this fine, because that nothing shall pass by this fine, but the two Messuages onely; but as this Case here is, where it is said, that he was seised of four Messuages, and that he had bargained and sold all his Lands; and accordingly tendred the fine unto him of four Messuages, whereas he sold but two, he is not bound here by his Covenant to pass this fine, because the same is not pursuing the bargain and sale.

George Croke urged Bolney and Quittes case, Hillar. 37. Eliz. Rot. 884. a Northamptonshire Case, where such an Action of Covenant was brought for refusing to levy a fine, being for further assurance, he tendred a Fine of a house, and twenty

2 Cr. 251. Mo. 810. 1 Bulst. 90.

twenty acres, the other refused, and he said that he was seised of the house, and 10 acres, and also of other 10 acres, which he did not sell, and that these 10 were also contained in the note of the Fine, the which he never did intend to pass, and for this cause he did refuse to acknowledge the Fine. It was resolved, that this plea was not good. If one covenants to levy a Fine of all his Lands in the tenure of I. D. and in the note of the fine to him tendered, more lands are contained, yet he is bound to acknowledge this fine, and by this no more shall pass, but those which were in the tenure of I. D.

Coke clearly, if he shews by the deed that he was seised of four messuages, at the time of the bargain, and tenders a fine of four messuages, where he sold but two, he is not bound by his Covenant to acknowledge this fine; also you cannot have a Nient comprise against an express thing, 48 E. 3. fol. 11. touching this.

Dodderidge & Haughton Justices. If it had been said, that at the time of the bargain and sale, he was seised but of two messuages, and after he purchased the other two, and the fine tendered of four Messuages, no more shall pass but the two.

Coke. As to this, if all these particulars are specified in the bargain and sale, and in as particular a manner as may be, yet the Covenant to levy a fine shall not run to such a Fine, containing more than was bargained; and if he says that he was seized of two Messuages, and tenders a Fine to him of four Messuages (my Opinion in this Case is onely known unto my self) but I incline to be of opinion against that which was lastly said, that he ought not to acknowledge this Fine, and he is not bound by his Covenant to levy a Fine to him of more than is contained in the Bargain and Sale.

Dodderidge agreed herein, and if it were otherwise it should be very mischievous: It was then urged, that if one having two Messuages, bargains and sells them, and covenants to make further assurance; afterwards he builds to other Messuages, the other tenders a Fine of the four Messuages; if this Fine be levied, the two Messuages which were bargained, shall onely pass.

Coke. I do doubt of this Case.

Croke Justice. If one hath ten Acres of Soccage Land, and ten Acres of capite Land, he bargains and sells his Soccage Land, and covenants to make further assurance, and afterwards the other tenders unto him a Fine of twenty Acres, in this comprehending the capite Land also; if he doth acknowledge this Fine, the Capite Land doth not pass, nor no Fine for Alienation is to be paid.

Coke denied this to be so, the whole Court in this case agreed against the Plaintiff, that here was no breach of Covenant by the Defendants refusal to acknowledge this Fine, and for this refusal, the Plaintiff had no cause of Action, and so by the Rule of the Court Judgment was given for the Defendant, & quod querens nil capiat per billam.

Judgment for the Defendant, *Et quod querens nil capiat per billam.*

Requisi

Requish, and *Requishes* Case.

Fine taken of an Infant. Inspection. Cro. Ja. 230. 1 In. 380. b Mo. 844. 78.

COmmissioners for the taking of a Fine, were brought into the Star-chamber, for taking a Fine of an Infant, the Case was this, Requish, of whom the Fine was taken, was an Infant, (S) Of the age of twenty years and three quarters, wanted but nine weeks of his full age; the Commissioners took the Fine of him, having no notice that he was within age, and by Inspection they could not perceive whether he was within age or not; nothing was done against the Commissioners in the Star-Chamber, for that this was a fault in them, but not a Crime.

Coke chief Justice. In this Case of Requish, being in Ward to the King, they have taken of him in the Exchequer a Recognizance of a great summ, being an Infant, that he should not convey his Land to any one, unless it were by assent, direction and order of the same Court, this is a strange course taken by them: Non facies malum, ut inde veniat bonum, and therefore if he do here bring an Audita querela upon this, we will give him redress, and reverse this, for the Law hath made a kind of perpetuity for preserving the Land of an Infant, during his minority, so that he cannot, during this time, convey these Lands, (at this time the said Requish, upon proof made by the Church Book, adjudicatus fuit, to be within age by the Court, and for this the Fine is avoided: In this Case, Curia, ex assensu partium, did take upon them the disposition and setling of his Land, in such manner as he should not sell this, but unto his younger Brother, (and this they so did, by reason of his simplicity.)

Dr. *Suckliff* Plaintiff, against Sir *George Reynill* Defendant.

Debt for an Escape. 1 Ro. Rep. 204.

IN an Action of Debt for an Escape, the Case appeared to be this, Dr. Suckliff in the Court at Norwich, recovered in an Action upon the Case for a Trover and Conversion, against one Wood and his Wife, had Judgment against them, and both of them taken in Execution: Mary the Wife was by a Habeas Corpus brought in B. R. and so committed to the Marshal, and being in his Custody in Execution, he suffered her to escape, and for this Escape, an Action of Debt brought against the Marshal, and whether this would lie or not, was the question.

Geo. Croke for the Defendant, that this Action of debt lieth not, but he ought to have against him an Action upon the Case onely for this Escape, and to this purpose is the Countess of Kents Case, in 16 E. 4. fol. 2, 3. but no Action of debt he is to have for this Escape, because he still hath the Husband in Execution upon the same Judgment in Norwich.

16 E. 4. fol. 2, 3.

Coke chief Justice. The labor in this Case lieth on the Defendants part, prima facie, I conceive this Action of Debt here upon the Escape is well brought.

Dodde-

Dodderidge Justice, demanded who ought in this case to pay the money recovered; this the Husband is to do, for he is the principal party who ought to discharge this Execution, it is he which carries the purse, and he still remains in Prison, and in Execution for this, and therefore no Action of Debt lieth against the Marshal for this Escape, but an Action upon the Case he might have had against him for this, but Debt lieth not.

Coke. An Action of Debt well lieth against the Marshal for this Escape, for the Wife was also in Execution, and here is a wrong done by the Marshal, for which wrong there is great reason he should be punished, and not to goe free: No Audita querela can here be sued, untill there be a full Execution and satisfaction of the whole Debt.

Dodderidge. He is not here altogether without remedy for this wrong, for he may well have an Action upon the Case against the Marshall for this Escape; and so the Court differing in Opinion, the same was adjourned till another time.

Afterwards, (S) Termin. Trin. 13 Jac. B. R. this Case was moved again and argued at the Bar. Term. Trin. 13 Jac. B. R. &c.

Germine for the Plaintiff, the first Action was a Trover and Conversion, upon a Trespass and wrong done by the Wife, and a Judgment given against them both; and by 40 E. 3. fol. 23. for this both of them to be taken in Execution; the Husband here was committed onely for conformity, the first Action being against the Husband and Wife, for the wrong done by the Wife, the Judgment is against them both, and the Execution ought to be according to the Judgment entirely, against the Husband and the Wife; so is 34 H. 6. fol. 33. and 7 H. 4. fol. 30. if damages be recovered against two, execution shall be accordingly against them both; the Sheriff here, according to the Judgment, is at liberty to execute the same against either of them, or against them both; here in this principal Case both the Husband and Wife were taken in execution. It hath been said, that an Action upon the Case lieth upon this Escape, but not Debt: It is true, that an Action upon the Case lieth at the Common Law for such an Escape, but an Action of Debt lieth for this, upon the Statute of Westminster the second, cap. 12. and so is Plats Case in the Commentaries, fol. 33. and 15 E. 4. fol. 19. b 20. a b that an Action of Debt lieth for the Escape, by the equity of the same Statute. 49 E. 3. f. 23. Statute of Westm. 2. cap. 12, &c.

George Croke for the Defendant, that an Action of Debt lieth not against the Marshal for this Escape; the Husband and Wife here taken in Execution, for a Trespass done by the Wife, the goods of the Husband to answer for this, and therefore an Action of Debt lieth not for the Escape of the Wife, for that the husband here is the Principal Debtor, F. Nat. Br. fol. 93. C. If the Sheriff hath a Prisoner in his Custody for Debt, and suffers him to escape before the Debt satisfied, he shall have an Action upon the Case against the Sheriff, and yet he may have an Action of Debt against him, so that here is an Action of Debt by Statute Law, and Trespass upon the Case at the Common Law; the Statutes are, where the party in Execution is set at large, this is to be a sole party in Execution, but it is not so here, the Husband being here the principal party to answer for the whole, and he still remains in Execution; the Wife she hath no goods, and if she dies, he which is to discharge the Execution, doth remain in Prison, by 14 E. 4. fol. 3. & 7 H. 6. fol. 6. that at the Common Law an Action of Debt lieth not upon an Escape, but an Action upon the Case for to recover damages; the Body being in Execution, is no satisfaction, but as a Pledge for the Debt, by the Statute an Action of Debt lieth for an Escape; but this is to be so taken and construed, when the party in execution, who is to satisfie the same, is suffered to escape; otherwise Debt lieth not, but an Action upon the Case, to have damages for the escape of F. N. Br. fo. 93. C. 14 E. 4. f. 3. 7 H. 6. f. 6.

the

the Wife who is gone, for if both remained in execution, the Debt will be the sooner paid; but here for the Wives escape (the Husband being the principal party concerned, and remaining still in execution,) such damages for the escape of the Wife shall be recovered, as a Jury will give.

Coke. It is a plain and a clear Case, that if two are in Execution for Debt, one of them is suffered to escape; that an Action of Debt lieth for this Escape, and so is 34 H. 6. where two are taken in Execution for Debt, the one escapes; for this an Action of Debt lieth against the Sheriff, and after the Debt recovered against the Sheriff, the other which remained in execution shall have his Audita querela to be relieved, the Body being taken in execution is no satisfaction for the Debt, for the body is taken ad satisfaciendum.

34 H. 6.

Dodderidge. I never did read or hear of such a Case, as of Husband and Wife, taken in Execution, that they both were to remain as pledges, in such a Case the Husband is to satisfie all, for the Wife hath nothing, she is to be attached by the Goods of her Husband, having nothing of her own, they are here taken as pledges, untill the Execution money be paid, and the Husband he is to pay this; if the Husband dies, then she may have goods, and then if she be suffered to escape, an Action of Debt will lie for this Escape, but not here as this Case is.

Coke. An Action of Debt here well lieth for this Escape.

Croke Justice. The Imprisonment here is several, and so the Escape is several, and for this Escape of the Wife an Action of Debt well lieth.

Trin. 9 Jac. C. B. Doctor *Husseys* case.

Dodderidge in Doctor Husseys Case, Trin. 9 Jac. C. B. in a Rabishment de gard, where found against the Wife, the Husband to make satisfaction, for that the Wife was out of the Statute of Westminster, the second capite 39. having of her self nothing.

Croke. Doctor Husseys Case upon the Statute of Westminster, if the Wife have nothing, perdet patriam, to be exiled: In the Argument of which Case I and another Judge were of Opinion, that a feme Covert was not within that Statute to be exiled, propter impotentiam that was in her: In this principal Case, I hold it a very strong Case, that an Action of Debt well lieth for this Escape; if two be in Execution for Debt, and one of them suffered to escape, the Court clear of Opinion, that for this Escape an Action of Debt well lieth, and so by the opinion of all the three Judges, (S)

Coke chief Justice, Croke and Haughton Justices, against Dodderidge. The Plaintiff here hath just cause of Action, and that the Action of Debt by him brought against the Defendant for this escape is well brought; but Judgment was not pronounced, there being some other error in the Proceedings, and so the matter was not moved again, but ended by Agreement.

The Spanish Ambassadour, by the name of *Don Degoe, Servient Deacuno*, Plaintiff, against *John Buntish*, and *John Points* Defendants.

A Prohibition to the Admiralty. 1 Ro. Rep. 133. 1 Ro. Abr. 531.

BY Libell in curia Admiralitatis, for cutting down, and for carrying away 200 loads of Ligni Brasilici, of Brasil-wood, growing at Brasil: This being laid by him to be infra dominium Regis Hispaniæ. The Defendants are two English Merchants, and strangers.

Crew,

Crew, The King's Serjeant, moved the Court for a Prohibition, to stay their Proceedings; for that this Libell, was not for any thing done, super altum mare, but for a thing done upon the land; for the Wood cut down, was growing at Brasil, and therefore not to be determined by them in the Court of the Admiraltie.

Coke chief Justice. A man is bound to another beyond sea, if the Court of Admiraltie will take upon them to have Jurisdiction in this case, we will prohibite them; for the Action is to be brought here, it appears by the Statute of 13 R. 2. capite 5. matters arising for merchandise beyond sea, they are not there to determine this; they being onely to meddle with matters done super altum mare, and not otherwise; if they should there hold plea of this, this would be very prejudiciall, to all the course of practise, if the matter, or contract, was done beyond sea, this by the Law of the Land is to be tried here, and may be laid to be done here, in what place the Plaintiffe pleaseth, and so without any further debate at this time, the same was adjourned to another time, for cause to be shewed, why a Prohibition should not be granted.

Stat. of 13 R. 2. capite 5.

Afterwards (S.) Termin. Pasch. 13. Jac. B. R. the Court was moved again herein, by——

Term. Pasch. 13 Jac. B. R. this matter moved again.

Coventry, for a Prohibition; this appearing upon the parties own shewing, to be for a thing done on the Land, this being for cutting of Brasil-wood, growing in Brasil, and this laid by him to be, infra dominium regis Hispaniæ, and the same not done super altum mare, and so the Court of Admiralitie hath no Jurisdiction of this.

Coke. The case here is no other, but that an English man comes into Spaine, and there within the Dominions of the King of Spaine, he doth fell, and carry away so many Loads of Brasil-wood. Whether in this Case for this; the Court of Admiraltie may hold plea, or not, they cannot of contracts made in Spaine, clearly the Court of Admiralty shall have no jurisdiction to determine these there, but the same may be laid to be done at any place here in England, and so to be here tried, so that the Admirall here, is like unto Neptune, and by the Statute of 15 R. 2. capite 3. his power is limited, within certain boundes, which he is not to exceed; and by this Statute, he is onely to have Jurisdiction, of matters done, super altum mare, not otherwise.

Stat. of 15 R. 2. cap. 3.

The Court all cleare of opinion, that here was just cause for a Prohibition, and so by the rule of the Court, a Prohibition was granted.

A prohibition granted, *per Curiam.*

Warde Plaintiffe, against *Æyre* Defendant.

IN an Action of trespasse for an Assault and Battery, & quod cumulum pecuniæ, containing five markes, cepit. The Case appeared to be this, the Plaintiffe and the Defendant, being at play, the Plaintiffe thrust his money into the Defendants heape, and so intermingled them together: the Defendant kept all, and upon this, being striving together for the money, for this the Plaintiffe brings his Action.

Trespass & Assault. 1 Ro. Rep. 133. 16. 45. 1 Ro. Abr. 566. 2 Cro. 366.

Coke chief Justice. In this Case, the Law is, that if I. S. have a heape of corn, and I. D. will intermingle his Corne with the Corne of I. S. he shall here have all the Corne, because this was so done by I. D. of his own wrong, and so it was adjudged in a case between Shordish and Moore, and so it is in case of money, if two being at play, and the one of them will intermingle his money in the others heap of money, he shall now have all, for this is so done by him of his own wrong, and this we

Shordish and *Moores* case.

Sir Richard Martins case.

we have so adjudged in one Sir Richard Martins case, for that his own proper money, or corn cannot now be known, and therefore by this his intermingling, being his own Act, and of his own wrong, by the Law he shall lose all, for this is so used and done by him, onely as a trick, thinking thereby to deceive the other, and so to gain something by this to himself, but by this his so doing, he hath deceived himself, and shall now by this his fortious Act, lose all; and if this should be otherwise, a man should be made to be a trespasser, volens nolens, by the taking of his goods again, and for the avoiding of this inconvenience, the Law in such a case is, that he shall now retein all; the whole Court agreed with him herein against the Plaintiffe, and for the reason aforesaid, and so the Rule of the Court was, quod querens Nil capiat per billam.

The KING, and *Shoyle*, Plaintiffs, against Doctor *Foster* a Physician.

Entred Mich. 11. Jac. B. R. on the Crown-side.

Information upon the Stat. of Recusancy. 23 Eliz. capite 1. 1 Ro. r. 88. 11 Co. 56.

Statute of 1 Jac. capite 4.

By Information, upon the Statutes of Recusancy of 23 Eliz. capite 1. Upon the Plea of Doctor Foster, Termin. Mich. 12. Jac. B. R. Judgement was given against him, for the King, and the Informer.

Coventry moved the Court, for stay of execution, in regard that the Defendant had now conformed himself, and that by reason of this, he ought to be discharged, upon this his conformity, by the Statute of 1 Jac. capite 4. but in regard, that after Judgement, the party hath no day in Court to plead this his conformation; but he may plead this in the Exchequer, as to the King's fine, and as to the party, the Informer, he prayed to have an Audita quærela, for his relieke.

Statute of 23 Eliz.

George Coke. This conformableness ought to be before Judgement given, and not after; the Statute of 1 Jac. doth revive the Statute of 23 Eliz. this to be from henceforth.

Coke chief Justice. (The words are, If shall conforme according to the true meaning of the Statute in this case provided,) it is to be considered, whether these words do referre to the manner of the conformity, or to the time of it, when it is to be, this is the great doubt; these words, are to have a benigne interpretation, whether this word (according) shall goe to the continuance of the conformity.

Haughton Justice. The last words of the Statute are very considerable (of all that might be charged.)

Stat. of 1 Jac.

Dodderidge Justice. The Statute of 1 Jac. hath revived all the former Lawes, as 23 Eliz. if he conform before Judgement, to be then discharged; and this Law of 1 Jac. was made, to adde a further grace, and favour to those Persons, which conformed themselves, (or otherwise) this to be after Judgement, and with this he shall be charged, if he do not conform himself.

Curia. We will be of this well advised, in regard that this will be a leading Case; it shall be very well for them all, if they will come to Church, and conform themselves; and so this was adjourned, for the Court better to consider of it.

Afterwards,

Afterwards, (S) Termin. Pasch. 13 Jac. this matter was moved again, and hereupon, the order, and rule of the Court was, That the Defendant, Doctor Foster should deliver unto Shoyle the Informer 20 l. upon reasonable security, by him given, to re-deliver this 20 l. to him, if he should afterwards free, and discharge himself from the said Judgement, and execution thereupon. Term. Pasch. 13 Jac. B. R. &c.

Coke. This which we now have done, in stay of the Execution, hath been onely done, in favour shewed to Doctor Foster, for judicially, we cannot take notice of his Conformity; for it is well and truly said, Non refert quid notum sit judici, si notum non sit, in forma judicii, and therefore Judgement being given against him, if he payes not this 20 l. or doth something to discharge the Judgement, before such a day given by the Court, then Execution to goe.

Curia. He hath now no remedy to help himself, but onely by his Audita quærela, (if he may have it) he is therefore to pay this presently, or Execution to issue out against him.

Afterwards, on another day, this matter was moved again.

Coke. It appeares, by all our Books, that in a common persons case, if he cannot plead, he is then to have his Audita quærela, but a man shall not have an Audita quærela against the King, he is therefore to plead, and for want of pleading, by the Rule of the Court, Execution was awarded. Afterwards, (S) Termin. Trin. 13 Jac. B. R. Execution awarded by the rule of the Court.

Davenport moved the Court for Doctor Foster, who had conformed himself. Judgement given against him, and a Writ of Execution for the King; after his conformity taken, he pleads for him the Statute of 1 Jac. capite 4. for the allowance of his conformity, and according to this, moved for his discharge. Term. Trin. 13 Jac. B. R. &c.

Coke. The Judgement was here given in Mich. Terme, no execution then awarded, nor yet in Hillary Term, nor yet any plea put in, nor in Termin. Pasch. now he is in execution, and you come too late to plead this; And for his Discharge, you might well have pleaded this against the King before, because he could not have an Audita quærela against the King, (but this the Counsell, either did not know, or not timely consider of it,) it is now too late to plead this; his onely way now is, to make his Address unto the King by his Petition; if you had put in your Plea before, it had been good, his Audita quærela against Shoyle the Informer, will not hinder the Execution, as to the King; for this a Capias ad satisfaciendum.

Curia. Upon this your Motion, he shall remaine in the Sheriffs hands till the next day, and then bring the money here in Court, and he shall be bailed.

Coke. Make your Petition to the King, and I will subscribe unto this his Conformity. Doctor *Foster* bailed, *per Curiam.*

Which was done accordingly.

The Money brought in Court, and so he was bailed.

Evely Plaintiff, against *Slouly* Defendant.

Entred Trin. 12. *Jac.* B. R. Rott. 983.

Trespass for an Assault, battery and imprisonment.

1 Ro. r. 264. Hob. 180.

IN an Action of Trespass for an assault, battery, fining, and for false Imprisonment, apud Charlton, the Defendant, as to the assault, and battery, pleads Non culp. and as to the false imprisonment, he justifies the same, at Ashberton, in this manner, setting forth, that there the Court was held before him, for the Stannery, he being the Steward of this Court, in which Court there was a suite between the now Plaintiffe, and another, for debt, which suite there went against the now Plaintiffe, who was condemned in the suite, and taken by his command, and in execution for this, untill he should pay it, and his fine, which is the same imprisonment, and justifies; and takes a Travers (S) absque hoc, that he was culpabilis, in any place, Extra curiam stanneriæ, upon this plea, the Plaintiffe demurred in Law.

Hele for the Plaintiffe, 1. This Plea is vitious, and repugnant in it self, having first to all the trespasses pleaded. Non culp. and afterwards, unto parcell, made a justification. 2. He doth justifie the imprisonment, and doth not shew, that there was any imprisonment by him, and so not good. 3. As to the Travers, this is not good, but an idle travers, the Action is brought against the Defendant, for a false imprisonment of him at Charlton, in Comitat. &c. he being Steward of the Stannery Court then held; he doth Travers (absque hoc) that he was culpable, out of the Stannery Court, at Ashberton, this Travers is not good; for by L. 5 E. 4. fol. 24. In a false Imprisonment, if he doth justifie, for a speciall reason, he ought to travers, both the time precedent, and subsequent, and so is 27 H. 6. fol. 1. here he ought to have taken a travers in this manner (S) absque hoc, that he was guilty at Charlton, or in any other place, out of the Stannery Court.

L. 5 E. 4. fol. 24.

27 H. 6. fol. 1.

George Croke, for the Defendant. The Action here is, for an assault, battery, and imprisonment, apud Charlton. In his Justification, he shews, that he was Steward of the Stannery Court there, that a Bill was there exhibited before him, against the Plaintiffe, for a debt of 28 l. and for want of Baile, he committed him to Prison, untill he paid the debt and fine, and takes a Travers, absque hoc, that he was after culpable in any place out of the Jurisdiction of the Stannery Court there; this Plea is good in Law, and no repugnancy in it, in a suite there, he ought to have his manucaptors, or to be committed; the Court of Stannerpes here, is an ancient Court, and hath been confirmed by divers Parliaments. As to the travers, being the principall matter, It is shewed that 26 Januarii, the commitment was justly, absque hoc, that he was guilty afterwards, out of the Stannery Court, of necessity here, he is onely to travers the time subsequent; if he did not justifie the imprisonment, the same day, as the Plaintiffe hath laid the same to be, then the course of pleading is to travers the time before, as well as the time after, but otherwise not so, as it hath been here resolved, in an Assault, Battery and Imprisonment; if he justifies the imprisonment the same day, he neds not to travers, the time before, here he was condemned, and in Execution till he paid the 28 l. absque hoc that culpable, after the same day (which he justifyed) or in any other place, out of

of the Stannery Court; Also he neds not to travers the place, as appears by 21 H. 6. fol. 8. and 37 H. 6. where a speciall Justification in one County, he is not to travers further; also the point of the travers, is but matter of forme, as it was resolved 4 Eliz. in one Blunts case, and the Law will intend Charleton to be within the Stannery; so that the plea in Barre here is good, and the Demurrer is generall, without cause shewed. 21 H. 6. f. 8. 37 H. 6.

Haughton Justice, The place where the Court was, is Charleton, or Chalterton, and your Justification is locall, (S.) at Ashberton, and so not good.

Dodderidge Justice. You ought to have said, in your travers, absque hoc, that you were guilty at Charlton, or in any other place, extra Jurisdictionem curiæ Stannariæ, you have answered the first exception well, for by 22 Assisar. fol. 69. placito 60. something ought to be offered, to make an assault, words will not doe it; there the holding up of a Hatchet was an assault; nor a command to one to have him imprisoned, the exception to the Travers, for the time, is well answered, but not for the place, and for this cause, the travers, as here it is taken, is not good. 22 Assisar. f. 99. placito 60.

Croke Justice. As touching the place, whether the same be within the Jurisdiction of the Stannery Court, or out of it, non constat curiæ, so the Court at this time seemed to be all of opinion, that the travers here was not good, because he therein answers nothing to Charlton, the place, where.

Dodderidge. He ought not here, to travers the time before, and notwithstanding this exception, the travers is good; but not for the other defect in it; and so this Cause was by the Court adjourned till the next Terme, for the Defendant then to shew better Cause, or Judgement to be given for the Plaintiffe.

Afterwards (S) Termin. Mich. 13 Jac. B. R. this matter was moved again.

Croke Justice Demanded whether Charlton, the place of the Imprisonment, be within the Jurisdiction of the Stannery.

Dodderidge. By this plea here, it doth not appeare, whether this place be within, or without the same.

Haughton. You have here answered, bene, but not plene, the trespass is laid in the Declaration, to be at Charlton; no answer is here made, as to this, and we cannot know, unless the same be specially shewed unto us by him, by his plea where this Charlton is. Ashberton is laid to be within the Stannery, no good answer by this plea is here made to this Declaration. As to the repugnancy alledged, this is not materiall, here money is to be paid, but this is no part of the trespass, it is not comprehended within the matter of the Imprisonment; here is a good Justification of the imprisonment.

Dodderidge. The travers here is not good, for by this it doth not appear, what the Jurisdiction of the Stannery Court is, nor how farre the same doth extend it self; the trespass here, for the Imprisonment, is laid to be at Charleton; he pleads a suite between the Plaintiffe, and another in Ashberton, that the Plaintiffe, in the suite there, was condemned, and imprisoned, untill he paid the debt and fine with a travers, absque hoc, that he was guilty, alibi, extra Curiam of the Stanneries; this is not good. For by this plea, in this manner, absque hoc, that he was guilty in any place, in Comitatu Devon. out of the Jurisdiction of the Court of Stannerves, by this it doth not at all appeare unto us, whether Charleton be within, or out of the Stannery; and if it be within the same, then here is no answer by this plea unto this, and therefore the plea not good; otherwise it would be, if this be out of the Stannerves; but this is altogether uncertaine; if he pleads Non culp. to the imprisonment, he shall not then plead to the Fine; otherwise it is, where he pleads Non culp. and justifies the Imprisonment; there he is to answer to the Fine, for the Imprisonment is for the Fine: so where he makes a speciall justification, there he ought also, to answer to the Fine, and so is the difference.

Croke. Agreed herein, that the Travers here is not good, for there is no answer

swer here made by this unto the Imprisonment at Charleton: but as to the matter of repugnancy, there is none here.

Judgement given for the Plaintiffe, *per Curiam.*

Curia. The whole Court (absent Coke chief Justice,) agreed herein clearly for the reason aforesaid; that the Plea, and travers here is not good; and so by the rule of the Court, Judgement was given for the Plaintiffe.

Chune Plaintiff, against *Piott*, one of the Sheriffs of LONDON, Defendant.

An Action for a false Imprisonment. 1 Ro. r. 237.

IN an Action of false Imprisonment, the Defendant doth justify; and for his justification sheweth, that one Henry Clare, 4 Februarij, was committed to the Counter in Woodstreet, and being in Prison, made an escape; that the Defendant, being Sheriffe, made pursuite after him, and in this pursuite he did meet with the Plaintiffe in nocturno tempore, circa horam nonam, wandring, who used him undecently, giving him uncivill words; indecenter se gesserit, opprobriosa verba dedit, & detrusit ad murum; and therefore he did take him, and for this did imprison him; and so doth justify: to this Plea, and justification, the Plaintiffe demurred in Law.

42 Assisar. placito 5. *Coke* 5. pars fol. 64. *Clarkes* case. Stat. of *Magna Charta.* &c. F. N. B. title *Withernam.* Coke 8. pars, fol. 60, 61. &c. Stat. of *West.* &c. Stat. of 28 E. 3. cap. 3. 1 E. 4. cap. 2. 1 Mariæ. cap. 8. Fit. Nat. Br. &c. Coke 4 pars. fol. 40, &c. 4 H. 7. fol. 2. 5 H. 7. fol. 5. Stat. of *Winchester.* 13 E. 1. c. 12.

Briscoe, for the Plaintiffe. That this Plea, and justification of the Defendant, is not good. As to the matter of the justification, this rests upon the power, and Authority of the Sheriffe of London. It appeares by 42 Assisar. placito 5. that a Commission, being to take a man, and his goods without any enditement, or suite of the party, or of other processe, is against the Law, and Clarkes case, Coke 5. pars. fol. 64. In a false Imprisonment, the Defendant justifyed, upon an Ordinance for Non-payment of an Assessement, this justification held not good, and the Ordinance to be against Law, against the Statute of Magna Charta, capite 29. Nullus liber homo imprisonetur, which Act hath been confirmed, and established above 30 times: As touching the Authority of the Sheriffe of London, to imprison, it appeares by F. N. B. in his title of Withernam, and Coke 8. pars. fol. 60, 61. in Beechers case, where a man shall be imprisoned, and where not. 2 H. 4. fol. 24. and the Register, fol. 87. Upon a Justicies, or a Nativo habendo, to the Sheriff, he is not to imprison. No imprisonment to be, but by a Court of Record, the Law did not like of the Statute of Westminster the first, capite 15. of Imprisonment to be by the Sheriff, the same was restrained, but to be indicted before him; other Statutes made to this purpose, as 28 E. 3. cap. 3. & 1 E. 4. capite 2. that the Sheriff not to have power of his own authority to imprison one, and by the Statute of 1. Mariæ, capite 8. the Sheriff is not to Act, or do any thing as a Justice of Peace; and in Fitz. Nat. Bre. fol. 80. A. E. & fol. 81. A. C. D. in his Writ De securitate pacis, to the Sheriffe, or to the Justices of Peace; this is by Statute Law; but the power of the Sheriff is small at the Common Law; as to the arresting of one, and restraining him of his liberty; here it is said, that he was a Night-walker, and that it was Circa horam nonam; Yonges case Coke 4. pars. fol. 40. in an Indictment, the stroake laid to be circiter pectus, and in Morgans appeale, circa horam, adjudged not good, for the uncertainty in it, by 4 H. 7. fol. 2. and 5 H. 7. fol. 5. the watch to arrest Night-walkers, they are to be appointed, and this is grounded upon the Statute of Winchester, 13 E. 1. capite 12. which gives authority to the Watch so

to

to do, but not to the Sheriffe: as to the misbehaviours alledged against him, these are, laid to be general, and particular. One, because he did undecently use him, and because he gave him undecent and uncivill words; but doth not shew the manner how in particular, and the Court is not to take knowledge of this, as it appeares. Coke 5. pars. fol. 51. in Specots case, and Coke 8. pars. fol. 68. in Trollops case, the Court is not to give credence to incertainties, not to the Bishop, to his general certification, that a party presented est schismaticus inveteratus, or criminosus, nor to the like return of the Sheriffe, as to the particular misdemeanour here alledged against him; that he thrust him to the wall, detrusit ad murum, he might do this, casually, inscienter, and by compulsion; so that this was no cause of imprisonment he doth not here say, that he did this willingly; this is a Plea in barre, by way of Justification, and this shall not be made good by implication. 5 H. 7. fol. 6. there a Constable pleads in Barre, by way of justification of an imprisonment; for an assault made upon him, if upon this Book of 5 H. 7. a Sheriff may imprison one, for an assault made upon him, he ought then to imprison him, for the breach of the peace, if it be for a particular misdemeanor, done unto himself, non definitur in jure, how long he ought to imprison him for this. Otherwise, where it is for Night-walking, or for the breach of the Peace.

Coke 5 pars. fol. 51, &c.

5 H. 7. fol. 6.

Coventry for the Defendant, the Justification here is good, both for the manner and matter of it; as to the exceptions taken, to the manner of the justification, it is shewed that Henry Clare was committed to the Counter in Wood-street, that he made an escape; that the Defendant being Sheriffe, made pursuite after him, and did meet with the Plaintiffe, prædict. tempore quo supponitur, imprisonamentum prædictum fieri, being the same fourth day of February, on which he escaped, and at the same time, the pursuit was, all being done upon one and the same day, so that there is no repugnancy in the Plea; it is not said, tempore quo factum, sed quo supponitur, and also this is but matter of inducement to the justification, and therefore, whether this be good or not, is not materiall, if he had not set forth this occasion, it would not hurt the justification, being the substance of his Plea, which was, that he being Sheriffe, and there present, the Plaintiffe was wandring, offered uncivill carriage towards him, and giving him ill words; and though this be laid to be, circa horam nonam, yet lay all the Plea together, and it appears, that the Plaintiffe was in the street, in nocturno tempore, when this affront was thus offered unto him. As to the matter of the Justification, there is no question, but at the Common Law, a Sheriff may commit any one for the breach of the Peace; it appears by Fitz. Nat. Bre. fol. 81. that the Sheriff hath Custodiam Comitatus, and therefore for cause, he may commit. 12 H. 7. fol. 17. b. by the Common-Law, the Sheriffe is conservator pacis, and therefore Fitzherbert makes it a question, whether he should bind him by Recognizance, or by Obligation; and no Act of Parliament made to the contrary, to meddle with Sheriffes turnes; and the Statute of 1 Mariæ capite 8. doth not take away any power from the Sheriff, by which statute, if he was in Commission of the Peace before, he is to forbear the Execution of his Commission for the Peace, so long as he is Sheriffe, but he is not to forbear the execution of that which is committed unto him for the County, as to the causes here set forth for his commitment. 1. He was a bagrant. 4 H. 7. Every man cannot commit a bagrant, but by the Common Law, before the Statute of Winchester, certain Officers were appointed, for to doe this; but watchmen were not before, and therefore they derive their authority from the same Act: this Statute doth enlarge the Common Law; here was also a breach of the Peace, which was cause sufficient for commitment; also here is further set forth a violence offered towards the Sheriff himself, (S.) quod detrusit ad murum, by 5 H. 7. fol. 6. a Constable may commit one for breach of the Peace, upon himself, a fortiori, the Sheriff may so doe. It is Objected, That it is not here laid, that he did this volenter, and he might do it (ignoranter) but this is sufficiently proved to be so by all the words used against him, being laid altogether.

12 H. 7. fol. 17.

Statute of 1 Mariæ. cap. 8.

gether. 1. He gave him ill words, and afterwards he thrust him up against the wall; and therefore of necessity, this must be done violently; and so the Sheriffe had good power, and Authority, for this Act of violence to commit him.

Coke Justice. Without all question, the Sheriffe hath power to commit, est custos, & conservator pacis, if contrary to the Statute of Northampton, he sees any one to carry weapons in the High-way, in terrorem populi regis; he ought to take him, and arrest him, notwithstanding he doth not break the Peace in his presence. It was the Major of Barstables case, who did commit one, and justified the same in an Action brought against him, for a false imprisonment, for that he did misbehave himself towards him, by ill words, and otherwise; if he had laid this to have been done, when he was in the execution of his Office, this had been good; but this appeared to be, when he was playing at Tables, and because he then called him fool, he did commit him, and so justifyed, but his justification held not good, the commitment by him being for this cause, and in this manner, here it is said, indecenter se gessit; opprobriosa verba dedit, & detrusit ad murum: but he doth not say, that this was so done violenter: and whether this shall not be so now intended to be so done, laying all together.

The Statute of *Northampton.*

Haughton Justice. It is not here laid to be done contemptuously, & violenter, nec contra pacem; here he did absolutely take upon him to commit him, for this his ill carriage towards him, may he be by the Sheriffe committed, where there is nothing by him done, against the Peace, this to be upon suspition.

Dodderidge Justice. Lay all the words here together, here wants contra pacem, & contemptuose, but if he gives him undecent speeches, and doth thrust him up against the wall, in the night, this doth argue, and imply a contempt, and this Act pursuing to be contemptuously done. It is not here alledged, that he did this (sciens) knowing him to be the Sheriffe. For this he committed him to the Counter, for this commitment, the Action brought, and the Justification made. The Court advised the parties to end this matter between themselves, and so without any further opinion given, this matter was adjourned unto another time.

Afterwards (S) Termino Mich. 13 Jac. B. R. this matter was moved again, and 4 H. 7. fol. 2. 5 H. 7. fol. 5 & 6. cited for the arresting of Night-walkers.

Term. *Mich.* 13 Jac. B. R. &c.

4 H. 7. fol. 2.
5 H. 7. fol. 5, 6.

Coke chief Justice. Clare was here a Prisoner in the custody of the Sheriff, being in execution, he makes an escape, the Sheriffe pursues him, and in this pursuite, he meets with the Plaintiffe, who doth misdemeane himself towards him, in manner as before, we ought here to intend, that he did this maliciously, and it cannot be otherwise intended, for he gave him at the very first unseemly words; and this shewed his spleen towards him, obviam dedit, he met him, & ipsum, usque ad murum detrusit, this ought not to be laid, to be done, vi & armis, in the Bar, this not Clarke-like, the Law here implies this, that it was done vi & armis, it is here said, that he met him & permulta verba incivilia dedit, super quo, videns eum vagantem, & tantopere male sese gerentem; propter malam gesturam, cepit & imprisonavit; this Justification is good, for Magistrates are not to be abused by any one; 5 H. 7. fol. 6. est conservator pacis, and he may arrest one, the Sheriffe is called Vicecomes, because the Earl at the first had this power; no Earl there was before the Conquest; but he had this at pleasure, ad voluntatem regis, but not to descend, but afterwards, when honor did encrease, Vicecomes was then made (id est, vicem gerens, he hath custodiam Comitatus, & custodiam gaolæ; and if he had not here laid him by the heels, for this his ill carriage towards him, he had not done well.

5 H. 7. fol. 6.

The whole Court clear of opinion, that the Defendant had done well here, that the Imprisonment was just, and lawfull; and the plea in Barre, by way of Justification, good.

Dodderidge. This is not to be suffered, for one thus to justle an Officer of the King, being in Execution of his Office, if this had been by chance, and unwillingly, he

he might have pleaded this, if it had been so; but his not pleading of it to be so, shews it to be otherwise, as Bracton observeth. *Bracton.*

Coke. Actus non facit reum nisi mens sit rea, it appeares plainly, that this was thus done by him, willingly, and of set purpose, to hinder him, in the pursuit of his escaped Prisoner.

The whole Court was clear of opinion for the Defendant, that this Plea in Barre and Justification was good, and so the Rule of the Court was, Quod quærens Nil capiat per billam. Judgment *quod querens Nil capiat per billam.*

Hercot Plaintiff, against *Underhill* & *Rochley* Defendants.

IN an Action upon the Case, in the nature of a Conspiracy, for conspiring to indict him for a Felony, supposed to be done in Westbrummidge, at Cawcot Hills; Upon Non culp. pleaded, a Verdict was given for the Plaintiff. An Action upon the case in nature of a conspiracy.

Paul Croke moved for the Defendant in arrest of Judgment, that there was a mistrial, the venire facias being not well awarded, the Felony supposed to be in Westbrummidge, at Cawcot Hills; at Stafford Assizes the Indictment preferred to the Grand Jury, who found an Ignoramus; the venire facias was, de Westbrummidge & Stafford; this not good, for that it ought to have been also of Cawcot Hill, and where the Felony was supposed to be done.

Hen. Finch. The venire facias was well awarded, if the same had been of one Town more or less, it had not then been good: It is true, and not to be denied, that the venire facias ought to pursue the cause of Action; it is laid, that Rochley, one of the Defendants, did malitiose prosecute him at Stafford, and brought him before the Justices at Westbrummidge, Et crimen Feloniæ, & Burglariæ, ei imposuit (ubi revera nulla Felonia, nec Burglaria facta fuit) & malitiose procuravit ipsum, to be Arrested and Imprisoned; that he pleaded Non culp. and it was found for him, and so the Tryal good, the venire facias well awarded, and Judgment ought to be given for the Plaintiff.

Croke Justice. The difference will be this, Where a Felony was done, revera, and where not, if it be a mere false Allegation, and no Felony done, yet such a matter is laid to his charge, and he acquitted, there this Action well lieth for him against such a Prosecutor; but otherwise it will be, where in facto, & in veritate, such a Felony was done there, and this laid to his charge, and he of this acquitted, he shall not for this Prosecution have this Action, because this is in advancement of Justice, and for the finding out and due punishing of Offenders: As to the venire facias, here are onely two material places laid, Whether adtunc & ibidem, shall have reference to Stafford, Westbrummidge, or to the other: Three things are named in the Declaration, and are so laid to be material.

1. Crimen Feloniæ imposuit.
2. Procured him to be arrested.
3. The Indictment preferred at Stafford.

If the third here be material, then the venire facias is not well awarded; the acquital here is but matter of form, you ought here to make the arrest to be at Westbrummidge, or else you will be too short.

Dodderidge Justice. 23 Martii, 9 Jac. apud Westbrummidge, Crimen Feloniæ, eidem Richardo imposuit, ac ipsum, &c. caused to be arrested, this was all at Westbrummidge, & adtunc, & ibidem ducit, before a Justice; this to be at

Westbrummidge, so that where he caused him arrestari, thither he caused him to be brought, this being all, and the same sentence, without any period, untill after the bringing; and this word (ac) doth couple the arrest to be at Westbrummidge; the venire facias here was of Westbrummidge and of Stafford, and as it was urged, nothing laid to be at Stafford, but onely the exhibiting of the Bill of Indictment unto the Grand Jury there, upon which they found an Ignoramus; this is the chiefest doubt, whether this venire facias be well awarded, or not, the same being of Westbrummidge and of Stafford: It is laid, that procuravit to be imprisoned, this goes to Westbrummidge, that he entred into a Recognizance to appear at Stafford, at the next Gaol-delivery; that there personaliter apparuit, he did exhibit his Bill there, and there he took a false Oath, and this he did at Stafford.

Haughton Justice. The Exception to the place is well answered, if the Declaration doth not contain in it some offence done at Stafford, then the venire facias awarded de Stafford, is not good; but it is laid, that there malitiose exhibuit quandam billam Indictamenti apud Stafford, so that here is an offence there laid to be; this is the matter, in regard that he was before bound by his Oath to do this, and therefore urged, that this shall not be said to be done by him, malitiose.

Dodderidge. If nothing had been by him done at Stafford, but that which he was before bound to doe by the Law, then the venire being awarded de Stafford is not well awarded; the Recognizance was onely for him to appear at the Assises, and there to answer to such matters as should be laid to his charge, but other matter was there done at that time by the Defendant, for he did not onely there prefer his Bill of Indictment to the Grand Jury, but he did also there take a false Oath against him, but the Jury did not believe him; and so for this cause the venire facias was well awarded, and the other place not material; and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

Judgment given for the Plaintiff.

Everard Plaintiff, against *Hopkins* Defendant.

A special Action upon the case. 1 Ro. Rep. 124. 1 Ro. Abr. 88, 96.

In a special Action upon the Case, the Plaintiff in his Declaration shews, that the Defendant being a common Chyrurgeon, had undertaken the cure of his servant, being hurt with a Cart-wheel, he shews farther, that he was not onely careless of the Cure (he being by promise and agreement between them, to have 5. Marks for the same Cure) but he had also applied unwholsome Medicines, and with them had put him to more pain, per quod servitium suum amisit, per spatium of one whole year; unde actio. The Defendant by Plea saith, that true it is he had agreed with the Plaintiff for 5 Marks; and that after this, the Plaintiff himself had discharged him, of and from the said Cure, but farther saith, that before this discharge (S) 25 Decembris 9 Jac. he had applied unto him good and wholsom Medicines, and so demands Judgment of the Court. Upon this Plea in Barre, the Plaintiff demurrs in Law, the Defendant joins in Demurrer.

George Croke for the Plaintiff, that this Plea in Barre is not good; the action, is an action upon the Case against a Surgeon, for applying of unwholsom Medicines unto the wounds of his patient; the Defendant in answer to this saith, that he hath applyed wholsome Medicines; this is no Plea, by 48 E. 3. fol. 6. there an

an Action of Trespass upon the case was brought against one, who took upon him to cure the Plaintiff of a wound, but did not: and Brook title Action upon the case placito 25. out of 48 E. 3. fol. 6. b. if a Smith do prick my Horse in shoing, an Action upon the Case lieth for this; and if a Smith do warrant my horse, to cure him, and doth not, an Action upon the Case lieth for this, otherwise it is where he doth what he can, without any such warranty; to this purpose is 46 E. 3. fol. 19. a. an Action of Trespass upon the Case brought against a Smith, and so is Fitz. Nat. Bre. fol. 94. D. and the old Book of Entries, Title Action upon the Case, fol. 2. b an Action upon the Case against a Barber, for barbing of him negligenter & inartificialiter, and the old Book of Entries, Title Physicians and Chyrurgeons, fol. 463. placito 1, 2, 3, 4. an Action upon the Case against a Chyrurgeon for undertaking of a Cure, and not performing of it; the Action here against him is, for his Negligence in the Cure, and also for his applying of unwholsome Medicines; his Plea to this is, that he hath applied wholsome Medicines, which is no Plea at all; but he ought here to have pleaded Non culp.

48 E. 3. f. 6. Brook Title Action upon the Case pl. 24.

46 E. 3. fol. 19. a & Fitz. Nat. Bre. fo. 94. D. Old Book of Entries, f. 2. Action upon the case, &c.

Whitlock for the Defendant, that the Plea here is good; here is laid against him crimen ignaviæ, & crimen versutiæ. Two things are mentioned in this Declaration, if this one plea doth vitiate the Declaration in both points, then this Plea will be good; if he had here taken a Travers, with an absque hoc, this had bin good; but this Plea, as it is, doth give a full answer to all the matters in the Declaration, and where a Plea is satisfactory, there needs no Travers; as in 9 E. 4. f. 36. b where it is said, that when the Tenants plead in the Negative, and contrary to the Writ brought against them, it is sufficient for the other to maintain his Writ; that they were Tenants, as the Writ supposes, where they plead Non tenure; as to the other matter, he pleads that he continued the Chyrurgery untill that 25 Decemb. he was discharged of the same by the Plaintiff; this discharge being by word, is a good discharge, and this appears by 18 E. 4. f. 8. b where a Carpenter did covenant to build a sufficient house, of a certain length and breadth, and to have pro labore suo 10 l. afterwards he would not suffer him to make this, but commanded him to the contrary, and so discharged him; with this agrees 19 E. 4. f. 2. b that such a discharge is good by word; and so here in this Case; Also the Declaration here is not good; this Action doth not lie for the Master, for at this time the Servant was not able to doe him service, being lame; also the consideration here is not well laid; (S) 5 Marks to be paid, but no time limited quando to be paid, (but postea solvend.) and it is not laid to be cum inde requisitus, and if there be no remedy for him, to come by this, then this is no perfect contract; and this appears by 14 H. 8. fol. 19, 20. in Wheelers case; so that he is here without remedy, because that no time is limited, when he should have it; also the Declaration is contradictory, for he is not to have the 5 Marks untill he hath cured him, and if he doth not cure him, then he is not to have it.

9 E. 4. f. 36. b

18 E. 4. f. 8. b

19 E. 4. f. 2. b

14 H. 8. f. 20. *Wheler's* case.

To this it was answered, that the Plea in barre is bad, and the Declaration good, it is here laid, that he was negligent of the cure, and had applied unwholsome medicines, and here the Plaintiff had just cause of Action. 15 Decemb. 9 Jac. he agreed with him for 5 Marks, postea solvend. and though no time be limited for the payment, yet this is to be paid when he hath cured him, and when he hath perfected this cure, he may then have his Action upon the Case for his money; so here the Plaintiff hath just cause of Action for the Defendants neglect in the cure; and the Defendant also hath good remedy for the 5 Marks agreed to be paid him when he hath finished the Cure.

Coke chief Justice. In the expressing of the Consideration, if there be a reciprocal promise laid, there needs not in the Declaration to be laid the payment of the money, nor yet the time when the same is to be paid, because the Law gives the party a sufficient Remedy to recover his money agreed to be paid, when he hath done that which on his part is to be performed; and for default of performance, or for negligence in the performance, an Action upon the Case well lieth for this, but

if a promise laid to be in this manner (S) that if you do pay so much unto me, I will then deliver unto you such a horse, here he ought to lay a special payment of the money, or no Action for not delivery of the horse, but here in this principal case it is laid to be pro & in consideratione, of 5 Marks, tunc postea solvend': pro, here the Plaintiff ought to have laid in facto, that he had paid the money; this is not so laid, and therefore as this Case here is, this omission is an incurable fault. It is also here laid, that he did apply, indebita & insalubria Medicina; for this the Master may have an Action clearly; but the servant cannot have an Action upon this agreement, but he may have an Action upon the case for his applying of unwholsome Medicines to him, It is considerable, whether the Master here may have an Action upon the Case, upon an Action of the Case, this he may have, if the Master sends his Servant to pay money for him upon the penalty of a Bond; and in his way a Smith, in shoeing, doth prick his Horse, and so by reason of this the money is not paid; this being the Servants Horse, he shall have an Action upon the Case for pricking of his Horse, and the Master also shall have his Action upon the Case for the special wrong which he hath sustained by this, by the non-payment of his money, occasioned by this; the pleading here is not good, he might apply wholsome and unwholsome Medicines.

Dodderidge Justice. If a third person do challenge the Servant of another, and by reason of this, the Servant keeps the House, the Master shall not have an Action upon the Case for this, nor yet for slanderous words spoken to the Servant.

Coke agreed herein.

Dodderidge agreed the Case of pricking the Servants Horse by the Smith, going to pay Money for his Master; but in this principal Case, how can the master have any detriment, (and without this he cannot have an Action,) here the servant was lame, and unable to doe his master any service, and it is altogether uncertain when he shall be cured. 3 E. 3. Fitz. Title Corone placito 163. a. a Physician to be hanged for applying of contrary Physick, with an intent to hasten the death of his Patient; but I do not say, that this is now Law, it was so then, when voluntas pro facto was adjudged.

43 E. 3. Fitz. title Corone pl. 163.

Coke. Medicamenta are of three kinds, (S) Medicamenta benedicta, which do cure. 2. Sperabilia, which do prolong the Cure, these are bad. 3. Medicamenta imperita, this is worst of all.

Coke & Dodderidge. This is a good Case, and worthy of consideration.

Coke. I never before did see an Action upon the Case upon an Action on the Case.

Croke Justice. If one do promise another 10 l. for to build a House, he is not to have this money paid him untill he hath built the House.

Coke denied this; for he is to have his money before, and if he do not build the House according to his agreement, he may have his Action against him, and so recover damages.

Croke. If a man sends his Servant upon a message of some importance, another having digged a hole in the High-way, into which the Servant falls, and hurts himself, so that he cannot go any farther upon his Masters message, here the Servant shall have an Action upon the Case for this, and the Master also shall have his Action.

The whole Court agreed this, and that so here is an Action upon the Case upon an Action on the Case; and so likewise in the Case of the Smith, where he pricks the Horse of the Servant being on his journey to pay money for his Master, to save the penalty of a Bond; both master & servant may have their several Actions for their several wrongs hereby sustained.

The opinion of the Court for the Plaintiff, but no Judgment given, ended by agreement.

The whole Court inclined to be of opinion for the Plaintiff, that the Action was well brought, but the pleading not good nor formal, and so no Judgment given in the Case; and the same being adjourned, was not moved again, but ended by agreement, as was conceived.

Wilson

Wilson Plaintiff, against *Dodd* Defendant.

Trespass for assault, wounding, taking and imprisoning.
1 Ro. Rep. 135, 176.
1 Ro. Abr. 546.

IN an Action of Trespass, for an Assault, wounding, taking and imprisoning, The Defendant pleads, quoad, the assault, and wounding Non culp. & quoad, the taking and the imprisonment he doth justify, by force of a Warrant he had from the Lord Major of London, but doth not shew in his Plea any time, when the warrant was made, nor yet any place where the same was made, he doth justifie in this manner, quoad captionem & imprisonamentum, but in this his justification, he leaves out the assault; to this plea the Plaintiff demurres in Law.

Coke chief Justice. He did this when he was Major, and a Justice of Peace, and he delivered this unto his Marshal such a day, and at such a time; this is good, and sufficient, without laying any certain time, when this was done, but this is good as it is, notwithstanding that no place nor time is shewed, when the precept was made, but that such a day, and at such a place, the same was delivered to the Officer, by virtue of which he did tempore quo take him and imprison him, this Plea and Justification, as to this, is good.

Binge, for the Plaintiff; the Warrant here is his sole justification, and if there was no such Warrant, then the justification is not good, and therefore this is a very material matter to be certainly shewed; and if a Travers should be taken, that there was no such Warrant, if it be not certainly shewed, where the same was made, this cannot be tried.

3 H. 7.

Coke. By 3 H. 7. Where divers things are laid in a Declaration, in a Plea in Barre, the Defendant needs not make mention of all of them; and as for the trial, this shall be where the delivery of the Warrant was, the Warrant is here directed unto the Kings Officer, and Waldron is an Officer to the City, it is to be considered, whether an Officer of the City shall be said to be an Officer of the King; he shall be said so to be; in antient time Serjeants were called Catch-poles, because they took men by the Pole, or Head, and then all the Body follows. 25 E. 2. cap. 2. de Servientibus, touching Labourers upon refusal to be set in the stocks, and so this Case was adjourned to be farther advised upon.

Term. Pasch. 13 Jac. B. R. this matter moved again.

Afterwards (S) Term. Pasch. 13 Jac. B. R. this Case was moved again.

Dodderidge Justice. These are several Assault here laid, (S) the assaults in the wounding, and the assault in the taking, here he hath in his Plea justified, quoad captionem & imprisonamentum; but in this his justification he hath left out the assault, which is the chief cause of the Demurrer; and for this defect in his Plea, the same is not good, but to be discontinued, and this appears to be so by Herlackendens Case, Coke 4. pars, fol. 62. where the Defendant, as to all the trespass, præter fractionem clausorum, nec non præter sucisionem 200 quercuum, & Non culp. & quoad fractionem clausorum, &c. ac herbæ prædict. &c. the Defendant pleads matter in Law, by which he entitles himself to the Land; but in the quoad, the trespass as to the Trees, was altogether omitted, and so nothing pleaded unto this; and the Demurrer being joined, all is discontinued; and so is 7 E. 4. fol. 24. b and 27 H. 8. fol. 1. b but there, that the matter in Law might appear by the assent, the Plea was amended, and the role.

Coke 4 pars, fol. 62. *Herlackendens* Case.
7 E. 4. f. 24. b
27 H. 8. f. 1. b

Coke. Quoad the taking and imprisoning here, he doth justifie, this doth not include the assault.

Dodderidge.

Dodderidge. The Action here is for an assault, wounding, taking and imprisoning, by 22 Assisar. fol. 99. placito 60. a man may assault another, although he do not strike him, as there one did with a Hatchet, out at a window, the offer is in judgment of Law an assault; he ought here to have answered unto the assault, for he may be found guilty of the assault onely; and here the assault in the wounding is not the assault in the taking, and therefore he ought in this plea to have made answer unto this.

22 Assisar. f. 99. pl. 60.

Coke. He ought here to have justified specially, which he hath not here so done.

Plea discontinued, and to begin again.

The whole Court agreed in this, That for the omission of the Assault in the taking (in his justification) for this cause the plea is not good, but discontinued, and therefore by the rule of the Court, to begin again.

Foorde Plaintiff, against *Hoskins* Defendant.

An Action upon the case against the Lord for refusing to admit one to a Copyhold Estate.

1 Ro. Rep. 125. 195. Mo. 842. Cro. Ja. 368. 1 Ro. Abr. 108. 2 Ro. Rep. 274.

If an Action upon the Case brought against the Defendant, being Lord of a Manor, for refusing to admit the Plaintiff unto a Copy-hold Estate, being nominated thereunto by the present Copyholder, the Custome of the Manor being laid to be, that every Copyholder may nominate one to his Copyhold Estate, who upon tender of his Fine unto the Lord in Court, ought by him to be admitted, and that he being thus admitted by the Custome, he also is to have the same privilege of the like nomination afterwards; that the Plaintiff being nominated to the Copyhold Estate, did tender his Fine to the Lord in Court, and prayed to be admitted; the Lord refused to doe this, and for this his refusal, the Action here was brought; Whether the same will lie, or not, is the question?

Coke chief Justice. It was against Feoffees in trust, who refused to perform the trust reposed in them, whether for this an Action upon the Case at the Common Law lieth, or not? or what remedy?

Stroude. The Chancery will aid him in these Cases; the Surrender here was, to the use of one for life, who came unto the Lord, and desired him to admit him; if he which requires to have a use performed, and hath neither jus in re, nor ad rem, for which there is no remedy in Law; this Action upon the Case is here brought for the damages which he hath sustained by reason of this his refusal to admit him a Copyholder.

Coke. So it may as well be said in the Case of Feoffees in trust, who do refuse to perform the trust.

Haughton Justice. May one have an Action upon the Case against the Lord of a Mannor, for refusing to keep a Court, such an Action lieth not against the Lord.

Dodderidge Justice. By this Custome, as it is here laid, this Action upon the Case well lieth against the Lord.

Coke. The Lord here hath jus admittendi, you ought here also to prescribe, in the remedy for such refusal to admit, as to have against him an Action upon the Case for such his refusal; if a man have a deed to be inrolled within six months, if not, he to lose the Land, if the Clark of the Inrollments will not inroll this, an Action upon the Case well lieth against him.

Dodde-

Dodderidge. An Action upon the Case, lyeth against the Bishop, as if one be instituted, hath a mandat to the Bishop, who refuses to do according to the mandat, for this his refusal an Action upon the Case lieth.

Croke. If one comes to the Lord of a Mannor, and desires him to admit him who saith, that he will be of this advised, whether an Action upon the Case shall lie against him for this; and whether the same shall lie for every refusal.

Dodderidge. The Action upon the Case here well lieth against the Lord in this principal Case, for his refusal to admit him; the Custome hath confirmed this Copyhold Estate to pass in this manner.

Coke. If a Copyholder of Inheritance grants his Copyhold land to one, and to his heirs, this shall descend, and no tenant by the courtesie, nor yet Dower, shall there be of this, without a special Custome for the same.

Dodderidge. If he shall not have this Action for his aid and remedy, then the Lord may cut them off from their admittances, which may prove very prejudicial to them.

Coke. He may go into the Chancery for his remedy there in Perimans Case, 5 pars, fol. 84. It is there objected, What remedy is there for the party, if the Tenants will not present the surrender, or if the Steward will reject the presentment; Answered by the Court, that the like objection may be made upon a bargain and sale by Deed, what remedy, if the Clerk will not enroll this; and so in the Case of a Copyhold; what remedy, if the Copyholders will not present a surrender made out of Court, it is there said, caveat emptor, he at his peril is to perfect all this which is requisite to his assurance; and this is a good Case. The whole Court (Dodderidge excepted) agreed clearly, against the Plaintiff, that the Action upon the Case lieth not against the Lord for this his refusal to admit the Plaintiff, and so the same was adjourned unto another time, to be farther debated. Coke 5 pars, fol. 84. in *Perimans* case.

Afterwards (S) Termin. Pasch. 13 Jac. B. R. this Case was moved again. Term. Pasch. 13 Jac. B. R. this Case was moved again.

Coke. Lord and Tenant Copyholder by surrender, or by nomination, by force of a Custome precedent, desires the Lord at his Court to admit him to the copyhold Estate, and offers him his Fine, the Lord refuses, he cannot take the profits before admittance, here is damnum & injuria, whether for this refusal he may have an Action upon the Case or not? if cestuy que use desires the Feoffees to make an Estate over, and they so to do refuse, for this refusal an Action upon the Case lieth not, because for this he hath his proper remedy by a Subpœna in the Chancery; this principal case here, est novus casus, and the first of this nature.

Dodderidge. If the Ordinary do refuse to admit a Clerk presented to him, an Action upon the Case lies against him for this, because he hath but a ministerial Office, at this time mutata opinione, this action upon the Case lieth not against the Lord for this his refusal to admit the Plaintiff unto the Copyhold Estate, for this is to draw an interest from him, by one who hath no Interest at all. I do not see how the Lord can be compelled by the Plaintiff, by way of Action, to do this against his will; and that by one, (S) by the Plaintiff, who hath no right at all.

Coke. He which hath the trust, hath no remedy by way of Action, against the other, who hath the Interest; for a trust is not assets, nor yet forfeitable by attainder, and so in effect the same is nothing; if a request be made, and nothing hereupon done, by this is implied a refusal, and if for every such refusal an action shall be brought, this will bring in many inconveniences, 4 pars, fo. 22. in Browns case, No dower, tenancy by the courtesie, nor any other incident, which the Law gives to other inheritances, shall be of Copyhold Estates (being of so small an esteem in the Law) without a special custome for the same, and for this reason, he shall not here have an Action upon the Case against the Lord for refusing to admit him upon request, without a special custome also for this. In the Case remembred of the Coke 4 Pars, fo. 22. a in *Browns* case.

present-

presentment, there the party to be presented hath jus, but here in this principal Case he hath not so, and therefore clearly he cannot have this action here against the Lord for his refusal to admit him, without a special Custome or Prescription for the same. But in all Cases of Ministerial Offices, if they refuse to doe their Offices, actions upon the Case shall well lie against them, as against the Clark of the Inrolments, if he refuse to enroll a Deed, an Action upon the Case lieth against him for this; but it shall not be so in the case of Trusts. It is very clear, that no Action upon the Case here lieth against the Lord for this his refusing to admit him; if an Infant Lord be, and there is one who hath such a nomination, the Infant Lord is disseised, a fine levied, and five years past, is this his nomination by this barred, if he hath any right, the same is bound, but it is very clear, that by this nomination he hath no right at all, the Interest is in the Lord, the Nominatæ hath neither jus in re, nor yet ad rem, he hath onely a nomination, which is matter merely in equity; if he pleads the admittance, he is to plead the surrender, and this is to be pleaded, as the grant of the Lord (S) dominus concessit, and so the admittance gives an interest, he having none before, in the case before of the Fine, the Infant Lord, after he hath avoided the Fine he may admit him, so that by this nomination, he hath no right at all before admittance. I never yet heard of any such action brought against the Lord, this is primæ impressionis, the first of this kind.

Haughton. Will an Action upon the Case lie against a tenant for life, if he will not attourne to a grantee of a reversion? it will not lie against him.

Dodderidge. If a man makes a Feoffement in fee to J. S. and delivers the Charter of Feoffement unto him, by this he is but a tenant at Will, if he refuses to make livery of seisin to him, he shall not have an Action upon the Case for this his refusall.

Coke. An Action upon the Case doth suppose, that there is both damnum & injuria; injuria is that which is contrary to the Law, here can be neither of these because he hath no interest.

Dodderidge. No action upon the Case lieth for not presenting of one to a Benefice, as if one do promise to present J. S. to a Benefice, and he presents another, and not J.S. he shall not have an action upon the Case for this; the whole Court agreed with him herein, but he is to have his Quare Impedit.

Dodderidge. Where an Action upon the Case lieth at all, the same lieth as well for a Non feasans, as for a Misfeasans; but here the Plaintiff hath no Interest at all, and therefore by such an action upon the Case, he shall not draw an Interest to himself from the Lord against his will.

Judgment *quod querens nil capiat per billam.*

Coke. Omnis innovatio plus novitate perturbat quam utilitate prodest. The whole Court clear of opinion, the Action upon the Case here brought by the Plaintiff against the Lord, for refusing to admit him unto the Copyhold Estate, doth not lie, if it should, the consequence of this is much to be feared; and therefore the rule of the Court was, Quod querens nil capiat per billam.

Ewer

Ewer Plaintiff, against *Chamberlaine* Defendant.

IS a Writ of Error to reverse a Judgement given here against him. A Writ of Error.

Yelverton, The Kings Sollicitor, moved the Court for an amendment of the Bill, upon the Fyle.

Coke. The Bill here is the Originall, we may amend the Declaration according to the Bill, but how can we here amend the Bill it self?

Yelverton. The first draught of the Bill was well and right, but in the Ingrossing of it, these words (S.) (primo intraverunt) for the occupancy was omitted, and this is the main point, but this was right in the Office-book, in the first draught.

Coke. By 10 H. 7. if the Office-book be well, then (God forbid) that this omission by the Clarke, in the Ingrossing, should any wayes prejudice the party, but that this may well be amended, and so according to this, by the rule of the Court, the same was amended. Amendment by the Court. 10 H. 7.

Tt TERMIN.

TERMIN. MICH.

3 *Caroli* Regis. *B. R.*

Certain CASES and Resolutions upon the Statutes of 18 Eliz. capite 3. *touching Bastard children, and* 43 Eliz. capite 2. *concerning the* Poor, *and Provision for them.*

The KING, and *Charles Hammonde.*

Upon a Habeas Corpus, Hammond appeared, the return thereof being read, it appeared, that he was committed, and detayned in Prison, in the County of Oxon. A Habeas Corpus.

Littleton moved the Court for Hammond, for his discharge, the ground of his commitment being not good, the same not being done, in a due and legall manner, being upon the Statute of 18 Eliz. capite 3. made for provision for Bastard-children. Hammond having got a bastard-childe. By the Statute of 18 Eliz. this is to be referred unto the examination of the two next Justices of the Peace, for to examine, and order the same; they accordingly did examine the matter, and made their order therein, the which, if the party refuse to perform, or to enter into bond, to appeare, at the next Quarter Sessions, then they are to commit him to Prison, without baile or mainprise. Hammond accordingly entred into this bond, and after, at the next Quarter Sessions, where he appeared, the Justices there did make another Order, and because he did refuse to perform this, they did there commit him to Prison; which imprisonment thus by them was illegally done, this being out of their power; they having no such power given them, by the Statute; but upon his refusall, to perform their order, they ought to have pursued their ordinary remedy against him, (S.) upon his bond, entred into, but not by such Commitment. Stat. of 18 Eliz. capit. 3.

Hide chief Justice. The Justices ought not here to have committed him, for not performing of their order made at the quarter Sessions; where they do alter the former Order; by this the first Order made by the two next Justices of peace is disanulled, and made voide, but in this Case, Jones Justice of Assise, by assent did make this Order, that he should pay 10 l. this Order was certified; afterwards, Sir Henry Poole did commit him, for not performing of the Order of the quarter Sessions; the Court being of all this informed, granted a Habeas Corpus to remove the body, and the cause of the Proceedings had against him; this all appearing unto the Court, upon the return of the Habeas corpus, and that this Imprisonment was illegall, by the Rule of the Court he was bailed.

The party bailed *per Curiam.*

Termin. Mich. 6 Caroli Regis. B. R.

The KING, and *Smith.*

A Habeas Corpus.

Rich. Smith came to the barre by a Habeas Corpus; and upon the return of the Sheriffe of the County of Oxon. it appeared, that there being a bastard child, begotten of the body of one Margaret Smith of Bleckthorne, in the County of Oxon, the matter was examined by Doctor Standard and Mr. Gregory, the two next Justices of Peace, and it appeared upon proof before them, that the said Smith was the reputed Father, upon this they made their order against him, according to the Law, and according to the Statute of 18 Eliz. capite 3. for maintenance to be provided for the bastard child, and for discharge of the Parish, and that by vertue of the Warrant made by Mr. Gregory, the said Smith was committed to his Custody for the not performance of their Order, & hæc est causa.

Jones Justice. Upon reading of the Return, I see the same fault in it, as was in the return upon Hammonds Habeas corpus, for the like matter touching a bastard child, who was committed by the Justices, for not performing of their Order, whereas they have no such power by the Statute of 18 Eliz. capite 3. to commit any one for not performance of their order, but the two first, and next Justices are to take bond for his appearance at the next Quarter Sessions; and for this cause, the return in that case was quashed, and the party bailed by the Court, and the Court gave further time for the examining of the matter, there being here a further point upon the Statute of 18 Eliz. 2. capite 3. For first, Sir Henry Poole, and Doctor Standard, being the two next Justices, did examine this matter, and it then appeared before them, that one Field was the reputed Father, and upon this they made their order against Field, according to the Law, for maintenance of the said bastard childe, and for discharge of the Parish, and to enter into a bond for his appearance at the next Quarter Sessions, and to abide their Order there made, he refused to enter into the bond; but appeared at the Sessions, and there did petition, and shewed that Smith was the reputed father, the former Order certifyed to the Sessions, the Justices there did nothing upon it, nor made any finall order, but granted a new reference of this unto the said Doctor Standard, and to Mr. Gregory, Sir Henry Poole being removed out of the Countrey, and they made the last Order contrary to the former, and by this Order they did charge Smith as the reputed Father, to provide for the bastard Child.

Stat. of 18 Eliz. cap. 3.

Stat. of 18 Eliz. cap. 3.

Hide chief Justice. And the whole Court cleare of opinion, that the Justices, at their next Quarter Sessions, ought to have made a finall Order in this case, or to have

have either affirmed, or disallowed of the former order, and then afterwards, to have granted a reference of the cause, to the same next Justices of the Peace (if in the County) which made the first order, for to consider better of it, and of the proof, and this had been according to the Law.

Nota, That upon Reading of the Statute, and conference had amongst the Judges, they all agreed in this, that after an appeal to the Sessions, and the Justices there do repeal the first order, the matter then is as res integra, before them: and they may then grant a re-reference of the matter to the two next Justices.

Nota, per Curiam, in this Case, that upon the Statute of 18 Eliz. capite 3. the Recognisance taken, ought to be in the disjunctive (S) to perform the order by them made, or to appear at the next Quarter Sessions, and to abide the order there. 18 Eliz. c. 3.

Nota also per Curiam, in this Case, that upon the Statute of 18 Eliz. capite 3. one Justice of peace by his warrant may commit, but because the Mittimus being shewed, and the same was not pursuing the Statute, the Recognizance being to be in the disjunctive, which was not so, therefore by the Rule of the Court, Smith was bailed, to appear at the next Quarter Session to be held for the said County. *Smith* bailed *per Curiam.*

Nota, That in this Case, another point was moved upon this Statute of 18 Eliz. capite 3. (S.) after the two next Justices have made an order under their hands, whether one of them may afterwards disavow this, or not, and if he so doe, what is then to be done, as here Doctor Standard did; Upon the reference from the Sessions. The Court delivered no opinion, as to this, in regard they all resolved the same reference to be illegall; the Justices at the Sessions, having done nothing upon the first order, either by way of affirmance, or disallowing of the same, nor any finall order there by them made, but a generall reference again unto the two next Justices. Which was not good, nor legall. 18 Eliz. c. 3.

Termin. Pasch. 8 *Caroli Regis. B. R.*

Bowber Plaintiff, against *Panter* Defendant.

IN a speciall Action upon the Case, the Plaintiffe laid in his Declaration, that the Defendant did endeavour, conatus fuit, to question him, and to charge him at the quarter Sessions, to be the reputed Father of a Bastard child, whether the Action lay or not, was the question. A speciall Action upon the Case.

Richardson chief Justice, and the whole Court, were clear of opinion, that the Action did not lie, this being an Ecclesiastical Scandal, and so to be punished there; but if he had laid, that he had procured an Order at the Sessions, to be there made against him for to be the reputed Father, and so to keep the childe, then the Action would well lie, by reason of the Temporal loss, but it is not so laid in the Declaration.

Richardson chief Justice, and the whole Court in this agreed, upon that Statute of 18 Eliz. cap. 3. That the Justices of the Peace, nor yet the Justices of Assise, have any power to meddle with bastard Children, but upon an Appeal and setling Stat. of 18 Eliz. cap. 3.

setling, but this is to be done by the two next Justices, by the Statute of 18 Eliz. cap. 3. this comes not to the Sessions, but upon an appeal, they are therefore to observe Order in their Proceedings; and where it is laid to be, that he did labor the Justices of Peace in this matter; this must be upon the Appeal, in which case they or the Justices of Assise may meddle in it.

Termin. Mich. 7 Caroli Regis. B. R.

The KING and *Reve.*

A *Habeas corpus.* Statute of 43 Eliz. cap. 2. &c.

REve was brought to the bar by a Habeas Corpus, and upon the Statute of 43 Eliz. cap. 2. the Case upon the Return of the Habeas Corpus, being read in Court, appeared to be this; Reve being brought to the bar, by the Keeper of Newgate, who made his Return, which being read, it appeared thereby that he was committed by vertue of a Warrant of Mr. Shepherd, a Justice of the Peace in the County of Middlesex, because he being the reputed Grand-father of one Benjamin Gregory, a poor Fatherless and Motherless childe, maintained at the charge of the Parish of St. Giles in Campis, and he being a man of ability, refusing to maintain or provide for the Childe, or to finde Sureties for his appearance at the next Quarter Sessions to be held for the County of Middlesex.

The Parishioners of the Parish of St. *Giles*, complained against *Reve.*

Upon this, the Return being read, the Court was moved to have Reve discharged, because this Warrant for his Commitment appears to be against the Law, the same being grounded upon the Statute of 43 Eliz. cap. 2. Rastal tit. Vagabonds, fol. 428. there being in this Statute this Clause: (S.) Be it Enacted, That the Father and Grand-father, Mother and Grand-mother, and the children and Grandchildren, of every poor person not able to work (they being of ability) shall pay such Rates, and in such wise, for the maintenance of such poor person, as the Justices of the Peace of that County, where such sufficient person dwelleth, at their general Quarter Sessions shall assess, Subpœna to forfeit Twenty shillings for every Moneth.

Statute of 43 Eliz. cap. 2. &c.

Against this Warrant, it was urged, that there was no such person as the Law takes notice of, (S.) as the reputed Grand-father, for that a Bastard, est filius populi; and the reputed Father, is by the Statute of 18 Eliz. cap. 3. Also the Court was informed, that this party Reve, did live and inhabit in the Town of Eye, in the County of Suffolk, and that he came hither to London, to follow some Suits which he had in the Star-Chamber, and that he being here, was taken and apprehended by the Warrant of Mr. Shepherd, and so brought before him; so that all this which was done by Mr. Shepherd, and his granting of this Warrant, was altogether illegal, for that he hath not herein pursued the Statute: And so all which is here done in this Case in the County of Middlesex, est coram non judice, they having no such power there; also at their Quarter Sessions for Middlesex, they have not any power to make any order in this Case by the Statute, the party inhabiting in the County of Suffolk: Also it doth not appear here that he was unable to work: Also he is not to be committed untill an Order made, and a refusal by him to pay the twenty shillings a Moneth; and if he refuse to doe this, then in default of a Distress to be committed, but not before.

Statute of 18 Eliz. c. 2.

Mr. Shepherd afterwards being at the Bar, said this to the Court in excuse of himself, that by the Statute of 7 Jac. cap. 4. Rastal tit. Vagabonds, fol. 430. he would have him taken as for a Rogue, because he did run away (as he pretended) from

Statute of 7 Jac. cap. 4. &c.

from the Parish, and did leave the Childe there. But as to this allegation, no answer was made unto it, but he was by all very much deridd for the same, there being no colour at all for it.

Jones, & Croke Justices. It is very reasonable that he should contribute to the maintenance of the Childe, he being a man of good sufficiency, but in this course, as is here taken, he is not compellable to do it; the Childe resides here in the Parish of St. Giles, in the County of Middlesex, and the contribution is to be here, but the party which is to pay it, doth inhabit in the County of Suffolk; the Justices of Peace there may make an Order in this, and so to cause the Money to be sent up: The Warrant here also was, because he refused to give Surety to appear at their next Quarter-Sessions. But as to this, the Court was clear of opinion, that they have no power there to make any order in this case.

The Rule of the Court was, to have Reeve bound to appear at the next Quarter Sessions to be held for the County of Middlesex; and so upon performance of this, he was discharged by the Court. *Reeve* discharged, *per Curiam.*

Draper, against the Town of *Glenfield* in the County of *Leicester*.

At the last Summer Assizes held for the County of Leicester, before Hutton and Croke Justices of Assize, this matter came in question concerning the Town of Glenfield, where, upon the Statute of 43 Eliz. cap. 2. the Grandmother being a person of ability, within the Statute of 43 Eliz. had a poor Grand-childe relieved by the said Parish, and the Grand-mother marryed with the said Draper; the question before the Judges was, Whether Draper should be taken to be a Grand-father within the Statute, and so liable to give maintenance to the Childe, he having married the Grand-mother, who was before a person of good ability. Statute of 43 Eliz. c. 2.

It was there resolved by them, that he should be so accounted of as a Grand-father within the Statute; for that the Wife, after her marriage, hath no ability at all, the Husband having all given unto him by the Law, by his inter-marriage with her, and the Husband is not a Grand-father, neither within the words, nor yet within the meaning of the Statute, for to be charged in this case.

But Croke Justice. It is reasonable either to charge him or not, upon this difference, where the Grand-mother, with whom he inter-married, was of good ability, and where not, at the time of the Marriage; if she was then of ability, it is then good reason that the Husband should be charged, but not otherwise. *Nota*, The difference.

Civitas

Civitas Westminster, against *Gerrard.*

Term. Mich. 7 Caroli Regis, B. R.

ALso after this Term of Mich. 7 Caroli Regis, B. R. ended, another matter of the like nature was referred unto.

Whitlock and Croke Justices. Being a matter concerning the City of Westminster, a complaint was made against Edward Gerrard, who had married the Grand-mother, who ought to have contributed towards the maintenance of her Grand-childe, as a Grand-mother, within the Statute of 43 Eliz. cap. 2.

Statute of 43 Eliz. c. 2.

Whitlock and Croke Justices. If such a Husband who had married the Grand-mother, had an Estate with her in Marriage, that for this Estate he shall be charged to be contributary within the meaning of the Statute of 43 Eliz. cap. 2. and for this cause they were both of opinion, that Gerrard, who had married the Grand-mother, should contribute towards the relieke and maintenance of the Grand-childe, he having an Estate with her by his marriage, by reason of which he is to be bound to contribute: But otherwise it shall be, if he hath not any Estate nor advancement by his marriage with her.

Statute of 43 Eliz. cap. 2. &c.

Also by Whitlock and Croke. If the Childe to be relieved be a bastard-childe, this is clearly out of the Statute of 43 Eliz. cap. 2. and all these Circumstances are to be well and duely considered of.

Nota, That afterwards, (S.) Termin. Hillar. 7 Caroli Regis, B. R. This matter which concerned the City of Westminster, was heard again before.

Whitlock and Croke Justices, At their Chamber in Serjeants-Inn, where the true Case appeared to be this, (S.) That Edward Gerrard having Married with Anne Seabrook a Widow, she being the Grand-mother of one A. S. a poor childe, left upon the Parish within the Liberties of the City of Westminster, and by the Parish relieved; they there did call the said Gerrard, who had marryed the Grand-mother, in question, to be contributory according to the Statute, and there the Justices of the Peace, Mr. Hayward, and the rest, at their Quarter-Sessions, did make an Order, according to the Statute, to have the childe sent to the said Edward Gerrard the Grand-father, and Grand-mother, to be by them maintained, and to have the Parish freed from this charge, because that the Father and Mother of the childe were not to be found nor heard of.

Nota, That this matter was removed into the Kings Bench, and the same heard before the two Judges at their Chamber in Serjeants Inn; where the Case agreed upon, was this, That Gerrard did marry the Grand-mother, being a poor Widow, and that he had no means, nor any advancement at all by her; the Husband also had but very small means, but they having been married by the space of 18 or 19 years, by the Industry and good Huswifry of the Wife, Gerrard is now become to be a man of Ability: The point upon the Statute of 43 Eliz. cap. 2. was, Whether he, being the Grand-father in Law, having married the Grand-mother, who had no means at the time of the Marriage, should be by the Law bound to keep and provide for this Childe, or not.

Croke Justice. Clearly he shall not. 1. It is clear that the Grand-mother, or Grand-father, having means, shall be bound to keep the Childe, but if they have no means, then they shall not: Also if the Grand-mother hath no means, and she afterwards marries with one that hath means, he shall not here be charged with keeping of the childe.

But if the Husband hath sufficient means with the Grand-mother in Marriage, there he shall be charged with keeping the childe, during the life of the Grand-mother,

mother, his Wife; and if the Wife dies, the Husband shall not be charged after her death.

Also if Land do descend, and come unto such a Grand-mother after her marriage, and the Husband hath this in her right, here by reason of this, the Husband shall be bound to keep the Child.

Here in this Case, at the time of the Marriage, the Grand-mother had nothing, and so not to be charged with the keeping of the Child; also if the Husband, after Marriage, becomes to be of Ability, he shall not be charged: The reason why the Husband shall be charged to keep the Child, where he marrieth the Grand-mother being of Ability, is, because by the marriage he hath acquired and got the means which the Grand-mother had, out of which means the Child is to be maintained; and so transit cum onere, he must take his Wife with this charge and burthen; but there is no reason in Law to charge the Husband in this principal Case here, because he had no means at all with her in Marriage; and where the Grand-mother is unable, and marries with a man of Ability, he is not to be charged.

Whitlock Justice. The Justices of Peace have done well, in making of this Order against the Grand-father, he being now become to be a man of Ability, and that by the care and industry of his Wife, and that if he had been there with them, he would have made the same Order.

Croke Justice, Clearly against him in this.

Nota, That upon this they differing in opinion, did therefore order Gerrard, either to offer a Distress unto them, and so upon this to go to a Tryal of the Title again, or to enter into a Recognizance to appear at their next Quarter Sessions, and they there to proceed against him according to the Law, and so in this way he may have his legal remedy.

Apud Hereford Assises, 18 *Martii* 7 *Caroli Regis*, 1621.

Villa de *Kimmalton*, against Villa de *Laystas*.

Upon the Statute of 43 Eliz. cap. 2. for provision to be made for the Poor, the Case appeared to be this, (S.) One Philip Winde and his Wife did live in the Parish of Laystas, his Wife was there kept and bred, she had a House and Land there given to her for her life by her Brother, they there continued four or five years after their Marriage; afterwards her Brother did place another Tenant in the Tenement, and dis-placed his Sister and her Husband: Afterwards they came into the Parish of Kimmalton, and they did there rent a House for a year, and they having children; and by this the Parish of Kimmalton conceiving themselves to be in danger to be charged with them, upon this, some of the Justices of the Peace did order him, who Leased the House unto him, to discharge him of it after the end of the year, or to enter into Bond to save the Parish of Kimmalton harmless; upon this, at the end of the year, the Lessor discharged him and his Wife, and did demise this House to another: Upon this, Winde complained to the Justices of the Peace, who made two several Orders at their Quarter-Sessions, against the Stat. of 43 Eliz. cap. 2.

Parish of Kimmalton, (S.) That they by such a time should provide a House there in the said Parish of Kimmalton, for him and his Wife, paying a yearly Rent for the same, or in default of this, that the Overseers of the Poor to provide there for him, and to give him means to live on: They refused to doe this; upon this, Philip Winde with his Wife and Children, did repair again unto the Parish of Layftas, where his means of Living was; they there refused to receive him, but did prefer a Petition to the Judges of Assise, against the Parish of Kimmalton, and prayed to have performance of the Orders made by the Justices of Peace; and shewed, how that at the last Assises an Attachment was awarded against the Overseers of the Poor, because they did not then appear: And they now appeared upon the Attachment.

This matter being moved before Sir James Whitlock, one of the Judges of Assise, on the Crown side, for his Resolution and direction herein.

Whitlock Justice. First discharged the Overseers of the Poor from all matter of contempt objected against them, and discharged them of and from the Attachment; and as touching the matter it self complained of, he discharged the Parish of Kimmalton from performance of the Orders made by the Justices of Peace at their Quarter Sessions, their Orders in this case, being altogether against the Law, this Case clearly not being within the Provision of the Statute of 43 Eliz. cap. 2. For that Philip Winde was neither a poor, nor yet an impotent person, to be provided for within that Law, he being a person able to work and labor for his living; and he hath also means of his own, and had payed his Rent for a House: And the Justices of Peace could not by Law make such an Order as they did, (S.) That the Parish of Kimmalton should provide for him a House for his money (for he might well do that of himself in any place where he could get it) or that the Overseers of the Poor should provide for him, this is against the Law for them to make such an Order, they having no such power given them by the Law; and here he was not a poor, nor an impotent man, within the Provision of that Law, and therefore they by the Law, had no power to make any Order in this Case by force of that Statute, but Winde was to provide for himself where he could get a House, and he might, when he pleased, go again to Layftas, where he had formerly lived, and where he had means in the right of his Wife.

Stat. of 43. 18 Eliz. cap. 2.

Apud Salop. Assises, 19 Martii, 7 Caroli Regis, 1631.

AT Salop Assises, before Sir William Jones Justice of Assise, this matter happened before him on the Crown side, upon the Statutes of 18 Eliz. cap. 3. and 7 Jac. cap. 4. touching Bastard children: This question was propounded by Sir John Corbet, a Justice of the Peace, unto Sir William Jones Justice of Assise, upon these Statutes; by the first Statute, punishment is to be inflicted, and by the second Statute, if she offend the second time, then she is to be sent to the House of Correction for one year, and to put in Sureties for her good Behavior, and not to offend again: Upon this, the Case propounded was, that one had a Bastard childe, but she was not questioned for it, no Proceedings being had against her upon the Statute of 18 Eliz. cap. 3. Afterwards she had a second Bastard childe; the Question now propounded was, Whether she shall now be proceeded

Stat. of 43 Eliz. cap. 3.

proceeded against upon the Statute of 7 Jac. cap. 4. as for her second offence, she not having been punished for her first offence; whether this second offence shall be now taken for the first offence, or not.

Jones Justice. She shall not be punished upon the Statute of 7 Jac. cap. 4. As for her second offence, unless she had been before questioned and punished for her first offence: But she might have been punished for her first offence, either by the Statute of 18 Eliz. cap. 3. or by the Statute of 7 Jac. cap. 4. but is not to be punished by the Statute of 7 Jac. as for her second offence, unless she hath been before punished for her first offence; but this second offence shall be now deemed and taken to be as her first offence, and so is to be punished for the same according to the Law.

Apud Gloucester Assises, 9 Julii, 8 Caroli Regis, 1632.

Villa de *Tewksbury*, against Villa de Twyning.

Before the Judges of Assise this Case came in question, upon the Statute of 18 Eliz. cap. 3. for Provision for Bastard children, (S) A servant Maid dwelling in Twining, was there got with child, and she being near the time of her Delivery, by practice she was conveyed out of the Parish of Twining, unto an outhouse or Hovel of one Edward Baughs, an Inhabitant in Twining; the which Hovel was near Twining but within the Parish of Tewksbury, being the uttermost Confines of it, and there the Child was born: Afterwards the Parish of Twining gave relief unto her, and the Minister of Twining did christen the Child, and afterwards when she was able to remove, they of the Parish of Twining did receive her with the Child, and gave relief to her for two years; afterwards the Mother being sick, they of Twining did send her away with the child to Longden, in the County of Worcester, where the Mother dyed; then they of Longden sent the Child unto Twining, and they of Twining sent the Child, being under the age of three years, unto the Mille of Tewksbury, within which Parish the Child was born, and they sent the Child again unto Twining. Statute of 18 Eliz. c. 3.

The question, upon all this moved to the Judges, was, whether of these two Parishes, (S) Twining or Tewksbury, were to keep this Child, and to provide for it.

Sir William Jones Justice, before whom this was moved legally and regularly, the child is to be kept by the Parish where the same was born (if no practice was used to have the child there to be born) but if any such practice be proved, then this rule doth fail, and then the child is to be kept and provided for by the Parish where she did dwell, and where she was got with child, and which had used this practice to have the Child born in another Parish; and so he did order the same in this Case (the practice being very apparent) that the child was to be kept and provided for by the Parish of Twining, where she with her Child were before; and he did likewise refer the Examination of this practice to the Justices of the

Peace, at their next Quarter Sessions, and if upon their Examination they did find it to be so, and so do certifie the practice to be, as is now informed, then by the Law the Child is to be kept by the Parish of Twyning, and by them to be provided for, and accordingly it was so ordered.

Apud Salop. Assises, 19 *Martii,* 7 *Caroli Regis,* 1631.

Statute of 43 Eliz. c. 2.

UPon the Statute of 43 Eliz. cap. 2. for provision to be made for the Poor, and for the disposing of Bastard Children, this matter came in question upon a Case then and there propounded by the Justices of the Peace to the Judges of Assise, and for their directions according to the Law therein.

The Case propounded unto them was this, (S.) That one Margaret Brown, a single woman, was begot with child by one Robert Gough, a single man, the Child born and baptized in the Parish of Drayton, in the County of Salop, eleven years since, and Gough the reputed Father took the Child from the Mother, and placed him at Nurse elsewhere; after he marries with another Woman, and with her did cohabit in the Parish of St. Chad, in villa de Salop, & alibi, the Bastard child dwelt with him, and had been maintained by the reputed Father, by the space of ten years last past; afterward the reputed Father dyed, leaving of his Wife, and divers children by him begotten of her, and also left the said Bastard child, the Estate by him left, being not able to maintain his Wife and her Children, but that the said Parish was enforced to relieve and maintain them; and the Mother of the Bastard Child for the most part of the time since the birth of the Bastard Child, had lived in Service, and is still able to doe some Service, but is a very simple Woman, and of weak understanding; that 3 l. was left unto her by her friends to maintain her self withall, the which 3 l. is owing by several persons, and is not in her own hands.

The question propounded to the Judges was, by whom this Bastard Child is to be maintained, and to what place to be sent, whether to the Ville of Salop, where he lived for ten years with his reputed Father, or to Drayton the place of the birth, or to his Mother, who is not able to maintain him; and if to the Mother, then in case that she dies, or afterwards grows impotent, and in need to be relieved herself, to what place the Bastard Child is then to be sent.

Nota, That in this Case it was resolved by Sir William Jones, and Sir James Whitlock, Justices of Assise, apud Salop, 19 Martii, 7 Caroli Regis, That this Bastard Child is to be sent to his Mother, to be kept by her, and maintained, if she be of ability and of power to doe this, and if she be not, then to the Ville de Salop, who are to keep and maintain this Bastard Child; and he is to be sent thither, in regard that the said Bastard Child had been there before setled with his reputed Father, because to the place of the last setling, this being in the Ville de Salop, where he was for ten years, and to this place of the last setling, as well as to the place of the Birth, the Law hath respect, and so it was ordered by them.

Apud

Apud Stafford Assises, 28 Julii, 5 Caroli Regis, 1629.

UPon the Statute of 43 Eliz. cap. 2. for provision for the poor, these matters happened to be questioned at the Quarter Sessions, before the Justices of the Peace there held for the County of Wigorn, and upon difference in opinion amongst them, the Cases were agreed upon, and to be referred to the Resolution of the Judges of Assise, for the Counties of Wigorn and Stafford, &c. the Cases in difference were these, as followeth. Statute of 43 Eliz. c. 2.

One Dorothy Clavely, with a young child, under the age of seven years, going about as a Wanderer, came with her child to the Ville of Arleey, in the County of Wigorn, and there desired a Warrant to be conveyed unto Egglesthal in the County of Stafford, where she had some friends, and where the child was born, as by a Certificate appeared; upon this the Constable of Arleey made her a pass to convey her to Egglesthal: The Constable of Arleey delivered her to the Constable of Rippesford, who delivered her to the Constable of Beawdeley in the County of Wigorn, and there at Beawdley the Mother dyed; they sent the child to Rippesford, and they sent the child to Beawdley, who sent him back again to Rippesford. The first case.

The sole question at the Quarter Sessions for the County of Wigorn, and which was referred to the Judges of Assise was, which Parish ought to keep this child, (S.) whether the Parish where the Mother dyed, or the Parish where the child was born: This was the first Case.

The second Case was this, (S)

One Elizabeth Burton being a Wanderer, with three Children, born in three several Parishes, came with them there unto Dale in the Parish of Sale, in the county of Wigorn, unto one Burton her sister, where she dyed, the three children being there left; upon this a Petition was delivered at the Quarter Sessions to the Justices of the Peace, to have an Order by them made for the disposing and keeping of these three Children; they were in doubt what Order to make herein, and upon this they agreed to refer the same to the Judges of Assise to make an Order in this case.

Nota, That the Judges of Assise, (S.) Sir William Jones, and Sir James Whitlock, did consider together of these cases, and 28 Julii, 1629. 5 Caroli Regis, apud Stafford, they delivered their Resolutions in both these cases, to be this, that the Children ought to be kept and provided for by the several Parishes where they were born, and not in the Parish where their Mother died in transitu; and according to this their Resolution, an Order was made, and signed under their hands, and the same delivered to the Clark of Assises, to deliver the same to the parties, by which they did order the several children to be sent to the several Parishes where they were born, to be there by them kept and provided for according to the Law, and this was so done accordingly: And the reason of this their Resolution was, because that the place of Birth is a setling of these Children in a place certain, to be kept and provided for there; and that the wandring of the Mothers with them afterwards, doth not alter the case, nor yet the dying of the Mothers in a parish, having the children there, shall not be said to be a setling, to make the said

Parishes

Parishes where the Mothers dyed to keep the Children: But the place of Birth, this is the place to be looked after, and a setling, to have the children to be there kept and provided for.

They also resolved, That the place of Birth, (or the place of their last habitation (if the same may be known) are in Judgment of Law said to be the places of setling; so that if one be born in such a place and Parish, and afterwards is an Inhabitant in service in another place and Parish, and after this he becomes to be a Wanderer, he is here by the Law to be sent to the last place of his setling, to be there kept and provided for.

Nota, That in the two last Principal Cases, the children to be provided for by the order of the Judges, and sent to the several Parishes of their Births as Poor, to be there by them provided for, they were so sent as Poor to be by them provided for, but not as Wanderers, Rogues or Vagabonds.

Nota, Also upon the Statute of 39 Eliz. cap 4. for punishing of Rogues, and the last Proviso therein, that it shall not extend unto Children, if they be under the age of 7 years; and upon this Statute they resolved, that an Infant under the age of 7 years, shall not be said to be a Wanderer.

Apud Worcester Assises, 29 Julii, 8 Caroli Regis, 1632.

The Parishioners of St. *Peters* Parish, Plaintiffs, against the Parishioners of St. *Ellens* Parish, in the City of *Worcester*. upon the Statute of 43 *Eliz. cap.* 2. provision for the Poor.

Statute of 43 Eliz. c. 2.

THe question propounded to the Judges for their Resolutions, appeared to be this.

It was shewed unto them, that by the said Statute, where one Parish is not of ability to relieve their own Poor, that then the next Parish, being of ability, are to be contributary to aid them herein, by a weekly allowance made for their relief; and where the first cause doth cease for the having of such relief, as if their Poor do decrease, and their Parish grown to be of ability, the Contribution there shall cease, or this shall be lessened accordingly, as the cause shall require; as if their poor decrease, or the poor and charge of the other Parish adjoining doth increase: These matters are considerable upon the Statute of 43 Eliz. as to the raising, or to the abridging of the allowance of them, by Sir William Jones Justice of Assise.

The Case.

The present Case in question between the two Parishes here (6) St. Peters Parish poor, and that their poor encreased by reason of divers Inhabitants of the Parish of St. Ellens, having divers Messuages and Tenants within the Parish of St. Peters; that they received great Rents, and their Tenants were very poor, and so became a charge to the said Parish, being not able to pay any relief to

to others, but to be relieved themselves by the Parish of St. Peters; and so they of St. Ellens Parish do raise their Rents out of the relief their poor Tenants have out St. Peters Parish.

Upon complaint made of this, several orders were made by the Major of the City of Worcester, upon a Reference to him for 2 s. a week to be paid by the Parish of St. Ellens, to the Parish of St. Peters, and this to be raised by the Church-wardens of the Parish of St. Ellens, and then the same to be by them paid over to the Church-wardens of the Parish of St. Peters, for and towards the relief of their Poor.

And these orders were formerly confirmed, by Sir James Whitlock Justice of Assise, with special directions to the Major of the City, to have them principally to be taxed in the Parish of St. Ellens, who had tenements within the Parish of St. Peters, and that they, by reason of this to pay more than others.

After this, another Major of the said City, upon pretence that the Parish of St. Ellens was charged with 5. poor people, that their poor encreased, and he conceiving that the poor of St. Peters did decrease, for this cause he altered the former order (which was before made and confirmed by the Judge of Assise) and had now abridged this weekly payment of 2 s. unto 1 s. weekly.

Upon this, complaint was made to Sir William Jones Justice of Assise, and for to have the former order to be confirmed.

Jones Justice. The Major here hath done well, and according to the Law; for as the former orders made, were there well and duely made, and so confirmed according to the Statute of 43 Eliz. cap. 2. he having had consideration to the cause and ground of the charge, and of the supportation of this by the adjoyning Parish; but this was not to be final, nor yet to binde them perpetually, but this was to have continuance onely quamdiu, the cause so remained, and their ability for the supportation of them did continue: But here it now appears, that the Poor of St. Peters Parish doth decrease, and the charge of the Poor of the Parish of St. Ellens doth increase, and so for this cause the weekly allowance before of 2 s. before ordered and confirmed, may now either in all, or in part, be taken away or lessened, for this before might well either have been all taken away, or lessened, by the Major and the Justices at their Quarter Sessions: But if any doubt or question should happen to arise about this, then we are to settle this; but for the relief of the poor of the Parish of St. Peters, by Law they may tax and rate the said Inhabitants of St. Ellens, having Tenements in St. Peters Parish, for their Inhabiting in another Parish, shall be no discharge unto them, but that they shall pay for their Land and Tenements which they have in another Parish, and this by Law they ought to do, by the Statute of 43 Eliz. cap. 2. and if there be no distress there to be found to come by this, because their Tenants are poor; if they refuse to pay this which they are rated to pay, then upon complaint made unto us at the Assises, they shall then have our aid and help for the speedy levying of this money, according to the rates imposed and assessed on them, and according to the quantity of their Tenements, and this by special order to Mr. Major, to have this proportion to be by him levyed according to the rates; and this is their remedy, to be in this manner aided and relieved against the Inhabitants of the Parish of St. Ellens, having Tenements within the Parish of St. Peters, they are to rate and tax them to the relief of their poor by a weekly payment; but the Major here hath done well, and he had very good cause to make this last order, the which is to stand, and shall be confirmed by the order of this Court, and the Major to examine this matter farther at their next Quarter Sessions; and so by the order of the Court, the last Order made by the Major was ratified and confirmed.

Statute of 43 Eliz. c. 2.

Apud

Apud Lincoln Assises, 11 *Martii*, 9 *Caroli Regis*, 1633.

Upon complaint made to the Judges of Assise, by Sir Anthony Earby, and others the Inhabitants of the Town of Boston, upon an undue Assessment made by the said Town, and Overseers of the Poor, and levyed by them, the same being, as was informed, undue and unequal, contrary to the Statute of 43 Eliz. cap. 2. for provision to be made for the poor, and contrary to former Orders and Directions given by the Judges of Assise unto them, to make due and equal Assessments.

Stat. of 43 Eliz. cap. 2.

Hereupon it was held, and so delivered for Law, by Haughton and Croke, Justices of Assise, that such Assessments ought to be made according to the visible Estate of the Inhabitants there, both real and personal, and that no Inhabitant there is to be taxed by them to contribute to the relief of the Poor, in regard of any Estate he hath elsewhere, in any other Town or place, but onely in regard of the visible Estate he hath in the Town where he doth dwell, and not for any other Land which he hath in any other place or Town.

And also by Hutton and Croke, Justices of Assise, This hath been so resolved by all the Judges of England, upon a reference made to them, and upon conference by them had together, where they all did resolve that the Assessments for relief of the poor, ought to be made in such manner as before, according to their visible Estates, real and personal, which they had and enjoyed in the Town or place where they inhabited, and not having any regard to any other Estate, which they had in any other place or Town.

Nota, That Sir Anthony Earby complained also, That he having divers Tenants there which paid rent unto him, they there did charge his Tenants by their Assessments, and did charge himself also.

Upon this, Mr. Leving being of Councel for the Town of Boston, did inform the Judges, that they did tax Sir Anthony Earby for his Estate, he having the Rents; and that such an Assessment was made in the County of Leicester upon the Lessor, and that by the Order and direction of the Judges of Assise, upon a complaint made unto them, and that they were not to tax the Tenants who paid the Rents.

Hutton and Croke Justices, made answer, That they did not remember any such Case; but they said, That by the words and meaning of the Statute of 43 Eliz. cap. 2. they are to assess the Occupiers of the Land, and not the Lessor who received the Rents, the Occupier of the Land being by Law onely to pay the Assessment, unless it be specially provided for as to this payment between him and his Lessor, and so by this to be discharged of this payment of such Assessments.

Statute of 43 Eliz. c. 2. The Occupiers of the Land to be taxed.

The Judges did both of them agree in this, that by the Law, the Occupiers of the Land are onely to be charged, and this in regard of their possessions, and not the Lessor, in regard of the Rents which he received; and so they declared, that it hath been also thus resolved by all the Judges of England: And so upon all this matter thus appearing to them.

The

The Judges here made their Order according to the several resolutions, and this they did thus settle and order, for the better directions for the time to come: That they are to make their Taxations and Assessments well and duly, and in an equall manner, according to the visible Estates, real and personal, of such Inhabitants within their Town, and also to Tax and Assess the occupiers of Land within their Town onely, and not the Lessors, with a speciall charge to them given, to be carefull in this for the future.

Apud Gloucester Assises, 20 *Julii*, 13 *Caroli Regis*, 1637.

Upon a Petition preferred by the Mille of Alderton, unto Sir VVilliam Jones Justice of Assise; the question being upon the Statute of 18 Eliz. cap. 3. touching provision to be made for a bastard childe. Statute of 18 Eliz. cap. 3.

The Case appeared to be this:

Anne Tarling having a bastard childe, upon a complaint made of this at the Quarter Sessions, this was referred, according to the Law, unto the two next Justices of the Peace, to have the examination and ordering of this: The next two Justices of the Peace, were these, (S.)

Sir Richard Tracy, and Sir John Tracy, who heard and examined the matter, and made an Order in it against one John VVood of Beckford, in the County of Gloucester, to be the Reputed Father of the childe, and ordered him to pay and allow towards the keeping of the childe Weekly, 1 s. 4 d. Afterwards, the said John VVood refuseth to perform this Order, but appeals to the Quarter Sessions, according to the Law: the Justices of Peace, at their Quarter Sessions, did re-examine the matter, and did dis-allow of this former Order made by the two next Justices, and they there did make a new Order of Sessions, by which they did charge another person, (S.) One VVilliam Cole of Beckford, to be the reputed Father of this bastard childe; upon this the Inhabitants Petitioned

Sir VVilliam Jones, Justice of Assise, for to hear the matter again at the Assises, the which he accordingly so did, and after both the Orders read in Court, that Order which was first made by the two next Justices, and also the subsequent Order, which was made at the Quarter Sessions by the Justices of Peace.

Jones, Justice of Assise, would not enter into the re-examination of this Cause, but did, in omnibus, affirm the last Order made by the Justices of Peace at their Quarter Sessions; upon the parties appeal unto them from the first Order, the which last Order, made at the Quarter Sessions, was a final Order, and no appeal to be admitted against this Order; and so as he then affirmed, it had been adjudged divers times, both formerly, and also of late time, in the Kings Bench: In a Lincolnshire Cause, which concerned one Pridgeon an Officer of the Bishop of Lincoln, who was questioned, and it was laid to his charge, that he was the reputed Father of a Bastard childe; this was there referred to the examination and ordering of the two next Justices of Peace, who, upon examination of 3 Cr. 341. 350 Jo. 330.

the matter, found him to be the reputed Father of the bastard childe, and so made an order against him for to make a Weekly allowance towards the maintenance of the bastard childe: Afterwards he appealed to the Quarter Sessions from their Order, and the Justices of Peace at their Quarter Sessions, did discharge the said Order, and another was there found to be the reputed Father, and an order made at the same Quarter Sessions against him.

Afterwards, at another Sessions of the Peace upon a re-examination of the matter, another order was there made against the last order, making the same void; and by this last order, Pridgeon was found again to be the reputed Father of the bastard childe, and so again ordered to make a Weekly allowance towards the maintenance of the said Bastard childe: Afterwards Pridgeon appeals again unto the Judges of the Kings Bench, and thereupon a re-examination of the matter, how the same was.

It was clearly resolved by all the Judges there, that Pridgeon was to be freed and discharged of and from the payment of the 2 s. a Week by the second order made at the Quarter Sessions, the same order being altogether illegal; and that the first order made by the Justices of Peace at their Quarter Sessions, upon the appeal first to them, the same to stand in force, and that no appeal to be admitted against this order, so made upon the first appeal, the which was a legal order, and the same to be final, and not to be altered by the Judges of Assise, and so it was then resolved by all the Judges of the Kings Bench.

And so Sir VVilliam Jones Justice of Assise, affirmed the former Order, made by the Justices of Peace at their Quarter Sessions.

And so it shall be also upon the Statute of 43 Eliz. cap. 4. touching charitable uses: If the Commissioners make an Order and a Decree in the Case, and upon an appeal to the Lord Keeper, and Exceptions put in before him to this Decree, and if upon hearing of them, the Decree made by the Commissioners is confirmed by the Lord Keeper; this Decree is now by this made to be final, and that no subsequent appeal is afterwards to be admitted in this Case, after this confirmation of the former Decree by the Lord Keeper: No more shall it be here admitted to appeal from this Order thus made at the Quarter Sessions by the Justices of Peace, but that this shall be final, and therefore this Order by them thus made at their Quarter Sessions, upon the appeal to them from the Order made by the two next Justices of Peace, this Order now by them made against the first Order of the two next Justices, shall be now final and stand in force, and this is to be performed by the party Ordered, without other re-examination, or alteration of the same, and this was accordingly so ordered by him.

Apud

Apud Worcester Assises, 11 *Martii*, 14 *Caroli Regis*, 1638.

THis matter happened in question concerning the Mileys of Suckley in the County of Worcester, and Whitborn in the County of Hereford.

Upon the Statute of 43 Eliz. cap. 2. provision to be made for the Poor. Statute of 43 Eliz. c. 2.

The Case appeared to be this, (S.)

One William Chappel a Cripple, who was born in the Parish of Whitborn, Twenty years since he went from this Town, and lived in Suckley in the County of Wigorn, and there he took a House and paid Rent for it, and afterwards, some six or seven years since, he went his way, and after came unto the Town of Luston in the County of Sommerset, and there he continued by the space of twenty Weeks, and did there work as a Laborer in a Quarrey of Stone, and by a fall of a Stone upon him, his back was broken, and so there he became to be impotent, and unable to work; there he was taken as a Vagrant, wandring and begging: Upon this, he had a pass to be carryed to Whitborn where he was born, they there refused to receive him.

Upon this, he Petitioned unto Sir William Jones, Justice of Assise, and shewed all the special matter in his Petition, and that he was born at Whitborn, and was found begging at Luston, and so prayed the direction of the Judge to have an Order made for him, and directed to the Overseers of the Poor of the Parish of VVhitborn to provide for him.

Upon this, Sir VVilliam Jones did subscribe unto this Petition, in this manner, (S.) That if the allegations in this Petition are true, That then the Overseers of the Poor of VVhitborn, are to provide for him as for one of their Poor, and so referred this to the two next Justices of Peace to examine this matter, and the verity of the Petition; and if they finde the Allegations true, then they to order the Overseers of the Poor of VVhitborn for to provide for him.

Upon this, the Justices of Peace there examined this, and upon Information to them given, that twenty years before, he went away from VVhitborn, and was settled in Suckley for divers years: upon this, they made an order at the Sessions of the Peace, that he was to be sent unto Suckley, being the place of his last settlement; and because they there did refuse to receive him, one of the Overseers of the Poor was bound in a Recognizance to appear at the Assizes, and so all this matter was now heard and examined before

Sir VVilliam Jones, Justice of Assise, and the order made by the Justices at their Quarter Sessions, was read in the Court.

Upon this, Sir VVilliam Jones, if he did beg and wander at Luston in the County of Sommerset, if this be true, he is then by the Law to be sent unto VVhitborn, where he was born, to be there relieved: upon this, by order of the Court, he referred the examination of this unto two Justices of the Peace for the County of VVorcester, and also to two Justices of the Peace for the County of Hereford, to examine this matter; and if they finde that he was taken as a Vagrant person, and begging, then if it be so, they of VVhitborn are to receive him, and to provide for him as one of their Poor: upon this, the party being now at VVhitborn, and they which followed the same matter for VVhitborn, and hearing the opinion

of

of the Judge in this Case, and they knowing this to be true, that he was born at Whitborn, and that he was taken as a Wanderer, and begging, and so sent to Whitborn: upon this, they to avoid the charge of drawing up the order of reference, were content, and did yield and submit unto this, without any further order, to keep him, and provide for him, and so accordingly they did thus doe.

Nota, That at this time it was also resolved, that if one great with childe be sent to the House of Correction, and there she is delivered of the childe, that the childe shall be sent to the Parish, from which the Mother was sent to the House of Correction, to be there kept and provided for, this being the place where she was last setled.

Nota, That it was also then resolved, That a Rogue is not to be sent to the House of Correction, but he is to be whipped, and so to be sent to the place where he was last setled, if the same may be known, or otherwise to the place of his Birth: But the House of Correction is for the Poor of a Parish who refuse to work there they are to be whipped and set on work.

FINIS.

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FINIS.

THE THIRD PART OF THE REPORTS OF Edward Bulstrode

Of the INNER-TEMPLE, Esq;

Of divers RESOLUTIONS and JUDGEMENTS, given with great Advice, and Mature Deliberation, by the Grave and Learned Judges and Sages

OF THE

LAW.

Of divers and sundry Cases and Matters in LAW, With the *Reasons* and *Causes* of their said *Resolutions* and *Judgments*, given in the Court of *Kings-Bench*, in the time of the late Reign of

KING JAMES I.

And the beginning of

KING CHARLES I.

Ἐν τοῖς νόμοις ἐστὶν ἡ σωτηρία τῆς πόλεως.

In legibus, Civitatis salus consistit. Aristot. Rhet.

The Second Edition.

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TO THE
RIGHT HONOURABLE
Bulſtrode Lord *Whitlock*.

My Lord,

THe continuance of your Lordſhip's more than ordinary Favors, joyn'd with your Lordſhip's Encouragements and Commands of my Proceeding this way, do juſtly challenge, not onely the continuance of my thankfull Acknowledgement, but of this Dedication likewiſe; which appertains to your Lordſhip (beſides my particular Obligations and Reſpects) in ſome propriety, in regard you are a moſt eminent Juſticiary amongſt us. *Inter Viburna Cupreſſus.* And which is more, your Lordſhip hath added to your place, a great affection to the Profeſſors of the Common Law, and a great zeal to the publick Good, regulated by a perfect Judgement, which laſt (at preſent) I might wiſh leſs, that your Lordſhip might the leſs exquiſitely cenſure theſe my weak and imperfect Labors; which yet I hope your Lordſhip will favorably accept, they being beſtowed for the neceſſary uſe of the Profeſſors of the Law; in the ſtudy and practice whereof, I have ſpent ſo many years, that I am now, *In*

Vergentibus Annis, wherein time grows so precious with me, that I fear I shall not be able to finish what I first intended, when I began this Work: But whatever either is, or shall be written, (during your Lordships time) concerning the Law, your Lordship justly deserves a Propriety in it, having been so zealous a Defender of it, that it may be truely said, The Law is more beholding to your Lordship, than you to the Law. And indeed, your Lordship could never have undertaken a more Honourable Defence, for without Laws the Common-wealth will, like a melted Vessel, run into a lump of confusion, and disorder. We should be like a Ship floating in the Sea without a Pilot, or rather like the Sea it self without Banks; nay, ἰχθύων δίκη, like Fishes, the greater would devour the less: We should be like those Barbarous *Scythians*, who did, says *Basil*, φιλονεικίαν σιδηρῷ κρίνειν, end their Controversies not by the Law, but by the Sword.

Justinian Institut. It was an excellent Sentence written from the Emperor *Justinian*, to the Prætor of *Laconia*, All things (saith he) which pertain to the well Government of a State, are ordered by the Laws, wherefore whoso would walk wisely, shall never fail, if he purpose them for the rule of his Actions. In the Laws of a Nation consists the safety of a Nation, and therefore the Gates of the *Jewish* Cities, as they were Seats of Justice, so they were the Magazines and Armories of their strength, to shew, that the strength of a Nation does not more

more consist in the number of Men and Arms, then in the due execution of Law and Justice: The Law of a Common-wealth, says Learned *Hooker*, is the very soul of a Politick Body, the parts whereof are by the Law animated, held together, and set on work in such Actions as the common good requireth: It is the Rudder by which the Vessel of the Common-wealth is steered, and it hath a sharp Sword to restrain men from Violence and Injustice, that so *formidine pœnæ*, they may learn their duties: And as the Judicial Law amongst the Hebrews was a Hedge or Fence of the Moral Law, so the Law of the Land well executed, is a good guard to the Law of God; and though compulsion cannot make men truely good, as they ought to be, yet it may keep them from being so bad, as otherwise they would be: *Major hæreditas venit unicuique nostrûm, à jure & legibus, quàm à parentibus*. No man is assured he shall either keep his Estate, or transmit it to his Posterity, but by the Law, which is the Sanctuary of a free Subject, the safeguard and defence of his Life and Fortune: The poorest person living, were not the Law his refuge, would be yet more unhappy than his present condition can make him, for be he never so mean he is within its care, and the greatest Person living is not exempted from its Power: And therefore that was very praise-worthy which *Antigonus* the Great replyed to one of his Favorites, who would needs perswade him, that whatever

Hooker Eccle. Pol. lib. 1. fol. 25.

Coke 1 part, fol. 142.

Kings

Kings had a mind to was lawfull; he told him, true it was so, but amongst *Barbarian* Kings, not them that profess Justice. For God hath appointed distinct *Laws* both for Princes and private Men, and Princes have their Judge, who sitteth in Heaven, before whose Tribunal they are accountable for whatsoever abuse or corruption, which the want either of care or conscience, hath bred in them. And that we might not be so much governed by Men as *Laws*, the Wisedom of our *Law-makers* did take care, that most of our *Laws* should be written, to the end, that neither favour nor hatred might approach the Tribunal, nor Judgement be left to the arbitrary will of Man, that Magistrates might know what to command, and People what to obey, that so no man might doe and undoe, bind and loose at his pleasure: And our very Precedents and Reports by which we walk, have onely so much of *Law*, as they have of *Justice*, they and *Law* being both built upon *Reason* and *Justice*, which may be easily made appear to all whose obstinacy is not above their fear.

Hooker Ecl. Pol. fol. 47. As every good and perfect gift, so this very gift of good and perfect *Laws* is derived from the Father of Lights, to teach us a reason why just and reasonable *Laws* are of so great use in the World; and that Laws apparently good, are (as it were) things copyed out of the very Tables of that high everlasting Law: The Laws which the very Heathens did gather to direct their actions

ons by, ſo far forth, as they proceeded from the light of Nature, God himſelf was both the Author and Writer of them in the Tables of their hearts. How much more then is he the Author of thoſe Laws, that are made by perſons zealous of his Service, and which have been drawn as near as may be to that firſt Original, that ſupream higheſt Law which he gave us? And if we do but ſeriouſly conſider, how our Anceſtors, after the tryal of many Ages, have grown up happily under our Laws, wherein their Fathers and themſelves were born and bred up: Laws which have been weighed and allowed not by the wiſedom of a narrow age, but by the experience of above a thouſand years; and if men were but likewiſe willing to learn how many Laws their actions in this life are ſubject unto, and what the true force of each Law is, all the diſputes and contumelious Invectives againſt our Laws, would have dyed the very day they firſt brought forth. But it is a great deal eaſier for men by the Law to be taught what to do, than inſtructed how to judge as they ſhould do of the Law: For *Ariſtotle* himſelf was ready to acknowledge, that τὸ κρῖναι ὀρθῶς μέγιστον, ſoundly to judge of *Laws*, was the weightieſt thing that any man could take upon him: Concerning which, the Learned *Hooker* gives an excellent caution, *If we will*, ſaith he, *give Judgement of Laws under which we live, let the Law Eternal be always before our eyes, which is of principal force to breed in Religious minds; a dutifull eſtimation*

Ariſtot. Eth. l. 10.

Hooker Eccleſ. Pol. lib. 1. f. 48.

tion of all Laws; and though we perceive not the goodness of Laws made, yet since things in themselves may have that which we discern not, we should therefore be very carefull how we speak or judge in the worse sense of them: For when Laws are slighted or despised, then are the People oppressed, then disobediencies, revolts, violences, and all the Crimes which are the Plague and ruine of a State, are in agitation, whereas the due observation of the Law, and a quiet submission thereunto, cutteth off those enormities which afflict us, and secureth us in the injoyment of those Goods which God hath bestowed on us. A Prince ought therefore never to let the Laws fall into disesteem, especially those which keep the People in obedience, and which serve to secure them from oppression, and allways to uphold the Dignity of the *Professors* thereof.

We find it was the Wisedom of the *Roman* State, to admit the Lawyers into their most secret and important Councels, and seldom was any Law made to which they were not called to give their Advice: Nay, History tells us, that *Alexander Severus* the Roman Emperor, never establisht any Law, without the presence and assistance of Twenty the most Renowned Lawyers; and certainly that State found the benefit thereof in its long continuance: and most necessary it is, that to devise Laws, which all men shall be bound to obey, nothing be acted therein, but by the deliberation and consent of those that

are

are to give obedience thereunto. And therefore the conſtitution of this Nation requireth, that the King ſhould be adviſed by his Parliament, when ever any Laws or Ordinances are made: And our Laws are thoſe, which publick approbation hath made ſo, and approbation is not onely given when men perſonally declare their aſſent, but when others do it in their names by right originally derived from them: And this is it which makes the People receive the Laws with more ſubmiſſion and willingneſs, for nothing is ſo acceptable to them, as that which carrieth the leaſt ſhew of abſolute Soveraignty, and the greateſt ſhew of Liberty: And our Laws do not onely favour Liberty, but they are notioned by that very word; for Liberties in *Magna Charta*, ſignifie the Laws, and in that reſpect is the great Charter called the Charter of Liberties: And our Laws in 38 *E.* 3. *c.* 4. are called, *The Liberties of England*, becauſe they make men free: And indeed the Law is the onely real Liberty, if we will believe my Lord *Coke*, 2 *Inſtit.* 4. But it is not a licentious Liberty which the Law gives us, but a real Freedom, a Freedom from Slavery and Tyranny. And ſince it is ſo, is it not much better to judge according to theſe *Laws*, than out of any mans knowledge, though never ſo wiſe; for though he may ſee clearly, yet the *Laws* ſee with the eyes of many Ages, with the eyes of all the moſt able and learned Councellors of State and Judges of our *Land*, they having been compo-

Forteſcue, c. 42.

Mag. Char. c. 29.

Bracton, 291, 214.

Fleta, lib. 2. *c.* 48.

Britton, 178.

sed by the most solid wisest Heads of all the ages past: And therefore the greatest Politicians have thought it dangerous to the good of a State to alter any *Laws* without common consent and urgent occasion, or unless the change carry some great alteration with it: *Aristotle* says, It makes Subjects slight Rules and Powers, and doth diminish their Authority: But *Cleon* in *Thucidides*, goes a little farther, affirming, *A City with the worst Laws immoveable, is better than one with good Laws not binding.* And the Common-wealth of *Sicyon*, had not survived the Policies and Estates of all *Greece* besides, but that in 740 years, they never set forth any new *Edicts*, nor went beyond any of their *Laws.* And it is worthy our observation, that in the *Venetian Commonwealth*, those Reformations of Government, those reassumings of State have been never seen, which with infinite Tumults the *Roman* and *Florentine Commonwealths* have so often used: It being the peculiar vertue of the *Venetian Senate* to perpetuate her self in her flourishing *Liberty*, by the punctual observation of her ancient *Laws:* It is therefore certainly an effect of a great Discretion, to preserve the observation of those Laws, which had formerly enough in them to remedy any inconvenience in the State. And not to do as King *Francis* the first of *France* did, after he had Conquered *Savoy*, and expelled *Charles* the Second, who was Duke thereof: The new Magistrates substituted by him, gave Judgement in all cases accord-

Thucidides, lib. 3.

according to equity, and often againſt their known Laws, but the Countrey was quickly ſo weary of it, that they Petitioned the King, that thoſe Judges might no more Judge according to equity, but according to Law: And my Lord *Coke* declaring the dangerous Inconveniencies that happen by changing Laws, does affirm, That all the miſchiefs and miſerable oppreſſions committed by *Empſon* and *Dudley*, were occaſioned by the Statute of 11 *H.* 7. authorizing to hear and determine offences againſt Penal Statutes, according to diſcretion, (and not according to the Laws and Cuſtoms of *England*) which Statute was afterwards juſtly repealed, 1 *H.* 8. *cap.* 6. And in the Preface to the fourth part of his Reports, he ſays, *That it is an old rule in Law and Policy, that correction of Laws be avoided*; which may be thought a ſtreyn too high, for if our Laws had not been often poliſhed, refined, and added to, where they have not been full to compleat them, they had not gained the perfection they have now attained.

And indeed it is a vulgar error, to imagine that Laws muſt never be altered, without common conſent, and juſt conſideration it ought not to be done, but when there happens any ſuch to be, the alteration of them cannot but be advantageous: It being impoſſible the firſt Law-makers ſhould foreſee all inconveniencies which might enſue: For as Mr. *Lambart* ſays, The

Law cannot be such a perfect Rule, as that we may thereby square out Justice in all Cases which may happen, for written Laws must needs be made in general, and grounded upon that which happens for the most part, because no wisedom of man can foresee every thing which time and experience doth beget: There must of necessity therefore, be many times alteration of some Rules of Justice, because the Manners of Men are variable, and the punishment of Crimes may admit of change, according to the disposition of Men and Times. But those Laws that are known Maximes for the common good, ought no more to be changed than the Laws of Nature, for both are equally founded upon Gods Law: 'Tis true, if Man had remained in his Original Integrity, the Laws of Reason had been sufficient to direct each particular person in all his affairs and duties, which now are not sufficient, but require the access of other Laws, now that Man and his Off-spring are grown thus corrupt and sinfull.

When the *Romans* were little better than Shepherds and Herdsmen, 'tis said, a few Ivory Tables contained their Laws; but after they came to be Lords of the World, how many thousand Books were written, of the Roman *Civil Law?* In like manner, let us but consider, how much more Traffick is increased here than in former times, how Contracts are more

more frequent, and breaches of Truſt more common; how great an Improvement of mens Eſtates, and how much more deceit and oppreſſion than formerly, and we ſhall then ceaſe wondering why our Laws run in a larger Chanel, and ſpread into more veins than formerly; for as Offences gather ſtrength and multiply, ſo muſt the Laws, and though they were but few at firſt, and then ſufficient, when men lived in publick Society with harmleſs Diſpoſitions, yet now when the Injuſtice of Wicked Men will hardly be kept in with Bit and Bridle, and that mens Iniquities cannot be reſtrained within any tolerable Bounds, when men are neither conſtant to their own goodneſs, nor to their lawleſs Sins; and that puniſhment which hath been ſometimes forcible enough to bridle Sin, grows now too weak and feeble; there is a neceſſity that as theſe Miſchiefs increaſe, there ſhould be ſupplements of Laws to meet with them, and to puniſh what is amiſs. And this is the true reaſon why our Laws are ſwell'd into ſo much a bigger Bulk than formerly; And if any do complain of the obſcurity of our Laws, they muſt conſider, that as we behold the ſtatelineſs of Houſes with Delight, though the foundation thereof is conceal'd in the Boſom of the Earth: So we may enjoy the uſe and benefit of our Laws with much comfort, though the Grounds and firſt Origi-

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ginal Causes from whence they Sprung be removed from our knowledge: Our Law hath reason every where, though not to every Eye conspicuous: And wise and modest Persons cannot but know, and consider, that at this distance, and after so many Ages, the reason of our *Laws* ought not to be inquired after, but we should rather presume, that those *Laws* and *Customs* which have been tolerated by our ancient Predecessors, did proceed from their mature Wisedom; and that our Fore-fathers have examined and digested the *Laws* much more accurately than we do, who run our selves into infinite disorders, when out of novelty we would abrogate those Ancient *Laws* which experience hath found to be good.

And now, *My Lord*, I have wearyed your patience in justification of our *Laws*, which I think were needless, were they rightly understood, for we cannot justly complain that good *Laws* have been so much wanting unto us, as we to them: To seek Reformation of *Laws*, is a commendable endeavour, but a speedy redress of our selves is for us more necessary, for we have lost much of the ancient Gravity of our Profession, and have degenerated from what we were; it is time therefore for us to return, and to be more cautelous and circumspect, by how much men are more clamorous

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and querulous against us: And the best way to confute the Calumnies of Men, is even our own Integrity, that we endeavour to be pure and clear in our Lives and Professions, and to be principled upon Religion and Conscience, endeavouring to be the best men as well as the best Lawyers: The meanest of which is,

My Lord,

From the Black Buildings in the *Inner-Temple*, *November* 1. 1658.

Your Lordships most obedient and most Faithfull Servant,

Edward Bulstrode.

A N

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TERMIN.

TERMIN. HILLAR.

12 JAC. *Banco Regis.*

The King and Sir *Thomas Waller* Plaintiffs, against *Frances Hanger* Widow, Executrix of *George Hanger* her late Husband, deceased, by Information.

Entred Termin. Pasch. 9 Jac. inter placita Regis, Rot. 163.

SIR Thomas VValler miles, Capitalis pincerna domini Regis, by his Letters Patents, exhibited an Information against Frances Hanger Widow, for deteining of Prisage, (S.) Eight Tun of Wine; and shews, That the King was seised in his demesn as of Fee, of this ancient duty called Prisage, ut in jure Coronæ, and that he and all his Progenitors have used to have Prisage, which is of every Ship, of all Merchants, Aliens, or Denizens, containing ten Tuns of Wine, to have for Prisage one Tun; and if it contain twenty Tun, or more, to have two Tun, (S.) Unum ante doleum, and the other deorsum, and this he is to have as a Flower of the Crown: That 28 Novembris, 5 Jac. Two Ships laden with Wines, of the goods of George Hanger, did arrive in the Port of London, the one called the Hopewell, with 26 Tuns, so that two Tuns of these were due to the King; and the other called the Desire, with 22 Tuns of Wine, of which two Tuns were due to the King: That afterwards the other two Ships did arrive also in the Port of London, and that in these four Ships were 124 Tun of Wine, of which eight Tun was due unto the King for Prisage; that he required these eight Tuns of Wine of the said Frances Hanger, to the use of the King; and that she, of the premises not ignorant, seeking the dis-inheritance of the King, refused to deliver them: Upon this he prayed the advice of the Judges, and to have process against the said Frances, who came in, and said by Protestation; First, That the Information was insufficient: Secondly, That Sir Thomas VValler was not Capitalis pincerna domini Regis, & pro placito dicit, quod bene & verum est; that the four Ships with Wines did arrive in the Port of London, as is laid in the Information; two of which Ships did arrive in the life time of the said George her Husband, and two after his death, and that the said George her then Husband, was possessed of these goods, ut de vinis suis propriis, and so being possessed, made her his Executrix, and dyed: Afterwards she being libera fœmina, accepta super se onera testamenti, did unlade

An Information for Prisage.
1 Ro. r. 138.
2 Bulst. 134.
261.
Latch. 261.
Calth. 33.
Mo. 832.

lade these two Ships, and did take and occupy the Wines, as Executrix; and
6 Martii, 1 E. 3. &c. she also pleaded the Charter of discharge of Prisage made, 6 Martii, 1 E. 3. &c. unto the Major, Commonalty, and Citizens of London, in hæc verba, (S.) Quod de vinis Civium, nulla prisa fiat, sed perpetue inde essent quieti, and takes a Travers, absque hoc, that these were her own proper goods, and that she had nothing in them, but onely as Executrix of George Hanger her late Husband, with an Averment, that the said George, fuit Civis, & liber homo de Civitate London, (S.) of the Company of Cloath-workers; and she also averred, quod Civitas Lon. est antiqua Civitas, Incorporated by the name of Major and Commonalty: Upon this Plea the Kings Attorney-general demurred in Law, upon which the Case was briefly this. (S.) Merchants, Fræmen, Citizens, and Resiants in London, by the Charter of 1 E. 3. are discharged of the payment of Prisage. A Merchant Citizen, and Fræman of London, had four Ships with Wines arrived here in the Port of London, two of them in his life time, and two after his death; after the arrival, and before the unlading of the two first Ships, he made his Wife his Executrix, and dyed; who afterwards unladed these ships so arrived, in the life time of her Husband, and also the other two Ships which arrived after his death: The sole question upon this demurrer was, whether she shall be discharged from the payment of Prisage for these Wines, or not, by force of the said general grant of discharge of Prisage, by the said Charter of 1 E. 3.

9 & 10 Jac. B. R. &c. This Case was long argued at the Bar, in the Terms of 9 and 10 Jac. B. R.

And afterwards in Trin. 10 Jac. B. R. this Case was argued by the four Judges, who were then divided in opinion, two against two.

1. Croke Justice. The question here is, Whether Prisage shall be paid for these Wines, or not: In angustiis positus sum, which way to incline my Opinion; but I think, that in this case, Judgement ought to be given for the King, and that Prisage ought here to be paid unto him, for these two Ships which did first arrive, but especially for the two last Ships: I am of Opinion, that Hoc privilegium à principe concessum, ought to be taken and construed, benign, largely and amply, and not to be restrained, bene meriti Cives London; this Immunity to be extended to Citizens, Men or Women Citizens, as well to the one, as to the other clearly; Civis utriusque generis, & gratuitum donum Regis, this was to be to the Citizens of London, being totius Britanniæ, & regni totius Epitome, that Women are not to be excluded out of the benefit of this Charter, for that they deserve as well as others; so that no dis-ability being in the Woman, but she being integra Civis, is very well capable of this immunity for the Widow of a Merchant Citizen, est civis & civium libertate dotata, and she shall have the same privilege, as well as her Husband, as long as she is resiant within the City, she shall be frè from payment of Prisage. All this I agree: But here relicta verificatione, that she is Civis, saith, that she hath these Wines in another right, and takes a Travers that they are not bona sua propria, but that she hath them as Executrix of her late Husband: As to the Privilege here of discharge, the difference will be, where the goods are attached in the life of the Husband, and where after his death; where it is in his life time, and he dies the same day, yet the Discharge shall continue; but here in this Case the same was after his death.

Also he which is to take benefit of this Charter, ought not to be inquilinus nec adventitius, he ought to be Civis residens, & commorans incola Civitatis, and so are the words of the Charter of Discharge, made unto them in 1 E. 3. And the King, ex speciali gratia, did then grant this Discharge unto the City; and it appears by Magna Charta, cap. 9. quod Civitas London, omnes habeat Libertates suas antiquas, & consuetudines illæsas.

Magna Charta, cap. 9.

Also this Prisage is an ancient duty in the Crown, and due unto the King, as of common Right, and the same is a Prerogative in the Crown, incident unto the King, as a flower or fruit from the Tree, but not so inseparably

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for that he may well grant this immunity to whom he will. A Woman may be a Citizen, but here she is not an Owner as she ought to be.

If a Citizen makes a Foreigner his Executor, who uniades the Wines, clearly he shall not have the benefit of this discharge, for that he here hath them in another right, and the Prisage grows due to the King, by the unlading: so that a Foreigner shall not have the benefit of this discharge, nor yet an Executor of an Executor.

If the Goods of a Citizen come to a Foreigner, he is not Civis.

If a Foreigner makes a Citizen his Executor, he shall not have this privilege of discharge from payment of Prisage; for these are not bona Civium, as they ought to be, or no discharge; for that he which is to be quit from payment of Prisage, ought to be a Citizen, and he ought to have the Goods in his proper, and not in anothers right.

How this Prisage at first grew due, a probable reason may be this; for that the King is to scour the Narrow Seas, and therefore he is to have of every Ship, bringing ten tuns of Wine, one tun; and if twenty tuns, or above, then to have two tuns for his Prisage; so that this is an Hereditary Right in the Crown.

Another matter is here observable, that formerly, in ancient time, the usual burthen of ships was but ten or twenty tun, but now, by great Industry, they are made greater, and in this, the great benignity of the King is to be observed, that he doth not extend the payment of Prisage, according to the bigness of the Ship, but onely to have two tuns out of a Ship, though the same contain forty or fifty tuns, as here it appeared to be; and from hence may be gathered a good caution unto subjects, ultra debitos limites & fines, not to extend the Kings Charter and Grant, and to doe contrary unto this, is retribuere malum, pro bono.

As to the Charter it self, made in 1 E. 3. and the due construction thereof, Letters Patents of the King ought to be construed, secundum intentionem domini regis, & non ad deceptionem: And the King, quatenus Rex, est Protector legis terræ, & quod rex legi, lex regi, as Bracton observeth, Rex est anima legis, & lex est anima Regis: *Bracton.* Letters Patents are to be construed benign, favorably and liberally; and upon the true construction of this Charter here of discharge, is the main knot and difficulty in this case, pupilla oculi regis Civitas London, and the same is called, Camera regis.

As to the words of this Charter, (S.) De vinis civium nulla prisa fiat, sed inde perpetue essent quieti: Here is Concessio Regis, and who he intended to have benefit by this immunity; and this was not Frances Hanger, but George Hanger, De vinis civium, &c.

Obj. But these are the Wines of a Citizen, and therefore no Prisage to be paid for them.

Resp. If none of this could be denyed, it must then be agreed to be so: But these are not now the Wines of George Hanger, nec vina civium, for that George Hanger is not now a Citizen; Non vina George Hanger, for that he in pulvere dormit, and he hath undergone this Sentence, (S.) Cines es, & in Cinere, &c. mors omnia solvit, and now he being dead, he hath no goods, nor is he now a Citizen; he was a Citizen, but now is not, non est spirans, non est inter vivos, & si non est, then non est civis civitatis London: So that here is a double disability in George Hanger; he hath no goods, neither is he a Citizen, and both these ought to concur, otherwise, not capable of this Immunity; he hath goods onely in Representation, in the hands of his Executor, which are in Judgement of Law, bona testatoris.

If two Citizens have Wines as in Joynt-tenancy, they conjunctim & divisim, shall have this Privilege; otherwise it is if a Citizen and a Stranger have Wines.

Here in this Case this Privilege doth not die, but onely quoad George Hanger: As to the Wife, she here saith, that she is libera fœmina & Civis, Whether she shall have this Privilege, or not, is the question. As to this, she shall not have this Privilege, for here she hath not any Wines; she is civis, but she hath not vina civium; If she had these Wines in jure proprio, then she should have the benefit of this immunity: But here she hath these Wines in the right of another, in jure mariti, and therefore she shall not have the benefit of this discharge. Also the Kings grants ought to have such a construction, as not to extend unto a representative person; and to this purpose is the Case in 11 E. 3. Fitz. tit. Executors, placito 77. If a Guardian in Socage hath a Ward, makes his Executors and dies, they do represent his person, as to the goods, but not to have the Wardship; so here in this Case Frances Hanger doth represent the person of her Husband and Testator, as to the goods, to have them, but not as to the privilege of this Immunity and Discharge, given unto him by this Charter; but this benefit doth onely redound to such a one, who is omni soli & semper civi, and such a person is onely to enjoy the same.

11 E. 3. Fitz. tit. Execut. placito 77.

Another matter is very material in this Case, (S.) The time when this Prisage becomes to be due to the King, this is very material, for that if it be agreed, that the same grows due upon the arrival of the Ship; then for the first, no Prisage is to be paid, because they arrived in the life time of George; but for the other two, Prisage is to be paid, for that they arrived two Moneths after his death: But as to the certain time when this duty begins, the words of the Record are in this manner (S.) de qualibet navi, important vina & disonerant inde, so that by the unlading this Prisage grows due.

Trin. 5. Jac. B. R. &c.

Trinity 5 Jac. B. R. in Kennicot and Bogens Case, this was agreed, that Prisage is not due to the King, untill the Bulk be broken open: If his Executor shall have this benefit of discharge, there would be a manifest inconvenience by this, for if he hath no Executors, then the Ordinary to have this, he being by the Law in the place of an Executor; and so of an Executor of an Executor, being an Executor of the first man, as appears by 19 H. 8. and so in infinit & infinitum, & incertum, always in lege reprobatur, and so it shall be in grants of the King, & in casu concessionis regis, concessionis causa is to be considered. The discharge here was granted, in regard of the great burthen and travel of Citizens Merchants, and for to encourage them to Merchandizer: But George Hanger, now non habet onus, and therefore not to have the benefit of discharge for these goods.

Magna Charta, cap. 21.

If the Wines in these Ships were divided in a Rationabile parte bonorum, they shall not have the benefit of this discharge; Magna Charta, capite 21. in casu privilegii. Nulla carecta dominica, alicujus personæ Ecclesiastica, vel militis, vel alicujus domini per ballivos nostros capiatur, &c. If such a person so privileged dies, this privilege shall not extend to his Executors, for that, as to these personal privileges, the Executor doth not represent his Testator, but onely quoad his Goods, for to have the Administration of them; yet it must be agreed, that this Charter ought to have as ample and beneficial construction, for the Citizens of London, as may be; yet he which is to have benefit and advantage of this, ought to be integre Civis, and an intire Citizen, as it was adjudged in 4 H. 6. in one Knowls Case a Citizen, and Free Grocer of London, removed his houshold, cum pannis, and did dwell at Bristow, but yet kept his Shop in London, and he had a Ship laden with Wines, which was unladen in the Port of London, and would have had the benefit of this Charter of discharge of Prisage, but it was ruled against him, for that he was not such a Citizen as was capable of this discharge, for that he ought to be Civis in cola commorans.

4 H. 6. *Knowls* Case.

14 H. 6. &c.

14 H. 6. A private Act of Parliament: Complaint was made, that the Lord Major of London would make Strangers Citizens: It was there declared, that this

this benefit, to be discharged from payment of Prisage, did not extend unto such Citizens as were donati, made Free, but unto those Citizens onely which are commorant incolant, and resiant within the City; here the Plea is, that the Wife, the Defendant, est & fuit libera fœmina, but not Civis, and therefore the Plea not good.

In 43 Eliz. a private Report, one Sacheverils Case, They were not Masters of Families, but they had taken Chambers in the City, and were Freemen, and subject to scot and lot, yet they could not have the benefit of this immunity, for that they were not in cola. 43 Eliz. *Sacheverils* case.

If a Citizen of London doth Merchandize with another, he shall not have the benefit of this discharge.

If the King grant to one all Amerciaments, he shall not have Royal Amerciaments, for the Kings grants ought to have a favorable construction.

This Case now here in question, est casus omissus & cessante causa (George Hanger the Testator being dead) cessabit & effectus, (S.) The discharge of payment of Prisage; but if the bulk of the Ship was opened before his death, his Executors afterwards may well take and carry the Wine without the payment of Prisage for the same, because the same was once discharged by the opening, in the life time of the Testator; for no Prisage is due before the bulk of the Ship be broken open, and then the same is due.

This Privilege of immunity is here knit to the person of the Testator, & moritur cum persona, and now these Wines are not bona Civium, and George Hanger the Testator, non est Civis, sed nunc est mortuus, and these Wines are not his goods; for as one well observeth, touching the disposition of goods by one,

Da tua, dum tua sunt, post mortem tunc tua non sunt.

And our Ancestors did not make so large a Construction of this Charter of the King, being made civibus London generally, as to extend the same to go unto every Citizen, but he ought to be such a Citizen, who is Civis, to all purposes and intents, otherwise he is not to have any benefit of this discharge from payment of Prisage, and the same is not to be extended unto a representative person.

And so this case here, being casus omissus, the Defendant is not by this Charter to be discharged from payment of Prisage for these Wines, but ought to pay the same; and so upon the whole matter, Judgement ought to be given for the King.

VWilliams Justice. Upon the exposition of this Charter of discharge of Prisage, granted 1 E. 3. to the City of London, Frances Hanger the Defendant, ought to be discharged from the payment of Prisage for these Wines.

In 5 E. 3. and 6 E. 3. this matter as touching Prisage is largely argued, between the King and the Bishop of York; without all question the King may well grant away this Immunity and discharge of Prisage; and so it is of another Inheritance, as Licenses for Transportation, without payment of Custom, as appears by 30 H. 8. Dyer, fol. 43. placito 22, 23, 24. and 34 H. 8. Dyer, fol. 52. placito 1. License for carrying of Bell-mettle out of the Realm, 21 E. 4. fol. 7. The King grants unto the Major of Norwich, to be Incorporated by the Name of Civibus, and this a good Name of Incorporation. 7 E. 4. fol. 14. the King grants probis hominibus Ville de Dale, and this a good Name of Corporation; and so here in this Case, the grant of discharge from payment of Prisage, being made civibus London, is good. 5 E. 3. 6 E. 3. 30 H. 8. *Dyer*, fol. 43. &c. 7 E. 4. fol. 14.

The King may grant away his Inheritance, as Taxes or Tallages, 21 E. 4. fol. 45, 48. The King may grant unto one to be discharged from the payment of Taxes, Subsidies and Fifteens; and so he may grant unto one, that he shall not be charged with the Collection of Tythes, 39 E. 3. fol. 35. touching the Kings grants; 21 E. 4. f. 45, 48. 39 E. 3. f. 35.

Coke 5 pars, fol. 107. &c. Grants; and Coke 5 pars, fol. 107. in Sir Henry Constables Case; one prescribes to have Royal Fishes, as Whales, Porpes; so this Grant, as it is here made, is good.

It is here confessed, that the Husband of the Defendant was a Freeman, and a Citizen of London, at the time of the lading of the Ships, and divers years before he had these goods, so that he was a person well capable of this immunity.

As to the time when this Prisage is due unto the King, the same is due as soon as the Ship comes on the Narrow Seas; here is the inception and progression of this duty, but the consummation of it, is when the bulk of the Ship is broken open; Wreck is due when this is cast and left on the Land by the Sea, and so seized; so prisage is due when laid on the ground.

In this Case no Prisage was ever due, quia bona Civium: London is the Chamber of the King, to supply him with support, when he stands in need of it.

The Narrow Seas are parcel of the Allegiance of the King, he is to scoure them, and to defend his Merchants in them, for their safer conduct: It appears by 6 R. 3. Fitz. tit. Protection, placito 46. and by Britton, cap. 33. That the Narrow Seas are parcel of the Allegiance of the King, and parcel of the Crown of England; so that no Prisage was due unto the King of the Goods of George Hanger, let him go whither he will.

6 R. 3. Fitz. tit. &c.

If any Prisage be due to the King, it must then commence to be a duty, presently upon the loading, but not payable untill the unlading of the Ship: For after it comes into the Port here, no Prisage is due by this coming of the Ship into the Port, for he may, if he will, go to another Port, as it hath been adjudged; but if he break the Bulk of the Ship here to unload, the Prisage is due to be paid.

2 E. 3. f. 7. Coke 6 pars, f. 6. &c. 2 E. 3. fol. 7. Touching the Kings Charter, and what construction is to be made of the Kings Grants; and 6 pars, fol. 6. in Sir John Molins Case, the Kings Grants ought to have a very beneficial construction, and this for the Honor of the King, and for the relief of his Subjects, and not to have any strict or literal Construction made in subversion of his Grants; so here in this Case there ought to be as favorable and Honourable a Construction made of this grant as may be.

I agree the Case remembred of a Foreigner, that he shall not have the benefit of this discharge for his Goods.

If it be here demanded whose Goods these are, clearly they are the Goods of George Hanger, Nuper defuncti.

Obj. As to the Objection made of fraud, If this Ship comes in ten years after, no such matter appears to be in the Case, neither is it to be disputed, whether a Woman may be a Citizen: It appears by 46 E. 3. f. 13. that he is a Citizen who is Commorant, and an Inhabitant, and subject to pay scot and lot: If he dwell in another place, he shall not be free; by 5 H. 7. f. 10. a Citizen and freeman of London, may by the Custom devise Land in Mortmain; and with this agrees 28 & 29 H. 8. Dyer, f. 33. placito 12.

46 E. 3. f. 13. 5 H. 7. f. 10. 28 & 29 H. 8. &c.

Here are the Goods of George Hanger the Testator; for if an Action be brought against an Executor, and ruled against him, if he do not plead a false Plea, the Judgement shall be De bonis Testatoris, as appears by 33 H. 6. and 34 H. 6. f. 22, 23. and by many Books; so is the Common Law, and Common Reason makes the Law, which supplies all; by 10 E. 4. f. 1. If an Executor gives omnia bona & Catalla sua, clearly by this grant, the Goods which he hath as Executor, shall not pass, neither shall such Goods be forfeited by his Attainder; and so is 33 H. 6. f. 31. 21 E. 4. f. 50. and 10 E. 4. f. 1.

33 H. 6. 34 H. 6. f. 22. 23. 10 E. 4. f. 1. 33 H. 6. fol. 31. &c.

If Executors have a surplusage of the Goods of the dead, these ought to be imployed in Pious Uses, and they of these to render an account to the Ordinary, as appears by 10 H. 7. and 16 H. 7. so that it is clear that the Law doth not account of

10 H. 7. 16 H. 7.

of these goods in the hands of Executors, as of their own proper goods, but as the goods of the Testator; and as to the distribution in Pious Uses, and their rendering of an account, Doctor Bennet hath put this very lately in ure, and hath called some to render an account, by 21 E. 4. f. 50. If an Executor be Out-lawed, he shall not forfeit these goods which he hath as Executor, neither can he devise them by his Will, for his devise shall onely go to such goods which he hath in his own proper Right, and not unto such goods which he hath as Executor. 21 E. 4. f. 50.

Here in this Case, these Wines are the goods of the Testator, and not of the Executor.

If a Foreigner brings a Ship laden with Wines into the Port of London, and then makes a Citizen his Executor, and dies, he shall not have the benefit of this Immunity from payment of Prisage for these Wines, for that these are not bona civium.

Here the King hath freed George Hanger from the payment of Prisage for his Wines; there is a great difference betwæn the Case of one who ought to pay Prisage, and of one who ought not to pay the same; where it is in the Case of one who ought not to pay Prisage, and he dies, no Prisage shall be paid for his Wines, which were discharged of Prisage in his life time, as here in this Case the Wines of George Hanger were, and there is no president to be shewed to the contrary; here they are his goods in the Inchoation, progression, and perfection of this duty of Prisage. For first, he loads them into the Ships. Secondly, he comes with them upon the Narrow Seas. And thirdly, they arrive here in the Port in his life time, so that these are his goods, and his Executor for these goods of the Testator, ought to have the same benefit, as to this discharge of Prisage, as the Testator himself might have had; for the Executor cannot forfeit these, neither for Utlary nor Treason, and so no Prisage ought to be paid for these Wines, being the goods of George Hanger, who was discharged from payment of Prisage, for his Wines brought in: And so in this Case Judgement ought to be given for the Defendant.

Yelver on Justice. In this Case Frances Hanger the Defendant, ought to be discharged from the payment of Prisage for these Wines.

In this Case, the Grant of King E. 3. to a Citizen of London, is onely to be considered of.

The Wines here, are the proper goods of the Testator, he loads them as his goods, and then he was a Citizen and a Fræman of London, and a person well capable of this discharge: they are of necessity either the goods of George Hanger the Testator, or of the Executor; not of the Executor, ergo, of George Hanger; no third person can claim them as his goods, and so the Law accounts of them; they were once his goods, and none can deny this to be so: What reason is there therefore that they should not still be accounted to be his goods, he having made no disposition of them; and the Executor here, and so in all Cases, doth represent the person of his Testator, and this as well to all manner of charges, as discharges, and so is 45 E. 3. fol. 17. placito 4. & 47 E. 3. fol. 23. & 10 E. 4. fol. 1. the Executor hath onely the possession, the property remains in the Testator, and so the Law accounts thereof. 45 E. 3. f. 17. placito 4. &c.

If the Debtor makes the Debtæ his Executor, here the property of so much as the Debt amounts unto, is presently changed in Law, and a discharge for so much, which he may retain to pay himself; and so is Woodward and Darcies Case, Plowdens Commentaries, fol. 184, 185. and the reason of this is, for that it shall be more for the benefit and avail of the Debtor, that his Debts should be paid then otherwise; but otherwise it is where it shall be prejudicial unto him, there no such change or alteration shall be. as where a Woman Executrix takes a Husband, he shall not have these Goods, but his Wife who is Executrix shall have them, *Plowdens* Commentaries, &c.

and

33 H.6. f.31. &c. and so is 33 H. 6. f. 31. and 21 H. 7. f. 29. which proves, that the Executor hath no property in the said goods, for if she had, then all should be given to the Husband, by his Inter-marriage with her.

If an Executor grants omnia bona sua, the goods which he hath as Executor do 30 H. 6. f. 3. not pass, as before appeareth, and by 30 H. 6. fol. 3. the Lord may seize the goods of his Villain, but he cannot seize on such goods which he hath as Executor, and if 18 H. 6. f. 4. he doth, an Action of Trespass lieth against him, by 18 H. 6. f. 4. and so it plainly appears, that no property in the goods, is in the Executor, but he hath them in the 20 H. 7. f. 5. &c. right of the Testator, and so is 20 H. 7. fol. 5. and Welkdens Case in the Commentaries, fol. 520.

The first commencement of a thing, is many times in Law to be regarded, as appears by many Cases put to this purpose; in Dame Hales Case, in the Commentaries, fol. 260. so here in this Case, the first Act done by George Hanger, is to be regarded, (S.) the lading of the Wines by him in the Ships, he being then a Citizen and Freeman of London, and then they were his goods, and now the property in these goods is not altered by his death; but these shall be freed and discharged from the payment of Prisage, in the hands of the Defendant, his Executrix; and if he had not made an Executor, yet they should be discharged from Prisage, in the hands of the Ordinary, he representing the person of the Executor, and so it should be in the Case of an Administrator; and so upon the whole matter, no Prisage is to be paid to the King for these Wines, they being bona Civium; and so within the Charter of discharge of Prisage, and therefore Judgement ought to be given for the Defendant.

Dame *Hales* Case, &c.

Flemming chief Justice. In this Case the Defendant is not to be discharged, but ought to pay Prisage for these Wines, the King having this Prisage by his Prerogative.

The Question here is, Whether this discharge shall go onely to a Citizen, or shall be extended also to his Executor.

1. First, It is here to be considered the nature of Prisage.
2. Secondly, To whom this is due to be paid.
3. Thirdly, By whom to be paid.
4. Fourthly, At what time to be paid.
5. In the next place, consideration is to be had of the Plea in Bar: and this doth consist of the Kings grant on immunity, (S.) Quod de vinis Civium, nulla prisa fiat, sed inde esset quieti.
6. In the next place it is to be considered, whether this here be a personal discharge, or common, or mixt, in the personalty and realty.
7. And lastly, the course of these Words of this Privilege, is to be considered, together, with the extent of the words of discharge, and to what persons this shall extend.

It is to be observed for a Rule, Quod privilegium est beneficium personale, & extinguitur cum persona.

The Question then will be, Whether the Defendant here shall have any benefit of this personal Privilege granted unto the Testator, or not.

1. This Prisage is a Royal Prerogative, and due, time out of minde, unto the Crown as an incident, but yet not inseparable, and the same due for the Kings provision, (S.) to have of every Ship of twenty tuns of Wine, one tun before the Mast, and the other behind the Mast, and this to be delivered unto the Kings Officers and Ministers; and for this purpose he hath his Officer, Capitalis pincerna, his chief Butler, unto whom these Wines are to be delivered.

2. This Prisage is onely due for Wines, and hath its denomination a Priser, of taking, because the same is to be taken by the Kings Officers.

3. Then of what persons this Prisage is to be demanded: As to this, it is very clear, that this is a Prerogative duty, which the King is to have of all his Subjects, and

and of Strangers, who bring Ships laden with Wines into his Ports, and there unlade the same; and no person is exempted from this, the same being to be taken for the Kings provision, and to his use; and at the beginning, there was none free from this payment.

4. Then as to the time when this Prisage first grows, and becomes to be a duty to the King: As to this, without all question, the King hath no right at all to have Prisage, when the Ship is beyond Sea, nor yet when the Ship is upon any part of the Seas, as if the same be upon the Narrow Seas, in coming for England, nor when the Ship cometh into the Port: But onely when the intention of the Owner of the Ship appears, that he will there unlade; and this is to appear by the breaking up of the Bulk of the Ship, or by his agreement for the Custom, and this entred in the Custom book, at this time onely, and not before is Prisage due unto the King: And to say that this is not due before the Ship be unladed, this cannot be so, for then he cannot have as he ought to have, (S.) One tun before the Mast, and another behind the Mast; but when it is certainly known that he intends for to unlade there, then presently Prisage is due to be paid and taken, but not before, so that the time of this duty is very material.

Portus est locus inclusus, and that for safety from Pyrates, and the King is at the charge of this, and Ports are as the gates of the Kingdom, and none is Owner of them but the King onely.

It hath been objected, that it is material to be considered, when Prisage is due, and when not: But it is to be chiefly considered, when this is due as a thing in the Crown, and this is not so due, before the Ship comes into the Port; and this is then due from all, if they have not their immunity, for the King may discharge if he will, whole Cities and Corporations from the payment of this, but yet this ought to be by his Grant.

He which takes a Freedom, and so would be by this discharged from this payment, ought to bring himself within the compass of having benefit by this grant; so it is in case of a Prescription, and this is to be laid as a sure ground, for he ought to be such a person as may have benefit of this: And this is the very point here now in question, as touching the discharge of the payment of Prisage, upon this Grant thus made unto the Major and Commonalty of London, and their Successors; this Body of the City is joyned to the Grant, and yet a Body Politick cannot have benefit of this, for this was not the intention of the Grant, but that this was to be to them in succession; and the persons which were to have benefit of this, are personal and singular, so that here is a meer personal Privilege granted.

The Case remembred of 21 E. 4. f. 7. A Grant made unto the Corporation of Norwich, of an immunity that the Citizens should not serve of Juries, he ought to to be singularis civis, and a Member of the City; there the Grant was made to the Corporation, but the persons singularly took benefit of this: And in such Cases, none but Citizens are to have any benefit of such an immunity. 21 E. 4. f. 7.

The words of the Grant here, are, pro meliorat one civitatis, and for the advancement of the Honor and civil Offices of the City; this the ground of the Kings Grant.

The Case of Bristow, in 4 H. 6. remembred, where a Merchant Citizen removed his houshold to Bristow, but yet kept a Shop in London, but could not have the benefit of this discharge; and so the Case remembred in 43 Eliz. Sacheverils Case, who was a Citizen within the City, and to bear Civilia & publica onera, yet he was not a party within the intention of the Grant, to have benefit of this discharge, he was in cola; but this was but domicilium, he onely took Chambers, and removed, and so came and did Traffick; it was adjudged, that he was not within the intention of the Grant, to be discharged of Prisage, yet he was a Citizen, a Freeman, and commorant there, but he ought to be inquilinus, and to have a House, not domicilium: And if such persons could not have the benefit of 4 H. 6. &c. 43 Eliz. &c.

this Immunity, a fortiore, Executors shall not have the benefit of this discharge.

To prove this to be but a personal Privilege, and if so, then extinguitur cum persona.

They are not the goods, but the person onely, to whom this Immunity and grant hath respect, and the goods are discharged in regard of the person, and not otherwise: And as to this, if a Citizen do adventure for Wines, and his Ship is laden with Wines, and upon the Seas, to be transported for England, and before the arrival of the Ship he is disfranchised, he shall pay Prisage for these Wines, because he was no Citizen at the time of the arrival of the Ship. Also, if one who is no Citizen, nor Freeman, do transport a Ship with Wines, and before their arrival he is made a Citizen, clearly such a one shall have the benefit of this Immunity, so that both are to be ruled according to the event, (S) If he be a Citizen at the time of the arrival and unlading; so if a Citizen do bring Wines to the Port, and before their arrival he sells these Wines to a Stranger, without all question he shall pay Prisage, for now they are not vina Civium: Also if a Stranger brings a Ship laden with Wines into the Port, with an intention to unlade there, but before any Agreement by him entred into the Custom Book, or the bulk of the Ship broken, he sells these Wines unto a Citizen, he shall pay Prisage for these Wines; for it was not the intent of the King, in this his Grant, to discharge them in such a manner, but this grant was made to them, to encourage them to adventure; and so in this manner to defraud the King, this is out of the intention of the grant, to discharge such from payment of Prisage, who in this manner go about to forestall the King of his benefit and privilege of Prisage: so that by this, it appears that the Citizens have this as a personal Immunity, and it is not sufficient for one that would have this benefit, to be locally within the City, unless he apparently also do bear the burthen of the City.

As to that which hath been said, that a Woman may be a Citizen: This she cannot be, to what end, she cannot bear Civilia, or publica onera of the City, she cannot do any thing for the benefit of the City, she cannot perform Watch and Ward, she can bear no office in the City, neither can she be of any of the Companies; she cannot be an Attorney, she may be a Free woman, but this is onely to have her will, (as many so have) but to no other purpose: But if she be to have any benefit of this Immunity, this is onely as Executrix of her Husband, and she hath onely relyed upon this.

The main knot of this Case now is, Whether an Executor of a Citizen of London, shall have the benefit of this discharge from payment of Prisage for these Wines adventured for, and brought home by the Testator, who dyed before such time as the Prisage became to be due, or not.

If the Law be clear in this, that this is a personal benefit, then the Law is as clear, that this moritur cum persona, and then the Executor cannot have the benefit of this discharge: This cannot be compared unto a better Case, then that which hath been put, where the King Grants to the Inhabitants or Citizens of such a place, free Carriage, without payment of Pontage, such an Inhabitant who hath this Freedom, makes his Executor, and dies, his Executor shall not have this benefit, but shall pay Pontage for the Goods of his Testator; for this is not a duty, before the Goods come to pass over the Bridge, where payment ought to be, so the Tenants in ancient demesn are free from payment of Toll, time out of memory; and he which will have this Privilege, ought to be such a Tenant, and if such a Tenant makes his Executor, and dies, his Executor shall not have the benefit of this discharge; for such a discharge, respects the person onely of him who is to have the benefit of it, and not his Goods.

If the King do discharge such a Ship of I. S. being at Sea, particularly naming the same from the payment of Prisage, and he dies before the Ship arrives, his

his Executor here shall have benefit of this discharge, and these Wines shall be free from payment of Prisage, unto whose hands soever they shall come before their unlading.

And so the difference will be, where such a discharge is granted to any singular person for discharge of his Goods, and where the Goods are to be discharged are specially named.

Nota, The difference touching a discharge of Prisage.

As to the Wines here, which are not the Goods of the dead person, for he cannot have any Goods: The Executor, he hath the Goods of the Testator, for to imploy them, and to make disposition and distribution of them, according to the Will of the Testator; and as to this purpose, he doth represent the person of his Testator: It hath been said, that the Ordinary may, and hath called in some to make their account, but as to this, the same is now but a new incroachment by him, and they do pretend for this, to have these Goods to dispose of them in Pious Uses, but they will have and turn them in usus suos proprios, and this was never so known to be, before these later times; and this is not likely long so to continue.

As to this discharge here, the Law doth not respect the Goods, but the person:

It is to be agreed, that an Executor by his Utlary, shall not forfeit the Goods which he hath as Executor, neither shall they pass by his Grant, where he Grants omnia bona sua, these shall not pass, as before appears; but if he will specially give such a Horse, this shall pass, though he have the same as Executor; If an Executor brings an Action of Trespass for taking away of Goods, in vita testatoris, there he shall say, bona & catalla testatoris, but otherwise it is, where the Action is brought for taking of them out of his own possession, there he shall say, bona & catalla sua.

An Executor doth represent the person of the Testator, but yet not to all intents and purposes.

Obj. It hath been objected out of the words of the Grant, (S.) Quod de vinis Civium, nulla prisa fiat, and that therefore this discharge should go to the Goods.

Resp. This not to be so, but that this discharge goes to the person, being a Citizen, and not to his Executor, and so this here is casus omissus.

And as to the Ships here of the Testator, both of them came into the Port with an intention to unlade, and this was three days before his death; but the last came in the same day on which he died, and of the unlading of this, no intention at all appeared.

If this Grant here of discharge from payment of Prisage goeth to the Goods, then it must be agreed that these were vina Civium: But he ought to be a Citizen, who is to take benefit of this Immunity; and where the Commencement, Progression, and Consummation of a thing, of necessity is to go together, there all of them are to be respected; so it shall be in Cases of Relation, before remembred out of Dame Hales Case, in the Commentaries, but the same is not to be so here; in this Case of Prisage, no Relation being here to be in this Case, if the Defendant, the Executrix will have benefit of this Grant of discharge of Prisage, she must then bring her self within the compass of this Grant, which she hath not done, and so for this she is not to be discharged, but to be for this in misericordia, and so Judgement ought to be given for the King against the Defendant.

Williams Justice. Where the discharge is, as here it is, de bonis Civium, this shall extend and go to the Executor.

Flemming chief Justice. This discharge is not so, the same going onely to the person of a Citizen; but if the Ship had been discharged, there this should have gone to the Executor, and so is the difference.

Nota. That three of these Judges dying, and others succeeding of them, this Case was long argued again at the Bar; and afterwards, in this Term of Hillar. 12 Jac. This Case argued again, &c.

12 Jac. the same was argued again by all the Judges, and in their Arguments they were again divided in opinion, (S.) two against two.

Haughton Justice. The Defendant here ought not to be discharged from payment of Prisage: In this Case these things are to be considered.

First, The duty of Prisage, quid est, what this is, and how this grows.

Secondly, Touching the validity of this Charter of discharge: And as to this:

1. This is an ancient duty in the Crown, and due unto the King and his Successors, as a Prerogative, and takes its denomination from Prender, 6 E. 3. f. 51. In a Quo warranto against the Arch-bishop of York, to shew for what cause he demanded to have Prisage for Wines brought into the Port of Hull, who claimed this by the Charter of 15 E. 2. which is a good Case to prove this to be a duty in the King, Trin. 12 Jac. B.R. between Kennicot and Bogen, such a Charter shewed for discharge of Prisage: So that all this proves clearly and fully, that this is an ancient duty in the King, and no doubt is to be made of this.

Charter of 15 E. 2. &c.

The great doubt here is, touching the time when this duty of Prisage grows to be due to the King.

This Prisage grows due, upon the unlading and breaking up of the Bulk of the Ship, and not before, which is proved by Kennicott and Bogens Case: It appears also by 6 E. 3. that the King did grant unto the Merchants, to be discharged from payment of Prisage, and for this Immunity, they did grant unto the King 2 s. in lieu of Prisage, for every Piece, and this to be paid, within fourty days after the unlading, and this was so granted by them to the King, in recompence of Prisage; so that this duty of Prisage grows due to the King, upon the unlading of the Ship, and not before.

Obj. It hath been objected, that this grows due before the unlading, but the payment of this is not to be till the unlading.

Resp. As to this, the same is not to have any relation to the buying of the Wines in France, nor yet to any other time, for that this would make the same to be altogether uncertain.

As to this duty, the same shall onely relate to the time of the unlading, and not to the time of the arrival, for that no duty can be to the King, to have this by the arrival onely; but if it should relate to the time of the arrival, then it must relate to both the times; and if he be not a Citizen, and a person capable of this discharge, at both these times, he cannot have the benefit of it, by the words and meaning of the Grant: But here in this Case, the duty of Prisage is due unto the King onely by unlading, and not before.

In the next place: As touching the force and validity of this Charter of Discharge, the words of which being, Rex dedit, voluit, & concessit Majori, & communitati civitatis London, quod de vinis Civium nulla prisa fiat, sed perpetuò inde essent quieti.

First. This will be agreed by all, that none ought to have any benefit of this Charter of Immunity, but he ought to be a Citizen, in facto, and in every regard, like into the Case in 12 Lib. Assisarum, placito 35. Brook tit. Grants, plac. 66. where a Charter of Conusans of Pleas was granted to the Dean and Chapter of Deverwick, that they should have Conusans of all Pleas which concerned the Dean and Chapter, and their men, in the one Bench or the other, excepting Pleas of the Crown for them, & hominibus: It is there questioned, who should be said to be talis homo, whether their Milleines, or their Homagers, but by all agreed, that he must be homo: So here in this Case, he ought to be a Citizen, and a perfect Citizen to all intents, who is to take any benefit by this grant of Immunity; and as in the other Case, he ought of necessity to be homo, for that this, there was part of the substance of the Grant; so here, he that will be within the compass of this Charter of discharge from payment of Prisage, ought for to be Civis.

12 Assisarum, placit. 35. &c.

The

The Charter here is, vinis civium: De vinis civium, nulla prisa fiat: In this Case: The time, quando, they ought to be the Wines of a Citizen, is to be considered, for this is here left not expressed, but uncertain, yet the matter of the Patent makes this certain enough, and a sufficient expression of this herein: And as to this, the matter of discharge ought to be applyed unto the time of the discharge, and so by this construction, they ought to be vina Civium, at the time of the unlading of the Ship.

28 H. 8. Dyer, f. 17. A good Case, as touching the exposition of time, where the condition of a Bond for the payment of Marriage-money, was in this manner, That if the Wife dyed before Michaelmas, without Issue of her body then living, that the Obligation should be void; she had Issue of her body, and dyed, and afterwards, before Michaelmas, the Issue dyed, there adjudged the Obligation to be void, for that these words (then living) shall relate ad proximum antecedens, (S.) Mich. and not unto the death; and it is there said, that in doubtfull Words such Interpretation shall be made, as comes nearest to the intent, and there the time is much material.

Here in this case, though the time of this duty be not certainly set down, yet by the words of the Patent, sufficient certainty is expressed.

It is here to be considered, at what time this duty and charge riseth and groweth due; and then, that this Grant here extends unto the Goods of Citizens: And as touching this, the case falls into two Questions, (S.)

The first, Whether by the death of George Hanger, after the Ships laden with Wines, and before the unlading, these shall be now said to be in the Judgement of Law, vina Civium, or not.

As to this, advantage had been taken, that these shall be said to be bona testatoris, and if so, that then there is a Citizen capable of this Immunity for these Wines, according to the Charter: But as to this, this shall not be so, though in common speech it is so; in 10 E. 4. fol. 1. by Littleton, there the property of Goods ought to be in some person, and this cannot be so in one who is dead; that this shall be so, appears by the usage, and of Judgements given against Executors, which is to be, De bonis quæ fuerunt testatoris in manibus Executoris, in manibus Executoris, and this this is a good and sufficient proof, that they are not now in Judgement of Law, the Goods of the Testator: And if an Executor brings an Action for Goods, the same shall be, De bonis quæ fuerunt testatoris tempore mortis: And it is a very improper speech, to say that they are the Goods of the Testator of a dead man: In 24 E. 3. f. 35. the Writ was, Recordare facias loquelam, quæ est in comitatu tuo inter R. executorem testamenti A. and the Defendant, de quodam bove, ipsius R. capt. It is there said by Skipwith, That by the Name of Executor, the property of the beeve is supposed to be to the Testator; and afterwards by another Word, the Writ supposeth the property to be to R. and so a repugnancy in the Writ, yet the Writ is there awarded good; so that by this it appears, that these shall not now be said to be the Goods of George Hanger, who is dead: So that now here is a double Question.

28 H. 8. *Dyer* f. 17.

First. Whether these Goods shall be privileged from payment of Prisage, in respect of the Woman, the Widow of George Hanger, for she hath here pleaded, that she is libera fœmina: As to this, for her quality, she cannot have the benefit of this Grant of discharge, for that she cannot be said to be a Citizen, 38 in the Book of Assises, and 45 E. 3. f. 26. being all one case in effect: It was found by Office, by the Escheator of London, That one Oates was seised of certain Tenements in the City of London, and had devised the same unto the Guardians of the House of St. Mary Overy, in Mortmain, without the Kings License, which was returned into the Chancery; and upon this, a premunire facias, issued to the terre Tenants, to shew wherefore the Tenements should not be forfeited to the King, and there the Custom of the City was pleaded to devise in Mortmain.

38 Lib. Assis. & 45 E. 3. f. 26.

And

And there it is said by Finchden, that Citizens ought to have such Franchises, (S.) those to whom such Franchises did extend, (S.) to those which were born, and Inherits in the same City, by way of Heritage, or which are reciantes & taxables, to scot and lot; and that he which is not so, shall not be said to be a Citizen, if he be not commorant and restant, subjects to scot, for payments, and lot, to supply the places and offices there eligible; and if he be not such a one, he shall not be said to be within the privilege of a Citizen.

This Woman here, the Defendant, notwithstanding by the Custom of the City, she hath some Privilege as to Merchandizer, during her Widow-hood, and so as to some purpose shall be said to be a Citizen; but this is onely quodammodo, but she is not subject to scot and lot, and therefore these Goods shall not have the privilege to be discharged of Prisage, in respect of the Defendant being the Widow of George Hanger.

The second matter here considerable, is, Whether these Goods, being in the hands of the Defendant as Executrix, and so quodammodo the Goods of the Testator, whether these Goods in regard of the Kings Patent: De vinis Civium nulla prisa, shall be capable of this discharge of Prisage, that they shall not be discharged: And in this, as to the Goods in the hands of the Executor, they are bona sua, to have an Action, and not of others: The Kings Grants ought to be construed according to his meaning, and this more especially, in such general grants as the same is here in this Case.

Here these are bona of Frances Hanger, in possession, but not in right.

15 Eliz. in the Exchequer, &c. This Case was adjudged in 15 Eliz. in the Exchequer, and remembred Coke 1 pars, fol. 46. in Alton Woods Case: King E. 6. by his Letters Patents, ex certa scientia, & mero motu, did Grant unto Crowch, omnes terras dominicales Manerii de Wellow; It was adjudged, that the customary Lands held by Copy, parcel of the same Manor, did not pass, and yet they are also in Law, parcel of the Demeans of the Manor, for that the Grant of the King, notwithstanding the words being, ex certa scientia, & mero motu, shall not be construed to pass any other thing against the intent and purpose of the King; expressed in his Grant; and yet without all question, in case of a common person, these should well pass, but not in the Kings Case.

Kellaway, f. 148. &c. Kellaway, fol. 148. b. placito 29. In a Quo Warranto, the Kings Charter was shewed, by which was Granted unto him, that he, and all his Tenants of his Honor of L. shall be quit of Toll through the whole Realm, the which Charter was Inrolled, and he shewed that he was a Tenant of the same Honor: It was demanded of him by the Justices, Whether he was a Tenant mediate or immediate, and he said, per meine, and therefore it was awarded, that his Franchises, as to this point, should be seised into the Kings hands, because he was not a Tenant according to the common Usage; 1 H. 7. f. 13. this Case put by Bryan, and not denyed: If A. B. Sheriff, or other Officer, be in the Kings debt by reason of his Office, makes his Executors, and dies, the King pardons the Executors by their proper names, omnimoda debita sua, these Executors shall never take any advantage by this pardon, because in effect, they are the Debts of two several persons: It is there said, Quod quælibet pardonatio debet capi secundum intentionem regis, & non ad deceptionem regis, and to this purpose is 2 R. 3. fol. 7.

1 H. 7. f. 13.

2 R. 3. f. 7.

If a tenant in ancient demesn hath a Privilege Granted to him, to be discharged from payment of Toll, if he make his Executors, and dies, his Executors shall not have this Privilege.

So here in this Case, inasmuch as these Wines were not absolutely bona of Frances Hanger, though she may have an Action for them, yet quodammodo they are hers; these Wines were unladen after the death of George Hanger, and therefore, neither in respect of him who is dead, nor yet in respect of the Defendant

dant, his Widow, being his Executrix, are these Wines by this Charter to be discharged from payment of Prisage; but the same ought to be paid, and so Judgment ought to be given for the King.

Doddridge Justice. That Judgement ought to be given against the King, for discharge of Prisage for these Wines, no Prisage being here due, the Defendant being to have the benefit of this Immunity Granted by Charter.

As touching Prisage it self: This is a right setled in the Crown of England, as a Prerogative, and this hath been so time out of minde.

3 E. 31. Custuma magna, which was the Merchants, by Charter granted unto the King: Custom for the Wares brought in, and for this, the King Granted unto them divers Immunities: The one was, to be discharged of Prisage: And for this, they did grant unto him for every Tun 2 s. and this to be paid within forty days after the unlading of the Ship, and this was so done by the Merchants Strangers; the original of this is in the Tower, 31 E. 1. and a Transcript of this is in the Exchequer, and Commissions have been upon this. 31 E. 3. *Custuma magna.* 31 E. 3. in the Tower.

6 E. 3. f. 3. Case 15. mentions this to be a right in the Crown, but yet grantable over by him. 6 E. 3. fol. 3. &c.

30 H. 8. Dyer, f. 42. 1 Mariæ, Dyer, f. 92. 1 Eliz. Dyer 165. as touching things Grantable over by the King.

This Prisage is an Inheritance incident to the Crown, and yet such as the King may grant away, and from the payment of this, he may discharge any particular person.

6 E. 3. f. 5. Case 15. and f. 10. Case 28. and f. 51. Case 50. being all one and the same Case, the which was this, John Archbishop of York, did challenge Prisage of Wines in the Port of Hull, (S.) to have two Tuns of twenty: A Quo warranto for this was brought against him, and upon this he claimed to have the first taste of the Wines, and the buying of them, after Prisage discharged, and so there was a Re-seiser: Afterwards another Successor of his took Prisage, and in a Quo warranto brought against him, he disclaimed in this, and did also claim to have onely the first taste of the Wines, and pre-emption, after the King had his Prisage. Afterwards, William Arch-Bishop of York, did prefer a Petition to the King, to be restored unto the said Privilege, for to have the Prisage. 6 E. 3. f. 5. &c.

Mich. 5 E. 3. This Case did begin, and 6 E. 3. he began to plead; Exceptions taken to the pleading of the Restitution of his Franches, he was put to answer, and said, that he had no full Restitution, and that before he had this, he ought not to answer; this is mention made of the 2 s. and there it is said, that he ought not to have this of Merchants Strangers, but to take it in kinde: Then he pleaded a Charter, by which he granted omnes prisas suas unto him; against this the several disclaimers were pleaded.

In this Case two Points were moved:

First, Whether the Charter it self did carry this, or not, and fol. 51. adjudged, that the Charter did not carry it.

Secondly, As touching the Disclaimer; and to this it was adjudged also, that this Disclaimer by the Predecessor, should bind the Successor, 6 E. 3. f. 5. 10. and 51. and there in the end it is so adjudged.

As touching the Estreats in the Exchequer, 22 H. 6. fol. 10. in the Case of Wooles, doth touch this Case of 6 E. 3. but there was no doubt made of the right of Prisage. 22 H. 6. f. 10.

The main point here in this Case, rests in this, (S.) Whether this Immunity, to be discharged of Prisage, shall extend to these goods in the hands of an Executor, the benefit of which, being to turn to a dead man, who is not in rerum natura: There is no doubt to be made of this, but that this grant being thus made unto a Politick Body, shall extend to every particular Member of the same, in his natural

20 E. 3. &c. real capacity, 20 E. 3. Fitz. tit. Corone, placito 125. A Citizen of London sued an appeal of Robbery; the Defendant gaged Battle, the Plaintiff said, that he was a Citizen of London, and that they have there such a Franches, that no battle shall be Gaged against any of them; this extends to every particular Citizen, 21 E. 4. f. 12. & 27. the Case of Norwich to this purpose, & 8 R. 2. Fitz. tit. Grants, placito 105. King John by his Charter, did Grant unto the Town of Lyn, that they should be a Bourgh, and that they should have a Provost in the same Wille, and that they shall be quitted of Toll, per tout le Realm; and did also Grant unto them by the same Charter, that if any one did take Toll of them, contrary to the Charter, that they might take again of them in Withernam, within the Jurisdiction: Afterwards King Henry the third, rehearsing the Charter of King John his Father, did Grant unto them, that they should have a Major and two Bailiffs, and that they should be quit of Toll, per tout le Realm: This Grant was made unto the Politick Body, but the Natural Body to take benefit of this; so here in this Case, the Grant was made to the Politick body, but the Natural body to take benefit of this; but here they shall not have benefit of this Charter, for those Goods which they have in their Politick, but for those which they have in their Natural Capacity: He who is to take benefit here of this Charter of Discharge from payment of Prisage.

21 E. 4. f. 12. 27. &c.

First, He ought to be a Citizen of London, and this hath divers significations, some are there Inhabiting, and so in this regard they are called Citizens: But if he hath not jus societatis, this Charter of Discharge of Prisage shall not extend unto him.

5 H. 7. f. 10. &c. Also every one which hath Land in London, by Custom there he may devise this in Mortmain, and yet notwithstanding he is no Citizen, 5 H. 7. f. 10. & 19. 45 E. 3. f. 26. A Citizen is such a one, as ought to be subject to scot and lot, and he ought to be liber homo; scot and lot are particular payments imposed upon every one, but extends not to one who is commorant in another place.

He ought to be a Citizen and a Free-man, and also commorant there who is to have benefit of this Charter of Immunity.

4 H. 6. Rot. 14. &c. And therefore as to this purpose, there was a good Case in the Exchequer, 4 H. 6. Rot. 14. or 18 Knowls Case, there he was a Citizen and a Free-man of London; but he left his commorancy, and dwelt at Bristow, and yet remained a Citizen and a Free-man, and was eligible to be called unto any Office; there it was yet adjudged, that he should not have the benefit of this Charter, to be discharged from the payment of Prisage; but he ought to be also a House-keeper in London: But if he be a Citizen and a Freeman of London, and do dwell there; as if he keeps no House, but takes a Chamber there, and so is an Inmate, this Charter of discharge shall not extend unto him: And this was also so adjudged in the Exchequer, Termin. Hillar. 43 Eliz. Rot. 22. in the Case of Sacheverril, and Thom. Snede: An Information was brought against them by Coke, then Attorney-General, for taking of these Wines without payment of Prisage, and adjudged there against them, because they were but inquilini.

Termio. Hill. 43 Eliz. &c.

By this Charter here of discharge of Prisage, the words are these, (S.) De vinis Civium, nulla prisa fiat.

As to this, it is to be considered, what manner of Citizens these ought to be, (S.) Citizens, Free-men, & Commorant, not in a Chamber, but to keep a settled House there; and this is sufficient, as touching the persons who are capable to have the benefit of this Charter of discharge of Prisage.

In the next place, as to the Goods, what Goods are to be freed from payment of Prisage.

1. First, The person to be discharged, ought to be the sole Owner of these Goods.
2. Secondly, He ought to be the sole Proprietor of these Goods.
3. Thirdly, He ought to be the true Proprietor of these Goods.

4. Fourthly,

4. Fourthly, This property ought to continue so in him, without any alteration.

1. As touching the first, That he ought to be the sole Owner, and therefore if he have them joyntly with another, Prisage shall be paid for these Goods; as if a Citizen and a Stranger be joyntly possessed of Wines, they shall pay Prisage for these, otherwise this Charter of discharge should be extended to a Stranger, the which shall not be.

2. Secondly, He ought to be the whole Proprietor, for if he have the general, and another the special Property; or if he hath the special, and another the general Property, they shall pay Prisage; As if a Citizen do pledge Wines, he now hath in them the general Property, and the other the special Property: And if a Stranger do pledge Wines to a Citizen, he hath the special Property, and the other the general; if these Wines be unladen, Prisage shall be paid for them. The reason of this is grounded upon 34 H. 8. Brook tit. Pledges, placito 28. 13 R. 2. Brook tit. Pledges, placito 31. 22 E. 4. Fitz. tit. Bar. placito 121. & Plowdens Commentaries, in Nichols Case, f. 487. 34 H. 8. A man doth Gage Goods in pledge for 40 l. borrowed upon them, afterwards the Debtor is condemned in 100 l. Debt to another, these Goods shall not be taken in Execution, untill the 40 l. be paid, for the Creditor hath an Interest in them, as in 22 E. 4. f. 10. A Lease made of Land, and a Flock of Sheep for years, they shall not be taken in Execution during the Lease; also Goods taken for a Distress, shall not be put in Execution, 35 H. 6. fol. 25. Symon Eyre found Goods of another, and bailed them over for money, there the Owner may take them again, 22 E. 4. per curiam. 34 H. 8. Brook tit. &c.

If a man Bails Goods unto one in Pledge, and afterwards he is utlagatus, the King shall not have these Goods before the party be satisfied: If a Lease be made to one for years, of Goods, and he is after utlagatus, a Scire facias issues out for the King, he shall not have the Goods till the Lease be ended, 13 R. 2. A Termor is distrained for Rent behind, afterwards he is attainted for Felony, done before the Distress taken, per Curiam, the King shall not have this Distress as a Forfeiture, unless he do satisfie the party who distrained, for this was lawfully taken, tempore captionis. And if one do Gage Goods to another, and afterwards is attainted of Felony, yet the King shall not have these Goods thus Gaged, without payment of the sum for which they were Gaged; the reason of this is, because that neither of them hath the absolute Property in the Goods so Gaged.

3. Thirdly, He ought to be the true Proprietor; As if a Stranger do bring over Wines, and afterwards fraudulently, and of set purpose to defraud the King of his Prisage, sells these Wines unto a Citizen, to be sold unto him again after the unlading, yet for these Wines he shall pay Prisage, because he was not the true Owner of them.

4. Fourthly, This property ought always to continue in him, without any alteration and disability of the person; As if a Citizen be dis-franchised before the unlading of the Wines, then he shall pay Prisage for these Wines. And this fourth matter brings now this main point in question.

Obj. And as to this, The question ariseth by way of an Objection, Will you extend this Charter here of discharge of Prisage unto the Goods of an Executor? (this cannot be.)

Resp. As to this, for some Goods an Executor shall have the privilege to be discharged of Prisage, and for some Goods not so.

For such Goods of which the Testator was never actually possessed in his life time, nor yet at the time of his death, for these the Executor shall pay Prisage; But otherwise it shall be for those Goods of which the Testator was actually possessed in his life time, and at the time of his death, there for these Goods the Executor is not to pay Prisage, as here in this Case now in question.

If a Citizen hath a Factor who sells Goods and buys Wines, and brings them hither after the death of the Testator, the Executor here shall pay Prisage for these Wines, and that because his Testator was never in his life time actually possessed of these Wines: But he shall have the benefit of this discharge, onely for such Wines, in which the property was in the Testator in his life time, and so continued also at the time of his death: But an Executor shall not have this benefit of discharge of Prisage, for all such Goods as he hath as Executor, and which shall be assets in his Hands, but onely with the restraint as before: Here in this Case, the Testator dyed before the Wines arrived in the Port; whether for these Wines the Executor shall pay Prisage, or not.

As touching the Cases and Reasons why in this Case here the Defendant Executrix ought to be discharged from payment of Prisage for these Wines.

Obj. First, the nature of these goods is to be considered; here the Objection hath been made, that a dead man can have no property in goods, as the Verse is:

Da tua, dum tua sunt, post mortem tunc tua non sunt.

Resp. In answer to this, That notwithstanding in verity and truth, a dead man can have no property, yet in the Judgement of Law, the property remains in him; and Fox and Greysbrooks Case, in Plowdens Commentaries, fol. 279. is good Law.

Greysbrook and *Fox* Case, &c.

Obj. Also an Objection hath been made out of the Judgement given, (S.) que fuerunt: As in an Action brought against Executors, who plead fully administred, and found against them, they shall answer, De bonis que fuerunt testatoris, if they have any; and for Costs, de bonis propriis.

Resp. But here a distinction is to be made, between the Goods which he hath as Executor, and which he hath in his own Right: Those which he hath as Executor, he is not to forfeit them, by Utlary or Attaint, and this proves that they are not his goods, for that all his shall be forfeited: So that rei veritate, he is dead, but yet in Judgement of Law, he is living in representation, for that Executors do represent the person of the Testator.

But yet to come nearer, Whose Goods are these, the property cannot be in suspence, but the same must be in some body: A moyn may be an Executor, and yet he cannot have any Goods, and therefore the property in them, in Judgement of Law, remains in the Testator.

10 E. 4. f. 1. 10 E. 4. f. 1. An Executor grants omnia bona sua, those which he hath as Executor, do not pass by this Grant.

Again, an Executor hath not in him an absolute power to dispose of these Goods which he hath as Executor, he cannot devise them: By act in his life time, he may give them away, but this shall be a Devastavit in him, but of his own Goods, he may make any disposition as he pleaseth.

Again, it is to be considered, for whose benefit this not paying of Prisage here shall be, this shall not redound to the benefit of the Executor, but the same shall be for the benefit and avail of the estate of the person who is dead. And though his person be taken away out of the World, yet he hath left his Estate here behind him, to be disposed of for payment of his Debts.

Again, for what reason will you now take away from him this Privilege of discharge from payment of Prisage, given unto him by this Charter, because he dyed between the coming in, and unlading of the Ship; if he had lived, he should then for these Wines have had the benefit of this Charter of discharge of payment of Prisage, and shall this act of God now take this away from him; it shall not do so, for that the act of God shall not turn any man to a prejudice: And here is no act at all done by himself, any ways to disable him from having the benefit of this Immunity, and therefore the act of God, by death, shall not take this away from him.

Also this Charter was Granted for the increasing of Trade, and therefore it shall be Construed largely, and as beneficially for the Subject as

may

may be, and he hath here left an Estate behind him, though his person be gone.

Obj. It hath been again further Objected, that true it is, that these Wines here are in Judgement of Law, the Goods of George Hanger; but he which is to have this Privilege, to be freed from payment of Prisage, ought for to be a Citizen, and that now George Hanger, non est Civis de civitate London, but he is Civis de civitate Dei, and therefore this benefit of discharge shall not extend to him, nor to these his Goods.

Resp. As to this, it is properly to be considered, when this privilege shall be to the Subject. As to this, the duty of Prisage beginneth at one time, but the same is payable at another time, (S.) When the Ship comes into the unlading Port, then this privilege of having Prisage is due to be paid to the King.

Obj. But then it hath been again thus Objected, that this is altogether uncertain, whether he will unlade there or not, for that he may unlade his Ship in any Port where he pleaseth.

Resp. As to this, the same is not so, but here is sufficient certainty of his purpose to unlade, for it appeareth by his Cocket where he will unlade, and then the Kings Officer may presently take his Prisage for the King, and is not to tarry his leisure, nor yet to attend him at every Port; if there be twenty tun and more in the Ship, the King is to have his Prisage, and to elect one tun before the Main Mast, and another behind it; and if he should tarry for the unlading of the Ship, he cannot then have this in this manner, as it ought to be taken, and the other ought not to break the Bulk untill the Kings Officer comes for to make his choice, so that the Prisage is due unto the King, when he comes with the Ship to the Port to unlade; and if the Kings Officer comes and demands his Prisage, and the other will answer him, that he will not unlade here, but at Hampton, yet this shall not hinder him from taking of his Prisage here, and he shall not drive him to every Port for to demand this, at his pleasure: And if he once begins for to unlade, he ought there of necessity to unlade all, otherwise he may defeat the King of his Election: which ought not to be: But the Kings Officer, he which is capitalis pincerna, may take the Prisage for the King when he will, the Ship being in the unlading Port, whether he will unlade there or not; otherwise, it may be in his power to make the Kings Officer to give attendance on him in every Port, when, and in what place he will, at his pleasure, to expect his unlading, and then to demand his Prisage, if not due before; but this he shall not be enforced to do, for that Prisage becomes due unto the King before the unlading.

Obj. It hath been further Objected, That every real Privilege ought to have a real man, to take benefit of this, and that here the Executor is but onely a person representative.

Resp. In answer to this, notwithstanding this be so, yet the Executor here shall have this privilege, for the Goods of the Testator.

If a man makes the Villeine of I. S. his Executor, and dies, the Lord doth seize, by 34 E. 3. he shall not have this as a perquisite, for these are not bona sua: But these Goods fuerunt, and yet are the Goods of a Freeman, and now in the disposition onely of the Villein as his Executor.

By this Charter here, the King Grants unto Merchants Aliens, divers Privileges: As if their Goods be stollen, and the Felon doth wafe them, that these shall not be said to be Waifs, by 13 E. 4. A Lord who hath bona waviata, shall not have these goods of Aliens so stole and waifed by Felons. If an Alien hath Goods which are stolen away, he makes his Executor, and dies; afterwards, the Felon brings these Goods into a Franches, and there he waves them; the Lord of the Franches, who hath bona waviata shall not have them, for his Executor shall have this Privilege: Here the privilege is annexed unto the property which he had in his life time, and therefore after his death his Executor shall have the benefit of this.

Obj. Another Objection hath been made, that the Kings Grant shall be taken and construed most beneficially for the King, and shall not be extended unto a special Case.

Resp. In answer to this, the same is to be agreed, but when this special Case is within the compass of the General Grant, then otherwise it shall be: As if the King Grants to one, all his Tenements and Hereditaments in Dale, and he hath an Advowson there, by 16 Eliz. Dyer, this shall carry the Advowson, for it is an Hereditament.

Here in this Case the Grant is, Quod de vinis Civium, nulla prisa fiat, notwithstanding his person be dead and gone, yet these his Goods do remain, and this benefit of discharge of Prisage, shall redound unto his Estate, which doth still remain: And so upon the whole matter, Judgement ought here to be given against the King, and for Frances Hanger the Defendant; that for these Wines, she ought to be discharged from payment of Prisage.

Croke Justice. Maintained his former Opinion, and the same grounded upon his former reasons, That Judgement ought to be given for the King, and against the Defendant; that for these Wines she should pay Prisage, and not to be discharged of the same, by the Charter of Grant and Immunity.

Coke chief Justice. This is a great Case, the which was first in the Court of Exchequer, and there to be argued by the Barons, and three of them were of Opinion against Sir Thomas Waller; but this would not satisfie him, and therefore he brought this matter again to be questioned, and determined here in this Court; and this Case
Trin. 10 Jac. hath been argued here before by the Judges; Termin. Trin. 10 Jac. wherein they were divided, (S.) Two against two: And now the same Case argued here by us again.

Qui incipit sine ordine, He will end in Confusion.

I shall therefore divide this Case into parts: As,

1. First, To examine the true causes of the Granting of this Charter of discharge of Prisage by the King.

2. Secondly, or in the second part, in the bye, to see the success of this Charter by Parliaments, and by Records for the same, this being onely in the bye, but yet very worthy of observation.

3. Thirdly, Touching the Grant it self, in which these five things are necessarily to be observed: As,

1. First, To whom this Grant is thus made.

2. Secondly, To what thing this Grant is to be extended.

3. Thirdly, De quibus rebus, of what things this Grant is.

4. Fourthly, What person shall have the benefit of this Grant (the same being Granted to a Body) and another takes benefit by it.

5. Fifthly, What kind of Prisage this is, (S.) One tun to be taken, ante, before the Mast, and the other, a retro, behinde the Mast: And in this it is to be considered.

1. First, Quid nomine, what thing this is.

2. Secondly, Quale, what Inheritance this is.

3. Thirdly, Quo jure, this is due.

4. Fourthly, De quibus personis, this is due.

5. Fifthly, Quando & quomodo, when, and how this is due, and this is the very life of the Case: And then

6. Sixthly and lastly, If all these should be against me, that he is not here Civis, neither these Wines vina civium, yet it is a clear Case, that no Judgement here can be given for the King.

In the Argument of this Case, I shall answer the Exceptions and Objections as they arise; and I shall make good my opinion in this Case.

1. First,

1. First, By Records, being venustatis & veritatis monumenta.
2. Secondly, By Book-Cases.
3. Thirdly, By Judgements in the Point.

As to the Charter, the words of the same being, quod de vinis Civium, nulla prisa fiat: The causes of this Grant are very evident to be collected out of the Records, they being,

1. First, For the advancement of Trades and Traffick, inward and outward: As the carrying forth of Native Commodities, and the bringing in of Foreign, and this is the life and the soul of this Island, which cannot stand and subsist without it.

2. Secondly, For the maintenance of the Navy, being lignei mures, for the Ports are the Walls and the Gates of the Realm: And 26 Eliz. the Queen did Grant unto a Bishop, a Port, and this was adjudged to be a void Grant, and that for this reason, because they are the Gates of the Land.

And as for London, this is Cor regni; and this Charter here was Granted to them, pro meleoratione Civitatis: Also the Lord Major of London is chief Butler to the King, at his Coronation: And in 1 H. 4. this was so allowed unto him, when Fitz. Allen was Lord Steward, who then allowed this unto him. The Lord Major of *London*, chief Butler, &c.

This Charter here is, in meliorationem Civitatis, for the maintenance of Trade, Traffick, and Navigation, and the same to be brought to London for the avoiding of drunkenness, for that all the Realm besides cannot avoid the superfluity of Wines: In the City of London, they are as under Lee, there being a Bridle for to restrain Drunkenness, and therefore to be brought in thither.

In the next place, As to the success of this Grant, Una lex alienigenis & indigenis, but indigena, are to be preferred before alienigena; this doth much enrich the City, when private gain is mixed with the publick: But then the Gascoyns, Almagines, and Spain, did complain, that London had taken away from them all their Trade of Wines; upon this, see these Statutes of 27 E. 3. cap. 7. against Licenses for passage of Wools, Leather, Woolfels, or Lead, out of the Realm, and 42 E. 3. cap. 8. That no English Merchant shall go into Gascoyn for Wines; so that by this, precedency was given to the Gascoyns, they onely to bring Wines in hither, and in this Strangers were preferred: But this Act was but for one year, for in 43 E. 3. cap. 2. this Act was repealed. Statutes of 27 E. 3. &c.

Clothing, and this Immunity from payment of Prisage, hath very much enriched the City of London: By this, Navigation hath been encreased, and Strangers shouldered out: For it was against all reason and policy, to prefer Strangers, before homeborn Citizens and Subjects.

3. As to the next and third point, being touching the Grant it self, of this discharge of Prisage; And in this,

1. First, What Prisage is. Prisa est vox artis, and derived a prender; It is but a taking; and this which is so taken, est prisa, Nulla prisa, &c. videlicet doth explain this, being nomen equivocum.

2. Secondly, Quid est re, genus, the kinde of this being described; the same being a certain duty, due unto the King by Custom, and the same a Prerogative in him as King, he having by this a good Title, to have and take of all English Merchants onely, so much, bringing in Wines from the Ports beyond Sea; for if he bring Wines from one Port to another, to have Prisage here, in such a Case there is no colour for it, but the same Wines ought to be brought from beyond Sea; And this is terminus a quo, and so to be brought unto the Ports here, being terminus ad quem.

If there be in the Ship twenty tun, and above, then the King to have two tun for his Prisage; But if under twenty tun, then he is to have but one tun.

And this is due to the King by Custom, if brought into any Port of England, paying for Portage 20 s. for every tun. And this description of Prisage, is pro-

ved

ved by a Record: Then quid est nomine & re, with the manner of the taking of it, (S.) One tun, ante dolium, and the other deorsum.

This Prisage is called in an old Record, Regia prisa, recta & certa prisa, and for Portage, every Merchant is to pay 20 s. all which is proved by Record, (S.) In Rot. Patentium, 40 H. 3. De prisis regiis, videlicet, de certis prisis, (quia certus numero) if ten tun, then to have one tun; if twenty, then two tun; prisa regia, so called, because the same is an ancient Custom, and a Flower of the Crown.

In Rot. patentium, 40 H. 3.

Also in Rot. patentium, 28 E. 1. rectis & certis prisis, so called; this is there said, to be an ancient duty, due unto the King of Common Right.

In Rot. patentium, 28 E. 1.

Also in Rot. patentium, 20 R. 2. a good president, memorandum est, quod rex habet, a property, ex antiqua consuetudine, his Title to have de quadam nave mercatoris, if buy, and bring hither to sell, Prisage if he comes infra aliquem portum Angliæ: De vigintis dolis, to have, duo dolia, (S.) One before, the other behind the Mast; and as soon as he arrives, Prisage is due, & pro quodam certo pretio prisæ viginti solidos, 6 E. 3. f. 9. by Parning, mention is there made of the 20 s. to be paid for Portage.

In Rot. patentium, 20 R. 2.

In libro rubro in Scaccario, f. 265. mention is there made of King John's Grant unto Merchants.

In libro rubro in Scaccario, fol. 265.

At the Common Law, they were not to be acquitted, but to pay pro quolibet dolio vini, duct. per Mercatores, infra regnum Angliæ & potestatem regis, and so it was used in the time of King John, to be paid by all Merchants Strangers also.

And so is Fleta, lib. 2. cap. 22. De officio Pincernæ, Officium Pincernæ est, de qualibet Navi, vinis venalibus carcata, unum dolium vini eligere in prora Navis, ad opus Regis & aliud in puppi, & pro qualibet pecia, pro portagio 20 s.

Fleta, lib. 2. cap. 22. &c.

As to the Charter of the King made unto Merchant Strangers: In Rot. patentium, 31 E. 1. the Kings great Charter: As touching Butlerage, what this is, and how this began, 31 E. 1. The King did grant mercatoribus, Almoniæ, Franciæ, Hispan. & omnium aliorum regnorum, to be free from Murage, Pontage, and to have legem mercatoriem, of full and speedy Justice, secundum legem mercatorium. And this is the Fountain of Pontage and Prisage, to have one tun before, and another behind the Mast; divers other Privileges were then granted unto the Merchants, and the Merchants, propter has libertates, did grant unto the King duos solidos, to be paid infra quadraginta dies, and so from hence it may be collected, that Prisage ought to be paid within forty days: And this the King had from Merchants Strangers onely, by their own Grant, for the Immunity Granted to them: And this is called Butlerage, so that the King hath this Butlerage of Merchants Strangers: And Prisage of Merchants Anglois, not of Strangers, but of London Merchants, he is to have none of them.

In Rot. patentium, 31 E. 1.

Butlerage.

4. In the next place it is to be considered, Qualis est prisa; This is not purveyance, which the King cannot Grant over, being inseparable from his person. This is separable, and inseparable, inseparable by way of Grant, but well separable, by way of discharge.

In Rot. patentium, 26 Aprilis, 15 E. 2. The King did Grant unto one Fitzherbert, so many Tuns of his Prisage; And this agrees with Fleta, before remembred.

In Rot. patentium, 20 April. 15 E. 2.

By the Statute of 1 H. 8. cap. 5. No Citizen of London, &c. being free of Prisage or Butlerage of Wines, by Grant, Custom, or otherwise, Custom no Wines of any person, &c. so that a man may prescribe in not paying of Prisage, so that this hath its commencement by Custom.

Statute of 1 H. 8. c. 5.

5. In the next place, when this Prisage is due to be paid.

As to this, when the Wines were bought in France, no Prisage was then due to be paid for them, neither was any Prisage due, the Wines being upon the Sea, nor

nor yet upon the arrival of the Wines: But all these together makes the Prisage due.

This Case here in question, as to the duty of Prisage, may be fitly exampled unto Dame Hales Case, in the Commentaries, where he and his Wife were possessed of a Lease for years: Justice Hales changed his Religion, but vindicta & ira dei followed this, he was never his own man afterwards, but distracted. First, He put himself into the Water, and he afterwards dyed; his putting of himself there first into the Water, was to be respected; so here in this Case, George Hangers putting the Wines first into the Ship. Dame *Hales* Case, &c.

Obj. As to the Objection made, that here was not Civis.

Resp. As to this, here is Civis & vina Civium; Civis est masculus, or Famella, this Charter of discharge of Prisage goeth to both Sexes: This word Civis is taken five manner of ways in our books.

First, Civis re, & non Residentia, and such a one is not in Judgement of Law a Citizen, and this appears to be so by 35 H. 6. f. 12. precipe I. B. in Debt; Civis Eborum; Non residentia, 36 H. 6. f. 28. Cive & pannario London, and he did not dwell there; this not good, for he may be pannarius de London, and yet dwell at York, 4 E. 4. f. 10. where one is Civis de London, and dwelt in another place: And if this sufficeth not, in legis astimatione, non sufficit, in regis concessione: If he be a Resident onely in name, this is not good, by 24 E. 3. f. 7. 5 H. 7. f. 10. & 19. if he be not a Citizen, and a Free-man, he cannot by the Custom devise his Lands in Mortmain: Also if he be but Inquilinus, this will not serve his turn, but he ought to be a continuing Citizen, and resident: He ought to have jus habitationis, & jus societatis: If in the Interim he happens to be dis-franchised, he shall not then have the benefit of this discharge of Prisage, but he ought to be a continual Citizen: And if all these do concur in him, and he continues to be Civis, then he is every ways compleat, and enabled to have and enjoy the benefit of this Grant of Discharge, Bracton, f. 411. comprehends all these in one Word, (S.) Barones London. 35 H. 6. fol. 12. 36 H. 6. f. 28. 24 E. 3. f. 7. &c.

6. As to the next matter in this Charter of Discharge, (S.) De vinis Civium, nulla prisa fiat: As to this, This Privilege is not so much tyed unto the person, but also to the Wines of Citizens: And the Charter it self here goeth unto Wines, (S.) De vinis, &c.

It cannot be denyed, but that Proprietas is divers ways to be taken: And as to this:

There is jus proprietatis tantum; And

There is jus possessionis tantum; And

There is also jus proprietatis, & possessionis.

There ought to be jus proprietatis, this ought to be proprium quarto modo. For so, if he pledge these Wines, or if he have them as a pledge; but this ought to be proprietas sola, & absoluta; For if two, or twenty Citizens joyntly have Wines, they all shall have this benefit of Immunity; sola, that is, soli Cives, but not so, if they have their Interest in the Wines with a Stranger. Then for these Wines, they shall not be discharged of Prisage.

Also this property ought to be proprietas vera. For if a Foreigner do fraudulently make a Citizen his stale, by a fraudulent conveyance to him made, and this done by him onely to defraud the King of his Prisage;

In such a Case, the King shall have Prisage of these Wines, for he ought to be verus proprietarius.

Reasons to prove that these Wines here in this Case, ought by the Charter of discharge, to be free'd from the payment of Prisage.

1. First, The discharge is of Wines of a Chattel; And then a representative, or a reputative Chattel, shall be within the compass of this Grant.

If the King hath a reputative Manor, by his Grant this shall clearly pass by

this

this name, if the same be known by it. 11 H. 6. f. 18. the King hath a Vicaridge, and presents unto it by the name of a Parsonage, and in this he mentions the right name of the Church; by this he hath now made this a Parsonage, 47 E. 3. f. 5. placito 9. Tho. Pens Case. The King presents to a Chappel, by the name of a Church, there by Belknap and Candish, although this was a Chappel, and of ancient time annexed unto a Church, and after divers Presentments and Presentees, there received to the said Chappel, as to a Church; by this the same is not now a Chappel, but a Church: And if so, the like shall it be in this Case. Also things which go in discharge, are easier discharged then Granted.

47 E. 3. fol. 5. &c.

Mich. 38 & 39 Eliz. &c.

Mich. 38 & 39 Eliz. The Lord Darcy's Case in a Quo warranto, he claimed to be discharged of purveyance; there it was resolved, that one may well be discharged from payment of purveyance, but the same not to be Granted by way of Grant; as if the King Grants over the Purveyance of another, this is not good. There the Dean of Pauls had such a Privilege Granted him to be discharged of Purveyance, for him and his Tenants for three Manors, and by reason of this, the Lord Darcy did purchase of the Dean of Pauls the said three Manors, and so would have the said Privilege of discharge: But it was resolved against him, because this was a personal Privilege, and did not pass.

Here in this Case there ought to be a continuing Citizen, and upon this, Walmsley did put this Case, when the same was argued before. The King did Grant unto a Lord, the Amerciaments of all his Tenants, afterwards the Lord did alien the seignory of one of his Tenants, he shall not now have the Amerciament of him; for that the Tenant ought to be a continual Tenant, or he shall not have the Amerciament of him; so here he ought to be a continuing Citizen, and as to this, the same is very clear.

19 E. 2. Fitz. tit. &c.

A Lord may well discharge his Tenant, that his Heirs shall not be in Ward, this is good by way of discharge, but not by way of Grant, as appears by 19 E. 2. Fitz. tit. Avowry, placito 224. and 40 E. 3. fol. 47. but the King may Grant this.

It follows then here in this Case, that these Wines are the Goods of George Hanger, notwithstanding he be dead.

Stanford, fol. 188.

It appears in Stanford, f. 188. F. That if an Executor, having Goods as an Executor, be out-lawed, he shall not forfeit these Goods, for they are always, and so remain to be bona testatoris, and onely in Custodia Executoris; so that by this they appear still to be, bona Georgii Hanger.

21 H. 6. f. 7. &c.

It appears by 21 H. 6. f. 7. that one who is incapable to have any property in Goods, may yet be made an Executor, as a Moign; and so is Perkins, f. 11. placito 51 & 12 H. 7. fol. 27 & 28. and by 14 H. 8. f. 16. b. A Moyn may be the Kings Farmor.

It appears by Bracton, That there is mors Naturalis, and mors Civilis, and therefore this is usually expressed in Leases for life, (S.) durante vita sua naturali, because he may enter into Religion, which is mors Civilis.

22 H. 6. f. 4. b. An Executor shall not forfeit the Goods which he hath as Executor, the reason is, for that they still are the Goods of the dead.

And by 21 E. 4. f. 50. a man makes a Villein his Executor, he shall not be enfranchised by the bringing of an Action against his Lord, for a Debt by him due unto his Testator, because he hath this to another use, for he doth so participate of the nature of his Testator, that if the Lord do answer him in his suit, without making of any protestation that he is his Villein, yet this shall not be any Enfranchisement unto him, for he hath these Goods, and this Recovery is onely for the benefit and to the use of his Testator, and that these are the Goods of the dead; where it is for the benefit of the Testator, there the Goods in the hands of the Executor, shall be said, in Judgement of Law, to be the Goods of the Testator; but otherwise it shall be, where it may be to his prejudice, 14 H. 6. f. 14, 15. Gargraffes case, That Utlagary is no Plea against an Executor, because all which he hath or recovers, is ad usum

14 H. 6. f. 14, 15.

usum testatoris, and nothing he hath of these Goods to his own use, and the Executor, is but as the Attorney of the Testator: And here we are in a Case, which redounds to the benefit of the Testator.

For another reason these Wines here are to be discharged from payment of Prisage, in regard of the great danger that these poor men have undergone in the Navigation: For posito, that they in their return had met with Pyrates, and the Owner had been killed in defence of himself and Goods, but the Ship escaped and came here into the Port; if now they should not be discharged of Prisage for these Wines, this were to adde calamity to calamity, and therefore they shall not pay Prisage for these Wines; they at the Sea, do adventure on the danger of Tempests and of Storms, and therefore not to be ousted of discharge of Prisage for these Wines thus brought into the Port, with so great danger, which, as it were, carries death in the face, and shall now his intervenient death prevent him from having benefit of this Privilege, for his Goods to be freed from payment of Prisage, certainly it shall not; will you have him to lose his life in the Navigation, and also to lose this privilege of discharge of Prisage, this should be very hard.

Another reason is, for the great danger which he undergoes for these Wines.

Again, if a Merchant Citizen of London, send his Ship with Wines hither into the Port, he himself being then beyond Sea, enquiry shall not then be made, whether he were then living, or not: Here they are his Goods, & vina Civium.

This Charter also was made, pro melioratione Civitatis: Also here is death in the Case, which is the act of God, and the rule of Law is, that the act of God shall turn no man to a prejudice: And notwithstanding here is not Civis, yet these Wines are vina Civium, and so to be discharged of Prisage. If George Hanger had sold these Wines to a Stranger, he should pay Prisage, for this was his own act.

38 H. 6. f. 28. Tenant pur outer vie is disseised, no Action lieth for the mean profits untill he enter; but if cestuy que vie dies, he shall then presently have an Action for all the mean Profits; the reason of this Case, comes to this Case in question: These Wines here, (though in the hands of the Executor) shall be said to be the Goods of the Testator, and as his Goods shall be discharged here of Prisage. 38 H. 6. f. 28.

Also you will judge here of things in parts, which ought not so to be, but you ought to judge, super tota materia: Origo rei inspici debet, not to judge here onely upon the last act, but we are to judge upon all; as in Dame Hales Case, there relation was to the first act, (S.) The first putting of his foot into the Water, and so it shall be here in this Case, to look to the first act, the putting of the Wines into the Ship, and then to have respect to all the subsequent acts, untill the coming into the Port and unlading.

Also George Hanger here was not the Grantee to whom the Charter was made, but the same was made to the Body of the City to have this privilege, and every particular Citizen takes the fruit and benefit of this Charter of discharge of Prisage: The Grant here was made to the Body of the City, and Hanger was no Grantee: And this was the great and principal reason in the case of Suttons Hospital, a representative Body good for Purchase.

The last and principal reason, is because this Grant here made was for the advancement of Trade and Traffick, and therefore this is to be taken and construed favorably and largely: And all Charters made which do hinder Trade and Traffick, are to be void: Carta Mercatoria, 31 E. 1. the Law incorporated all Merchants Strangers, and enabled them to take of the King, or to give to the King; and to this purpose they are a Corporation: In the Register, f. 259. and in Fitz. Nat. Brev. fol. 227. there is a Writ upon 31 E. 1. *Carta Mercatoria*, 31 E. 1. Register, f. 259. &c.

Here this Charter being thus granted for the advancement of Trade and Traffick, ought not to be construed after a vulgar and common construction.

The Information defective.

The Information also here is not good, for by this you will have Prisage of all persons generally, whereas Strangers ought not to pay this: Also it ought to have been expressed in the Information, (causa mercandisandis, & de rebus venalibus) for this omission the information is not good.

Term. Trin. 4 H. 6. &c.

This differs from Knowls Case, which was Trin. 4 H. 6. Rot. 14. where Thomas Chaucer miles, capitalis pincerna, did prefer an Information, &c. which was, Quod cum a tempore, &c. usitatum fuit: De vinis mercatorum, indigenarum, venalium, but the Information here is, de quocunque (S.) de al enigenis; also qui non habent libertatem, quod sint inde quie i, duo dolia, and this called prisa regia, because the same is due to him by Prerogative: It was there urged, that if he unlade before Prisage paid, then the Kings Officer cannot have his election; in the Information there it was laid, that he had unladen the Ship before the Kings Officer had taken and made his election: It was urged for his discharge of Prisage, being a Citizen, and these his own proper Goods: to this it was said, that he never was ju atus ad libertatem London, prout mos est; Knowls then alledged, quod natus fuit, a Freeman, and was free of the Trade of Grocers, and that he did there keep a shop: The Kings Attorney said, that he himself was not there Commorant, for that his servant being there was no Commorancy for his Master; and also he was Inquilinus: This Case was in the Exchequer, and the Barons took consideration of it.

Termin. Hill. 43 Eliz. &c.

Termin. Hillar. 43 Eliz. Rot. 22. Sacheverils Case before remembred, where two Joynt-tenants and Inmates kept no House, and therefore could not have the benefit of this Discharge of Prisage; but in this Case here George Hanger was a compleat Citizen in every respect, and so continued till his death, and these Wines in the hands of the Defendant Frances Hanger his Executrix, are bona Civium, and so within the compass of this Grant, to be freed from payment of Prisage; and so upon the whole matter, Judgement ought here to be given against the King, and for the Defendant to be discharged from payment of Prisage for these Wines.

TERMIN.

TERMIN. PASCH.

13 JAC. *Banco Regis.*

The KING against *Marsh.*

Enkins moved the Court for a Habeas Corpus, for Marsh a Prisoner, in the Prison of the Admiralty, and having been Indicted there for Piracy, and upon several Indictments, Ignoramus found: The Circumstance of the matter was this, Marsh was a Fisherman, and he being fishing at Sea, was taken by Pyrats, and all which he had; afterwards they took another Ship of the Danes, and the Pyrats took the best of the Provision out of his Ship, and of his Men, and instead thereof, did put into his ship some of the Goods of the Danes, and so suffered him to go away, and so he came and landed here, and went presently to Doctor Talbot a Civilian, and shewed unto him all this his Case, and then desired his advice herein; and according to his advice, he made an Inventory of all the Goods he had in his Ship, which were the Danes, Afterwards the Danes coming hither, did commence and prosecute Indictments against him in the Court of Admiralty, for Piracy; upon which Indictments, Ignoramus was found, and yet they there detained and kept him still in Prison; and upon this matter shewed, a Habeas Corpus was prayed for him. A *Habeas Corpus.* 1 Ro. Rep. 175.

Coke chief Justice. If you had not opened the matter as you have done, then perperadventure, upon the Ignoramus found, we would have granted a Habeas Corpus; but as you have now opened the verity of the matter (in which you have done well) we will not now grant you a Habeas Corpus, for upon your own shewing, we have very great cause now to suspect him for Piracy, and that he had his hand in this: A Pirate est hostis humani generis, and this is præda requissima. But now I will acquaint you further with a good Case lately in question, unto which I, with others, were called to Counsel, and the Civilians also, to declare and shew our Opinions, both for the Common and the Civil Law, the Case arising upon them both.

And the Case was briefly this: One Samuel Pelagii, a Subject of the King of Morocco, pretended that he was an Ambassador, sent unto the States of the United Provinces; he came to them, and they accordingly did treat with him; afterwards he departed from them, and being upon the Sea, he did take, rob, and spoil a Spanish Ship, and afterwards came hither into England: The Spanish Ambassador here having notice of it, did take him, and would have here proceeded against him as against a Pyrate, and imprisoned him; and to this Case, in the Vacation time, to shew our opinions herein, the Civilians, with my self and other Judges, were called for to declare, what was the Common Law and the Civil Law in this point, as touching this his intended proceedings, and whether he might in this Case proceed here against him as against a Pyrate, or not: And at this time of the The Case of *Samuel Pelagii*, &c.

the Treatie, a great dispute was had as touching the several Privileges of an Ambassador, what the same are.

The Civilians then said and affirmed, That an Ambassador hath divers Privileges to him allowed by the Law of Nature; As that their Bodies are not to be Arrested: also if they offend against penal Laws, as against the Statutes made for Apparel, or the like, his Ambassadorship shall excuse him, but not if he offend in Case of Treason, being an offence against the Law of Nature: And as Aristocle in his Politicks observeth, That Magistracy is by the Law of Nature, and if he offend against this, his being an Ambassador will no ways privilege him; otherwise it shall be in other Criminal Cases. But we all answered, That at the Common Law he ought to be arraigned by the Statute of 28 H. 8. cap. 15. and not by the Law of Nature: But as touching the main point, Whether by the taking of Spaniards by the Morocco Ambassador, be a taking by him as a Pyrate, or not, Whether by Judgement of Law for his doing of this, he shall be adjudged to be a Pyrate, and so to be proceeded here as against a Pyrate; we did all agree, that by this taking he is not in Judgement of Law said to be a Pyrate: In regard that the King of Spain, and the King of Morocco are Enemies, and that open Hostility is between them, and therefore this taking from an Enemy in this manner by the other, is not in Judgement of Law spoliatio sed legalis captio: And if an Enemy do take Goods of another, this is not Felony. And all this is well proved by a Case adjudged in point, in 2 R. 3. f. 2. where a Spanish Merchant, before the King and his Councel, in Camera Scaccarii, brought a Bill against divers English-men, therein setting forth, quod depredatus, & spoliatus fuit, upon the Sea, juxta partes Britanniæ per quendam virum Bellicosum, de Britannia de quadam Navi, and of divers Merchandises therein which were brought into England, and came unto the hands of divers English-men, naming of them, and so had Process against them, who came in and pleaded, That in regard this depredation was done by a Stranger, and not by the Subjects of the King, and therefore they ought not to be punished, in regard that the Statute of 31 H. 6. cap. 4. gives restitution by the Chancellor, in Cancellaria sibi vocato uno Judice, de uno Banco vel altero; and by the Statute of 27 E. 3. cap. 13. That restitution may be made in such a Case, upon proof made by the Chancellor himself, without any Judge; It is resolved in this Case, quod quisquis extraneus, &c. who brings his Bill upon this Statute to have Restitution, debet probari quod tempore captionis, fuit de amicitia domini regis, and also quod ipse qui eum ceperit, & spoliavit, fuit etiam sub obedientia regis, vel de amicitia domini regis, sive principis querentis, tempore spoliationis, & non inimicus domini regis, sive principis querentis. Quia si fuerit inimicus, & sic ceperit bona, tunc non fuit spoliatio, nec depredatio, sed legalis captio; prout quilibet inimicus, capit super unum & alterum, and this was the opinion of all the Judges then, in Camera Scaccarii. And so this Case there, resolves this Case now here in question, and well satisfies all. So that he cannot here proceed against him as against a Pyrate, and yet he was still kept in Prison.

Statutes of 28 H. 8. c. 15.

Statute of 31 H. 6. c. 4.

Statute of 27 E. 3. c. 13.

As to this present Case now in question. Coke chief Justice, and the whole Court agreed in this, (S.) That the Admiral may keep him here still in Prison for suspicion of Piracy, notwithstanding an Ignoramus found upon the Indictments; and therefore no Habeas Corpus is to be Granted in this Case, because he is in Prison for Piracy. The Court was then informed, that in the Court of Admiralty they had proceeded to trial against divers, for Robberies done upon the River of the Thames.

Coke, & curia, If this be so, this is unjustly done by them, for they have no such Jurisdiction, this being done infra corpus Comitatus, and so out of their Jurisdiction, but no Habeas Corpus was Granted in this principal case.

Habeas Corpus denyed. Term. Mich. 130 Jac. B. R.

Afterwards, (S.) Termin. Mich. 13 Jac. B. R. This Case between Samuel Pellagii, and the Spanish Ambassador, was moved again upon a Prohibition, prayed to stay proceedings against him in the Court of Admiralty, and against others; and as to this, the Case was, That he had taken from him upon the Sea, Jure Belli, a Spanish

nish Ship, and sixteen Chests of Sugar; that he came hither, and sold them unto some English Merchants, against whom the said Samuel, the Spanish Ambassador had libelled in the Court of Admiralty for these Chests of Sugar; upon which libel, these being lawfully taken (as was pretended) and so enforced, Jure Belli, they moved for a Prohibition.

Coke chief Justice. For the determining of this matter by the Order of the Council, a Conference was again appointed to be had, between my self and some other of the Judges, together with the Civilians, further to consider of this matter.

It appeared to us, that this Pellagii was a Jew, who took the Spanish Ships; and as one said, they sent their Men home by Sea, tossing them over-board; they took also some English men, but to them they made satisfaction. The Spanish Ambassador desired to have had him tryed by the Statute of 28 H. 8. cap. 15. as a Pyrate. Statute of 28 H.8. c.15.

Upon this, the Civilians did argue, and shew what Privileges he should have, in regard that he was an Ambassador of the King of Morocco, and that jure naturæ, he was not to be punished for criminal Matters, as upon penal Statutes; but if he offended contra jus gentium, then he is to be punished as for Treason; this was resolved, that if he, contra jus gentium peccat, then, as before, proceeding to be had against him, as against a Pyrate.

By the Statute of 28 H. 8. cap. 15. All Robberies done upon the Sea, shall be tryed upon the Land; but then the same ought to be a Robbery, as appears by the Book before remembred, of 2 R.3. f. 2. and upon the resolution of that Case, we did signifie our Opinions unto the King, that he could not here be tryed as a Pyrate.

Then as to the Goods which were taken on the Sea, the Civilians held, that because he brought them, in solo amici, notwithstanding the taking of these was not Felony, yet they may there deal civilly for them in the Court of the Admiralty, and he ought there to answer civilly, and therefore no Prohibition was to be granted.

Dodderidge Justice. If an English Merchant buys Goods of a Pyrate, may not the Owner have remedy against them who bought these Goods; clearly he may, and here he may answer the Suit, as to the point of Restitution.

Moor Serjeant, prayed a Prohibition for those who lawfully bought these Chests of Sugar of Pellagii; upon the Libel, a Sentence was given for the Spanish Ambassador: The Court all clear of Opinion, that no Prohibition was to be Granted, for then there was no remedy for him, and so a Prohibition was denyed by the whole Court. A Prohibition denyed by the whole Court.

Quick, and *Harris*, Plaintiffs, against *Ludborrow* Defendant.

In an Action of Covenant for non-payment of money, the Case appeared to be this. The Covenant was, that a stranger should pay yearly 8 l. to one of the Covenantees, and to one Frances Joyner a stranger; which Frances took to husband, one Buckes, who did release this payment; The question was, whether by this release, by him thus made, the Defendant shall be discharged of this payment, or not. 1 Ro. r. 196. An Action of Covenant. 1 Ro. Abr. 402.

It was urged for the Plaintiff, that by this release, he should not be discharged of the yearly payment: because that this release was made by one, who is a stranger to the Covenant, and cannot therefore by this his release discharge the same, but he shall be bound by his Covenant, if he do not perform the same, because by this his Covenant he hath taken upon him to doe it. Like the Case in 37 H.6. f. 16. & 17. Sir John Birres case, who there brought an Action of Covenant, against one William

William At-gate, who had granted unto him, by the same Indenture, for to marry with M. the daughter of the Plaintiffe, before such a day, the which he had not done, unde actio. The Defendant pleaded, that divers times before the day, he did offer himself to the said M. but she refused him. It is there held, that this was no good Plea, and the difference taken, where he is a party to the condition, or Covenant, and where a stranger to the same, if he be a party, to whom the performance is to be made, and he refuseth; and the same pleaded, this shall be a good Plea, because it was his folly, thus to refuse it, otherwise it is, where the same is to be done to a stranger, who refuseth; this is no Plea, but it shall be accounted his folly, thus to bind himself, to perform this, which he cannot effect; and there by Prisot, if a man be bound to perform something, which may lawfully be done, and by possibility, though the same be refused, by him who is a stranger to the condition, the party shall be charged, if he do not perform it, otherwise it is, where he which doth refuse, is privy and party to the condition; this is there agreed by the whole Court. The reason, because the Defendant takes upon him to doe it, and if the stranger do refuse, it shall be his folly thus to bind himself. And this appears to be so by the Judgement given, Coke 2. pars. fol. 3. in Mansers Case, where the Defendant was bound, that his son (who was a Stranger to the Obligation) should do an Act, in which Case he hath taken upon him, that his son shall do this at his peril; for he which is thus bound, takes more upon him for a Stranger, then for himself; and where by a condition a thing is to be performed to a Stranger, or by a Stranger, by this undertaking, there ought to be a punctual performance, as appears by 4 H. 7. f. 3, & 4. 27 H. 8. f. 1. Perkins in Conditions, fol. 146. plac. 756. 35 H. 8. Dyer, fol. 56. for where the thing is to be performed to a Stranger, the same is there to be performed according to the words, and with this agrees Lambs Case, Coke 5. pars, f. 23.

Coke 2 pars, f. 3. &c.

4 H. 7. f. 3, 4. &c.

Coke chief Justice. The payment here is to be to a Stranger: If a man be bound, that I. S. a Stranger shall enfeoff the Obligee, and he refuseth to take it, he shall take now no advantage of this; but if the Condition was to enfeoff a Stranger who refuseth to take it, this is a forfeiture, because he hath taken upon him to doe it; but the other to whom it is to be done, hath neither jus in re, nor ad rem, and this is very clear: and if a day be limitted, As if a man be bound that another shall pay so much to I. S. at Mich. next, and he dies before, this ought now to be paid unto his Executors.

31 H. 6. Fitz. tit. Bar. plac. 59.

In 31 H. 6. Fitz. tit. Bar, placito 59. If one be bound to another that I. S. shall make him a House by such a day, or else to pay him 20 l. by such a day; it is no Plea for him to say, that I. S. was dead before the day, for that another might have made it; to this purpose is 15 H. 7. f. 13.

Back here a Stranger, to whose Wife the payment is to be made, he cannot release this, he having no right at all therein; and if his refusal shall be no discharge of this, his release shall not serve for it: If a Feoffment in Fee be made to the use of such a one as I. S. shall name, he cannot release this Nomination; here the release is made by a stranger which hath nothing in the thing, nor yet any remedy to come by it; but for non-payment of this, the Plaintiff to have his Action of Covenant; and therefore his Release here made is not good.

Doderidge Justice. This is neither debt nor duty in the party to whom the same is to be paid by Covenant, and a Release doth not operate, but upon an Estate, Interest, or Right, none of which is here in this Case, and therefore his release is void. A Rent may be released before the day, but here he hath no Interest at all in him, and so his release not good.

Coke. If a man be bound to build a House for another before such a time, and he which is bound dies before the time, his Executors are bound to perform this.

Haughton

Haughton Justice. If I devise that my Executors shall sell my Land, they cannot release this power.

Croke Justice. If the Obligee himself be the cause of the non-performance, he shall have no advantage of any forfeiture here; he which makes the release, had no duty at all in him, if he had dyed before the day, it had been good, and therefore his release here is void.

Dodderidge. The payment of this 8 l. a year was to be to them for forty years, if they or any of them should live so long; no duty here is in them, but a Covenant to pay: If one doth Covenant to pay so much to two, if this be no Interest, and one dies, then there is nothing to survive.

Coke. If a Lease be made, during the life of I. S. and I. N. or if an Estate be limited unto A. if B. and C. shall so long live; if one of them dies, he shall hold the same during the life of the Survivor, this being in a limitation; but otherwise it will be in a Condition, as it is resolved in Brudnels Case, Coke 5 pars, fol. 9. Coke 5 pars. f. 9. &c.

The Court was clear of Opinion in this Case, that the release here made by Buck, was a void release, and could not discharge the payment covenanted to be paid, and that Judgement ought to be given for the Plaintiff against the Defendant, for not paying of the money according to his Covenant. Judgement for the Plaintiff.

Cryps Plaintiff, against Sir *Harry Baynton*, Defendant.

IN an Action upon the Case for a promise, the Case appeared to be this, Such a one being a Friend of Sir Harry Bryntons, and coming to the House of Cryps the Plaintiff in Cicester, and there ægrotus; this being an Inn, Baynton the Defendant came thither, and hearing of this, said unto Cryps, Provide for him such necessaries as he shall want, & pro omnibus talibus necessariis, he did assume and promise to him bene solvere; the Plaintiff in his Declaration shews, that he had provided for him necessaries, amounting to such a sum, the which he had demanded of him, and he to pay this did wholly refuse; upon which his refusal the Action was brought, and upon Non assumpsit pleaded, a Verdict given for the Plaintiff. An Action upon the case for a promise. 1 Ro. Rep. 173.

It was moved in arrest of Judgement, that the Declaration was not good, because he hath not shewed therein what necessaries in particular he had provided for him.

Coke chief Justice. He hath here shewed the matter plainly, that he lay in his House in Cicester two monethes, in which time he had provided for him such necessaries as he needed, amounting unto the sum of 15 l. the which, upon request made, he refused to pay; this is good, as it is here pleaded, for the avoiding of such multiplicities of Reckonings, he was to finde him with all necessaries, during the time that he was sick: The Plaintiff here sets forth, that he did provide him with these, amounting to so much, without shewing what these necessaries were; the Declaration here is good, without any special shewing of this.

Dodderidge Justice. We have here before had this Case, One said unto a Phylitian, that if he did cure such a one of a Fistilow, he did assume and promise to give him so much for his pains, after the cure was done, he refused to pay him the money: Upon this, he brought his Action upon the Case, grounded upon his promise, and in his Declaration shewed, that he had cured him of the Fistilow; this was held good, without shewing all the several Medicines which he used about the Cure: This being then moved in arrest of Judgment, as here in this Case, but the same was over-ruled by the whole Court; so here in this Case, this general Alle-

Allegation, that he had provided him with all necessaries, is good, without shewing in particular what they were, and so the rule of the whole Court was, Quod judicium intretur pro querent.

Judgement for the Plaintiff.

Brownlow Plaintiff, against *Cox* and *Michil* Defendants.

An Assise. 1 Ro. Rep. 188.288.205. Mo. 842.

In an Assise for the Supersedeas Office.

Sir Francis Bacon, the King's Attorney-General, moved the Court to have further time, (S.) Nine or ten days for to plead.

Coke chief Justice. We are sworn for to maintain the Kings Prerogative. A farther time was then given him by the Court to plead, and a day appointed for the Tryal.

Four Pillars of the Kings Prerogative.

Bacon Attorney-General. The Kings Prerogative hath four Columns or Pillars. (S.)

1. The first, which concerns the State, and Marshal matters.
2. The second, which concerns Ecclesiastical matters.
3. The third, which concerns Judicial matters, in which these Patents for the Supersedeas Office are.
4. The fourth, which concerns matters of Commerce.

And these four I shall ever maintain according to my place.

Nota, That Sir Francis Bacon, Attorney, being to move, a Serjeant at Law having a short motion, offered to move before him, at which he was much moved, saying, That he marvelled he would offer this to him.

Upon this, Coke chief Justice. No Serjeant ought to remove before the Kings Attorney, (when he moves for the King) but for other motions, any Serjeant at Law is to move before him: And when I was the Kings Attorney, I never offered to move before a Serjeant, unless it was for the King.

Brownlow Plaintiff, against *Cox* and *Michill* Defendants.

1 Ro. r. 188. 288. Mo. 842.

As to this Case of the Assize. At this time, for stay of the suite, Sir Francis Bacon, the Kings Attorney Generall, did present the Court, with a Writ De non prosequendo Rege inconsulto.

Coke chief Justice. These Writs are usuall, and frequent in the old Books of Law, as in the first, and second part of King E. 3.

At this time, the Attorney General, and the Kings Sollicitor came to the Judges, and the Attorney said unto the chief Justice, and to the rest of the Judges; That the King did greet them well, and as to this Assize. Jure Regali, being a thing which concerns the King, and his Prerogative, that they were not further to proceed in this: And so he delivered to them, to this purpose, this Writ, De non ulterius prosequendo Rege inconsulto, The which Writ they received, and by their command it was read. Afterwards, Brownloes Counsell moved the Court to have a Copy of the Writ, and time to speak unto it; this being a new President. And this was granted by the Court.

Coke. Such Writs are not new, but have bien very usuall, and frequent in our old Books, as before.

After-

Afterwards, at another time.

Harris, and Hutton Serjeants at Law, did move the Court, as touching this Writ of Prerogative, De non prosequendo Rege inconsulto, and moved the Court for the Plaintiffe, to have proceedings in this Assize; this Writ notwithstanding.

It is a good rule in Law, where the matter in question doth touch the King, either in interest, or in property, if such a cause be shewed, then the cause is to stay quousque, &c. The Writ here contains two Patents, The first is, 9 Januarii, 7 Jac. comprehending this matter, (S.) First, that the King out of his Royall power, by vertue of his Prerogative regall had erected an Office, for the Writs of Superiedeas, quia improvide, &c. and in the C. B. (This is Novella) after the order of Officers, to be inrolled, and that Sir John Michill should have the execution of this, for his life, and the Fees appointed for the Execution of this, &c. Then, Sir Francis Bacon, the Attorney Generall did pray the Serjeant for to spare his speech, saying, that he did not thus interrupt him without cause, But he would shew good cause wherefore he ought not to be heard; This is a very great case, and doth greatly concern the King, in point of Prerogative, and that he were better to lose his Castle of Windsor, then to lose this his privilege of Inhibiting Proceedings by this Writ, De Non prosequendo rege inconsulto; and the ayde prayer of him.

I shall first observe, the nature of this Writ, and other Writs of this nature, are conditionall. (S.) if the Judgement be not, &c. But this Writ is not so.

Another Writ there is of this nature, and mingles this, with a circumspecte agatis: this referring to the consideration of the Court. But this Writ here, is none of them. For this Writ, is not, Si vobis constare poterit. But this is an absolute writ, inhibiting them, from proceeding ulterius rege inconsulto. And so this writ is a Novelty, as it hath been said. But we will not bring in any Novelties; these we will not maintain. In this Case you ought not to be heard against the King, but we do expect the direction of the Court herein. Heretofore, in Arden, and Darcyes case the like motion was offered to be made against such a writ of the King, as this is, and it was one Harris then also, who offered to make this motion, (so that I think this is incident to this name,) but the Court did then refuse it, as here I hope they now will doe. *Arden & Darcyes Case.*

Coke chief Justice. We which are Judges, ought to hear the Counsell of the party, and this we are to doe without any colour of question. The reason of this is, because that his suite, by this is to be stayed, and this being in a legall course, his Counsell for him, ought to be legally heard in 34 & 35 Eliz. the Lord Glofields Case, the parties were Kent against Arundell, where the like writ came De domina Regina inconsulta, Non prosequendo, and there the Serjeants did argue, that this writ did not lye, but there was no dispute at all, whether they might argue this or not, this being to be so, without any question; for this is a legall course, and this writ also, is ancient, and legall. *34 & 35 Eliz. The Lord Glofields Case, &c.*

Coke & Curia. We have read, and weighed all the Books in this, as 2 R. 3. fol. 13. John Hunstones Case. 21 E. 3. fol. 19. & 44. 22 E. 3. fol. 15. 15 H. 7. fol. 10. *3 R. 3. fol. 13. Hunstones Case, &c.*

Dodderidge Justice. These things happen in our Books, and this matter hath been divers times debated before.

Coke. My Oath is, for to serve the King, and his People; here these are not to pray in aide. No writ of this was ever as yet brought, but this was then disputed; as touching the validity of the same writ.

The Court all agreed herein clearly. And so by the Rule of the Court, this Case was adjourned to another time, and then to hear Counsel on both sides, to argue the same; for and against this Writ, and the allowance, or disallowance of the same.

Afterwards (S.) Termin. Trinit. 13. Jac. B. R. This Case was largely, and learnedly argued, by Harris Serjeant, Hutton Serjeant, & Richardson Serjeant, who argued strongly against the Writ, and the allowance thereof: and by Chibburn Serjeant, and by Yelverton the Kings Sollicitor, for the Writ, and the allowance thereof. And a farther time given to Sir Francis Bacon, the Kings Attorney Generall, to argue for the maintenance and allowance of the same, before which time, the Attorney Generall being ready to argue, the matter was composed between the parties, and so ended without any further argument, or opinion of the Judges herein onely so far, after the end of Serjeant Chibburnes Argument, who then prayed to have allowance of the Writ, by the Court, as to this.

Coke chief Justice. After the allowance of this Writ, we cannot then proceed again, without having, 1. A Procedendo, ad loquelam, &c. 2. A Procedendo ad Judicium; and without these Writs, we cannot proceed; and this is the Law, as touching this Writ, and the allowance of it.

Dodderidge Justice, agreed herein, that after allowance of this Writ, we ought to have two Writs of Procedendoes before we can proceed.

Nota, That after the end of Yelvertons Argument, who concluded praying allowance of the Writ.

Sir Francis Bacon then said, That this Writ is as a Watchman to the King, and as a Centinell to give Warning. This Case was ended, as before, without any Judgement given therein by the Court, one way or other, but large and confident Arguments on both sides.

Ended by Agreement.

Parslow Plaintiffe, against *Dennis* Defendant.

A Prohibition. 1 Ro. Rep. 190.

IN a Prohibition, to the President, and Counsell in the Marches of VVales; The Case appeared to be this; That one Dancy, being seised of Land in Fee-simple, of this makes a Lease for 1000 years, in the time of King H. 8. unto one Dennis, which came to his Executor, and the same hath ever since from time to time, been enjoyed by Executors, untill the heire of Dennis pretending title to this, as heire, commenced there a suite for this Land, and had caused divers offices to be found, of this, in the Court of Wards, that this was Fee-simple; and upon this, the Vice-President of VVales, had proceeded against him, who had the Lease, and had setled the heire in the possession, as of Fee-simple Land, had removed the termor out of possession; and hath also there sentenced against him, for the heire, 20 l. in dammages for the mean profits; Upon this a Prohibition was prayed.

It was shewed, that this matter was now in the Court of VVards, and divers offices found of this, that Dennis dyed seised of this Land in Fee, and that discents have been had of this, and that upon these offices thus found, the Vice-President, and Counsell there, had removed Parslow out of the Possession, and had setled the heire in the same, as heire.

Coke chief Justice. You now come hither too late to have a Prohibition. If it had been, as you say, that this Land had gone, for these 100. years, from Executor, unto Executor, this had been then clear for you, that it was but a terme. But here otherwise it is, for this hath gone contrariwise, from heire to heire, and offices have been found of this accordingly; and therefore, it is to be presumed, that this was Fee-simple Land, and not a Lease for years. Also the Vice-President, and Counsell here, have done nothing, but what was well done, for this which was done by them, was onely for the quieting of the Possessions, and this was well done. And that the heirs of Dennis to enjoy this untill the right of this should be determined by the Law. But they have here gone farther, and have also given 20 l. dammages for mean profits; In this their so doing, they have not done well; for this is the absolute determining of the Title, to be for the heire; and this they cannot there do: and therefore, as to this particular, their proceedings are not right;

right; but as to that which they have there done, as to the setling of the possession, this is well done by them, and the same shall stand; but as for their sentence, of 20 l. dammages, for the mean profits; this we will stay, but no more; and so as to this particular, A Prohibition was Granted, by the Rule of the Court. A Prohibition for part.

Lea Plaintiffe, against *Adams* Defendant.

IN an Action upon the Case for a promise, for a Horse, the Plaintiffe in his Declaration sets forth, that the Defendant had made a promise unto him, in manner following. (S.) that if the Plaintiffe would make him a Lease for 21. years, of certain Land, for 10. l. yearly Rent; he did then in Consideration of this, assume and promise to give unto him a Horse, and shews that he had made unto him a Lease for 21 years of the said Land: That the Defendant, according to his promise, had not given him the Horse, but to doe this refused, whereupon, the Action was brought upon Non assumpsit pleaded, a verdict was given for the Plaintiffe. It was moved in Arrest of Judgement, that the Declaration was not good, to intitle the Plaintiffe unto this Action, he having here set forth, a Lease made generally, making mention of no rent reserved upon this Lease, whether this Declaration be good or not, was the sole question. It was urged for the Plaintiffe, that the Declaration was good, though no Rent was reserved upon the Lease; this being for the greater benefit of the Lessee, and therefore good, the Lease being made of the same Land, and for the same term agreed upon between them. An Action upon the case for a promise.

Haughton Justice. The Declaration is not good, the rent agreed upon, being not mentioned, to be reserved, and he having expressed no rent in this, he may have reserved a greater rent upon the lease, then was agreed between them, that he should doe.

Coke chief Justice. Clearly this cannot be so intended, being an affirmative, the which for a Rule in Law ought never to be intended, but to be proved so to be. But as to this Declaration here, that he had made a Lease unto him Generally, this ought to be intended by the Law, to be a Lease, without any rent thereon reserved; so that the point here onely is, whether this Lease, as it is made, may be intended to be a Lease made upon the same contract, upon which the action is here grounded. For the Jury have found, that he did assume and promise, prout.

Dodderidge Justice. If such a promise had been made to a Tenant in taile, as to say unto him, if you will make me a Lease for so many yeares, before the Statute, or now, since the same, at such a Rent, and I will give unto you a Horse; he brings his Action upon the Case for this, and in his Declaration averreth, that he had made him a Lease for so many years as was agreed upon between them, generally, and saith nothing of any rent reserved; this is not good, for if he made this Lease, rendring Rent, then the Issue in taile by his acceptance of the Rent, might make this good; otherwise it is, where no rent is reserved, for there the Lease is void against the issue, and cannot be made good, by any acceptance, being void before, as appears by 22 H.8. Brooke title Acceptance, placito 14. But to put this doubt out of question, it was answered, that this was Fee-simple Land, and no estate tail. 22 H.8. *Brook* tit. Acceptance, placito. 14.

Coke. The doubt in this case, is not, whether this Lease being made without any rent reserved, shall be for his greater benefit, or not, but the Contract here being, to make him a Lease, with a rent reserved, when he hath here made unto him a Lease, without any Rent, whether this shall now be taken and intended to be a lease well pursuing, the original contract between them or not. As to this, it cannot be so intended to be a Lease, pursuing the contract, as it is here alledged.

Croke and Haughton Justices. If one saith to another, make me a Lease for 21.

years, and I will give you a Horse, and he makes him a Lease for 60. years, this is more for his benefit, & omne majus, continet in se minus; yet he shall not here have the Horse, because that by this, he hath not (as he ought to have done) precisely pursued the body of the consideration, in his terminis, which intitled him unto the Horse.

Coke. If one saith to another, go, and doe me an arrand at York, and I will give you for your pains, 40 s. and he afterwards hearing, that he dwelled some few miles on this side York, said unto him, doe this arrand for me, at your house, and this shall suffice; yet, this notwithstanding; if he do not go to York, and doth his arrand there, according to the contract, upon which the promise was grounded, he shall never have the 40 s. for that he hath not pursued the body of the contract. So here in this principal case, the sole question is, Whether by this Lease made without any rent reserved, he hath pursued the body of the contract, upon which the promise here was grounded, the which was, to have made such a Lease, at such a rent.

The whole Court clear of this opinion, that by this Lease thus made, without any rent reserved, he hath not pursued the contract: and so by consequence, the Action not maintainable by the Plaintiffe, for this Horse, & quod querens Nil capiat per Billam.

Termin. Trin. 13 Jac. Banco Regis.

Richard Harris Clerk, Plaintiff, against *William Austin* Defendant.

Entred Hillar. 12 Jac. B. R. Rot. 1315.

A Writ of Error upon a Judgement, &c.
1 Ro. Rep. 210.
2 Ro. Abr. 350, 374.

IN a Writ of Error to reverse a Judgement, given in the C. B. In a Quare Impedit there brought, by Austin Plaintiff, against the Bishop of London and Harris, for disturbing of him to present to the Church of Bradwel, in Comitat. Essex, juxta mare, and for his Title shews, that Sir Edward Pincheon, being seised of the Advowson in Fee, of the same Church; which Church being void, he did present one Genge unto it, and afterwards he Granted the first and next avoidance thereof unto the Plaintiff in the Quare Impedit; that afterwards, (S.) 19 Septembris, 10 Jac. the said Genge dyed, so that it belonged to him to present, that the Bishop and the Doctor had disturbed him, upon which disturbance, the Quare Impedit was brought.

To this they appeared and pleaded; the Bishop pleaded, that he had nothing but as Ordinary, (S.) Admission and Institution: Harris pleaded a special Plea, (S.) That he was persona imparsonata, of the Church in Possession, and shews for Title, that King E. 6. was seised of this Advowson; and 7 Maii, 4 E. 6. he granted this unto William Harbert miles, and afterwards Earl of Pembrook: That he Granted this unto one Cox and his Heirs, and this was 10 Maii, 4 E. 6. afterwards King Edward the Sixth dyed, and Queen Mary took the Realm upon her, & Coronata fuit.

Coke chief Justice. I never saw such a pleading.

Afterwards the Church became void, by the Deprivation of Peaking, then Incumbent, and that Queen Mary, (usurpando upon Cox) did present one Thomas Wood, who was in by six Moneths.

Dodderidge.

Dodderidge Justice, observed, That there was no time shewed in the Bar, when the deprivation was, nor yet when the Presentation of the Queen was.

Afterwards the Church became void again, by the Resignation of the said Thomas Wood: And then William Herbert Earl of Pembrook, usurpando upon Queen Mary, did present George Mason.

Coke chief Justice. Here are so many Usurpations in the Bar, as Presentations, but yet there is no Usurpation in this Case, but onely of the Plaintiff in this Writ of Error.

Afterwards the Church became void again by the death of Mason, and that William Harbart, usurpando upon Queen Eliz. did present one Debauk; but before the death of Mason, Queen Mary dyed, and the Crown came to Queen Elizabeth: Afterwards William Harbert dyed, by whose death the Advowson discended and came to Henry Harbert: Afterwards Debauk the present Incumbent did purchase the Advowson to him and to his Heirs, of Henry Harbert: Afterwards Debauk made his Will in writing, and by this did devise the first Presentation unto William Tabor, and after to Thomas Tabor: That afterwards Cox devised the Fee-simple to Thomas Tabor; afterwards the Church being void again, Cox & Debauk, usurpando upon Queen Eliz. did present Tabor: Afterwards Queen Eliz. dyed, and the Crown came to King James, and the Church being void, Sir Edward Pincheon, usurpando upon the King, did present Genge; that afterwards it belonging to the King to present, he presented Harris the Plaintiff in the Writ of Error.

To this Plea in Bar, Austin the Plaintiff replyed, and by this sets forth, that before King E. 6. had any thing in this, that King H. 8. was seised of the said Manor of Bradwell, unto which the Advowson of this Church was appendant; and 35 H. 8. He Granted this unto Queen Katherine his Wife for her life, and the King being seised of the Reversion, Queen Katherine did present Peaking; afterwards the Reversion discended, and came to King E. 6. who Granted this to William Harbert Earl of Pembroke: Afterwards by the death of King E. 6. the same came to Queen Mary, who 7 Maii, 1 Mar. usurpando did present Wood; that for this, William Harbert brought his Quare Impedit in the C. B. against the Bishop of London, and Wood; and Wood having no title, suffered a Judgement to pass against him, for VVilliam Harbert, by a Non sum Informatus, and a Writ to the Bishop, by which VVood was debito modo amotus: Afterwards VVilliam Harbert did present Mason, the Church became void again, and he then presented Debauk: Afterwards the Earl of Pembroke dyed, and by his death the same came to Henry Harbert, who made the Grant unto John Debauk, as before; Debauk then made his Will, as before, and made three Executors, and willed, that they or any two of them, should present VVilliam Tabor to the said Church upon the next avoidance, and afterwards to Thomas Tabor; VVilliam Tabor refused the Execution of the Will, Thomas Tabor Grants the Advowson to James Norris, and to Edward Leawcknor, and to their Heirs, who Grants this unto Sir Edward Pincheon; the Church became void by the death of Tabor, afterwards he Granted the next avoidance unto Austin the Plaintiff, in the Quare Impedit, the Church became void, so that it belonged to him to present; the King presented Harris here in the Writ of Error, upon which Presentment the Quare Impedit was brought, with a Travers, that VVilliam Harbert did not Grant the Advowson unto Cox: Judgement in this Case was given in the C. B. for Austin the Plaintiff in the Quare Impedit; upon which Judgement a Writ of Error was here brought by Harris the Plaintiff.

Note, That in this Case, all the Counsel for the Defendant were served with an Injunction; the Judges then answered, That they would be of Counsel for the Defendant.

Coventry for the Plaintiff, in the Writ of Error: The first Error assigned was, That Termin. Trin. twelve Jurors, and no more, did appear: This (ex assensu partium)

partium) was adjourned untill Crastin. Animar. on which day, two others came in and were sworn, being of the first Pannel.

The Court all clear of Opinion, that this is no Error, this being good enough, they being all to be called again.

A second Error assigned, because it was not here shewed, that there was any Writ to the Bishop to remove the Clerk.

Coke chief Justice. This is no Error, the Writ to the Bishop is not to remove the former Clerk, but it is non obstante reclamatione of the Incumbent: These two things are recovered in a Quare Impedit. 1. The Patronage. And 2. The Presentation.

Dodderidge Justice. If he agree that the Incumbent shall have this, he shall have his Patronage; You cannot here say against him, Non obstante reclamatione, when as a Nihil dicit est nulla clamatio.

Coventry, in 6 E. 3. f. 23. A difference there appears to be, between a Recovery in a Writ of Right of an advowson, and in a Quare Impedit.

Coke. He may present him without any Writ to the Bishop, after Judgement he is debito modo amotus: The Writ to the Bishop, is but an Execution of the Judgement: If the King usurps upon me, if I usurp upon him again, and present, and my Clerk is in by 6 Moneths, I am now remitted: And so it was adjudged in Dyers time, upon Fitz Herberts Case, because his Clerk was legally in by 6 Moneths, and so a Remitter which shall bind the King; he was amotus by the Judgement, and might present without any Writ to the Bishop.

Dodderidge. If one presents unto my Benefice, and I bring a Quare Impedit against the Ordinary, and the Disturber, and leave out the Incumbent, yet by this I shall recover my Patronage, but not to remove the Incumbent.

Coke agreed herein, when there is a certain Recovery by the Judgement: And so the Court over-ruled this Error.

A third Error: It is set forth, that 7 Junii, the Recovery was had in the Quare Impedit, but doth not shew, that the same was brought within the six Moneths after the Usurpation.

Coke. This is no Error.

Dodderidge. The other Errors are not material: In the Bar here you do plead, that this Advowson was in King E. 6. who Granted this unto the Earl of Pembroke, that Queen Mary usurped: It is onely shewed, that the Clerk was in by six Moneths, but doth not shew, that the Presentment was within the six Moneths.

Coke. Omnia presumuntur, solemniter esse acta: It may be that the Quare Impedit brought against Cox, was within the six Moneths, and it may be not, but Judgement follows upon it, and therefore it shall be taken and so intended, that the Quare Impedit was brought within the six Moneths.

Dodderidge agreed with him herein.

Haughton Justice. King E. 6. did Grant this to the Earl of Pembroke: Queen Mary usurped by Presentation, and her Clerk in by six Moneths: A Quare Impedit then brought, by this the Usurpation of the Queen is purged.

Coke. The reason of the Remitter is, because he comes in by admission and institution, being Judicial Acts, and therefore remitted: Admit that the Recovery had been in the time of King H. 4. that Piercy usurped, and afterwards a Quare Impedit brought, and a Recovery had of this, will you now have it hunted out, whether this Quare Impedit was brought within the six Moneths, this ought not to be, being upon an incertainty: and we ought always to presume, that this was all well done, and according to the Judgement; for that in such a Case, Omnia presumuntur solemniter esse acta.

If a man doth purchase an Advowson, and so hath the Presentation, one usurps upon the Purchaser, and his Clerk is in by six Moneths: A Quare Impedit is then

then brought, and passeth by a Nihil dicit, the Bishop, Nihil clamat, the purchasor shall have his right.

Dodderidge agreed herein, for that we are to presume pro sententia.

Coke agreed, the Rule to be so; for that Judicium, est juris dictum, sicut veredictum, est dictum veritatis & res judicata; pro ratione, as Bracton, and this Judgement, is not to be intended to be contra jus. In all causes, where one recovers in a Quare Impedit, against a common person, if he names the Incumbent, he shall then recover against him; and in this he shall recover against the Queen, because he cannot name her; And if this had been in the time of King H. 4. all had been one, for we ought to make such intendments, as thereby we may maintain the former Judgement given. *Bracton.*

Nota, That afterwards, on another day, in this term, this Case was solemnly argued by all the 4 Judges.

Haughton Justice. Two errors have been assigned for the reversing of this Judgement, which are worthy to be remembred. Another error hath been moved out of the Record; But notwithstanding all these errors, the Judgement given in the C. B. was well given, and the same ought here to be affirmed; there being no error in it: It hath been alledged, that this Church became void, by the deprivation of Peaking, and no time shewed when this deprivation was; and that afterwards VVood was presented, and in by 6. moneths. It is shewed that the Quare Impedit was brought 7 Junii, primo Marie, by VVilliam Harbert, against the Bishop, and VVoods exception hath been taken, because it doth not appear, whether this Quare Impedit was brought within the 6. moneths, or not? VVood being in by 6 Moneths: if it was brought out of the 6. Moneths, then by this, there is no avoidance of the usurpation by Queen Mary: there is no time, when the institution of VVood was.

The Plea here, shall be taken strongest, against him, who pleads it.

The Replication of Austin here, makes against him, that this was after the six moneths. Yet notwithstanding all this, the Judgement is good, and was well given; and we ought here to intend, that this Quare Impedit, was brought within the 6. moneths.

It must be agreed, that every plea is to be taken strongest, against him, who pleads it; as in 3 E. 4. fol. 21. Debt brought against one, and counts upon the retainer of the Predecessour of the Defendant, in office of the baily of husbandry, for 40, s. a year, that he did the services, to the Predecessor, which came to the use of the house; and that for so many years, he was behind, and unpaid; they were at issue, and found for the Plaintiff, but Judgement stayed, because he did not alledge by whom he was retained, and so uncertain, and for this cause the Declaration there not good. Yet it is not requisite for a Plea in barre to be certain, to all intents. If it be uncertain, in the thing alledged, it is not good. 3 E. 4. fol. 21.

In this case here, the Quare Impedit, is grounded upon the disturbance, and the being in by six moneths, is but an inducement, and therefore is not so certainly to be alledged. For this is a thing subsequent, and matter in fact, and therefore not to be averred in the allegation, in the point of the Action, the same being grounded upon the disturbance: but this ought to come on the other side, and shall be intended to be rightfully brought, especially being pleaded, as here it is, that a Judgement was given, and therefore shall be intended, to be truly and rightfully given.

It is here said, that the Incumbent, fuit debito modo amotus, by the Recovery, and by the Judgement of the Court, and execution had accordingly; therefore it is implyed, that the Action was brought within the 6. moneths; for if the Quare Impedit, had been brought, after the six moneths past, the Incumbent could not then have been Legitimo modo remotus, and therefore this ought to be intended, that this was well, and in due time brought. And when they went to issue here, and

no

no exception at all taken to this, for this ought materially to have come, and been shewed, on the other side. It is alleadged, by way of Objection in the Bar, That Wood, who was presented, was in by 6. moneths, and that therefore if the Plaintiffe would avoid this, by a Quare Impedit, he ought to have shewed, that the same was brought by him, within the 6. moneths, and that the other matter ought to have been traversed. In answer to this. By this Barre of the Defendant, the title of this Advowson is conveyed to Cox; and this allegation in the barre, that VVood was in by 6. moneths, is idle, the same not being there materiall, and therefore as to this, no answer was needfull.

Object.

Resp.

If a man do plead a deed of release, and that I. S. who made it, at the time of the making thereof, was of full age, and the other saith, that he was within age, he needeth not to travers with an absque hoc, that he was of full age: In the barre here, this allegation was surplusage, and idle, and so here, in regard that he layes the Quare Impedit to be brought upon the disturbance, a Replication to this, and upon this a Judgement given in Court: Therefore it must necessarily be intended, that the Incumbent was by this lawfully removed. Another answer may be given to this, that notwithstanding he was in by 6. moneths, yet when the Quare Impedit is brought by him, who hath right after the 6. moneths, he by this shall reduce his right, but this is not much to be insisted upon, the same being doubtfull; but the other matter before urged, is to be relyed upon.

Resp.

As to the exception taken to the devise, this is of no force at all. (The Will was, that Executors, or any two of them, to present one,) a man may devise, that his Executors, shall devise, to such a man, (Debanke was here presented: the authority here remained joyntly in them, notwithstanding one of them had right to the advowson; And so upon the whole matter, the Judgement given in the C. B. was well given, and ought to be affirmed.

2. Dodderidge Justice. Three errors have been alledged; the first appears in the Barre, when the Church became void by the death of Peaking, and upon the Grant to Cox, Queen Mary presented VVood, who was admitted, instituted and inducted, and in by 6. moneths, here the purchasor had not the presentment, but the patronage gained unto Queen Mary, by usurpation. It must be agreed, that if the Queen, or any other, do usurp, upon a purchasor, before any Presentment made by him, and 6. Moneths passe, and no Quare Impedit brought; the usurper by this hath gained the patronage in fee; and the purchasor remains without any remedy. For before the Statute of VVestminster, the second, capite 5. a plenarty by 6. moneths had defeated the Purchaser perpetually, and a Purchaser is not within the aide of that Statute. The which Statute doth recite two Writs of Possession. (S.) A Quare Impedit, and an Assise of dorrain presentment. And one writ of right, (S.) Breve de Recto. And a Purchasor cannot have any possessory Action, for that he cannot alledge a presentation in himself, as he ought to doe, in his count: And he cannot have a Writ of right, because he cannot alledge seisin in the espiues, as he ought to do by the Law. And these are the 3. remedies which he may have, and no other, as appeareth fully by these Books. (S.) by 7 E. 3. fol. 246. 16 E. 3. Fitz. title presentation, placito 62. 33 E. 3. Brooke, title presentation, placito 6. 43 E. 3. fol. 15. 43. lib. Assisar. fol. 21. 19 H. 6. fol. 40. 20 E. 4. fol. 15. 22 E. 4. fol. 9. 1. By all these Books it appears, that if the purchasor do never present, to the Church, but suffers a usurpation, and the Incumbent of the usurper, to be in by 6. moneths, by this he hath now lost his right of advowson, and the same is now become a right remediless. But if a purchasor do present once, and afterwards, at the next avoidance, a stranger presents, and his Clarke is in by 6. moneths; by this his right is not gone, for if the Church becomes void again, he cannot have a Quare Impedit, but a writ of droit d' advowson, for he hath right of action, and of advowson, 7 E. 3. fol. 1. in the end of the case, it is there said, that if the Grandfather doth present, and the right of advowson descends to

Stat. of *West-minst.* 2 cap. 5.

7 E. 3. fol. 246.

16 E. 3. Fitz. &c.

6 E. 3. fol. 1.

to his son and heire; Afterwards another presents, after the son presents, it shall be rather adjudged that he presented in his own right, then in the right of another, this there by Baster, who said, he had known it so adjudged. 17 E. 3. fol. 37. b. by Parming, at the Common Law, purprise of one shall not put another out of his possession, and when one presents, who can intend, that he presents by any way, then by such a way, as he hath title, and colour for to clayme by, for if one do purchase an advowson, and presents, he presents by force of his purchase, in his own right, and if afterwards another purprent, and then he again happens to get a presentment, this shall be intended to be in his ancient right. L. 5 E. 4. fol. 119. b. in the Abbat of Leicesters Case. It is there said, That if the King presents to the advowson of another, and is seised, and after the Church becomes void again, and the other presents, and his Clarke is in, he is now in his possession again, and by this, he hath regained the patronage. (But I do doubt of this, if it be in the case of a purchasor, there being no Book in it,) for that here is his mere negligence, and laches. And this shall suffice to be spoken to the Barre.

17 E. 3. fol. 37. *Parming.*

L. 5 E. 4. fol. 119. b. the Abbat of *Leicesters* case.

Now to the Replication here, and to examine this.

First, All matters in fait, ought to be confessed, and avoided, to be traversed, or protestation to be taken of this.

But here are divers matters alledged, in which there are many oppositions, the one being contrary to the other.

The one saith, that the Church became void, by the resignation of Wood. The other saith, that it became void by the amotion of Wood, without any traverse. All this being matter in fait; but yet notwithstanding all this (which is not much materiall,) they being here at issue, here is no formall pleading. But now to look unto the right. And as to this, by the Replication, Queen Mary did usurp, by presentation, as appears, presented Wood; But William Herbert had the right of Patronage, and brought his Quare Impedit to all, a Non sum Informatus pleaded for Wood, and a Judgement passed against VWood, and so he was lawfully amoved: if in by 6. moneths, and a Quare Impedit brought against him. If by this he shall recover the Patronage.

As to this, it is first alledged in the Barre, that Queen Mary usurped, usurpando, she presented Tho. Wood, who was admitted, instituted, and inducted, and in by six moneths.

Whether Cox, a purchasor of Herbert, and never presented, yet if he brings his Quare Impedit, within the 6. moneths, by this he hath undone all, which Queen Mary had gained, by the usurpation. But if this was brought after the 6. moneths, Quid operatur by this.

Two especiall points are here to be considered. (S.)

First, How this case stands upon the pleading of plenarty. This is alledged to be in the presentæ of Queen Mary, but it is not alledged when this presentation was; and this may be in the beginning of her Reigne. But when the Quare Impedit is brought, it is said to be in 1 Mariæ, and he may be in by six moneths before, but this doth not appear, and so this is uncertain, for it may be the same was brought within the 6. moneths, and it may be, it was after; it is now to be considered, what we shall here intend, upon this so uncertain a Barre, and Replication.

As to this we ought alwayes to intend that to be done, which stands with the Judgement given. And where it is said, that he was by this, Legitimo modo amotus, we ought to presume, all things to be lawfully done, to maintain this Judgement, and still we are to presume the best, for upholding of the Judgement; to this purpose is the case in 36 H. 6. fol. 17. a. by prisot, if one recovers, against another, the Manor of Dale, and three Acres of Land, by default, in a precipe quod reddet, and afterwards he brings a scire facias, to have execution of the said Judgement, he shall not say that the 3. Acres, are parcel of the Manor, for that it cannot be so intended. It is there said, that if a Fine be levied of a Manor, and of three acres

36 H. 6. fol. 17. a. *Prisot.*

of Land, It cannot be any wayes intended, that these three acres, are parcel of the Manor, otherwise it is where a Fine is levied of a Manor, and of an advowson, there it may be, that this was parcel of the Manor, and it may be not so; and so is the difference there put by Danby.

It is a Rule, Quod semper præsumitur, pro sententia, as if a doubtfull sentence be given in the Ecclesiastical Court, we ought for to presume the best. As in Buries case, Coke 5. pars fol. 98. b. and 2 Eliz. Dyer, fol. 178. Two Judgements there, the first Judgement upon the libell, in the Spirituall Court, that he was frigidus, and upon this a sentence of divorce was given accordingly; in the sentence it is said, that he was frigidus, generally, whether this shall be understood, and intended, that he was Maleficiatus, and so inhabilis, uni, & habilis alteri, or whether it shall be intended, that he was naturally frigidus, but afterwards, because he had a second Wife, and had Issue by her, therefore it shall be intended, that the first Judgement was, quia maleficiatus. So that semper præsumitur pro sententia, notwithstanding proof be to the contrary. 18 E. 4. fol. 29. In trespasse, for cutting his Grass, and breaking his close, the Defendant claimes the Land, as son and heire of I. S. the Plaintiffe saith, that there was a divorce between I. S. and his wife. In this case the best shall be presumed, and this shall be for the legitimation of the heire, and so it is also said in Burges Case, Quod semper præsumitur pro legitimatione puerorum.

Coke 5. pars. 98. 6. *Buries* Case, 2 Eliz. *Dyer*. fol. 178.

18 E. 4. fol. 29.

And if it shall be so upon Judgement given in other Court, why shall it not be so here in this case.

By the Statute of 4 H. 4. capite 23. Judgements given in the Kings Courts, shall stand in their force, and not to be avoided, but to be upheld, untill they be overthrown, by Attaint upon verdict, or by a Writ of error, and not otherwise.

Statute of 4 H. 4. capite 23.

And so is the Common Law also, as the same appears by 18 E. 4. fol. 29. a. b. 33 H. 6. fol. 43. 34 H. 6. fol. 24. 37 H. 6. fol. 33. Where it is said, quod Judicia, in curia domini regis, illata, stent in suo robore, & effectu, quousque per errorem, adnihilentur, &c. And this Judgement here given in 1 Mariæ, was never impeached by any Writ of error, and therefore the same is to stand, and be in its full force. And we are now for to maintain this Judgement, and as touching this, we are to intend, all things conducing thereunto, to be lawfully done.

18 E. 4. fol. 29. 33 H. 6. f. 43. 34 H. 9. f. 24. 37 H. 6. f. 33.

Admit here, that the Quare Impedit was brought after the 6. Moneths. Yet this now is not at all materiall, the Clarke being removed. But this Judgement hath never bœn impeached, by error, or attaint, the same therefore remains in force, and so shall stand, having never bœn avoided.

And so this Judgement here remains in force, and therefore we ought here to presume, pro sententia, that this Quare Impedit was brought, within the 6. moneths; and this in maintenance, and upholding of the said Judgement. And if the same was brought after the 6. Moneths, yet because the Judgement hath not bœn impeached, by error, or ataint, the same therefore still stands and remaines, in suo pleno robore. And these are onely the two legall wayes to impugne this Judgement; either by error or attaint.

As to the last matter, being, The Parson of the Church, hath the advowson of this in Fee; by his last will, he wills, that his Executors, two, three, or any one of them, do present such a one, when the Church shall become void, and dies, and the Church becomes not void, till by his death.

That this may be devised, appears by 37 H. 6. a man may devise a Reversion, as well, as to passe this by Deed; so here it shall be so, of this devise, De proxima præsentatione, when this is granted, at this instant, that the grant should take effect, (S.) by the death of the devisor, at this very instant, (S.) by his death, the Church becomes void; yet this shall be a good devise. For notwithstanding the Testament

hath

hath no effect, but by the death, yet it hath an Inception in his life time, and this shall make it good.

In 48 E. 3. A man having Lands in London, deviseth this, and after dies without heire, which shall now take effect, (S.) the Will, or the Escheate. It is there held, that the Will shall stand, for that the Escheate merly doth commence by the death, but the Will shall relate to the inception of it, and so shall prevent the Escheat. 48 E. 3.

31 H. 8. Dyer. fol. 45. A Lease is made upon condition, that the Lessee shall not alyen to any one, during his life, without the assent of the Lessor, he deviseth this, without his assent, whether this was a breach of the condition. It could not be an alienation, but in respect of the Inception of it. So in this Case here notwithstanding they presented VVilliam Tabor, who, with the 2. others, was made his Executors, and the Church coming void by his Death; yet they had good right to present him. It is said, that Tabor came, and refused the Executorship. But it is not said, before whom this was; this ought to have been shewed. 9 E. 4. fol. 33. & 47. the Bishop of Canterbury was made an Executor, and refused, he was compelled to shew that he refused before himself. But if he had not refused here, yet they might have presented him; and this is the difference between Heckars Case, 13 H. 8. and 21 E. 4. fol. 66. they cannot present the head, but one of the members they may present; and here notwithstanding, that Tabor cannot present himself, yet the other two may well present him. And so upon the whole matter, the Judgement given in the C. B. was well given, and no error in it; and the same ought to be affirmed. 31 H.8. *Dyer.* fol. 45. 9 E. 4. fol. 33 & 47.

Croke Justice. The Judgement here ought to be affirmed.

The matter in question is for the Church of Bradwell, which seems to be a very unfortunate Church: For quod malo principio inchoatur, raro finitur bono exitu: Five Usurpations have been alledged to be in this Case; and the foundation of this Title for Doctor Harris, is a usurpation by Queen Mary first had, who usurpando did present VVood: Afterwards, four usurpations alledged by the Presentation of Mason, Debauk, Tabor and Genge, so that the Bar by Doctor Harris, is intricated with five several Usurpations: But debile fundamentum, fallit opus: And the Presentation, under which he doth deduce his Title, is of all the others the weakest: For the Presentation of Queen Mary, is wholly avoided by the Quare Impedit, in which the matter being generally put, the point here considerable is, Whether it shall be intended that this Quare Impedit was brought within, or after the six Moneths; if within the six Moneths, then the Presentation by this is avoided, but if after the six Moneths, then not.

As to this, it is to be observed for a Maxim, (S.) Quæ in Curia regis acta sunt, rite agi presumuntur: (if the contrary be not expresly shewed.) And when a Judicial act is done in the Kings Court, always in such a Case, presumetur pro sententia.

In the Tryal in the Quare Impedit, the Bishop pleaded nothing, and the Clerk had nothing to plead, it therefore passed against him by a Non sum Informatus: est probabilis & violenta præsumptio, that this Quare Impedit was brought within the six Moneths, because the Judgement of the Court was subsequent unto this: And this Judgement so judicially given, ought not thus to be blown away by a bare and an uncertain surmise, but the same is to stand and remain in force, untill it be legally avoided by error or attaint, as appears by the Statute of 4 H. 4. cap. 23. Judicia in Curia regis reddita, Non debent reversari, nisi per errorem, vel Attincta: And so the Usurpation by this is clearly avoided, and so a good title for Sir Edward Pincheon. Statute of 4 H. 4. c. 23.

Then as to the devise, this is clearly good: If a Patron in Fee, doth devise that his Executors shall present such a one to the Church, when the same becomes void; although he cannot grant proximam advocationem, fallen in his life, yet by

devise this is good; the Executor represents the person of the Testator: And so the Judgement was well given, and ought to be here affirmed.

4. Coke chief Justice. When I was the Queens Attorney, she said unto me, I understand that my Counsel will strongly urge, Prærogativa Reginæ, but my will is, that they stand, pro domina veritate, rather then pro domina Regina, unless that domina Regina hath veritatem on her side: And she also used to give this in charge many times, when any one was called to any Office by her, that they should ever stand pro veritate, rather then pro Regina.

In the argument of this Case, I agree in opinion with those which have argued, and will confirm their reasons.

These Errors have been very probably taken, but in this Case there appears no title for the King.

The great doubt is, if the recovery in the Quare Impedit be not just, then there is a title in the Crown; and if so, then scribatur Episcopo, as it doth appear by all the Books: But here no title appears: I shall in my argument speak unto these particulars, and will therein shew;

1. First, That it shall be here intended upon this whole Record, that the Quare Impedit was brought within the six Moneths.

2. Secondly, If the same had not been brought within the six Moneths, yet the title of the Earl of Pembroke is by this well revested, having a Judgement and a Presentment; by this the same is revested, and the right of the Queen gained by the Usurpation, shall be altogether taken away and defeated.

3. Thirdly, As touching the devise, and what is wrought by it.

1. As to the first Point: For four Causes it ought here to be intended, that the Quare Impedit was brought within the six Moneths, and this is a plain Case: But to adde reason to that which hath been said, this is but an Inducement to a Travers, and is not the main point; yet it ought be so pleaded, as that it ought probably to appear to the Court, that it was brought within the six Moneths.

I will argue this by admittance, if it shall be so intended: The Record it self proves this plainly unto me, virtute cujus, &c. ab Ecclesia prædicta, prædictus Wood, debito modo amotus fuit; and this cannot be so, unless the Quare Impedit was brought within the six Moneths, and this is expresly so averred, that he was debito modo amotus, and therefore &c. and the Earl was seized of the Advowson, and this is a common ground.

21 E. 3. f. 43. Baron and Feme, do release all the right which they had in certain Lands, which Deed was inrolled; the Wife brings a Writ of Error, and assigns for Error, because the Court Inrolled this Deed, by the Conusance of one who was a feme Covert at the time: Thirning there demands Judgement of the Writ, the same being, that the Deed was Inrolled by the Husband and Wife, ad damnum ipsius Helenæ, and hath not supposed the death of the Husband: To this it was answered, that the Writ saith, that the Deed was Inrolled, ad damnum ipsius Helenæ, which thing could not be intended, if the Husband was not dead, (and if he was living, the other ought to shew this:) This is a good Case, to prove the Case in the C. B. of Nuper Episcopo.

So here in this Case, when the Record saith, That debito modo amotus, it ought to be intended that this was lawfully brought within the six Moneths, and as for Doctor Harris, if he had dealt Clerkly, he ought to have shewed that the Quare Impedit was brought after the six Moneths.

Obj. It hath been objected, Whether the Incumbent be amotus, by the Judgement it self, before any Writ to the Bishop, or a Presentation had by him which recovered, if by Law he be not removed, any other Allegation against Law shall not make an Intendment.

Resp. As to this, and in answer thereunto, by the very Judgement in the Quare Impedit, the Incumbent is removed, and the Patronage is by this regained,

ed, and this so appears by L. 5 E. 4. f. 115. that without any Presentation, by the Recovery, the disturbance is gone and avoided, and the Incumbent by this recovery is removed; and with this agrees 17 E. 3. f. 59. Smalls Case, being the best Case in the Law for this, that the Church to be void, before he is to present: There is an avoidance in fact, and in Law, not to present to an avoidance in Law, without an avoidance in Fact, And this is for a Rule, if he be not to present when the Church is void in fact, no Writ shall issue to the Bishop. 17 E. 3. f. 59. *Smalls* case.

46 E. 3. f. 13. John Marshals Case, that the Plaintiffe who recovered, may present after Judgement, without any Writ to the Bishop; so that this is a plain case, that the Church is void before any Writ to the Bishop. 46 E. 3. f. 13. *Marshals* case.

Hillar. 37 Eliz. C. B. Rot. 620. A famous Case between Brown and Tirrey: It was found by Office, that such a one dyed without Heir, seised of certain Lands held of the Queen (but there was a right Heir) the Queen had the possession by usurpation. Hill. 37 Eliz. C. B. Rot. 620. &c.

By the Statute made in time of King E. 6. the right Heir shall Travers a Deed of Feoffment made in Fee, and a Letter of Attorney to make Livery; afterwards Judgement was given, quod manus dominæ Reginæ amoveantur, afterwards the Attorney made Livery.

The first question was, Whether by this the right of the Queen be amoved, without any Writ to the Escheator; the Queen had no title but by a false Office, the Livery was adjudged to be good, because the same was after the Judgement, and before any Writ to the Escheator; and it was adjudged, that the possession of the Queen was amoved by the Judgement.

Obj. It was afterwards objected, that at the time of the Charter of Feoffment made, he had no right.

Resp. To this it was answered and resolved, that he had good right, for that afterwards it shall be adjudged a good Feoffment, upon the Judgement, Quod manus domini amoveantur: So here in our Case the Judgement here given in the Quare Impedit, shall restore all.

It appears by the Register, fol. 17. and 61. In the Writ he may say, ad Ecclesiam jam vacantem. Register, f. 17. 61.

21 Eliz. Dyer, f. 364. Gerrard Onslows Case, the Queen did sell a Benefice, there a Quare Impedit was brought against the Queen, the Ordinary, and the Incumbent, and pendente lite, the Queen upon a Resignation presents another, who is instituted and inducted, and is in by six Moneths; he is removable by a Writ to the Bishop, although he be no party to the Judgement, in the Quare Impedit, there all the Counsel of the Queen were deceived, who held the contrary: For that by the very Judgement all are to be removed; and according unto this, I have known it to be so adjudged again.

2. A second reason, that it shall be intended that this Quare Impedit was brought within the six Moneths, Quia semper præsumitur, jus, & veritas in judiciis, Plowden, Judicium, est juris dictum, and none shall alledge any thing against a Record, which is Teste meipso.

3. Thirdly, here is Cohærentia actus, 8 E. 3. f. 386. old Print, and f. 18. new: The Arch-Deacon of Woodhouses Case, in an Assise of d'arrain Presentment, Collusion to be enquired, they enquire of the right, a notable Case it is, there to see how the Judges inclined unto the Possession, and to pass with the same; and Herle there saith, If the Possession be so, I will presume the right to be accordingly, here are five Presentations with the Earl of Pembroke. 8 E. 3. f. 386. &c.

The reason of the Case in 8 E. 3. is, because the Statute of 7 E. 1. ordains, That if any Church-man get any Term, arte vel ingenio, this shall be Mortmain. Statute of 7 E. 1. *De Religiosis.*

See the Statute of Westminster the second, upon a Recovery not to intend Covin or Collusion; as touching this, vide. Westmin. 2.

49 E.

49 E. 3. f. 29. &c. 49 E. 3. f. 29. 47 E. 3. f. 13. and Westmin. 2. cap. 3. In another Case, upon a Recovery had against Husband and Wife, durum videbatur: A Recovery shall be always intended to be true, quia Judicium, est juris dictum.

4. A fourth and last reason is this, That Doctor Harris had Connusance of this; for you have divers Protestations, that the Earl had no Title, but there is no Protestation of this, that the Quare Impedit was not brought within the six Moneths, but that this passed by a Nient dedire, he confessed this.

1 Octobris, Queen Mary was Crowned, the Deprivation to be after the Coronation.

Obj. It hath been objected, That he might be deprived in April, or in August.

Resp. But in answer to this, it cannot be so, for this was after she came to the Crown: VVood did well in this Case, for he having no title, suffered it to pass against him, by a Non sum informatus: But Doctor Harris hath not done so, but the contrary, as thus to prosecute this matter, without any title at all; and he having notice that he was amoved, and so was debito modo amotus; this was not well done by him, for Church-men ought not thus for to boulster out such bad Causes.

The second Point, be the Recovery in the Quare Impedit, within, or after the six Moneths, yet the Advowson is by this revested, and the Usurpation avoided, by the Recovery in the Quare Impedit, and a Presentment afterwards: For if I purchase an Advowson, and before any Presentation had by me, another usurps upon me, and presents, and I bring my Quare Impedit after the six Moneths, and for the Incumbent, a Plea is of Non sum informatus; by this the Advowson is revested, est vere dictum, and it doth revest this, for here was but a remediless right, and if you will not take advantage of it, I shall by this have my right again: I have a right, and having a Judgement to recover this, to the which I have a right, my right by this shall be recovered.

There are Judicial Patents which shall revest one in his ancient right, and if the Kings Patent shall doe this, a multo fortiori, a Judgement shall do it.

2 H. 7. f. 17. If the King usurps upon one, and afterwards by his Letters Patents Grants this unto him again, this judicial Patent, reciting his ancient right, shall revest this in him, and he shall be in again in his ancient right; the King there usurped by Presentation, to the Advowson of a House of Religion, and afterwards reciting the ancient right of the Abbat, Grants this Advowson again to him, and to his Successors for ever; the Abbat by this Grant is again in his ancient right, as it is there adjudged.

21 E. 4. f. 49. 32 E. 3. 21 E. 4. fol. 49. Hassey there saith, that in 32 E. 3. it was adjudged, that where the King rehearsed, that whereas he had recovered an Advowson by default, in a Quare Impedit against a Stranger, which Advowson was lawfully appropried to the Abbat, long time before this recovery; after the King, by his Letters Patents reciting the recovery, Grants the Advowson to the Abbat, and to his Successors, there adjudged, that the Abbat should not be in by the King, but by his ancient right in his Remitter, (which Book I have, but I cannot finde this Case there) here in this Case he hath a Judgement to recover the Patronage, and shall he be Patron, and the Crown also, this cannot be; for this Patronage cannot be in two, and therefore the tortious Title which was in the Queen, shall vanish, and the sole right shall be and remain in him who recovered the same.

21 Assisar. placito 19. 21 Assisar. placito 19. Tenant in Tail hath issue two Daughters, makes a Feoffment in Fee; they cannot enter, one of them enters, claiming for both of them, this is not good; but if an Assise be brought, and a Recovery in this, she shall be by this revested unto her first right, and her sister shall enter with her.

4 E. 3. f. 19. by VVilby, If Tenant in tail be disturbed, and where he ought to have a Quare Impedit, he brings a Writ de droit d'advowson, and in this recovers,

bers, or shall be in by force of the taile, and not in fee-simple; notwithstanding that the gift of the action be so. For where a Judgement, and my right do meet together, I shall be in, in my right.

25 E. 3. f. 48. Sir John Darcyes case, put in Plowdens Commentaries, fol. 553. in VValsinghams Case, where, upon the default of tenant for life, the King in reversion prayes to be received, by his Attorney, and Serjeants to defend his right, and sent to the Judges, to the same intent, and he could not be received, for if he should be received, the demandant should count against the King, as against a tenant, and so he cannot doe, but is put to his petition, he is not to impleade him, as tenant, in no case, neither shall count against him; and so though the King was not received there, yet no prejudice shall come to the King; for if the title of the demandant be feint, he shall not gain the reversion against the King by such a Recovery: but if it be good by a Recovery against tenant for life, this shall divest the fee-simple out of the King, who is in reversion, or remainder; so if the King have a title, no recovery shall shake this. 25 E. 3. f. 48. Sir *John Darcyes* case, &c.

4 E 3. fol. 19. When the Crown hath a title by wrong, if I bring an Action against one, when I recover, and the Judgement and my right do meet together, I shall be revested in my right, and the title of the Crown shall vanish, as in Brown and Tirryes case before remembred. 4 E. 3. fol. 19.

In Plowdens Commentaries, fol. 489. a. in Nicholls Case. If tenant in taile discontinue in Fee, and the discontinuee enfeoffe the King, by deed inrolled, the King leaseth the Land to tenant in taile, for life, the remainder to his issue for life; the first tenant for life dies, the issue is now remitted, by this remainder, and the fee-simple devested, out of the King, into the donor, and this without any monstrance de droit, or any other circumstance. *Plowdens* Commentaries, f. 489. a. in *Nichol's* Case.

So that allwayes, when right and wrong do meet together, the right shall ever be preferred.

Now as to Judgements given, these are sacred things, and this appears by these Statutes following. (S.)

Magna Charta, capite 29. 5 E. 3. capite 9. 14 E. 3. capite 5. 25 E. 3. capite 4. 28 E. 3. capite 3. 27 E. 3. 41 E. 3. VVestminster the 2. 4 H. 4. capite 23. That after Judgements given, in the Kings Courts, the parties and their heirs, shall be of this in peace, untill the same be reversed, by Error or Attaint, if error be in the same, be it in personal, or in reall actions. Statutes of Magna Charta, capite 29. 5 E. 3. &c.

In the next place, As touching the devise here.

Debanke, being Parson and Patron of the Church, and devised the next presentation to Thomas Debanke, Taber, and Cox, &c.

It hath been objected, that this is a flower fallen, and so not to be Granted after his death, for that the Church becomes void by his death, when the devise is to take effect. In answer to this, which is a high point in a low house. The devise hath its inception before, (S.) in his life. 38 H. 8. Dyer, fol. 45. before remembred, in case of a devise, over-rules this case. 4 H. 4. fol. 17. a remainder is to vest, during the particular estate, and good, there was the Original Act, a remainder to the right heirs of cestui que vie hereditamenta tenui pendente filo, Inheritances, the saying of St. Augustine. Sicut audio sic judico, & judicium rectum meum. Non sicut odio nec sicut amo, sed sicut audio, So to judge. And so I will conclude this case, with the saying of Queen Eliz. before remembred, to stand pro domina veritate, Non pro domina Regina; and that the Judgement given in the C.B. was well given, and so the same ought here to be affirmed; Et Sic Scribatur Episcopo, &c. being the consequent of this. Object. Resp. 31 H. 8. *Dyer*, fol. 45. 4 H. 4. fol. 17.

Dodderidge Justice. If I plead a Recovery by default, Whether ought a title to be averred?

24 H. 8. Brookes Cases, fol. 13. placito 64. Brooke, title pleadings, placito 6. Dictum fuit pro lege, that he which pleads a recovery by default, ought to averre his 24 H. 8. *Brookes* cases, fol. 13. placito 64, &c.

his title of his Writ, and also, that the Defendant in the Recoverie was tenant of the Frée-hold, die brevis, but where the Recovery was by Action tryed, he néed not to take the one averrment or the other. If one Recover against another, by a Nihil dicit, he ought not not to averre his title.

Coke. He ought not here in this Case, to averre his title, because the same appears, where I plead a Recovery, against the party himself, I néed not to averre the title against him, nor to averre his title.

Dodderidge. The difference will be this, where the title appears of it self, there no averrment néeds to be; but where this doth not appear, there an averrment ought to be.

Doctor Harris, moved the Court, for stay of Execution, till Mich. Term next.

Curia. We will not make you any longer to be of this malæ fidei possessor, and so to burden your Conscience any more with this, and you will be much better without it; we cannot in this satisfie your demand.

Coke. One was never as yet deprived under three moneths, and then the Quare Impedit was brought within the 6. moneths. It is better for you to be in the University, then to be here prosecuting of such suits. For Clericus in oppido, tanquam piscis in arido. And so the Rule of the Court was, Quod affirmetur Judicium; and a Writ to the Bishop, granted for the Defendant.

Judgement affirmed.

Selly Plaintiff, against *Facy* Defendant.

Action upon the Case for words, loss of Marriage.

IN an Action upon the Case for words. The Plaintiffe lays in his Declaration, that there was a speech of Marriage between him and one Susan Watts, and likely to take effect. To which Susan the Defendant did utter these words of the Plaintiffe, (S.) My Wife is a Whore, and I will prove it, for she was nought with Will. Selly, the Plaintiffe, and if I had had a Candle, I had taken them together doing the déed; and that by reason of these words, he lost his Marriage; a verdict for the Plaintiffe, and dammages moved in Arrest, that the words not Actionable, being spoken of a man.

Coke chief Justice. Justice Clenches Grandchilde was to marry with such a man, to whom one said, of her, that she had had two Bastards, one by one Watts, and another by, &c. By which words she lost her Husband; she brought her Action, and recovered 200 Marks, and it is all one, if the words be spoken of a man, as of a woman, laying a speech of Marriage, and the loss of his Wife, it being all one, in the same degrée and equipage to lose a Husband, or to lose a Wife, and so by the Rule of the Court, Judgement was given for the Plaintiffe.

Judgement for the Plaintiffe.

John Burrowes, Will. Cox, Dyton, and other Plaintiffs, against the *High-Commission Court.*

A *Habeas Corpus* to the High Commission Court. Mo. 840. Cro. Ja. 388. 1 Ro. Rep. 337. Hob. 84. 3 Inst. 333.

THey being committed by the High-Commission Court, upon motion, a Habeas Corpus was granted for them; upon which they were brought into Court, and the Return was read, expressing the cause of their Commitment.

Finch Serjeant. The return is bad, both for the manner and matter of it. The Warrant for their commitment, was to detain them there in prison, untill the High Commission Court should take Order for their delivery: This is not good, the same ought to have bèen, untill they should be delivered by order and course of Law.

The

The Return is likewise bad for the matter of it, the Commitment being for their refusal to take an Oath; this was no cause for their commitment of them, being to answer upon Oath unto certain Interrogatories to them ministred, in matters touching penal Laws, whereas they ought not to be compelled to answer upon Oath, and so thereby to accuse themselves; and for this their refusal so to doe, they were by them committed.

In 36 Eliz. B. R. in one Mansfields Case, before Popham Chief Justice, this difference was then taken by him: As to answering there to their Interrogatories, between Ministers and Lay-persons.

And as touching this, there is in the Register, fol. 36. b. an express Prohibition Ne laici, ad citationem Episcopi, conveniant ad recognitionem faciendam, and there is the Writ accordingly, (S.) Rex vicecomiti, &c. præcipimus tibi, quod non permittas, quod aliqui laici ad citationem talis Episcopi, aliquo loco conveniant, de cætero ad aliquas recognitiones faciendum, vel sacramentum præstandum, nisi in casibus matrimonialibus, & testamentariis, &c. But this did not run to Ministers.

Also they ought not there to press any one to take an Oath, by which he should subject himself to the danger of a penal Law, or of Felony, this they are not to doe.

To this purpose is 1 and 2 Eliz. Dyer, fol. 175. placito 25. Scrogs Case, who refused to answer unto Commissioners appointed for the determining of the Office of the Exigenter of London, between him and one Colsehill, a Patentee of Queen Mary, upon the death of Brook chief Justice of the C. B. tempore vacationis, and therefore he was committed; and Hindes Case there cited to be, Termin. Mich. 18 Eliz. agreeing with Scrogs Case, who refused jurare coram Justiciariis Ecclesiasticis, super articulos pro usura: The reason why in such Cases a man neds not to answer, is, because that no man ought to accuse himself.

And in 1 Eliz. in the C. B. one Leigh's Case; who was committed by them, for refusing to answer to certain Articles read unto him, concerning the hearing of Mass, and was therefore by them committed, but delivered upon this reason, That if he should answer, he might by this subject himself unto a penal Law, which he ought not to doe. *1 Eliz. C. B. &c.*

Also in the return, there are these general words, (S.) (and other things) which are not expressed, and this may contain matter of Felony; and so in verity it was, for one of the Articles ministred was, Whether he had stolen a Surplice out of the Church, or not; he having been accused for this, and therefore not bound to answer thereunto.

Coke chief Justice. This is a Point of very great consequence, to examine and to see in what Cases the Ecclesiastical Judges may examine one upon Oath, and in what not.

A Minister, who is infra sacros ordines: It is clear, that they may examine such a one upon Oath.

It is also clear, that by the Statute of 2 H. 4. cap. 15. and untill the Statute of 25 H. 8. cap. 14. which repealed the same; Lay-men also were by them to be examined upon Oath, but not afterwards, (unless it were in these two Causes, (S.) Matrimonial, being secret, and testamentary. *Stat. of 2 H. 4. cap. 25, &c.*

In these, Lay-men to be by them examined upon Oath.

And as to this which hath been said, it is evident and clear, That if they exhibit Articles to one, which concerns a penal Law, they ought not in such Cases to examine them upon Oath, notwithstanding they have Jurisdiction of the Cause, for that they shall not make one thereby to subject himself to the danger of a penal Law.

As to Leighs Case remembred, this was mis-recited, for it was 10 Eliz. Dyer, but not in the Printed Book; but in his other Book, a Manuscript written with his *Leighs Case, 10 Eliz. Dyer.*

his own hand, which Book I have, in which there are many Cases, not in the Printed Book; and this Case was then in the Court of the C. B. when the same did flourish; this Leigh was an Attorney of the C. B. (he loved Mals as well as he loved his life) thither he went, and would go to hear this: And as touching this matter, the Ecclesiastical Judges would have examined him upon Oath, he refused to answer them; upon this, they committed him to the Fleet: The Judges did then presently send for their Attorney by a Habeas Corpus, and upon the return they did in this Case examine the matter, and said, Quod nemo tenetur seipsum prodere, and so for this cause they then delivered him, (the Paramor would be always ready to take one by the back for the penalty, if he once confess the matter against himself.)

18 Eliz. *Hindes* Case. In 18 Eliz. Hyndes Case before remembred, resolved, (some love money, and he loved Usury well) the Paramor there presently had him by the heel, they would there have examined him touching this matter, upon Oath, to have had him to swear, Whether he had taken by the year more then 10 l. for the loan of 100 l. to doe this he refused, therefore they committed him to Prison; upon this he had his Habeas Corpus, and was discharged by the Judgement of the Court, upon the former reason.

Also there were two other Cases there in the time of my Lord Dyer, of the same nature, and upon the same reason, were discharged upon their Habeas Corpus: Quia nemo tenetur seipsum prodere, and so by his own confession, to subject himself unto an Informers suit.

Here in this principal Case, they were to answer unto these Articles ministred unto them, which concerned the reformation of the Book of Common Prayer, and the altering of it, which would be an offence against the Statute of 1 Eliz. This is a new Case, but yet it is an old and a beaten Case, and hath been before this time argued.

And so a day was given over for the Court to be better advised herein.

This matter was afterwards moved again, and rested upon a Curia ulterius advisare vult:

One reason for this was, because the other party desired to have their Counsel heard in this Case, and therefore they, (S.) Dyton, Holt, Burrows and Cox, by the Rule of the Court were remanded to the Prison of the Fleet.

Termin. Mich. 13 Jac. B. R. &c. Afterwards, (S.) Termin. Mich. 13 Jac. B. R. This Case was moved again: Concerning the High Commission Court, and their Oath, ex officio, to examine upon Oath, a matter concerning the breach of a penal Law, (S.) Upon the Statute of 1 Eliz.

Coke chief Justice. Lee's Case was, as it hath been remembred, who was at Mals in the Spanish Ambassadors House, they would there have examined him upon Oath, as touching this, but he refused; and so was Hindes Case for Usury: In such Cases they are not there to examine upon Oath.

As to examine Patrons, touching corrupt Contracts, for that Nemo tenetur seipsum prodere.

Here the Civilians are to shew cause why they proceed there in this manner.

And as touching this matter, I will confer with them of the High Commission Court, and I will shew unto them what hath been done in like Cases in former times; and I will further shew unto them the Books: For it is very clear, they cannot proceed so, and so I will satisfie them herein for the time to come.

And all this I will doe for the future ease of the Subject, and so to prevent motions in the like Cases.

And this I will doe, (not that we are afraid here to doe Justice) for this howsoever we will doe, but this I will doe for their future directions.

The

The Court directed to have the Articles brought into Court, and to be here read, and for this a further time was given.

Afterwards this matter was moved again.

Coke Chief Justice. This is a Case of great consequence: In the time of King H. 5. fault was then found, and a great complaint made in Parliament, that they in the Ecclesiastical Court would not deliver unto the parties copies of the Libels against them, for their directions how to make their Answers, or to see in what cases they might have a Prohibition: Upon this complaint, and for redressing of the same, was the Statute made of 2 H. 5. cap. 3. by which it was Enacted, that they should have the Copy of the Libel delivered to them, by which they might either give an answer, or procure a Prohibition; and it hath been adjudged in the C. B. that this Statute was but an affirmance of the Common Law: And so for them there to do against this, is to do against the Law; so that such denying of the Copy of the Libel by them, is against the Law of the Land, and also to the great damage of the party.

Here in this Case the High Commission Court do not proceed by way of Libel, but by certain Articles, being in the nature of a Libel; Whether they are not to deliver a copy of these to the party, by this Statute.

If a man be to answer, and takes his Oath to answer, before he knows to what he is to answer.

This Statute extends to all such Courts, who use to examine ex officio; if they proceed there, and do not deliver a copy of the Articles, we will then in such a case grant a Prohibition.

To this purpose, see 4 E. 4. f. 37. Rose Browns Case, upon this Statute of 2 H. 5. capite 3. That an Action upon the Case lieth upon this Statute, if they refuse to deliver a copy of the Articles, or the party may have a Prohibition. 4 E. 4. f. 37. *Rose Browns* Case.

And so a day was given them, to shew cause why they refused to grant this copy.

At which time the Court was moved again to have them discharged, being committed for refusing to answer the Articles upon Oath, without having a copy of them.

The Statute of 2 H. 4. cap. 15. made for punishing of the Lollards for Heresie, and this continued in force till the Statute of 25 H. 8. cap. 14. which repealed the former Statute. Stat. of 2 H. 4. cap. 15. &c.

See Fitz. Nat. Brev. fol. 41. who writ after 25 H. 8. recites the said Statute, by which 2 H. 4. is repealed: They are not to cite men to appear before them, nisi in causis matrimonialibus & testamentariis, &c. Fitz. Nat. Br. f. 41.

Also they would here examine them upon Oath, and so draw them within the danger of a penal Law, within the penalty of the Statute of 1 Eliz. for not conforming of themselves to the Book of Common Prayer; they are therefore not to answer upon Oath, according to the former Resolutions in Leighs Case, Hinds Case, and Scrogs Case.

Also a Copy of the Articles was prayed, upon which they were to be examined according to the Statute of 2 H. 5. which was denied them; these Articles being in the nature of a Libel, and so within the extent of the Statute: And so was the Resolution in Rose Browns Case, where they denied a Copy of the Libel, a Prohibition thereupon was granted, and an Attachment for that, this denying a Copy of the Libel is a temporal wrong.

Doctor Martin, the Kings Advocate for the High Commission, did inform the Court, that a cause was shewed unto him between the King and the Commissioners, and Dyron and Holt, the matter against them being for misdemeanors, tending to Schism; these were called to answer, being wicked Schismaticks, traducing the King, saying, That his Laws are wicked and impious, speaking against

all Church-Government; this Court hath been in this Cause very much abused: There were eight of them called in question for this, the two here are minimi Apostolorum, the other have answered; but these two, Non rel cti, sed electi, to stand out in this matter, and not to answer to these Articles offered to them; and this tends to the great disgrace of the King, and of his Ecclesiastical Court.

Obj. As to the Objection, That they are not here to answer this upon Oath.

Resp. Crimes of this nature which concerns the State, do require diligent examination, and this by Oath.

Obj. As to the Statute Objected of 2 H. 5. and that this Case here shall be taken to be within the equity of it.

Resp. This is not so, for this Court was not then suprema Lex, salus populi, here is no party, and so not like to a Libel; these men are well known to be Schismaticks, and it is against the policy of the State, to shew unto them the particulars upon which they are to be examined, and for these sixty years this course hath so been practised in this Court: One of these, (S.) Burrows, had a Copy of the Articles delivered to him: This Faction doth much abound, and if these are not to be called into the Ecclesiastical Court, they will then grow bold and factious, and spoil all in the end; and if this Court shall not be suffered to question them, this Land will then overflow with blasphemous and wicked persons, and therefore they are to remain in Prison until they do conform themselves.

Coke Chief Justice. Here you have taken upon you three persons, (S.) A States-man, a Judge, and an Advocate.

As an Advocate I commend you: But for you in your judicial course, to censure a Serjeant at Law, this doth not beseem you.

And as a States-man: In this also you are much mistaken.

As an Advocate we joyn with you, if you have certified any thing done against the King: But here you say, that they do keep Conventicles, and do not conform themselves to the Book of Common Prayer.

All this which you have thus said to this purpose, is out of the Book, this not appearing unto us by your return so to be: Contemporanea expositio is the best: I have shewed you a Case adjudged, 10 Eliz. Rich. Leigh convented before the Bishop of London, for hearing of Mass in the Spanish Ambassadors House, he was committed by them, because he refused to answer upon Oath to the Articles, and upon his Habeas Corpus was then delivered by the Judges of the C. B. and so was Hinds Case before remembred.

In Brown and Hixons Case, in the time of Anderson Chief justice, committed for Simony, because he refused to answer, and upon his Habeas Corpus was delivered by the Judges of the C. B.

In doing of Justice, we do honor the King, he being the most renowned King in Christendom: If you proceed against one upon a penal Law, in this you are not to examine upon Oath, you are to Fine and Imprison.

No Judges that ever were in former times have done more for the High Commission Court than we have done: And as to that which you have said, that they ought not to have a Copy of the Articles on which they are to be examined; this your Allegation is clearly against the Law, for they ought by the Law to have Copies of the Articles delivered to them.

We will not here encourage any Sectaries; you say that this concerns the King, and here we are coram ipso Rege: If this matter, as you say, was done publickly in the Church: This is then notorious, and therefore you need not examine them upon Oath as touching this, when as all the Parish can well inform you of it.

Dodderidge Justice. We do all of us agree with you in the due punishing of these Sectaries; and in this we will rather strengthen than weaken you; and will acquaint them of the High Commission Court with this, before we will do any thing herein.

And

And so this rested with a Curia ulterius considerare vult.

Afterwards (S) Termin. Hillar. 13 Jac. B. R. the Court was moved again, for the discharge of these Prisoners committed by the High Commission Court, and now brought in by Habeas Corpus. Term. Hillar. 13 Jac. B. R. this matter moved again.

Coke Chief Justice. As to these persons thus committed by the High Commission Court, they have now been in Prison three quarters of a year; an Oath was there offered them to be sworn, which to do they refused, and desired a Copy of the Articles against them from the Register, which was denied them; for their refusal to answer upon this Oath, ex Officio; they were therefore committed.

We are now to give our judgments here upon the return now before us; being that they refused to receive the Rites according to the Book of Common Prayer; and for their not answering to the Articles they were committed.

I will not by any ways maintain Sectaries. But the Subject ought to have Justice from us in a Court of Justice. For three causes, my Conscience and Judgment do lead me in this Case, that this return here is not good.

First, the Statute of 1 Eliz. is a penal Law, and so they are not to examine one upon Oath upon this Law; thereby to make him to accuse himself; and this was Leighs Case, 10 Eliz. before remembred, noluit jurare, therefore he was committed, and delivered by the Judges of the C. B. upon his Habeas Corpus; and so was Hindes Case, 18 Eliz. 1.

A second cause which doth satisfie my Conscience, when they demanded the Articles, they ought to have had of them a Copy. The saying of Bracton doth satisfie me, being this, (S) Jura Ecclesiastica limitata, intra limites separatas. If they do exceed them, then a Prohibition is to be granted. 2.

Also to prove this, that they ought to have a Copy of the Articles. By the Statute of 2 H. 5. capite 3. the Ecclesiastical Judge ought to deliver to the party a Copy of the Libel; and this to be so, for his better direction what to answer. Two reasons there are for their delivery of Copies of the Libel. Stat. of 2 H. 5. capite 3.

1. First, that by this, they may know, wherher the matter, for which they are questioned, be within their Jurisdiction, or not. 1.

Secondly, that by this they may know what answer they are to make to the matters against them. 2.

And for these two reasons they ought to have a Copy delivered to them. The denial of which is against the Law. And this Law of 2 H. 5. is not introductivum novæ legis, but Declarativum juris antiqui. They have there but a circumscribed and a limited power, which they are not to exceed.

A third reason may be drawn from the liberty of the Subject, the which is very great as to the imprisonment of his body, and therefore before commitment, the party ought to be called to make his answer, and if he be committed, yet this ought not to be perpetually; if one shall have remedy here for his land and goods, a multo fortiori, he shall have remedy here for his body, for delivery of him out of Prison; being there detained without any just cause. I do much dislike of these Sectaries: In Leighs Case, there it was in case of Idolatry, being committed for hearing of Masse, and delivered by the Court of C. B. because he was not lawfully committed; not to be taken pro confesso, his not answering, but we here will not deliver them, as there the Judges did in 10 Eliz. Dyer. But we will here bail them; and they in the interim to make their application unto the Commissioners in the High Commission Court, and there to submit themselves to them. 3.

Croke Justice. We in this case here have proceeded Lento pede, we have agreed to bail them (Cursus Curiæ est Lex Curiæ,) This to the Objection made, that they are to examine upon Oath, as in the Star-Chamber.

Croke. This is Inventio Diaboli, ad detrudendas animas hominum, ad Diabolum.

Curia.

Curia. We are all of us agreed here to bail them; but withal we advise them in the interim to go and conform themselves.

Coke. Non experientia, sedi reverentia, as to the receiving of the Communion kneeling.

Dodderidge Justice. If they think they may examine them upon Oath, and not to deliver them a Copy of the Articles, yet shall they still be suffered to lie in Prison perpetually; we will not suffer this so to be, but we will bail them until the next Term, and in the mean time to conform themselves.

Coke. In their proceedings here, there is no conviction, neither are they convinced by proofs made.

Coke & Dodderidge. We will not here do as the Judges in like cases did in Dyers time, there they did discharge them absolutely; but we here will now only bail them, to appear here again the next Term; and so accordingly, by the rule of the Court, Bail was taken for them.

Term. Trin. 14 Jac. B. R. this matter moved again.

Afterwards, (S) Termin. Trin. 14 Jac. B. R. This matter was moved again, and Harvey Serjeant took exceptions to the Return.

Coke. As to this matter, before the return read, This is a return of another Term, and there may be other new matter happened in all this time. And therefore this is to be observed for a Rule, and always it hath been so used in such a case to have a new Habeas corpus, as of this Term, before the Return be read.

And so accordingly upon the Serjeants prayer, a new Habeas corpus was granted by the Court, and a day given for the Reading of the Return; on which day Harvey Serjeant took exceptions to the Return, the same being, Quod Commissio fuit per Commissionarios pro causis Ecclesiasticis. The cause that being asked openly in the Court, whether they would conform themselves according to the Law of the Church, or not? They to this answered, that they came thither to satisfie the Judges: de B. R. and if they offended afterwards in this, they would submit themselves, but made no other answer, to the question to them propounded, either by way of affirming or disaffirming the same, and because they would make no other answer to the question, for this cause they were by them committed again.

The Court upon this gave them a further time to make their return, so as they would stand unto it.

The Court was then moved to have Holt committed to the Prison of the Marshalsey, being indebted to another for a just and due debt.

Coke. If it be for a due debt, the Law is clearly so, that he is then to be committed to the Prison of the Marshalsey; and this appearing to be so, he was accordingly by the Rule of the Court committed to the Marshall.

Afterwards Harvey Serjeant took two exceptions to the return, 1. The commitment being in this manner, (S) Take into your custody the bodies of such persons, and them keep until we shall take further order for their delivery, this is not justifiable, for the same ought to have been, until they should be delivered by due course of Law.

2. Because there was no Bill against the parties.

Coke. Take the whole case touching matters of commitment; many times the parties are committed donec, the business discussus fuerit; This here is an ill case, it concerns the Law of God, (the cause) for that they did not kneel, and this is of a dangerous consequence, their Bail is not discharged by that which we have done before, we commanded you to attend the Archbishop, but did not discharge you. As to this manner of proceeding, I do doubt of it, but no new Libel is to be.

Dodderidge Justice. Whether there was a Libel or not, it belongs not unto us to determine this; they are there to deal with Heresies and Schisms by the Statute; and this is a Schism, this is also the manner of their proceedings, and we are not

not to take notice, whether they proceed there, in this case by libell, or not; but we do know this, that the matter, for which they were committed, is a Schisme.

Curia, Did all accord in this; and advised them to submit themselves, and not to be (as they have been, worse then before) when they came there before them, to submit themselves; and therefore, untill their submission, they are to remain in Prison. The reason, upon the first return of our Opinions, for their delivery, was, because they were committed, upon the Statute of 1 Eliz. for refusing to answer upon Oath, being the Oath ex Officio; and for this cause, they were not to be imprisoned; and so this unlawfully done by them; but it is not so here now, this being for heresie, the which is hærere, & pertinaciter hærere, and they have as good power and authority, to commit for such causes, as any Court hath; and the cause for which they are here by them imprisoned, is for a great schism, and this doth properly belong to them; so that their imprisonment here is lawfull; and they ought there to submit themselves. And so by the Rule of the Court, they were remanded back again to the High Commission Court, without any Baile taken for them.

Remanded *per Curiam*, without bail.

Golde Plaintiff, against *Death* Defendant.

Entred Termin. Hillar. 12 Jac. B. R. Rott. 241.

In an Action of Debt, upon a Bond of 300 *l.* being the Bond of an Apprentice; conditioned in this manner, (S.) That if he did wast his Masters Goods, and that this should be proved, by his Confession under his hand in writing, or otherwise, and if within three moneths after, satisfaction was not made unto him, then the Bond to stand, and be in its full force, it is set forth, that this was so proved, and that he had made no satisfaction to him, unde actio accrevit.

Debt upon a Bond.

Mo. 845, 888. Hob. 92. 217. 1 Ro. r. 222. 261. 2 Ro. Abr. 595. 2 Cr. 381.

The matter in question, and doubt in this Case was, touching this proof; and what kind of proof this ought to be; when and how to be made.

It was urged for the Defendant, that by the condition of the bond, this ought to be proved by the apprentice, under his hand, in writing or otherwise; here it is alledged to be written, but not pleaded to be under his hand and seal; but the same is his own confession, also that this is not to be shewed here in Court, but to the party himself, and as to proofs, what proof the Law intends. See for this ——

Coke 4. pars. fol. 74. b. in Palmers case, and Coke 6. pars, fol. 20. in Gregories Case; if it be spoken of proof generally, though there are many kind of proofs in the Law, yet this shall be intended the best proof, and that is by Jury; and so is 10 E. 4. fol. 11. b. and 7 E. 2. Fitz. title Barre placito, 241. and Perkins in his Chapter of Conditions, 154. placito 791.

Coke 4. pars, fol. 74. b. *Palmers* case, *Coke* 6. pars. fol. 20. in *Gregories* case. 10 E. 4. fol. 11. *Perkins*. fol. 154. placito 791.

For the Plaintiffe, it was urged, with this difference, as touching proof, (S.) where by the condition of a Bond one is to prove a thing, before Justices of the Peace, and where before Justices de L. B.R. where the proof is to be made before a private man, there the proof is not to be by Jury; and here in this Case, the reference is to prove by the Apprentice himself, and no other proof can be.

As to the Objection made, out of the reference of the proof to his own confession; That here two Issues by this are offered, (S.) either, that he did not waste the Goods, or that he did not confess the same; and that this his confession here, is not sufficient, because it is not said to be under his hand and seal. In answer to this; The proof here is good, having reference to the condition, the same being, if proved by his Confession, under his hand, or otherwise, that he had wasted

Object.

Resp.

wasted the Goods; and that if upon notice of this given unto him, he did not pay, and then, &c. and this so shewed accordingly, under his own hand, and yet he hath not paid.

The Court at this time gave no opinion, nor Judgement in this Case, but would be further advised herein, and so the same was by the Court adjourned to a further time to hear Arguments herein.

Termin. Mic. 13 Jac. B. R. this matter moved again.

Afterwards (S.) Termin. Mich. 13 Jac. B. R. This Case was moved again, and argued by George Croke, for the Plaintiffe, and the onely point insisted upon, was touching this proof, what kind of proof this ought to be, how, and in what manner to be made; that this proof here is properly to be made, in the same Action, and suite brought; but otherwise it is where the reference is especially to another kind of proof, as the Case is in 7 R. 2. Fitz. title Barre placito 241. before remembred, where the proof is referred to no time, nor person, there the proof is to be in the same suite, the Book of 10 E. 4. fol. 11. Alblasters Case, before remembred, the best case in the Law for this, the condition there was, that if he did sufficiently prove the matter, that then, &c. What kind of proof this ought to be, there appeareth. Coke 5 pars. fol. 107, 108. in Sir Henry Constables Case, touching proofe, where it appeareth what proofe is allowable by the Law, and what not; and where a proofe is to be by a Jury of 12 men, and where not. But where proofe is limited to be within a certain time, as within a moneth, or three moneths, as this Case is; there the proof ought not to be by Jury, but by testimony of witnesses, 15 E. 4. fol. 25. agrees with the other Books, upon the former difference, and 33 lib. Assisar. placito 1. where the reference is, to proofe made by certain persons; and Mr. Perkins before remembred, fol. 154. placito 791, 792. having viewed all the Books, agrees upon the former difference, where the proof is generall, there to be by enquest, in the same suite, otherwise where the same is especially referred to times, or to persons certain, before whom proof is to be made.

7 R. 2. *Fitz.* tit. Bar. placito 24. 10 E. 4. fol. 11. *Alblasters* case. Coke 5. pars. fol. 107. 108. in Sir *Henry Constables* case. 15 E. 4. fol. 25. 33 Liber Assisar. placito 1. *Perkins*, fol. 154. placito 791, 792.

In this principal case here, the condition is, that if he do waste the Goods, and this proved, by confession, or otherwise, he then to have three moneths to make satisfaction.

32, 33 *Eliz.* B. R. *Cragge* against *Grifin.*

In 32, and 33 Eliz. in the B. R. between Crogge and Griffin, in an action upon the Case for a promise; two were in controversie upon a wager for running. It was said, that the wager was got by deceit; the other said, give me 1 s. and if you can prove, that this was gotten by me, by deceit, I will give unto you 5 l. for it; upon this he took the shilling, and the other brought his Action upon the Case upon an assumpsit, for the 5 l. and laid in facto, that he had gained the same wager, by deceit; and adjudged that the proof of this deceit, in the same action brought for the 5 l. is sufficient; and there in this case, Wray chief Justice, took the difference, where the proof was generall, and where with a reference, to time, and to person, where the proof is generall, there the same ought to be by Jury, for this is optima probatio.

29 & 30 *Eliz.* C. B. *Glemman* and *Brownes* case.

And so was the Case, 29 & 30 Eliz. in the C. B. Glemman, and Browns Case, in debt upon a Bond, the Condition was, that if he payed to the obligee so much, within 6. moneths, after his return from Venice, proving this, he proved the same under the hand of the Duke of Venice, this was held to be no sufficient proofe, but that the same ought to be by Jury. But here this Case doth differ, the condition being, if proved by his confession, or otherwise.

Object. Resp.

As to the Objection, which hath been made, and that very colourably, that this confession ought to be intended, and a confession in the Action. But this is not to be so, but it is a Confession under his own hand, and this is good, and sufficient, for that every man is estopped, to say any thing against his own confession. And according to the former difference, it was here in this Court so adjudged, in a Case between Holliway and Tedcase, upon an Apprentices bond also. And if the Law should

Holliway and *Tedcases* case. B. R.

should not be so, no remedy would then be had, upon an apprentices bond; and here in this case it is their own agreement, to have it so, & modus, & conventio vincit legem.

Dodderidge Justice. The words of this condition, are, If wast the goods, &c. then, and so often, &c. proved by his Confession, or otherwise howsoever, and this is as generall as the same may be.

Haughton Justice. This reference of the proof is particular in this Case, the same to be, by confession of the party himself, or otherwise, no evasion can there be out of this; if it be not to be a confession, in the Action.

Croke Justice. This is to be observed for a Rule, that if the issue be, whether due proof, or not, in facto, the Law shall then try, and determine this per pais, but where it is upon the validity of the proof, whether the same be good, or not, the Judges they are to try, and determine this.

Dodderidge Justice. The Case remembred, in 33. Lib. Assisar. placito 1. is a notable case, and no difference there is between that Case and this Case now here in question; there it is, if rent be behind, or wast done, and that 8. men to have the view of it, it is there shewed, that the rent was behinde, and that 12. men had viewed the wast; and therefore he entred; the condition there was, if proved by 8. there 12. did view, but it did not appear, that they viewed it by Writ; but they under their hands, did testifie, that the land was wasted; and this there adjudged, to be a good proof, the which case over-rules this Case now here in question. 33 Lib. Assis. placito 1.

Haughton Justice. Notwithstanding, generally, proof is to be by a Jury; but yet if the Case be particular, there this proof shall be, as it is in 10 E. 4. fol. 11. by Littleton, if to be proved within 3. moneths, this is not to be by Jury, because this cannot be done in so short a time. 7 R. 2. makes not much to this Case, two things are there mentioned to be done, but it comes not there to proof by two witnesses. Here the Case is not put upon a general proofe, but upon a proofe by confession of the party himself, and this is to be intended, a personal Confession. 10 E. 4. f. 11. 7 R. 2.

Croke Justice. If one be bound to pay such a sum of money, within 10. dayes after the death of I. S. this proof is not to be by a Jury; so where it is referred to the lives of parties, or to other Circumstances, this not to be tryed by Jury; but the Law shall here adjudge, what proof is good.

Dodderidge Justice. As this condition here is, it is altogether to have this proved by Jury (this being, from time to time, and as often, &c. he may make here Sundry Spoiles.

Croke Justice. The matter in this Case that troubles me, is, whether this Confession were gained by restraint, or by any undue means.

Dodderidge Justice, & Curia, Ye may then as to this well take Issue, that either he did not confess the same, or that he did not waste or imbesil any of the Goods, and then proof ought to be here by verdict; but no such matter there is in this Case; and so the whole Court agreed herein, that here was good proof made according to the condition, and that so the Plaintiffe had just cause of Action; and therefore by the Rule of the Court, Judgement was entred for the Plaintiffe.

Afterwards, Hutton Serieant, did shew unto the Court, that the Defendant had brought a Writ of Error, upon this Judgement, and so moved the Court, for stay of Execution, this being in the nature of a supersedeas; But in verity, this Writ of Error was brought, and the same returnable, the second return of the next Terme. A Writ of Error.

Coke chief Justice. By 5 and 6 H. 7. If a Writ of Error hath a long return, then Execution shall be Granted presently. No cause there is here in this Case to have a Writ of Error. But this Writ of Error being returnable the next Term, by this it plainly appears to the Court, the same to be onely for delay, and 5 & 6 H. 7.

therefore to be no stay of Execution. But if he had brought his Writ of Error returnable the same Terme, then this should have been a supersedeas, as to the execution.

The whole Court agreed herein, that as this Writ of Error is here brought, the same is no supersedeas, to the Execution, being onely for delay, and without any just cause; and therefore by the Rule of the Court, execution was Granted to the Plaintiffe, according to his Judgement, notwithstanding the Writ of Error.

The KING, against *Capell.*

A Quo warranto.

IN a Quo warranto, against Arthur Capell miles, for claiming of a Market; who pleaded to this, that he claimed the same, by Letters Patents of King E. 3. who Granted this per literas suas patentes, unto the Abbat of Glasingbury; But doth not plead, Hic in Curia, Prolat. as he ought to doe.

Sir Francis Bacon the Kings Attorney, did confess all this to be so. Upon this his Confession, Hutton moved the Court to have Judgement for the Defendant.

Dodderidge Justice. The Patent of King E. 3. he pleads not hic in Curia prolat. The first Abbat dyed, the second Abbat dyed; the third Abbat, named Whiting, under whom, &c.

The Attorney shewed the Statutes of 31 and 32 H. 8. and the Letters Patents made unto William Capell.

Dodderidge. Notwithstanding the Confession of the Attorney Generall. Yet the Judgement is ours; you cannot now plead, after the Confession of the Attorney Generall. But yet, as amicus Curiæ, you may shew any matter in Law, to us; The Court all agreed herein.

Dodderidge. The Patent is here in Court. But yet this doth not appear so to us judicially; because the same is not here pleaded, Hic in curia Prolat.

Hutton then moved the Court, to have this amended.

Dodderidge & Haughton Justices, moved the Attorney Generall, for his consent herein, otherwise it cannot be amended, and without amendment, Judgement ought in this Case to be given for the King, and against the Patentee.

Afterwards, at another time, this matter was moved again---and---

Coke chief Justice, Moved the other Judges, to have a Rule entred in this Case, to this purpose; That the opinion of the Court was, that the Plea in Barre here is not good, neither in the manner, nor yet in the matter of it; and accordingly, the Rule was so entred, otherwise this matter hereafter, might be evidence against the King; for the preventing of which, this Rule was thus entred, by the Order and direction of the Court.

Slade Plaintiff, against *Tompson* Defendant.

Entred Hillar. 9 Jac. B. R. Rot. 530.

2 Cro. 374.
1 Ro. Rep. 198.
1 Ro. Abr. 421.
451.
Trespass and Ejectment.

IN an Action of Trespass and Ejectment for a Messuage in Surrey, called the Wallnut-Tree; upon Non culp. pleaded, the Jury found a special verdict, upon which

which speciall verdict, the case was briefly this, That Cuthbert Beston was seised in Fee of this Messuage, and held this of the King in capite, made his will, and by this devised the same, after the death of Alice his wife, the remainder in Fee or in Tail to &c. upon this condition to pay 4 l. yearly unto 4 poor Maidens, to provide so many Sermons yearly, and to give them 5 s. apiece, and to give so much annually unto the Prison in Southwark: The first Devisee dyed in the life time of the Wife, and never came to this; afterwards the Wife dyed, and the heir of the first Devisee being within age, and so during his minority in ward to the King; during which time, these payments were not made according to the condition, but at his full age; after his Livery sued, an entry made for supposed breach of the condition, by not performing of the several payments according to the condition, wherein the sole point moved and insisted upon for the Plaintiff, was this, touching the non-payment of these sums, which were to be paid out of the Issues and Profits; the same being in the Kings hands for the minority of the Ward; Whether the non-performance of these payments be a breach of the Condition, and so to give cause of Entry, or not, and whether the Heir shall be enforced to perform the condition, during this his minority, and being in Ward, and the Profits in the Kings hands, or not.

It was urged for the Plaintiff, that the Heir should be liable to the performance of this condition, notwithstanding his Minority, Wardship, and the Profits in the Kings hands, for that the condition is created here with the Estate; and that he who is to have the Estate, ought to perform this condition, which always runs with the Land and the Estate in it; and to prove that an Estate of an Infant shall be bound with a Condition, and he to perform the same, and to all conditions in fait, as appears by Stowels Case, in Plowdens Commentaries, f. 355. and Coke 8. pars, f. 44. in Whittinghams Case. *Stowels* Case, &c.

It was further urged, that in these three Cases an Infant shall be bound.

First, In Cases of necessity. 2. In cases of Compulsion. And, 3. In Case of Livery. 1. For his Dyet, and for his necessary Apparel. 2. Where he is to present to a Benefice; if he do it not within his prefixed time of six Moneths, he shall be bound by this his Laches; and so is Perkins, f. 4. plac. 15. Also an Infant shall be liable to a Condition to pay a sum in gross, by 31 Lib. Assisarum, placito 17. *Perkins* f. 4. &c. 31 Lib. Assis. plac. 17.

It was urged for the Defendant, that here was no breach of the Condition by these non-payments, during the time that this was in the Kings hands, by reason of the minority of the Ward, who shall not be prejudiced thereby, by his not paying these sums, during this time, which shall make no breach of the Condition; for if the Land be carryed away by operation of Law, the Condition also annexed unto it, shall pass therewith; and this is a good excuse, to say that he could not have the Profits, (therewith to satisfie the condition) during the time that the same was in the Kings hands.

Coke chief Justice. This is a very plain and clear Case, that here is no breach of the Condition: It is without any question, that during the life of the Wife, no payment was to be made; and the first here in remainder, dyed in the life-time of the Wife, and his Heir, in Ward to the King, is not now to pay this, the right that is to him, but the Profits belong to the King: And by this Condition, the same is as much as if he had said, That he and his Heirs shall pay this, as long as they enjoyed the Profits of the Land; and this is but a description of the person who ought to pay this.

21 E. 3. If Lands be given to the King, and to his Heirs, Kings of England, this is a description of the person to have the same (S.) So long as his Heirs shall be Kings of England: This is a very plain Case, that at the Common Law these payments are to be made, with the Profits of the Land.

20 H. 6. f. 23. If a Lease be made to one for years, reserving a Rent, and the Lessee is bound to pay this Rent: If by reason of a Statute upon this Land,

before acknowledged, or by another eviction for two or three years, the Profits are taken from him; during this time, he shall not pay the Rent, though he be bound by his Bond to pay it; so here in this Case, the Devisor did see and perceive this, which made him to mention the tenure in capite.

If a man devileth, that I. S. shall yearly pay out of the Profits of the Land, so much: If he pleads that he hath not paid this, this is not good, but that he had not paid it out of the Profits of the Land, and so he ought to put in certain the Condition, and that he had not paid it out of the Issues and Profits of the Land.

Here these payments could not be made, the Issues and Profits being in the Kings Hands, and so by reason hereof, no breach of the Condition, to give an Entry for the non-payment of these sums, during this time, and no cause of Entry by the Lessor of the Plaintiff for breach of this Condition, and so consequently Judgement ought to be given for the Defendant.

Croke Justice. The charge here is to be supplyed with the Issues of the Land, and this is not to be absolute, but sub modo, how? and the difference will be between this Case, and a sum in gross, which is certain.

If he had here said, That the remainder man should pay so much, (S.) 10 l. to such an Hospital, this he should have paid presently; otherwise where it is to be paid with the Profits of the Land; the not payment of these sums here, the Land being in the Kings hands, this shall make no breach of the Condition.

Dodderidge Justice. As to this payment, nothing is here left to satisfie this, but that onely which riseth out of the Land, (S.) The Issues and Profits of this; and if this be in the hands of one who is not subject to the Condition, it is then Impossible for him to pay the same: And this is not to be resembled unto any other Case so properly, as to the Case of Eviction.

Here the condition is to be suspended, because the party could not perform this, by course of Law, he cannot break this condition, as the Case is, this being to be performed with the Profits; it is therefore a plain Case here, that this non-payment is no breach of the Condition, the Profits being in the Kings hands.

Haughton Justice, agreed herein: This is a Condition, which hath also a Condition in it self, to doe and perform this so long as he hath the Profits.

The Case of Eviction proves this plainly, as where a Lease is made of two Acres, with a condition to pay a Rent, one of them evicted by an elgn Title, the condition by this is gone: So here in this Case, the Land being in the Kings hands, the non-payment of these sums, according to the condition during this time, is no breach of the condition.

Judgement for the Defendant, &c.

And so by the whole Court, nullo contradicente, here is no breach of the condition, and so no cause of Entry to avoid the Estate, thus devised in this conditional manner; and that Judgement ought therefore to be given for the Defendant, and accordingly the Rule of the Court was, Quod querens Nil capiat per billam.

Nota, In an Action upon the Case against baron & feme, for words spoken by the Wife.

Man. secundary, Clench, and the other Clerks of the Court, all said, that in this Case the Husband is not to be found culpable, because nothing is laid to his charge; the verdict here was, that they were not Guilty.

Curia, If a feme sole doe a Trespass, and then takes a Husband, the course in pleading is, that both of them, the Baron and feme, do say, that the Wife is not Guilty.

Coke chief Justice. In this principal Case for the words, it is as if they should say, That the Client and his Attorney are not Guilty; this is good there, and so here: As to the Husband, the verdict is void, good for the Wife alone, the Husband not Guilty.

The

The Rule of the Court was, that this verdict is good, as to the Wife, who did speak the words; but a void verdict as to the Husband, being onely named and joyned for conformity, and not otherwise.

Haver Plaintiff, against *Gibbons* Defendant.

IN a Writ of Error to reverse a Judgement given in the C. B. the Case appeared to be this; One brought his Bill by his Attorney in the C. B. in which he had Judgement; upon which Judgement a Writ of Error was brought, and the error assigned was, because he had found no Pledges. 1 Ro.R. 205.

Curia, This is a clear Error, and so is 12 Eliz. Dyer, fol. 288. placito 53. where for default of Pledges, the Judgement was reversed. 12 Eliz. Dyer, &c.

And so was there a Case, Termin. Mich. 11 Jac. B.R. Vaughan Plaintiff, against Delahay Defendant, in a Writ of Error to reverse a Judgement given in the C. B. in Debt; the Error assigned was, because no Pledges were entred upon the Original Writ in Debt, and for that by 12 Eliz. Dyer, and 9 E. 4. f. 27. every Plaintiff is to be by his Pledges; the reason of this, because he is to be amerced, if Judgement be given against him; and so for this cause it was there held per curiam, that for this omission of Pledges, the Judgement was erronious, and for this cause the same was reversed. Term. Mich. 11 Jac. B.R. &c.

Curia: In the principal Case here, Pledges may be entred when the party will, as appears by 18 E. 4. fol. 9. where it is held by all the Judges in B. R. That in any Bill or Writ, where Pledges are left out, that the party at any time, hanging this Plea, may finde Pledges, for that this is in the discretion of the Judges, and is but matter of form.

And with this agrees 2 H. 7. f. 1. where a Case was moved in B. R. one sues a Bill against another, in Custodia Marescalli, &c. after emparlance the Bill was viewed, and no Pledges found to pursue, Whether he might then, (being in another Term) put in Pledges or not; and Hussey being in Court, by advice he entred his Pledges: But he there took a difference between a Bill and a Writ: The Writ being, Si querens fecerit te securum, but so is not the Bill.

In this principal Case, another matter was moved, being this, That this being in a Declaration upon a Writ of Privilege, and no Privilege found: It was urged, that if he appear, this is good, and not to have an Attachment of Privilege to bring him in; if he appear gratis, this is good, without any Attachment; if a Capias be awarded to take one, for to make his appearance at such a time, and he appears, the Capias not returned.

Curia. This his appearance gratis, is good: But as to this last Error, Curia ulterius advisare vult.

Ball Plaintiff, against *Collis* Defendant.

IN a case of Prescription. Nota, by Coke chief Justice. If one prescribes to have the dying of all the Clothes in such a place, he ought here of necessity especially to aver, that he is sufficient for to dye them; as the custom that one hath in Torcester, to have a common Bakehouse, he ought to aver, that his Oven there is sufficient to serve them all, and this was Sir George Farmors Case against Brook, Mich. 32 & 33 Eliz. in B. R. A Presentation with an averment. Custom of *Torcester*, &c. 1 Ro. Rep. 216.

Quelsh

Quelsh & Uxor Plaintiffe, against *Carpenter* Defendant.

A Writ of Error. 1 Ro. Rep. 216.

IN a Writ of Error, to reverse a Judgement given in the C. B. against them, in an Action upon the Case for scandalous words spoken by the Wife of the Defendant, in the Action: upon Non culp. pleaded, a verdict was found for the Plaintiff, (S.) Quod ipsi sunt inde culpabiles: Judgement there given: A Writ of Error brought to reverse this Judgement; the Error assigned, because the Jury found, Quod ipsi sunt inde culpabiles, the Words being spoken by the Wife onely.

It was urged, that this was no Error, but the Judgement ought to be affirmed.

Mich. 32 & 33 Eliz. &c.

And so was it held in a Case which was, Mich. 32 & 33 Eliz. B. R. Rot. 53. Stanley Plaintiff, against Osbeston Defendant, in an Action upon the Case for words, brought against baron & feme; and the words laid to be spoken by the Wife; upon Non culp. pleaded, the Jury found, Quod ipsi sunt culpabiles, a Judgement given for the Plaintiffe.

Term. Trin. 37 Eliz. &c.

Upon this, a Writ of Error was brought in the Exchequer Chamber, Termin. Trin. 37 Eliz. and the same Error there assigned, as now in this Case, which Error was there over-ruled by all the Judges to be no Error, but that the Judgement was well given, and so the same was there affirmed: And upon this president shewed in Court, by Mr. Man, secundary.

Judgement affirmed, &c.

The opinion of the whole Court was clear, that this was no Error, but the Judgement was well given there for the Plaintiff, and so by the Rule of the Court, the Judgement was affirmed.

Nota, per Coke chief Justice. If one be delivered to the Sheriff, in Execution by the Kings Writ, he is by this presently in execution, and in his Custody, without his laying hands on him for to arrest him, and so is 7 H. 4. fol. 4. & fol. 30. and so hath always the constant practice been, as I have observed.

Nota, by Coke chief Justice. For a Rule observed in taking of Bail, upon a Writ of Error brought, if the Error assigned be matter in Law, then the use is to take Bail of the party: But if the Error be upon matter in fait, then the use is not to take Bail, before this matter in fait be tryed; and so is the difference.

Berry Plaintiffe, against *Perry* Defendant.

Entred Mich. 12 Jac. B. R. Rot. 386.

1 Ro. r. 223. 375. Cro. James 399. Mo. 849. 1 Ro. Abr. 44. 256. 7. Debt upon an Award.

IN an Action of Debt, for the non-performance of an Award, the Case appeared to be this, The Defendant was bound in a Bond of 100 l. to stand to the Arbitriment of four men, of all Actions, &c. Ita quod, the said Arbitriment be so made, and delivered in writing, under the Hands and Seals of these four, or of any three of them; three of these Arbitrators made the Award between the parties, and delivered the same under their Hands and Seals of these three: An Action of Debt brought

brought upon this Bond, for not performance of the Award made.

To this the Defendant pleads in Bar, that the Arbitrators made no Award, and so no breach.

The Plaintiff replyed, and shews the submission, as before; and also shews, that three of the Arbitrators did make an award, and did deliver the same under their Hands and Seals, the which the Defendant hath not performed, unde actio accrevit.

To this Replication, the Defendant demurred in Law.

So that the onely point insisted upon, was, Whether this award here so made by three of the Arbitrators, and delivered under their Hands and Seals, be an award well pursuing the submission, or not.

The Court, upon the first moving of this, was of Opinion, that this award is to be made by four, but the same may be given up by any three of them.

Coke chief Justice. Three of them may subscribe, but not make this award clearly; four are to make the award, or else the same is not good.

Dodderidge Justice. First, The Submission is to four, and referred to their power to Arbitrate, so as the same award of the said Arbitrators, be made by four, or by any three of them, given under their Hands and Seals.

The whole Court at this time, upon the first moving of this, seemed to be strongly of opinion, that this award, upon this submission, ought to be made by all four of the Arbitrators, but the same may be well signified by three of them, otherwise there should be an apparent repugnancy.

Coke. All the matter rests upon this part (made) we will see the Books, and be better advised.

Dodderidge. (made) ought to be referred to the four, and the signifying of this award, to these four, or to any three of them.

And so without saying any more at this time, Curia advisare vult.

Afterwards (S.) Termin. Mich. 13 Jac. B. R. this Case was moved again, and urged for the Plaintiff; that this award is good, and that by the words, four or three may make the award. Term. Mich. 13 Jac. B. R. &c.

Coke. Four are to make the award, ita quod, the said award; this is to be the said award, made by four according to the submission.

Haughton Justice. By any four or three of them to be made, indented, and delivered, under their Hands and Seals; whether this refers to four or three, ita quod, the said Arbitriment, &c. here it may be in such a Case well distributed to four or to three, but not so in this principal Case, where the reference is unto four, and this way the whole Court seemed to encline.

Coke. All the point and difficulty rests here upon this word (made:) This shall be by four, and to be delivered under the Hands and Seals of four or three.

Dodderidge. Four to make this award, and three to put their hands to it, and so by this sense all the words stand well together.

Coke. There is here a clear Repugnancy in these words.

Dodderidge. But this Repugnancy, with this Construction, shall be made good.

Coke. Yet there is a Repugnancy here: It is clear, that four ought to make the award, yet his meaning peradventure was, that three might make the award as well as four, but we are not now to judge upon his meaning, so as the same award be made by four, and put in writing by three: The one may be a Plow-man, or may have other business, so that he cannot stay the writing of it.

Where it is left generally to be done, the common people call the making of it, the writing of the same; so four may, and ought to make it, but three may write and subscribe it: The submission here was to four, ita quod, the said award, &c. this to be of the four; Natura non facit saltum, Nec ars facit saltum, ita quod, the said award and Judgement, and this to be by four.

George Croke for the Plaintiff, informed the Court of a direct President, adjudged contrary to this they seemed to hold, which was, Termin. Pasch. 8 Jac. B. R. Rot. Term. Pasch. 8 Jac. B. R. &c.

Rot. 64. between Girling and Sallows: In debt upon an award, the submission was to four, ita quod, the said Arbitrators, or any three or two of them, do make their award of the Premises in writing, under their Hands and Seals; three of them made the award, and this award adjudged to be well made: But a Writ of Error was brought, and the Judgement reversed, because it was not shewed that this award, so by them made, was under their Hands: And it was urged, that arbitrimentum, est arbitrium boni viri, and therefore the same is to have a favorable sense and construction to be made of it.

Coke. I will be advised of this Precedent, cited to be adjudged in point, and I will see and peruse the same, and so for this time it was adjourned over, with a Curia ultetius advisare vult.

Term. Pasch. 14 Jac. B. R. &c. Afterwards, (S.) Termin. Pasch. 14 Jac. B. R. this matter was moved again, and long argued. (S.)

By Sidnam for the Defendant, against the award:

And by Whitlock for the Plaintiff, that the award was well made, being by three of the Arbitrators, and the same well pursuing the submission: The Authority here given to the Arbitrators, est potestas alternativa, the same being to four or to three of them, and in the nature of a Commission, being potestas Delegata, 9 E. 4. fol. 43. b. touching Arbitrators; a good Case, shewing of what things they are to Arbitrate, and where it is said that an Arbitrator is a private Judge, made by the parties: And as touching Powers, they are of three sorts, (S.)

9 E. 4. f. 43. b.

Touching powers.

1. First, Ordinary powers created by the Law.
2. Delegate powers, by Commission: And,
3. Thirdly, Arbitrary powers, by the Parties.

4 Eliz. Dyer. 217. &c. 4 Eliz. Dyer, fol. 217.* It is there said, that to every award there are five things incident, (S.)

1. The matter of the Controversie.
2. The submission to the Arbitrators.
3. The Parties to the submission.
4. The Arbitrators themselves: And
5. The making of their award.

Or every award consists of two parts, (S.)

1. The matter of the award: And,
2. The manner or form of the award.

So as the said award: This hath reference to the matter, but not to the manner of the award: And an Arbitriment ought always to have a benign and a favorable construction, the same being according to its definition, Judicium boni viri, secundum æquum, & bonum, and therefore to be construed favorably.

And here it is, so as the same award by them, or by any three of them, be made and given up: This power of making is materiall: And this, by these words, is given to them four, or to any three of them; and that by the force of this (ita quod) which is conditionalis dictio, & coactiva, coactare precedentium, & denotare modum.

Coke chief Justice. If Repugnancies are here, as in the Cases of Interest, this is to be looked into, and to be weighed: I will look upon the Precedent cited.

Dodderidge Justice. Without all question, the meaning of the parties here was, that this award might be made by them four, to whom the submission was, or to any three of them: It is one thing to make an award, and another thing to make this in writing, and to deliver this up.

Haughton Justice. The president shewed expounds the authority.

The Court seemed now to be clear of opinion, that the meaning here was of the parties, that these four, or any three of them might make the award.

Coke. I do as yet somewhat doubt of this Case, because here is but an authority,

ty, and no interest, and no such repugnancies shall be material in cases of authorities, as in Cases of Interests, to make a thing void.

And so this Case was again adjourned, for the Court to be better advised herein.

Afterwards at another time this Case was moved again, and argued by all the four Judges.

1. Haughton Justice. Recited the Case as before.

In this Case Judgment ought to be given for the Plaintiff. The point here only is this, whether by this submission three have power to them given as well as four to make the award; this power they have, and this award thus made by three of the Arbitrators, is a good award. And to prove this, it resteth upon the construction of the Bond. The first part of the Condition is for the performance of the award of four if he had stayed there, and said no more, then they all four were to have made the award, but he proceeds further with an (Ita quod) the said award by them, or by any three of them be made, and if this ita quod shall give any construction to the premises, is the sole question now to be discussed. And as to this the ita quod here hath enlarged their Authority given unto them by the first words. And also this (ita quod) hath here explained three things. (S)

First, Who ought to be the Arbitrators.

Secondly, In what manner their arbitriment is to be made.

Thirdly, The time before which the award ought to be made.

And all this stands well together, and may well be made parcel of the first part of the condition, and may also well explain this, shewing thereby what should precede; And this is the nature of an (ita quod,) which may either restrain or enlarge the premises. And this sense doth well accord with the rules of the Law for that, ex precedentibus & consequentibus, optima fit constructio.

Here in this Case he is not bound to perform the arbitriment of four, but with an (Ita quod) that this be made by them four, or by any three of them, of the said Arbitrators, or any three of them; the same arbitriment of four, or any three of them; these are the words of the condition; and if this award be made by three, yet by these words it shall be the same arbitriment, and so this is a good explanation of the former words, and that this shall be so, may be proved by many Cases.

35 Assiar. placito 14. Lands are given to B. and to his heirs for ever, (if he have heirs of his body) and if he have none, this to revert again to the first donor, here the ita quod doth restrain the premises. So this particle (Si) sometimes doth express, sometimes it doth expound, abridge, and explain. 35 Assiar. placito 14.

5 H. 5. fol. 6. Land given to Baron & Feme, hæredibus eorum, & aliis hæredibus, of the Husband, Si dicti hæredis, of the Baron and Feme should die without Issue. This as in our Case, there dicti hæredis taken for heirs of the body; the same construction as here. So here in this Case these words make for the Plaintiff; here it is named the said arbitriment, notwithstanding it be made by three, and so this exposition makes all the words to stand well together, and to agree with the Rules of Law. 5 H. 5. fol. 6.

2 R. 3. fol. 18. By Hussey, Fairfax and Catesby Justices; in the Exchequer Chamber. If three, and another man submit themselves to the award of one, of all debts and demands between them, who hath power by this to make an award of all matters which the three have against the fourth, joyntly, or of every matter, which every of the three hath against the other; If he award that one of the three shall give something to the fourth person, and that the other two shall be quit, and where he finds that the fourth person owes to one of the three 20s. the which he awards to be paid unto him; and that he owes nothing to the other two, and doth therefore award that he shall be quit against them, this is a good award. And this is a good Case; if an award be made for any of the three, it is sufficient; for here this being in case of an abitriment, the which is by intendment of Law to make Peace, 2 R. 3. fol. 18.

and to put a perfect end to matters of Controversies in question; and therefore in maintenance of such awards, a reasonable construction is to be made of them, and so it was in the Case of 2 R. 3. fol. 18. And to make this more evident, it appears Coke 5 pars, fol. 103. in Haugates Case, that an abitriment is to be taken according to the true meaning of the parties, notwithstanding the words of this do enforce it otherwise; and so it shall be here in this Case, where the award made by three is a good award pursuing the submission, and so ought to have been performed by the Defendant; for not performance of which award, the Plaintiff here had just cause of Action; and so Judgment ought to be given for him.

Coke 5 pars, fol. 103. *Haughtons* Case.

2. Dodderidge Justice Agreed herein, that Judgment ought to be given for the Plaintiff. By the condition of the Bond, he is to stand to the award of four ita quod, the same award of the said Arbitrators, or any three of them be made and given in writing before such a day; these words at first do seem to have a shew of contradiction in them; and to carry this Exposition, so as the same to be made by four, and not to be made by three. But the difficulty is not great, if you will consider the context of these words, no speech being of an arbitriment to be made, until they come to these words, (S) by four or by three.

As touching arbitriments, these grounds are to be observed; If there be any contradiction in the words thereof, so that the one part cannot stand with the other; the first part shall stand, and the other be rejected. But if the latter be but an explanation of the former, there both parts shall stand. In 19 H. 6. fol. 37. It is there said, that Arbitrators are Judges; here they have only an Authority, and therefore the same ought to have a favourable exposition; boni est judicis, lites dirimere, Bracton, and this which is the cause of Justice, is not to be made the cause of injustice; So here in this Case, this which is the cause of peace is not to be made the cause of suit and contention.

19 H. fol. 37.

Arbitrimentum est boni viri arbitrium.

As to the words here, they are to have such an exposition which may lawfully stand with the act done by them, and with the words also. In Plowdens Commentaries in Throgmorton and Tracyes Case; The intent of the parties is to be taken, if there be no absurdity therein; so here in this Case.

Commentaries. *Throgmorton* and *Tracyes* Case.

As to the words here in this Case, (ita semper quod.)

First, Four are elected, the Obligation to stand to their award: afterwards there comes a modification, (S) (ita quod) the same award, (what award is this?) not of all four, but so as the same things compromitted unto them; The same award hath reference here to the things to them submitted, not to the persons to which the submission was, this comes in afterwards, where he speaks of that which is to be done; and this to be by four or three of them; and so the sense of these words are, (S) So as the same award of the things compromitted be made by four or by three of them. The same award of the said Arbitrators concerning the premises be made, (if it be demanded by whom) this to be;

The answer is, By them four, or by any three of them.

And so by such construction these words are plainly expounded. And if you will lay the parts of this together, it will then be manifest that by these words here, three have as good power to make this award as four have. And this (ita quod) doth modifie their power first to them given; and here by this he doth explain himself in what manner he will be bound; and this is evident by this construction. That the same award doth not include the persons, but the thing submitted. An award is called arbitrium boni Viri, and the same is not to be taken strictly, but largely in the point of submission, according to the intent of the parties submitting, and according to the power given unto them. And this appears to be so by 2 R. 3. fol. 18. before remembred, and by 19 H. 6. and 22 E. 4. fol. 25.

2 *R.* 3. fol. 18. 19 H. 6. 22 E. 4. fol. 25.

20 H.

20 H. 6. fol. 18. The submission was of a matter between him and another singularly, by this they may make an award for matters between him and another, which he hath in the right of his Wife, and so by this the same shall be taken largely, and this after the award made. The reason of this is, because an award is to make an end of differences and contentions, and to settle peace between the parties. And for this cause we ought to uphold such awards made, if by any means we can by the Rules of Law. 20 H. 6. fol. 18.

17 E. 4. fol. 3. Two submit themselves to the award of another, who doth award, that the one should deliver up the other, the Testament of his Testator; In an Action of Debt brought, the Defendant pleads, that he had delivered unto him literas testamentarias, and there adjudged, that by this he had well performed the award, for in effect all is one. 17 E. 4. fol. 3.

36 H. 6. An award is made for one to enfeoff J. S. who comes unto him, and requires him to enfeoff J. N. and him, to the use of him and his heirs; the which he doth accordingly, by this he hath performed the award, having pursued his intent, but not the words; and yet this a good performance. So that in Cases of awards, and the performance of them, the intent is to be observed, and so it is here in this Case, and no contradiction, so that this award here made by three is a good award, and the same ought to have been performed, which being not done, the Plaintiff had good cause of action, the Replication here is good, no cause of Demurrer, and so Judgment ought to be given for the Plaintiff. 36 H. 6.

Croke Justice. In this case Judgment is to be given for the Plaintiff, Animus hominis, est anima scripti. I will in this Case follow the intent, and see whether the same be against the words, or repugnant to them, or whether the words will bear a double construction, and then ex precedentibus & consequentibus optima expositio, we are not to make such an exposition, as that one part should overthrow the other; I will not in this Case distinguish between authorities and interests, the one to survive, the other not. Nimia subtilitas, & Nimia curiositas in jure reprobatur, & qui hæret in litera hæret in cortice, Cases may be instanced to prove that Grants are to be taken according to the intent of the parties. Here the award is to be made by them, or by any three of them. In this and in all other such Cases, qui bene interrogat, bene docet. Ita quod, the same award 8 Eliz. Dyer, this is to be referred ad rem, the same award of the same things be made by the said Arbitrators, or by any three of them. And so take the words in such a manner here, and there is no contradiction at all. Also such awards are always to be taken in mitiori sensu, ut res magis valeat quam pereat. In this Case here is a good award made; and being not performed, the Plaintiff had good cause of Action; and so Judgment ought here to be given for the Plaintiff. 8 Eliz. Dyer.

Coke Chief Justice. The words here are, so as the same award, &c. The question is, whether this be joynt or several, and whether there be any repugnancy in these words or not? prima facie, there seems to be here some kind of contrariety in these words; but yet upon a more strict and perfect view there is none, and in this it is like unto an optick Glass.

This arbitrement here is good, well made, and pursuing the submission. In this Case I agree in omnibus with the rest that have argued, and that for these reasons.

1. Because it is the office of every interpreter in all Cases, as well divine as humane; to find the true intent and meaning of the parties, if by any way this may be, and when this is once found out, then he ought so to marshal the business, that he swerve not from the rules of Law. And here the intent is very apparent, that four or three were to make this award; so that his intent is plain and perspicuous. The Bishop of Norwiches Case here was this, he made a Lease of all the demeasnes of his Mannor to one Derrick, in 25 E. 8. and further of Norhelmes, granted unto him the keeping of the Park; what is the office of a Judge here, to gather the in- Reasons. The Bishop of *Norwiches* Case.

tent of the party. It was adjudged here in this Case, that the Park, the soil thereof did not pass, but the custody of the Park only. There the first words do carry all his demeasnes, and the soil of the Park also. But the subsequent words do limit in what manner he intended this to be, and do also qualifie his Grant. So here in this Case the submission is to four Arbitrators, (Ita quod) this explains his meaning. To this purpose was the Case.

Hol. 34 Eliz. C.B. Rot. 120. &c. Hil. 34 Eliz. in the C. B. Rot. 120. Between Carter and Ringstead, the Case of Odiham remembred, 8 pars, fol. 118. in Doctor Bonhams Case, construction there of all the words. 1. There were general words which passed all his lands, but the words subsequent did well explain the former; and so it shall be here in this Case.

2. A second reason grounded upon the difference between an authority and an interest. In case of an interest it can hardly be severed or divided.

Bracton. Bracton. Nihil tam conveniens, est naturali æquitati, quam voluntatem domini, volentis rem suam in alium transferre, ratum habere. Here we are in Case of an authority. To this purpose there was a Case, Trinit. 31 H. 8. Rot. 420. Benlose, Sir Thomas Longford was seised of the Manor of Langford, did grant unto one Fulgeam, and to another, the next Advowson, & Habendum, eis, & eorum uni, conjunctim & divisim. Resolved, that this Grant was not good, because an interest cannot be divided; and with this agrees 14 Eliz. Dyer fol. 304. placito 54.

Tpin. 31 H.8. Rot. 420. &c.

14 Eliz. Dyer. fol. 304. placito 54.

3. A third Reason, because we are here in case of an authority, being in Case of arbitriment, in which these things are to be observed. (S)

2 R. 3. fol. 81. 22 E. 4. fol. 25. Harringtons Case.

1. First, The parties submitting.
2. Secondly, The thing submitted, — and
3. Thirdly, The persons to whom. And in all these a favourable construction is to be had.

1. The persons submitting, as 2 R. 3. fol. 18. 22 E. 4. fol. 25. Harrington. Case. If three on the one side submit themselves to the award of, &c. If there be a joynt Interest, this is to be respected, and also the interest of the persons.

Mich. 29 & 30 Eliz. Beckwiths Case, & 6 E. 2. Brooke title Covenant, placito 49. As they are not to sever an interest, so not to sever a Covenant as there held, the persons to attend upon the interest on the Covenantees side, not to be severed; And so in Cases of Arbitriments.

39 H. 6. f. 9. Coke 8, &c. 2. In the things submitted. By the Rules of Law, if they be joynt, (S) of all Actions reals and personals, an award made of one only is good by the Law, 39 H. 8. fol. 9. is against this. But it is so resolved, 8 pars, fol. 97, 98. in Bulpoles Case. If a submission be made of three several matters, an award made of any one of them is good, and so is 8 Eliz. Dier, fol. 242. The difference is, If they submit three several matters, so as of all of them, an award be made, there the award is to be made of all, and if made but of one, the same is not good (but if these words be wanting (S) so as of all, &c.) there the Law will make things joynt, to be several, and there if the award be made of any one of them; this shall be good, and to this purpose is 19 H. 6. fol. 6. 7 H. 6. fol. 41. 4 Eliz. Dyer, fol. 216. But in this Case here it is not so. The reason why arbitriments ought to have so great favour is this, when after a submission between me and another, and I have made him satisfaction according to the award, if after this so done, he will trouble me, and urge me to plead to him, for this vexation, there is a special Writ in the Register, fol. 111. called Breve de arbitratione facta. In which damages are to be recovered for the vexation, and it were good, that some one would bring this Writ.

19 H. 6. fol. 6, 7, &c.

The reason why awards are to be favoured,

Quia expedit Reipublicæ, ut sit finis litium.

In

In 5 E. 3. the day of an award is called the day of Love, and Herl there saith, Ecce quam bonum, & quam jucundum, est habitare fratres in unum; and he there saith, That he remembred he was at one of those days.

Here in this Case all the parts of the Deed do take effect at one and the same time by the delivery; so as the same award by them, or any three of them be made.

All these words are to take effect together.

This award here is to be made by four or by three, nothing is here to be rejected: If these words, (S.) (the same) had been omitted, no question had there then been in this Case: But this (monosyllable) (same) I will not reject, but expound it (same) this to be of the matter submitted to them, (S.) of the premises: Be made by them or by any three of them.

Obj. It hath been objected, for what cause ought this to be so, this award being to be made by the said Arbitrators.

Resp. In answer to this, (same) is not here to be taken, (the same) which, idem numero, but for idem substantia, and this is proved by 45 E. 3. f. 22. 46 E. 3. f. 32, 33, 34. 30 Assisar. placito 12. and Littleton, tit. Rents, f. 48. placito 222. If one hath a Rent-charge, and purchaseth parcel of the Land charged, by which all the Rent is extinct: If the other grants unto him, that he and his Heirs shall distrain, propter redditum eundem, adjudged that this shall be the like Rent. (S.) (redditum similem) and with this agrees 8 E. 4. f. 21. (the same) taken for the same in substance, & viscerina expositio, quæ corrodit vipera textus; so as it alters the construction of Law. Here in this Case the words which before were joynt, by this (ita quod) are now made several. 45 E. 3. f. 22. &c.

As to the Case which hath been cited between Girling and Swallows; this comes not unto our Case, there the same hath reference only to the persons. *Girling* and *Swallows* case.

As to the making of Arbitriments, this hath always been my rule, the one to make a release presently to the other, and the other to make a Covenant, or a Bill obligatory for the payment of the money, to be paid by him by the award of the Arbitrators.

As to the pleading here. 1. The award is, That John Perry was to pay 50 l. if he have nothing awarded to be done to him, the award then is not good. Also two bound to another 30 Maij to stand to the award of—of all Differences, Suits, and Actions then depending; they may be depending 30 Maij, but not in April, and an Arbitriment shall never be aided by an Averment, as appears by 22 H. 6. fol. 39. and 16 E. 4. fol. 8, & 9. a good Case, but ill reported. 22 H. 6. f. 39. &c.

Also the pleading of the Award here is, That all Actions and causes of Actions shall cease; this is good, but it had been better to have said, That he shall go quit touching the Actions.

Obj. It hath been objected, That he ought to have alledged a breach of the Award, or no cause of Action; the award was to pay the money at or before such a day, the other saith that he did not pay it super &c.

Resp. Yet this is good, for if he did not pay it before the day, he did not pay it super diem: So that the award here is good, and the pleading is also good, and so Judgment ought to be given for the Plaintiff: And accordingly the Rule of the Court was, Quod judicium intretur pro querent. Judgment given for the Plaintiff.

Perry Plaintiff against *Berry* Defendant.

IN a Writ of Error by him brought in the Exchequer-Chamber, before the Judges of the C. B. and the Barons of the Exchequer, to reverse the former Judgment: The Errors upon which they relied were these, (S.) A Writ of Error in the Exchequer Chamber.

1. One

1. One upon the assignment of the breach of the award, the payment being awarded to be made, ante vel super, such a day; for breach, it is said, that he did not pay this super diem, and doth not say that it was not paid ante diem: This Error was over-ruled by the Judges, for if it were paid ante diem, it was not then unpaid super diem.

2. A second Error, One was bound, this being submitted, the Arbitrators have made no award of this; the award being, that the said Obligation shall remain in full force unto the Plaintiff, and as it was objected, this is as no award at all: This Error was also over-ruled by the Judges, that the award was good, and that they could not have made a better award of this, to have this to stand and be in force.

Judgment affirmed, &c.

And so by all the Judges, Termino Hillar. 14 Jac. in the Exchequer Chamber, the Rule was, Quod affirmetur Judicium pro querent. in the first Action.

Copper Plaintiff, against *Dickenson* Defendant.

Action on the Case for promise. 1 Ro. r. 215.

IN an Action upon the Case grounded upon a promise, the Case appeared to be this, The Plaintiff had goods bailed unto him for a pawn or pledge in the presence of the Defendant, being a third person; he said, That if the other would not pay him his money, he would then sell the pawn to raise his money; Upon this the Defendant being present, said unto him, Keep the Goods until such a time by you, without sale of them, and if he do not then pay you, I will then pay you the money and take the Goods: Upon this he kept the goods by him without sale; the Defendant not paying the money according to his promise, unde actio.

Coke Chief Justice. This is a good conditional bargain and sale of the Goods.

Haughton Justice agreed with him herein.

Coke. If the Defendant had paid the Money, and the other not delivered the goods, he might well have had for them an Action of Detinue.

Dodderidge Justice. If one have Wares purposing to sell them, another desiring to buy them, saith unto him, Do not sell them away, but tarry till such a day, and I will then pay you for them; this is a good promise, and a good consideration, for by this he is hindered in the interim from the sale of them.

Judgment given for the Plaintiff.

The Court were all clear of opinion, That in this Case here was a good consideration to raise a promise; and so by the Rule of the Court, Judgment was given for the Plaintiff.

Nota, 5 Stat. of 8 H.6. &c.

Nota. That an Exception was taken to an Indictment upon the Statute of 8 H. 6. cap. 9. of forcible Entry, for that it is therein said, quod adtunc & adhuc fuit firmarius; And if it be so that he was adhuc, &c. then there was no putting out, and so the Indictment not good.

The whole Court clear of opinion, That the Indictment was good, this Exception notwithstanding, for that he is firmarius still, though he be ousted, and shall pay his Rent: But if he had been adtunc, & adhuc existens liberum tenementum, &c. this had not been good, but repugnant in it self; but there is no repugnancy by saying here adhuc firmarius.

Another Exception moved, that they entred upon super possessionem intraverunt, not shewing that they did eject him.

Curia. This shall be so intended, so the exceptions were over-ruled, and the Indictment good, per Curiam.

The

The KING and *Arden.*

NOta. In the Case of Robert Arden, his Council moved the Court for to have a Copy of the Attainder of Edward Arden his Ancestor, intending to bring a Writ of Error to reverse the same.

Coke Chief Justice. By 22 E. 3. and by all the Books, if one be attainted of Treason, no Writ of Error shall be brought of this, without a Petition before made unto the King, to give his allowance unto this. 2. If one attainted of Treason, and executed for the same, as the Ancestor of Arden here was, no Writ of Error is to be brought of this at all, for the inconvenience that may happen, you cannot have a Copy of the Attainder: If you can obtain leave of the King to prosecute this in this manner, (by a Master of Requests) yet I will not grant this unto you, before I have spoken with the King: For that this is a dangerous thing, and if this course should be allowed of, by this way all attainders might be searched into by Writs of Error, which is not to be suffered; and so by the whole Court this motion was denied.

Nota. An Exception taken to an Indictment upon the Statute of 8 H. 6. cap. 9. of forcible Entry, because it is not therein shewed, in whom the Freehold was. *Nota*, upon the Statute of 8 H. 6. cap. 9.

Coke Chief Justice. Clearly this ought to be shewed, and to say dissiesivit & intraverunt, &c. the Statute saith expressly, Disseise, and therefore Tenant by Elegit, or by Statute Merchant, cannot endite one upon the Statute of 8 H. 6. but he ought to shew that he did him expulse and disseise the Reversioner.

Curia. But this may be upon the Statute of 5 R. 2. cap. 7. He ought to pursue the words of the Statute, Ubi ingressus non datur per Legem, ibi non, &c. Stat. of 5 R. 2. cap. 7.

Coke. This is not good upon the Statute of 5 R. 2. manu forti & illicite, are not æquipollens, he ought precisely to pursue the words of the Statute: So was it in one Slanys Case, an Indictment upon the Statute of Usury, of 37 H. 8. cap. 9. Touching a corrupt Bargain, there it was said, that he did lend money, and did take more then after the rate of, &c. but did not say it to be a corrupt Bargain; this was not good: So an Indictment for cutting of a Purse, if he doth not say that this was done, clam & secrete, the same not good; he ought to pursue the words of the Statute: Also the conclusion here is not contra formam Statuti. Stat. of 27 H. 8. cap. 9.

Curia. Clearly this Indictment is not good, and for these Exceptions the Indictment was quashed per Curiam. Indictment quashed, *&c.*

The Corporation of *Colchester* against, *&c.*

NOta. By Coke Chief Justice, and the whole Court in this Case of Colchester concerning their Corporation: That if there be a popular election of the Major and Aldermen in Corporation-Towns, and this happens to breed confusion amongst them; this may be altered by their Agreement, and by the common consent of all, to have their elections made by a fewer number, but not otherwise: But if by their Charter they are to be elected by them all, then this is not to be altered, but by and with the general assent of the whole Town, and so by this means to take away confusion. *Nota*, Touching Corporations. 1 Ro. r. 335. 2 Ro. Abr. 456.

Baker

Baker Plaintiff against——Defendant.

Action upon the Case for words. 1 Ro. Rep. 227. 1 Ro. Abr. 80.

IN an Action upon the Case for scandalous words, upon Non culp. pleaded, a verdict was given for the Plaintiff: It was moved in Arrest of Judgment, that the Declaration was not good, the same being, That such a one named Carolus being of good name and fame: The Defendant dixit de præfato Carolo; where is this Baker, Innuendo, the said Carolus Baker: I, he hath taken a false Oath, and I could make him look through the Pillory.

It was urged, that this Declaration is not good, because there was no Baker spoken of before, and the Innuendo will not make this good; and to this purpose the Case between Ieames and Rutlech was cited, Coke 4 pars, fol. 17. touching the force of an Innuendo.

Coke 4 pars, f. 17. b. &c.

Coke Chief Justice. The Declaration here is good and sufficient: If one shall say of a Counsellor, where is this Counsellor, Innuendo such a one, this is good.

Dodderidge Justice. If one shall say, your Father-in-law is forsworn, Innuendo J. S. your Father-in-law, and so laid in the Declaration, this is good.

Judgment given for the Plaintiff.

The whole Court clear of opinion, That the Declaration here was good, and accordingly the Rule of the Court was, Quod judicium intretur pro querent.

Hornigold Plaintiff against *Bryan* Defendant.

Debt by an Executor. 1 Ro. Rep. 226. 2 R. 2. &c.

IN an Action of Debt, brought by the Plaintiff as Executor, he being Executor ratione testamenti, from this Will; the Defendant by way of Plea appeals, Whether he may have this plea for to appeal, or not, after which there remains now no Will proved, for that this appeal doth suspend the proof of the Will; yet as it was urged, that he still remains an Executor to be sued, but not to sue, 2 R. 2. Fitz. Quare Impedit, placito 143. If a Judgment of Deprivation be given in Court Christian against a person for his Benefice; if presently upon this Judgment he makes his appeal, the Church is not void, but he remains Parson during all the time of this appeal; for if by this he doth reverse the Judgment, he shall need no new institution and induction: As if a Judgment be given of a Divorce in Court Christian; and this is afterwards reversed by an appeal, there shall need no new Marriage.

Bracton.

Dodderidge Justice. It appears by 39 E. 3. and Bracton, that if the matter to to be tried be fil loyal occuple, ou nemy: The Bishop certifies, &c. loyalment accouple: No appeal lieth of this, and so in Case of an Excommunication, no appeal to be allowed.

Coke Chief Justice, 39 E. 3. hath the same Case: And if an appeal be from a Sentence of Divorce, they are now by this Baron and Feme again; so if a Parson be deprived, and appeals, he is by this Parson again, and may have an Action of Trespass: And as touching this Plea here, the same is but a shifting Plea; he ought here to have demanded Oyer of the Testament, and not to have appealed from this.

Dodderidge. Proof allowed of there, is by two ways, (S.) 1. By insinuation; & 2. In communi forma, by shewing of literas testamentarias.

Coke. By 38 H. 6. You may demand Oyer, and have it, but you cannot say that the Will is not proved, neither can you appeal from this.

Dodderidge

Dodderidge. The reason why an Executor is to be sued, but not to sue before Probate is, because that before he doth sue, he ought to publish unto all by the Probate that he is the Executor.

Coke. The reason why an Executor shall be sued before Probate, because that otherwise very great mischief might happen, for that a bad Executor would never then prove the Will.

Haughton Justice. Notwithstanding this appeal, all things before lawfully executed shall be and remain in full force; so that here was once a full Executor by Probate, and so he remains. If one brings an Action of Debt as Executor, and shews forth literas testamentarias, hic in Curia prolatus, these are not shewed to the party, but to the Court, and this he cannot Traverse.

The Court at last were all clear of opinion, That the Defendant could not have this Plea of appeal in this Case, this being in effect as much as to say, that the Will was not proved, and so for the mischief and inconvenience which may hence ensue, he shall not have this plea: For he may Travers the Probate, if he shew it not in Court, or he may demand Oyer of the Testament.

And so the Court were all clear of opinion, That this Plea of appeal, where he shews forth literas testamentarias, is not good, nor to be allowed of to him, this being only (as before the Court observed) but a shifting Plea, and so the same was disallowed of by the whole Court; and therefore the Rule of the Court was, that the Defendant should put in a better Plea, or that Judgment to be entred against him upon a Nihil dicit.

Coke & Dodderidge. Clearly by the Appeal the Probate is disallowed, and so remains as not proved.

But by Coke & Curia, If this Plea of appeal should be here allowed of, this would be a great mischief to all Executors, for then this plea might be made in all Cases against Executors bringing of Actions.

As touching this matter, vide Coke 6 pars, fol. 18, & 19. in Packmans Case, where the difference is put between a Citation, which is to countermand, or to revoke former Letters of Administration, and an Appeal, which is always to reverse a former Sentence; for the Appeal doth suspend the former Sentence, but not the Citation.

And as touching this learning of Appeals, there was a famous Case in the Court of C. B. about 5 or 6 Jac. a Worcestershire Cause, between Lechmere Plaintiff against Car Defendant, in an Action of Trespass, and upon Non culp. pleaded, a special Verdict was found, upon which special Verdict, the Case was this, That Bonner was made Bishop of London in the time of King H. 8. and so he continued until 2 E. 6. at or about which time a Commission issued forth to the then Lord Chancellor and others, to convent Bishop Bonner before them, and to examine him; and if they found him to be contumacious, and would not answer them, the Commissioners were impowered then to Imprison him, or to deprive him: The Commissioners upon this did first Imprison him, and afterwards proceeded further against him to deprivation: Bonner from this appealeth (and his appeal not heard:) Nicholas Ridley is made Bishop of London, who makes a Lease of the Park and Manor of Bushley, under which Lease the Defendant claimed. *Lechmere against Car, &c.*

Afterwards (S.) primo Mariæ Ridley is declared to be a Usurper, and Bonner by a Sentence definitive is restored again to the Bishoprick of London, and makes a Lease of the premises demised unto the Plaintiff.

Upon which special Verdict, the points stirred were these.

1. Whether the Deprivation of Bonner was lawful, or not: The authority by the Commission being in the disjunctive, (S.) To imprison or to deprive him; and (as it was urged) they first imprisoning of him had thereby executed their authority, and so then the deprivation void.

2. Secondly, Admitting the privation void, then Bonner still continued Bishop of London: And then Ridley was never Bishop; for that there could not be two Bishops of London, Simul & semel; and so the lease by him made to the Defendant was a void lease.

3. Thirdly, Admitting the Deprivation good. Then quid operatur, by the appeal, Whether it did not suspend the sentence of deprivation: and if so, then again Ridley was no lawful Bishop, and so the lease under which the Defendant claimed was void.

This Case was learnedly argued by Common Lawyers, and also by Civilians, and the Judges inclined to be of opinion for the Plaintiff. But the Defendant perceiving this, preferred his Bill in Chancery, and there obtained a Decree against Lechmere.

Termin. Mich. 13 Jac. Banco Regis.

Lowes Plaintiff against *J. S.* Defendant.

Entred Trin. 13 Jac. B. R. Rot. 114. & 130.

Action for words. 1 Ro. r. 255. 2 Cr. 399. 1 Ro. Abr. 44, 45.

In an Action upon the Case for slanderous words, upon Non culp. pleaded, a Verdict was given for the Plaintiff. It was moved in Arrest of Judgment, that the words were not actionable, which were these, (Mr. Lowes is a Witch and I will prove it, for I have seen him, and his ympes and evil spirits appear unto me in my Chamber, and put me in fear of my life. And he said, come, they will never be at quiet till we have killed him. And he did bewitch a Child of mine. That these words are not actionable, because it is not alledged that he did any hurt, and such words shall be taken in mitiore sensu, as it is Coke 4 pars, fol. 20. in Barhams Case; and without laying, that he did hurt, he is not to be punished by the Statute of 1 Jac. cap. 12.

Co. 4 pars, fol. 20. in *Barhams* case. Stat. of 1 Jac. cap. 12.

Coke Chief Justice. To have wicked Spirits, is a plain demonstration that they are Witches. If one saith of another, that he hath conference with wicked Spirits; these words will bear an Action, the speaking of these words here is a plain slander, if the Devil comes to them, or they go to the Devil, all is one, if they consult to do harm, this is a slander. But for one to say, that such a one is a Witch in anger; these words are not actionable.

The whole Court agreed with him herein. And so the Rule of the Court was, Quod Judicium intretur pro querente.

Judgment *per Curiam pro querente.* Judgment reversed.

Nota, That afterwards a Writ of Error upon this Judgment was brought in the Exchequer-Chamber, and there held by the Judges, that these words were not actionable; and so the former Judgment for this cause was there reversed.

Sneade Plaintiff against *Badley* Defendant.

Entred Trin. 13 Jac. B. R. Rot. 861.

Action upon the Case for words, &c. 2 Cr. 397. 1 Ro. r. 244.

In an Action upon the Case for words spoken by the Defendant, thereby Slandering of the Plaintiffs title to certain Lands, upon Non culp. pleaded, a verdict was found for the Plaintiff, and damages given.

It

It was moved in arrest of Judgment, that as the words are laid in this Declaration they are not actionable.

In the Declaration it is laid in this manner, that the Plaintiff was seized in Fee-simple by a good title of the Mannor of Colenorton, that he had a purpose upon a Marriage to settle this on his Son, and also to make certain Leases.

That the Defendant did speak and utter these false and malicious words (S) Mr. Suede hath no more right or title to the Farm or Mannor of Colenorton, or to any part or parcel thereof then a meer stranger hath, he shewing that he hath this by title of discent from his Brother. And that by reason of these words thus spoken, minus sufficiens fuit, according to his purpose to settle this or any part thereof upon his Son for his preferment, or to make any Leases, sed inhabilis existit, unde dicit quod deterioratus ad damnum de, &c. That these words, as the Declaration is, are not actionable, because he here shews only a purpose he had to do so, but not any Contract agreed upon. Like unto the Case between Sell against Facy, Mich. 12. Jac. B. R. an Action upon the Case for words, thereby hindring him in his Marriage, and this laid with a Conatus fuit, to marry such a one, and resolved not good, without shewing that there was a speech of marriage, and there this principal Case was put by Coke Chief Justice, that he ought to shew there was a speech for the sale of his Land, and that the same brake off by reason of the words.

Sell and *Facy* Mich. 12 Jac. B. R.

Haughton Justice. The Action here well lieth without any such special allegation; for if one hath a good title, and another will slander his title, in such a manner this will keep and dissuade all men from buying, or from dealing with him for this; and therefore though he doth not lay in facto, that he was about to sell this; yet these words are actionable, without any present intent shewed to sell this. For these words do hinder the sale to be made afterwards by him.

But here the Declaration goes further, it being therein expressed, that by reason of these words he could not conbey and settle this on his Son, and that so by reason of these words thus spoken, multipliciter damnificatus fuit. For that none would take leases of him.

Dodderidge Justice. To maintain an Action upon the Case for words; these two things are requisite (S) damnum & injuria. This is an injury offered to him, to say that he hath no title. The damage which is laid, because he was in speech, and had a purpose to conbey and settle part of this on his Son for his preferment, this is no damage, for notwithstanding these words, he may well settle this on his Son if he will; so that here is injuria sine damno.

Croke Justice. There will be a difference, where one doth slander and disable the person of another, as where one being an heir, the other saith, that he is not heir, but a bastard, an Action upon the Case well lieth for this; as it is resolved in Ann Davies Case, Coke 4 pars, fol. 17. in Banisters Case there cited to be Termin. Trinity, 25 Eliz. B. R. here in this Case the Slander is to the title of the Land; and this is no slander without damage; and this cannot be without laying that he was in contract and speech for the sale of this land, and that by reason of these words he could not sell the same, neither is it laid here, that he was in speech to make Leases, nor that he had contracted for them for a certain sum of money to be by him received for the same; and so for these defects, these words as they are laid in this Declaration are not actionable.

Nota le diff. *Coke* 4 pars, fol. 17. in *Ann Davyes* Case, *Banisters* case there.

Dodderidge Agreed with him herein; that these words are laid to bar in this Declaration.

Haughton. The Case put in Anne Davyes Case, is for calling of one Adulterer. Of themselves these words not actionable, but with the circumstances ther added unto them they shall be actionable; as if a speech of Marriage was laid, and a loss of the same by reason of the words; so here is a slander of his Title.

Croke & Dodderidge. These words here as they are laid are not actionable.

And so the Rule of the Court was (absente Coke) that proceedings to stay till moved again by the other side.

Afterwards on another day this matter was moved again, and urged for the Plaintiff, that the Declaration was good, and the words actionable; and a Precedent cited, Coke liber Entrees, fol. 35. entred Hillar. 3 Jac. B. R. Rot. 519. Sir Thomas Gresham Plaintiff against Gunsley Defendant; by which Precedent this Declaration was drawn, and no particular Cause there laid; here it is laid that he did slander his title.

Coke Chief Justice. For to call one a Thief, or a Millein regardant, &c. This is good cause of an Action upon the Case; without any averrment here in this Case, the Plaintiff being seised of a Mannor: another saith unto him, you have no right unto this. I do somewhat doubt of these words, whether actionable. I have never seen an Action upon the Case brought for slandering of the title of any Land, if no certain detriment be alledged to come unto him by the speaking of the words; here it is set forth in the Declaration in this manner (S) habens propositum, this is not good, being too barely alledged. This difference is to be observed, that an Action upon the Case for words, which do tend to the slandering of the person of one, may be without any averment; but not so where the words are for slandering of the title, here it is said, habens propositum & intentionem, this is not good; but if he had said, habens colloquium & propositum, this had been good cause of Action; we ought not to give too much way to Actions upon the Case for scandalous words, unless that the slander be apparent. And so for this time this Cause rested upon a Curia ulterius advisare vult, and was adiourned.

Term. Pasch. 14 Jac. B. R. &c.

Afterwards (S) Termin. Pasch. 14 Jac. B. R. this Case was moved again.

Coke Chief Justice. If one should say, that I have no title to my Mannor of Stoake. If these words do not hinder me in the sale of it, or of making Leases thereof. I shall not have an Action for this, and this is to be certainly expressed in the Declaration, and also the same is to be proved upon the evidence.

28 H. 6. fol. 7.

In 28 H. 6. fol. 7. Sciens canem consuetum ad mordendum oves; this sciens is not traversable, but the same is to be proved; if he hang the Dogge at the first time no Action lieth, otherwise if he suffer him still to use this. A trial was had before me in an Action upon the Case for words, which were, the Plaintiff being in speech of Marriage, the Defendant did say of him, that he had a Bastard, and that by reason of these words the Marriage broke off; and so being damnified by this, he brought his Action, and it was proved on the other part that the Marriage was broken off before the words spoken, and by reason of this the Verdict was found against the Plaintiff. Here it ought to be shewed certainly that he was damnified by reason of these words thus spoken; he is to shew the speech and communication here in this Case, it is only said, habens propositum & intentionem, to conbey unto his Son this his allegation in this manner is not material, there being no certainty in this; this is like unto the Case here before adiudged of Conatus fuit, to marry such a one, this not good, resting only in intention and nothing in action, he may here conbey unto his Son if he will, notwithstanding this which hath been said, and his Son would not have refused this.

Dodderidge Justice Agreed herein, but a difference there may be between a stranger and a Son. The other Judges all agreed herein against the Plaintiff. And so the Rule of the Court was, Quod querens Nil capiat per billam.

Judgment for the Defendant.

Phelps

Phelps Plaintiff against *Winchcomb* Defendant.

Entred Termin. Hillar. 9 Jac. B. R. Rot. 259.

IN an Action of false Imprisonment brought by the Plaintiff against the Defendant, being a Deputy-Constable, for Arresting and Imprisoning of him: wherein the question was, An Action of false Imprisonment.

1. Whether a Constable may make a Deputy for to Arrest one, upon a Writ to him directed by a Justice of Peace, (the Constable himself being sick.) 1 R. r. 274. Mo. 845. 847. 1 Ro. Abr. 591.

2. And then a second question was, Whether such a Deputy-Constable, upon an Action brought against him, and found for him, be such a person as may plead, and by pleading may have the benefit of the Statute of 7 Jac. cap. 5. to have double Costs, or not. Stat. of 7 Jac. cap. 5. Costs.

It was urged for the Plaintiff, that he being a Deputy, is no such person as may take benefit by this Statute.

And it was also urged, that a Constable cannot make a Deputy, without special words for the same.

And for this, 10 E. 4. fol. 18. was cited: A Constable ought to be idonea persona & habilis to perform his office, and by his Oath he is to execute such things as do belong unto him by reason of his Office, à fortiore; here he having this special Warrant to him directed, ought to execute the same himself.

By 14 H. 4. fol. 34. and 31 lib. Assisar. If a Writ be directed to the Coroners, there being three, they all ought to execute this Warrant, for the same is to be executed according to the direction. 14 H. 4. f. 34. &c.

Coke Chief Justice. As to this, if in Judicial matters there any two of them may do this; but if it be in matters Ministerial, there all are to do it, and this is the difference.

It was then urged, that here he could not make a Deputy, this Warrant being specially directed to the Constable himself by a Justice of Peace, & 7 E. 4. f. 14. cited of an excommengement, certified under the Seal of the Commissary of the Bishop: That the Justice of Peace may direct his Warrant to the Tithing-man, or to any other, and no inconvenience may thereby ensue.

And as to the Statute of 7 Jac. cap. 5. It was urged, that the Deputy of a Constable is not a person within the intent and meaning of this Statute. Stat. of 7 Jac. cap. 5.

Coke. In divers places the Custom is, that they do use in such Cases to make a Deputy, as in London; the Writ is, Vicecomiti, he makes his Deputy the Under-Sheriff.

At the first, an Earl had the Jurisdiction of the County, and their Commission was, (S.) Commissimus vobis, and therefore he is called Vicecomes, Commissimus vobis, custodiam comitatus, ad voluntatem nostram, and the Sheriff comes in his place, in loco vicecomitis; and all Sheriffs have their Commissions in this manner, ad voluntatem nostram: If this be so, and that in his Patent no mention is made of any Deputy by him to be made; what is the reason then that he may exercise this his place by Deputy.

It was then answered, that what the Under-Sheriff doth, he doth the same in the name of the High Sheriff.

Coke.

Coke. And so it shall be here in this Case, and this doth well agree with all the Books remembred, and the Custom will aid this also.

Croke Justice. Sub vicecomes is a person of whom our Law takes notice, and so the Custom may be for sub constabularius; all this is so used in London, and a Deputy Alderman there made.

Coke. This the first Case of this nature that was ever questioned.

Dodderidge Justice. Of Officers there are these two kinds, (S.) A judicial Officer, and Ministerial; a judicial Officer cannot make a Deputy, because he is called to do Justice; otherwise it is of a Ministerial Officer, who may make his Deputy: But yet distinguendum est, All Returns made by him ought still to be made in the name of the principal Officer, and not in his own name; here the Office of a Constable is a publick and a very necessary Office, and you ought not so to straiten him being sick, and so unable to execute the place in person, as that he should not make a Deputy.

At the first, in the first Government the Earl made his Deputy, (S.) The Sheriff and he also made his Deputy, (S.) the under-Sheriff and his Baylifs arrants within the County, called the Serjeants of the County, and no warrant yet for them to do so, but the same was still so done.

But as to the Statute of 7 Jac. cap. 5. for double Costs, this extends only to the Constable, and by this Costs are given to him only.

Coke. The Under-Sheriff is never sworn, but the High Sheriff, and he is to answer for all, and it shall be so also in the Case of a Constable: He is not to be confined always to his House: No word there is in the Charter for a Deputy Alderman, and so here: A Justice of Peace may make his Warrant to have the party to be brought before him.

As to the Statute here of 7 Jac. for Costs; by this Statute double Costs are given to a Constable; and a Deputy-Constable is within the intent and meaning of it, for that he is a Constable pro tempore; so a Sheriff is named therein, and his Under-Sheriff shall have benefit of this also.

Haughton Justice. A Justice of Peace may make his Warrant to the Constable to take such a one, and to bring him before himself, as it was resolved by Wray Chief Justice in Sir Nicholas Bacons Case. in which there is a great inconvenience, for it may be a great way to come unto him; but usually their Warrant is in this manner, (S) To bring the party before him, or before some other Justice of the Peace.

Coke. Majors may make Deputies, and so of Deans; this is usual, and will you restrain this Constable here, that he may not so do, but be always tyed to his House; this is a very plain and a clear Case, that he may well make a Deputy.

Also upon the Statute of 7 Jac. cap. 5. for Costs: A Deputy is the person of the Constable, and so within the Statute: A Commissary is not to certifie but in the name of the Ordinary.

The Statute of 35 H. 8. gives power unto a Justice in Eyre to make a Deputy, but not so at the Common Law; for the King cannot make us Judges to us and to our Deputies: This Case here now in question before us, is a very clear Case. 1. That a Constable may well make a Deputy. And 2. That this his Deputy is within the meaning of the Statute to have double Costs; the Case of the Under-Sheriff doth much lead and induce me to be of this opinion.

Whether a Constable may make a Deputy.

The whole Court agreed herein in Opinion in both Points against the Plaintiff, but no Judgment was given, the same for this time being adjourned, and was never moved again, but ended (as I heard) by agreement between the parties, perceiving which way the Court inclined in their opinion against the Plaintiff.

No Judgment given, &c.

Moor

Moor Plaintiff against *Salter* Defendant.

IN an Action upon the Case, for diverting of a Water-course: The Case appeared to be this, That a Water-course was granted in the time of King E. 1. and afterward by another Grant and Confirmation, this was increased one foot more; afterwards the original Deed of this, and of the increasing of it, was left in the Custody of Baron Snig, and by casualty of fire the Seal of this was melted off; in this Action the Defendant being a mere stranger, and Owner of the Land, pleaded a special Non est factum.

An Action upon the case for a Water-course. 1 Ro. Rep. 188.

Upon this the Court was moved that he might plead the General Issue, and then the Jury might well find all the special matter for the Court to judge upon.

But upon this Plea the Deed is to be shewed here in Court, and then it will appear to be no Deed, because it wants a Seal.

Coke Chief Justice. We cannot aid you in this, for if his Right depend upon a Deed, if he lose his Deed, by this he loseth his Right, and no remedy here for him.

Curia, (absent Dodderidge) agreed with him herein.

Afterwards the Book of 43 E. 3. was remembred, being, that if one hath a Deed, and the party from whom he had it takes the Deed from him, and pulls off the Seal; that he may plead this Deed without shewing of it, but shall plead that his Adversary had done this: It was urged, that Ne granta pas, a Stranger may plead, but not Non est factum; but an Executor may plead Non est factum: And in this principal Case Baron Snigs affidavit was shewed, proving the verity of all this.

The whole Court made answer, that this would no ways at all move them.

Nota, That afterwards upon this Action brought for diverting of this Water-course, the Plaintiff claiming the same by Prescription; upon Non culp. pleaded, a Verdict was found for the Plaintiff.

It was moved in Arrest of Judgment, that the Trial here was not good, the Prescription for the Water-course being laid to be in one Parish, to have a Water-course to his Close in another Parish; and upon Non culp. pleaded, the venire facias was for a Jury of both the Parishes, whereas the same ought to have been but of one of the Parishes, (S) Of the Parish in which the diverting is laid to be: If the Prescription had been traversed, there the venire facias to have been of both Parishes: But when he lays here the Prescription in one Parish, and the diverting in another, and Non culp. to this pleaded, this goeth only to the place where the diverting was alledged to be, and not unto the other, and therefore the venire facias ought to have been of this Parish only.

Hill. 37 Eliz. B. R. Rot. 1004. between Banning and Brag, this difference was here resolved; if the Prescription be traversed, there the venire facias to be of both places; but where Non culp. is pleaded, there the venire facias to be only of the place, where the diverting is laid to be.

Hill. 37 Eliz. B. R. &c.

Dodderidge Justice. The ground of the Action here is the Prescription, and Non. culp. being pleaded, this goeth to all before alledged, and here the Prescription is to be proved, and therefore the venire facias ought to be of both the Parishes clearly, and the same being so here, is well awarded.

Haughton

Haughton Justice. In an assise for disseising one of his Common in one place, and he claims this by Prescription in another place, the Venue here is to be of both places.

Dodderidge agreed with him herein; and it is clear, that if the Prescription be in Issue, as it is upon Non culp. pleaded, all is here put in Issue, the Venire facias is to be of both places; but if the parties be upon a special Issue, that he did not divert the same, and so are upon this only; touching the diversion, here the Venire facias is to be only of that place where the diverting is laid to be.

Another Exception was taken to the Declaration, because he doth not lay, that he was possessed of, &c. at the time of the diverting.

Dodderidge. When he lays the possession in himself, for divers years before the Action brought, it is to be intended that he was still so possessed at the time of the diverting; and this is plain, for it is here alledged that he was seised on the day of, &c. ip oque sic existente, divertit, &c. this is well and sufficiently laid.

The whole Court agreed with him herein, that the Declaration here was good, and the venire facias well awarded; and so by the Rule of the Court, Judgment was entred for the Plaintiff.

Judgment given for the Plaintiff.

Belfield Plaintiff against *Adams* Defendant.

An *Ejectione firmæ*, trial at the Bar. 1 Ro. Rep. 256. 1 Ro. Abr. 501.2.871.2. 506.

In an Ejectione firmæ, a Trial at the Bar by a Hertford-shire Jury was had, upon a Lease made by one Southcot, of a Copyhold Tenement, parcel of the Manor of Bushy.

In evidence to the Jury for the Plaintiff, the same rested upon two things. 1. Upon a forfeiture of the Copyhold Estate. 2. Upon the surrender of this Estate, by the acceptance of another Estate.

What shall be said to be a forfeiture of a Copyhold Estate, what not.

1. The matter of forfeiture was this, (S.) because that for the space of three years the Copyholder had not done his Suit at the Lords Court; Whether his not coming to the Court to do and perform his Suit, whether this shall be any cause to forfeit his Copyhold Estate.

It was urged, that this should be no forfeiture, unless that he denied to do his Suit, and that no such Custom there was to have a forfeiture for non-fesans of his Suit within three years.

Haughton Justice. You ought to prove, that he had knowledge given to him of the time when the Court was to be kept; and also to prove, that this was in him a wilful refusing by him to do his Suit, and so a forfeiture.

Dodderidge Justice. A Copyholder may withdraw his Suit, and this is only finable; but by 42 E. 3. fol. 25. If a Copyholder do deny his Suit, this is a forfeiture, and therefore you are to prove that he had warning of the Court, and refused to come to do his Suit.

Croke Justice. If it had been here said, Renuit, or Recusavit, to do his Suit, this had been a forfeiture; but here it is only laid, that he did withdraw his Suit: Presumption was then alledged to prove this to be a forfeiture, because at the next Court-day he came into the Court, and did there take a new Lease, (S.) to himself for his life, after to his Wife for her life, and after to his Son.

The whole Court agreed herein, that this was no forfeiture, if you cannot prove a warning by the Lord given to his Copyholders of the time of his Court to be held, for the Lord may hold his Court when he will.

Dodderidge. The Copyholder may be dwelling far off, and without hearing of the Court; and his refusing to come thither to do his Suit, unless this be so, and the

the same directly proved, there can be no forfeiture: Here the withdrawing of his Suit is only fineable, and no cause of forfeiture.

2. Another forfeiture was here alledged, for the cutting down of Trees: To which was answered, that this was no forfeiture, being warrantable by the Custom, this being Copy-hold of Inheritance; but otherwise it should be of a Copy-holder for life.

3. As to the other point of forfeiture, (S.) the Surrender: For that the Case was this——

Robert Smith, a Copy-holder in Fee-simple, 2 Eliz. comes into the Lords Court, and there takes a new Estate from the Lord of this Copy-hold, (S.) To himself for his life, after to his Wife for her life, and after to his Son for his life; Whether this act of his, and new taking in this manner, be a giving up of his Estate of Inheritance, or not.

It was urged that it should not so be, but peradventure, if he had only taken an Estate to himself for his life, it might have been so; but not here as this Case is, being a taking to himself, to his Wife, and to his Son, to him and to his Wife for their lives, and after to his Son; this shall be no giving up of his Inheritance, but the same shall only enure by way of Surrender.

A Case remembred in the C. B. 36 & 37 Eliz. entred Hillar. 36 Eliz. Rot. 2648. between Adams and Shepherd, where Robert Smith the Son claimed the Copy-hold of Inheritance; to this, the others pleaded the said acceptance to him, to his Wife, and to their Son, and upon this point, a Demurrer was there joyned, and there adjudged this later acceptance, to be a giving up of his Inheritance. 36 & 37 Eliz. C. B. &c.

Haughton Justice. The Grant here was, of the Reversion unto Southcot, To have and to hold (and doth not say the Land) but the Reversion; whereas in the Commentaries, in Adams Case, it is there, To have and to hold the Land.

Dodderidge The Reversion, est terra revertens: As to the taking here by him, for his life, the remainder to his Wife for her life, the remainder to his Son for his life, this amounts but unto a Surrender, to the use of himself for his life, the remainder to the use of his Wife for her life, the remainder to the use of his Son for his life, and this amounts but unto a Surrender, to this effect, admitting there be no forfeiture in the Case.

Haughton. If Lessee for 1000 years, takes a new Lease but for five years, this is a Surrender of his first Lease; and so it shall be, if a Copy-holder do take a Lease by Indenture of the Lord of his Copy-hold Estate, this is a surrender of his Copy-hold.

Dodderidge. If a Copy-holder of Inheritance takes a Lease by Indenture for years, by this his Copy-hold is gone, and this is a surrender of the Inheritance; but if he take a Lease to himself for life, there peradventure it shall be another case: But without all question, where he takes it to himself, to his Wife, and to his Son, for their lives, the Inheritance is not here surrendred and gone, but this still remains in him, and this shall be in Judgment of Law but as a surrender to his use for his life, after to his Wife for her life, and after to the use of his Son for life; and it is a clear Case, that this shall be so, and so by this way, and by this construction, all may well stand together.

Haughton seemed something to doubt of this, whether this should be so, or not.

Nota, That the Jury upon this direction of the Court, being ready at the Bar to give a general Verdict at large, whereas the Plaintiff thought they would have found the matter specially; and for this cause the Plaintiff (having some notice which way the Jury intended to go in their Verdict) being called, he became non-suited. The Plaintiff Non-suited.

Rice Plaintiff against *Wiseman* Defendant.

An Action of Covenant.

1 Ro.Rep.259. 2 Ro. Abr. 60.

IN an Action of Covenant, the Case appeared to be this, (S.) The Defendant having a Warren in a Park, called Braddock Park, demised Warrennam suam, Anglicè, the game of Conies unto the Plaintiff, and did Covenant, that he should enjoy the benefit of his Demise; for breach of Covenant, the Action brought, and lays the breach, in killing of the Conies in the Park, sibi dimisso: and also for his not suffering of him to come there, and to kill the Conies to him demised, Quia ipsum intrare, & venare non permisit.

Coke Chief Justice. If I have Warren in my Land, and I demise my Warren in such a place, clearly the soil doth pass: If the soil be in him by a Grant, or Lease of the Park, the soil doth pass.

Dodderidge Justice. A man may have a Warren in another mans Land, and there by the Grant of the Warren, the soil doth not pass.

Coke. By 33 H. 6. If one grants his Warren, excepting the soil, the same doth not pass, and therefore it followeth, That if it had not been accepted, the same would have passed.

Dodderidge. I cannot have a Park in another mans Land: If I grant unto one my Manor of Dale, Manerium de Dale; Anglice, my Close in Dale, the Manor shall pass; so here in this Case, the Warren doth pass: Also a man, (as here in this Case) may have a Warren in his Park; by his demise of the Warren in his Park, the soil doth not pass.

Coke agreed with him herein, because he is here to have the Park himself, otherwise it were if he had no Park.

The Court all agreed in this, that the Warren here demised, is to be intended to be in the whole Park, and this to be as large and broad as the Park, and that here is a good breach of Covenant assigned; and so by the Rule of the Court, Judgment was entred for the Plaintiff.

Judgment given for the Plaintiff.

Cuddington Plaintiff against *Wilkin* Defendant.

Entred Trinity 13 Jac. B. R. Rot. 683.

2 Cro. 377. 1 Ro.Rep.259.

IN an Action of Trespass, for debruising and breaking of his Close, 44 Eliz. In the Declaration it was laid to be done, tam contra pacem Dominæ Reginæ, quam contra pacem Regis nunc, a Verdict being found for the Plaintiff: It was moved in Arrest of Judgment, that the Declaration was not good, being laid to be done contra pacem Regis nunc, which cannot be so.

Coke Chief Justice. Declarations are aided by no Statute: These Words here, (S.) contra pacem Domini Regis nunc, are but surplusage; the difference in this Case will be this, if the Trespass be laid to be done in the time of Queen Eliz. and with a continuando in the time Regis nunc, there he ought to lay in his Declaration, the same to be done contra pacem of both, (S.) Dominæ Reginæ, & Regis nunc; otherwise it is clearly, where the Trespass is only laid to be in the time of Queen Eliz. there the Declaration is only to be contra pacem Dominæ Reginæ, (& Regis nunc) this is but matter of surplusage, and shall not vitiate the Declaration.

The

The whole Court agreed with him herein, and that this was a probable exception, but such surplusages are not material, being aided: And so by the Rule of the Court, Judgment was entred for the Plaintiff. Judgment given for the Plaintiff.

Helley Plaintiff against *Hender* Defendant.

IN an Action upon the Case for scandalous words, upon Non culp. pleaded, a verdict was found for the Plaintiff. An Action upon the Case for words.

It was moved in Arrest of Judgment, that the words were not actionable: The Case appeared to be this.

It was laid in the Declaration, Cum quidam malefactores ignoti, had Feloniously shorn the Sheep of one Henry Clemens; upon communication had between Margery Hender the Defendant, and another, as touching the sheering of these Sheep, prædicta Margeria Hender, did then speak these slanderous words, (S.) I do know who did sheer the Sheep, (Prædicti Henrici Clemens innuendo) the other to whom she spake, then demanded of her who this was; unto this she answered, that it was Helly and Michel that did sheer them (innuendo Felonice.)

It was urged, that these words are not Actionable, for that general words shall not be restrained to particular, and that the Innuendo will not help this, as appears, Coke 4 pars, fol. 17. Jeams & Rutlechs Case, & fol. 20. in Barhams Case. Coke 4 pars, fol. 17. &c.

Croke Justice. Take all the words here together, and they are scandalous, and well Actionable.

Dodderidge Justice. She said, I do know who did sheer the Sheep, Quid inde? Nil.

Haughton Justice. It is well here laid, that certain Malefactors had feloniously shorn the Sheep: But afterwards he comes too short, saying in his Declaration, that there was communication between the Defendant and another, concerning the sheering of the said Sheep (but not concerning the Felony) and they might speak of the sheering of the Sheep, and not of the Felony; and it is not here laid, that she said, she did know who did sheer the Sheep Feloniously, but that she did know who did sheer the Sheep generally.

Dodderidge. This speech and communication, as it is here laid, is touching a general sheering of the Sheep, and not of a special and felonious sheering; for if one saith, the Sheep of such a one were Feloniously shorn; if the other saith, I know who did sheer them, and names him, this is no scandal, nor are the words actionable.

Croke. If one complains, saying, My Sheep are feloniously shorn: He to whom he complains, saith, I know who shore them, and names him; (S.) such a one, is not this scandalous? clearly it is.

Dodderidge. The scandal here grows out of an inference, and this ought not to be so, to make words to be actionable, but the words ought to be directly scandalous; if the words had been, I do know who did it, this refers directly to the Felony before alledged to be done.

Croke. If one complains, saying, My Sheep were Feloniously stolen away, another to whom he did speak, saith to him, I know who took them, and names him, Is not this scandalous?

Dodderidge. These words are not actionable, for nothing is said of the Felony.

Croke. This is a direct answer to the complaint made unto him; and so in the principal case here, the words are scandalous, and so actionable.

The better opinion of the Court against this Plaintiff.

Dodderidge & Haughton, Clearly they are not Actionable, they being only a scandal by an inference, and so by the Rule of the Court, the matter to stay, till the Plaintiff moved the same again; which was never moved by him afterwards, perceiving the better opinion of the Court to be against him.

William Hanmer Plaintiff, against *Thomas Clive* Defendant.

Entred Termin. Mich. 12 Jac. B. R. Rott. 612.

Error.

IN a Writ of Error, to reverse a Judgment given against him, in the C. B. for Tho. Clive, in an Action of Debt for 260 l. The Case appeared to be this; It was shewed, that in the first Declaration there, William Hanmer, Summonitus fuit ad respondendum Thomæ Clive, quod reddat ei, 260 l. Hanmer afterwards pleads to this, and hath an Emparlance granted him. Afterwards, in another Term, upon a second Declaration, Wil. Hanmer, Summonitus fuit ad respondendum Thom. Clive, quod reddat ei, &c. Et le Judgment fuit done upon this second Declaration, for the said Thom. Elmes, whereas his true name was Thomas Clive, and so a variance from the first Declaration.

1. Declaration in C. B. entred, Hil. 10 Jac. C. B. Rot. 2636.
2. Declaration &c.

Nota, That there were two Declarations in the C. B. the first was entred, Hillar. 10 Jac. C. B. Rot. 2636. The second Declaration in the C. B. was entred, Pasch. 11 Jac. C. B. Rot. 1536. and the Declaration here in B. R. was entred, Mich. 12 Jac. B. R. Rot. 612. Hutton Serjeant, The Judgment was given upon the second Declaration, and also upon default. The Error assigned to reverse this Judgment was, for that the same was given for another person, and not for the Plaintiff in the suite; The Judgment upon the second Declaration, varying from the name, in the first Declaration, for that the Plea role ought to agree with the Declaration, both in the matter, and also in the person. But here the same varies in the person from the first Declaration, and so shall it also be, if it vary in the matter. It must be agreed, that if he had been named right, in any place in the second Declaration, that this is good, and shall be amended, according to the first Declaration, but it is not so here. This is a material Error, and to this purpose, there was a Case in this Court resolved directly in point, which was.

Term. Pasch. 37 Eliz. B. R. Rot 85. &c.

Termin. Pasch. 37 Eliz. B. R. Rot. 85. between Warner and Wincher, in debt, upon a Bond. In the first Declaration, he declared upon a Bond, dated 1. May, after an Emparlance in another Term; in the second Declaration, he declared upon a Bond, dated 2. die Maij. Judgment was given in the C. B. upon the second Declaration, upon this a Writ of Error was here brought, and assigned for Error, this variance in matter; and the Judgment for this Cause resolved here to be erronious, and for this Error was reversed. And so in this Case here; The first Declaration being for Tho. Clive against Wil. Hanmer. And the second Declaration was Thomas Elmes against William Hanmer, and so a material variance in the person of the Plaintiff, there the first Declaration, being the chief Declaration.

It was urged for the Defendant; that if this be true, that the second Declaration, upon which the Judgment was given, varies from the first Declaration, yet this shall be amended, according to the first Declaration, and so made to agree with it, and this

this is the usual course, and that this is so, will be warranted by very many Presidents.

Dodderidge Justice. In the C. B. there may be two several Declarations, the one by Tho. Clive, against Hanmer, and the other by Tho. Elmes against Hanmer, and here it may be so, that you have removed the wrong Record.

But as to this, the Council of both parties made answer, and did agree, that this was not so; but that this was, in one and the same suite; and between one and the same person, and they also agreed this variance to be so, between the second and the first Declaration.

Dodderidge. If it be so, the first Declaration is the true Declaration there, and this is right; And if the second Declaration do vary from this, I have known this to be amended here in this Court, and the second Declaration made to agree with the first. This matter is also amendable there in the C. B. according to the first Declaration.

And so without any further debate at this time, by the Rule of the Court, this was adjourned over to another time, and in the interim, to have search made for presidents in this Case; and also then to have one of the Prothonotaries of the same Court of C. B. to certifie this Court, of their usage, in such Cases.

Afterwards at another time, this matter was moved again, and then the Court was informed, that upon examination of the Records, the original Record, was throughout right, and also, that all the Records in the C. B. in the proceedings in this Case, are in every particular right. But the Record here removed, doth not agree with the other, but vary in this (S) being (Elmes) for (Clive.)

The Court then answered, that they would have this searched out, this being a great abuse to the Court, It appeared upon search made, That the Record certified was right, but the entring it here in this Court, was not right, the same being inserted, and made (Elmes) for (Clive.)

This appearing to be so. The Court was therefore moved, to have the Judgment affirmed, both the Records below being right.

Dodderidge. This is but a misentring of the Clark here, and so the same ought to be amended.

The Record amended, and Judgment affirmed.

And so the Rule of the Court was to have the Record here amended; and this being done, by the Rule of the Court, the Judgment given in the C. B. to be affirmed.

Hall Plaintiff, against *Hemminge*. Defendant.

Entred Termin. Trin. 13 Jac. *B.* R. Rot. 336.

IN an Action upon the Case for a promise; upon Non assumpsit pleaded, a Verdict was found for the Plaintiff.

An Action upon the case for a promise.

Coventry For the Defendant moved the Court in Arrest of Judgment, that the Declaration here is not good, and upon this the Case appeared to be. That upon the delivery of two Weyes of Barley, by the Plaintiff to the Defendant (one Wey of Barley in Worcestershire being six Quarters) the Defendant did then assume and promise to give unto him so much for a Wey, as any other should give unto him, for the residue, which he should sell unto them; he sets forth in his Declaration,

2 Cro. 432. 1 Ro. R. 285. 314. 1 Ro. Abr. 463. Hob. 51.

tion, that he delivered unto him two Weyes of Barley, and also sets forth, that he sold the other Weyes to others, for so much a Wey, and that so the two Weyes by him sold, and delivered to the Defendant (deducting 1 d. in a Wey, according to his promise, amounted in toto unto 17 l. 12 s. the which (licet sæpius requisitus) he hath not paid, unde &c. It was urged, that this Declaration here, is not good, for that he ought therein to have shewed, that he sold the other Weyes, to, &c. for so much, and that he gave notice of this, to the Defendant, for how much a Wey, he sold the rest, and so to have requested payment thereof, and he ought also to have shewed, the certain time of his request made, this being upon a sale made by the Plaintiff to another. And to this purpose there was a Case, Trin. 12 Jac. B. R. Rot. 1758. between Twist and Homes. The Case was for Wood, and the same case in effect agreeing with the Case here, and in this case the Assumpsit was, to pay for so many loads of Wood, to him to be delivered, so much to pay him for every load, as he should sell the residue by the load unto others; he there shewed in the Declaration, that he sold the residue to others for so much a load, and that according to that rate, the Wood by him delivered to the Defendant, came to so much, the which he requested him to pay, but he refused. Unde actio, upon Non assumpsit pleaded, Verdict and Judgment was given for the Plaintiff, upon this Judgment a Writ of Error brought in the Exchequer Chamber, and the same Error there assigned, as is now here moved in arrest of Judgment (S) because he gave no notice to the Defendant, that he sold the residue of his Wood for so much a load, and so requested him to pay this, and for this Error, for want of notice given to the Defendant, for what he sold the residue of his Wood by the load. Judgment was reversed. And so upon the same reason here, because the Plaintiff in his Declaration hath laid no notice to be given by him, to the Defendant, for how much he sold his other Weyes of Barley, by the Wey unto others, nor yet any time laid of the request, for these causes the Declaration is not good, and Judgment to stay, there being no more difference between this Case and the other, but that there it was for Wood, and here for Corn, for Weyes of Barley.

Trin. 12 Jac. B.R. Rot. 1758. *Twist & Homes* case.

Haughton Justice. He ought here to have given notice of this to the Defendant, for what he sold his other Weyes of Barley to others by the Wey, this being a private matter unto the Plaintiff; otherwise it would have bæn in Case of an arbitriment, and a Bond given to perform the same, there he is to take notice of it, at his peril, unless it be specially specified, that notice be given of the award to the party. And so without any more said herein at this time, by the Rule of the Court, this Case was adjourned over to another time, for the other side to answer these exceptions taken to the Declaration.

Afterwards (S) Termin. Hillar. 13 Jac. B. R. The Court was moved again in this Case, and the same exceptions moved again unto the Declaration.

Term. Hil. 13 Jac. B. R. this case moved again.

Upon the former Case cited between Twist and Homes.

Coke Chief Justice. How shall a Taylor be paid upon a quantum meruit? this is issuable, and a Jury is to find this, no notice of this to be given. But here in this principal Case, the Plaintiff is to give notice to the Defendant, for what he sold the residue of his Barley by the Wey; and it is not sufficient for him here to demand the money, without giving first unto him particular notice, for what he sold the residue of his Barley for a Wey, before the demand by him made of his money, for the two Weys delivered by him to the Defendant, this notice is to precede.

Dodderidge Justice. We have so far agreed in this before, for the point of notice to be first given to the Defendant. And so it was agreed in another Case here adjudged; where one did assume, to pay so much money upon the marriage, of such a one, and here adjudged, that before demand of the sum, he ought to give notice of the marriage.

Coke, Agreed with him, this to be so.

Haughton,

Haughton. In case of an Arbitriment, no notice to be given, because that both are parties and privies to it.

The Court all clear of opinion, that for the omission in the Declaration, of notice given unto the Defendant, for what he sold the residue of his Barley a Wey; the Declaration for this cause is not good, and therefore the Rule of the Court was, quod querens nil capiat per billam. Judgment for the Defendant, &c.

The KING against *Law.*

By Information against him, upon the Statute of 23 Eliz. cap. 1. for the Recusancy of his Wife, in not coming to Church, by which, to forfeit 20 l. a month; the Information against him was for 240 l. which he was to forfeit for the Recusancy of his Wife, by absenting of her self from Church for so long time; upon this Information, and a Trial thereon had, It was found for the King. 1 Ro. Rep. 233. Information upon the Statute of 23 *El.* &c.

Richardson Serjeant. For the Defendant moved the Court in Arrest of Judgment, for that, as he urged, this Statute doth not extend unto the Husband, to subject him to the penalty of the said Act, for the Recusancy of his Wife, he himself being conformable; and that this should be like unto Doctor Husseys Case, Coke 9 pars, fol. 71, 72. upon the Statute of Westminster 2. cap. 39. that a feme Covert should not be within that Act, for to make the Husband chargeable. Coke 9 pars, f. 71, 72, &c.

Haughton Justice. This which is now moved in Arrest of Judgment, is not worthy of any disputation, this being resolved, Coke 11 pars, fol. 56. 57. in Dr. Fosters Case, fol. 61, & 62. that a feme Covert is within the Statutes of 1 Eliz. 2. cap. 2. for the forfeiture of the 1 s. and of 23 Eliz. cap. 1. for the 20 l. forfeiture for every months absence. Coke 11. pars, f. 56, 57, &c.

Dodderidge Justice. In the Argument of Dr. Fosters Case, apt occasion was then given unto us, to have a review and a diligent consideration of all the Statutes made concerning Recusants; and this which is now moved in arrest of Judgment, is clearly against the Defendant; and so we all did resolve it in the Argument of Doctor Fosters Case, that the Husband was liable unto the penalty of 23 Eliz. cap. 1. for the Recusancy of his Wife, notwithstanding that he himself be no Recusant.

And so by the whole Court, this Exception was disallowed, and a further day then given by the Court to shew better matter, otherwise Judgment to be given for the King.

At which time Finch Serjeant moved another matter in Arrest of Judgment, upon the Statute of 23 Eliz. cap. 1. that the party ought to be convicted before.

This was also resolved against him in Dr. Fosters Case.

The whole Court now clear of opinion, that he ought to be convicted in the same Suit.

Another matter was then by him moved in Arrest of Judgment, that in this Case, this was for the Recusancy of his Wife, and therefore he is not liable to the penalty in the 23 Eliz. for if a feme Covert do commit a Riot, the Husband shall not be liable for this; here the Husband is not made a party by 23 Eliz. and therefore he shall not pay the penalty, by the Statute of 23 Eliz. inflicted: But the Statute of 35 Eliz. cap. 2. gives an Action of Debt for the penalty, and this brings the Husband in; and so for slanderous words spoken by a feme Covert, the Husband shall answer. Stat. 35 Eliz. cap. 2.

But

But this was all over-ruled by the Court, for that upon solemn Argument by a the Judges, Termin. Mich. 12 Jac. B. R. in an Information by William Shoyl, agai Doctor Foster, entred on the Crown side; in the same Mich. Term. 12 Jac. it w adjudged against Doctor Foster: In which Case, the Arguments of all the Judg I have at large, but have not reported this Case, the same being already reporte as before.

Mich. 12 Jac. B. R. &c.

And so the Rule of the Court was, Quod judicium intretur pro Domino Rege, coram Domino Rege; and also by the Rule of the Court, execution was to b awarded for the King.

Judgment and Execution for the King.

The King against *Zakar*, and others, Defendants.

Entred Termin. Pasch. 13 Jac. B. R. Rot. 21. on the Crown-side.

A *Quare Impedit*, &c.

IN a Quare Impedit brought against John Bishop of Norwich, Thomas Cole, an Robert Sakar, Defendants.

2 Cro. 385. Hob. 75. 1 Ro.Rep.235. 2 Ro.Abr.336. 346. 349.

The Declaration grounded upon the Statute of 31 Eliz. cap. 6. of Simony therein is set forth a Simoniacal agreement, between Thomas Cole and his Wif and Robert Zakar, who was to be presented upon this agreement, that presentl after his Presentment, he should make a Lease of part to Cole the Father, and o other part, a Lease to Cole the Son, and also to pay 60 l. to Cole the Son.

It is further set forth, that upon this, Zakar was presented unto the Vicaridg of the Church of Havering, he made the Lease accordingly to Cole the Father and after to Cole the Son, and also paid the said 60 l. That by reason of this Sy moniacal Agreement, the Church became void, and so it belonged to the King t present; and not for suffering of him to present unto this Vicaridge, the Quare Im pedit brought.

And shews further, That Thomas Cole the Father, did enfeoff Thomas Cole th Son of the Manor of Havering, to which this Advowson of the Vicaridge did apper tain, and that he presented Zakar.

The Declaration sets forth the Statute of 31 Eliz. cap. 6. for Simony: W which such Presentation, Admission, Institution, and Induction, should be utterl void, frustrate, and of no effect in Law; and that it should be lawful for the Queen her Heirs and Successors, to present to the same Benefice for this time only; an that every person who shall give or take contrary to the Statute, shall forfei double the value of one years profit of such Benefice; and that the person so cor ruptly taking, or procuring, &c. such Benefice, shall be upon this, and for eve after, adjudged a disabled person in Law, to have and enjoy the same Bene fice.

It is also set forth, That the Vicaridge of Havering, is, and hath, Curam animarum; there is also set forth the Lease made to Cole the Father of some things, and to Cole the Son of others, and the payment of the 60 l. to Cole the Son; ant that upon this, the King had good title to present, &c. and for the disturbance the Quare Impedit brought.

As to this, the Bishop he pleads, that he claims nothing but as Ordinary. And so Judgment given against him for the King.

Tho. Cole pleads, Non disturbavit, and so at issue upon this.

Zakar, he pleads, That long time before, John Smith had any thing in the said Manor of Havering, Queen Eliz. was seized of the Rectory of Havering impro-

priate,

priate, to which this Advowson of the Vicaridge did appertain; and this being void, John Smith, Usurpando, did present unto it, and that after this manner, to which this Vicaridge supposed to be appendant, did descend and come unto George Smith, who did of this manner enfeoffe Tho. Cole the Father, who of this enfeoffed Thomas Cole the Son, and died. That Tho. Cole presented Robert Sakar, bona fide, usurpando, upon the King, to whom this descended from Queen Eliz. who was admitted and instituted. And then the King, ad Ecclesiam vacantem, did present the same Sakar, And takes a Traverse, absque hoc, that this did appertain unto the Rectory. And upon this the Kings Attorney General demurred in Law.

Thomas Crew. That Judgment ought to be given for the King.

The first point here considerable is, where the King hath grounded his Quare Impedit, and thereby intitled himself upon the Statute of 31 Eliz. cap. 6. for Simony; this is the most material thing to have been traversed, to which there is here no answer at all given, and so in this he hath failed. Points, 1.

21 E. 4. fol. 1. That the cause of Action is traversable. 21 E. fol. 1.

Also where two matters are alledged for the King, there the most material ought to be traversed. With this agrees, 10 H. 7. fol. 27. by Keble, 20 E. 4. fol. 14. 9 E. 4. fol. 39. by Danby, all agree in this, that the most material thing is always to be traversed; and so is 22 H. 6. fol. 25. in Denhams Case, where the darrain Presentment was traversable; Here in this Case the appendancy is not traversable, but the Simony, as the most materal thing, and so is Coke 5. pars, 98. in the Countess of Northumberlands Case. 10 H. 7. fol. 27. 20 E. 4. f. 14. 9, &c.

2. The second point. Whether here be not a sufficient title set forth for the King by the Simony. The Defendant here hath shewed another title for him; for he hath shewed that Q. Eliz. was seised of the Rectory of Havering, and that Smith did Present by usurpation upon the Queen, and sets forth a descent unto Cole, that after the death of Faircloth, the Incumbent of Smith, Coke presented Sakar, usurpando upon the King; so here he hath made a plenarty against the King by usurpation; but yet the King may have a Quare Impedit, as appears in Greens Case, Coke 6. pars, fol. 29. in the Bar he shews, that Smith did usurp upon Queen Eliz. (being seized in jure Coronæ of the Rectory, and did present Faircloth, and after made a Feoffment in Fee of the Manor unto Cole. It appeareth by 12 H. 7. fol. 12. Fitz. Nat. Bre. fol. 28. and 9 H. 7. fol. 9. b. That where a Title appears for the King in a Quare Impedit, a Writ to the Bishop shall there be granted for the King. 2. *Coke* 9 pars, fol. 29. in *Greens* Case. 12 H. 7. f. 12. 9 H. 7. f. 9. 6 Fitz. Nat. Bre. f. 28.

3. The third point; One is presented by Simony, the same person afterwards obtains a Presentation from the King, this is not good, for that he is now a disabled person to take this Benefice, he hath a Leprosie upon him, by the Statute of 31 Eliz. cap. 6. like unto that of Gehazi.

Coke Chief Justice. Notwithstanding the King saith so, that the said Incumbent shall still continue, yet the King shall have the next Presentation.

1. As to the first Point, it was urged for the Defendant, that the appendancy, and not the Simony, is here to be traversed. It must be agreed, that the cause of Action ought always to be traversed, here in the Declaration is set forth the seisin and presentation of John Smith, the appendancy and the Simony.

Where the Plaintiff and the Defendant do agree in the person presented, by which the Plaintiff makes title to himself by appendancy; here this ought to be traversed. But if they do vary in the person presented, and in the Presentment, there the appendancy is not to be traversed; Here they agree in the person presented, and the appendancy is the Kings Title, 17 E. 3. fol. 10. 11. the King brings a Quare Impedit, there the title of the King is by the Presentment, and this is traversable. But here the appendancy is the Kings title. The King is not here intituled by the 17 E. 3 fol 10. 11.

Statute of 31 Eliz. because there is an inheritance in the King, but by the Statute of 31 Eliz. the King is intitled only for one turn. It is put for a Rule in Greens Case before remembred, that if one presents Simoniace to a Church of the Kings, and the King afterwards presents, jure Simoniaci, this is a void Presentment, because he hath mistaken his Title, but he ought to present jure Patronatus, not ratione Simoniace Præsentatus, the Presentment is to be traversed, where the same is denied.

2. Coke 6 pars, fol. 48. *Boswells* Case.

2. As to the second Point, being touching the superinstitution, this is not material. Coke 6 pars, fol. 48. in Boswells Case, if one usurp upon the King, by this he gains a Presentation upon the King, but no Patronage. He is not to be removed by Action, but by a Quare Impedit, as appeareth by 9 E. 3. fol. 20. new print, and fol. 660. old print. If the King do ratifie the possession of the Incumbent, ita quod in nullo gravetur, this is now as a new Presentment.

3. As to the third Point, (S) the disability of the person by the Statute of 31 Eliz. 4. matters are to be observed upon this Statute. (S)

Four things in the Stat. of 31 *Eliz.*

1. The Presentation to be void.
2. The King to have this Presentment.
3. A Fine to be imposed by way of forfeiture; and
4. The party presented, to be utterly disabled.

It must be agreed, to be a disability as to the party, but whether he shall be disabled as to the King himself, this is a Point here considerable; as to this it is to be considered, whether the King may not enable him to take this Benefice? By the Statute of 13 Eliz. cap. 12. a Presentment of an Infant to a Benefice is void. But if the King will dispence with this, it is good; if the King may do this, the Court to judge of this, no authority being in it.

Stat. of 13 Eliz. cap. 12.

27 H. fol. 26. *Tatams* Case, 30 E. 3. f. 9.

As to a Contract made with a feme Covert, this is good by 27 H. 8. fol. 26. in Tatams Case, and it shall be said to be the Contract of the Husband, 30 E. 3. fol. 9. a sale by a feme Covert is good, and he shall declare that he himself sold this.

As to the Declaration, It was urged that this is not good. For that no Quare Impedit is to be brought, but a Presentation ought to be alledged. Here it is, because he did not suffer him to Present Ecclesiæ de Havering.

Whereas it ought to have been ad eandem vicariam, for here is both Ecclesia & vicaria.

Doderidge Justice demanded, Quid if the Parsonage be presentable.

Coke Chief Justice. Omnis vicaria est Ecclesia, this is clear, and also verba generalia, generaliter sunt intelligenda.

Stat 31 *Eliz.*

As to the Statute here of 31 Eliz. cap. 6. One Presents by usurpation upon the King, he Presents him again, this is void if he do not recite this, and to have him first to be removed; as it was held in Dallingtons Case. The King hath a Tenant for years, if he makes a lease for life, this is void if he do not recite the lease for years. If one Presents upon the King, this Presentee ought to be removed. In the Bishop of Winchesters Case, 2 pars, fol. 43. if the right of an Abbot comes to the King, this shall not pass out of him, unless it pass by special words, and not by a Release. An Advowson shall not be drawn out of the King, and this was Sales Case.

Dallingtons Case. Coke 2 pars, f. 43. &c. *Sales* Case.

As to the matter here of Simony, if there be fraud in the Incumbent, or if mony be given for the Presentation, though it be unknown to the Incumbent, to this let the Patron look. The Incumbent shall be removed. As to the disability of the person.

It was the Case concerning the Cofferers place, an old Judge had this place heretofore, being a place of very great confidence, 40000 l. per annum passeth through his hands. One did lately contract with, &c. and for to have this Office. And it

it was questioned, whether this was within the Statute of 5 E.6. capite 16. for buying of Offices. Stat. of 5 E. 6. cap. 16.

And it was Sir Arthur Ingrams Case. In which Case the Judges were all demanded their opinions (notwithstanding his Wife there paid the mony,) this Statute clearly doth disable such a person for ever to have the said Office, for the which he had so contracted. So that as to the Cofferers place, we all did Resolve that Sir Arthur Ingram was by the Statute disabled for ever to be made Cofferer, because he would have bought this place, and we also resolved, That the King was bound by this Statute. Sir *Arthur Ingrams* Case.

Dodderidge Justice. There is Simoniacus, & Simoniace promotus, or institutus, as was Resolved in Calverts Case, Termino Pasch. 9 Jac. in Scaccario, a good Case as touching this matter. Pasch. 9 Jac. *Calverts* Case, in Scaccario.

The whole Court agreed clearly in this, without any further Argument, that this Person here presented by Simony; the Presentation is meerly void, and that the party so presented, is utterly disabled for ever, by the Statute of 31 Eliz. cap.6. to take the same Benefice, to the which he was thus presented by Simony, and that he is incapable to have another Presentation to the same Benefice; and therefore the Rule of the Court was, Quod judicium intretur pro Domino Rege, unless cause be shewed by a time given. Judgment for the King, *Nisi causa in contrarium.*

Afterwards this Case was moved again, and George Croke moved the Court to stay Judgment. That the Demurrer might be waived, and to go to trial upon the Simony.

The whole Court denied this.

Then he moved exceptions to the Record to stay Judgment. 1. That there is a mistaking in the reciting of the Statute (as Regardo for Rewardo,) this not good, this is warranted by the Lord Cromwells Case, Coke 2 pars, fol. 69. touching recitals and misrecitals, and for this cause, the Declaration is not good, The first Clause of the Statute being, If any one for any sum of mony or reward. *Coke* 2 pars, f.69. the Lord *Cromwells* case.

Coke Chief Justice, cum omnibus regardis; this is the common form in all Patents, if it had not been in a general Statute, this is but only matter of form, Regardes is an old French word: In Cromwells Case there it is Nuntijs for Mendatijs. These exceptions taken are but minutæ decimæ, by 5 R. 2. Title Quare Impedit, A Vicaridge may well be appendant unto a Manor. 5 R. 2. tit. *Quare Impedit.*

The Court was then moved for stay of Execution till the next Term.

The Court denied this, and so the Rule of the Court was, Quod judicium intretur pro Domino Rege. But by the assent of the parties, Sakar was to continue in the Vicaridge for a certain time. Judgment given for the King.

Afterwards (S) Termino Hillar. 13 Jac. this matter was moved again. Sakar by assent of parties being to continue for a time in the Vicaridge, this time being now past, and he still continuing in possession, and committing of great wast, (S) by pulling down of Glass-windows, and pulling up of Planks, the Court was therefore moved to have a speedy time given him to remove; and also for an Attachment against him for this his Contempt. Termin. Hil. 13 Jac. B. R. &c. Mo. 917. n. 1303. 2 Ro.Abr.813. V. 2 Bul. 158.

Coke Chief Justice. We cannot grant this, because that after Judgment here by us given against him, this his staying in possession was by assent of the parties, but not by the Rule of the Court, for if it had been so, then there had been a good ground for an Attachment; you may have a vi Laica removenda, but not in this Case here, because he is a Parson. But you may have your remedy by way of Indictment of forcible entry, or by an Ejectione firmæ. But here you may have a Prohibition, and this you may have, not only for the Patron, but also for any for the second Incumbent, for this is the Kings Writ; and any one may have a Prohibition for the King. Also here, this is the Dower of the Church, and we will here pro-

hibite them, if they fall and wast the timber of the Church or if they pull down the houses; And therefore by the Rule of the Court in this Case a Prohibition was granted to stay the doing of any wast.

A Prohibition granted, to wast.

Afterwards this Case of Sakar was moved (S) Termin. Pasch. 14 Jac. B. R. Judgment being formerly given against him for Simony; and for this to be removed, and by this to be for ever disabled to have this Benefice again.

Term. Pasch. 14 Jac. B. R. this Case moved again.

Richardson Serjeant now moved the Court to have him restored again, because, as he urged it, he was unlawfully removed. The reason being, that in a vi laica removenda, by which removed, by which by Fitz. Nat. Brev. and the Register, this Writ comes to remove omnem vim Laicam, he shews that the Sheriff had dispossess him, and put another in, the which he ought not to do (and this he offered to make good by an Affidavit,) this is returnable by the Sheriff.

Fitz. Nat. Brev. Regis.

Coke Chief Justice. In this his so doing, he hath done against the Law, If he removes one and puts another in.

Richardson Serjeant cited Robinsons Case, Hilar. 38 Eliz.

Hill. 38 Eliz. in *Robinsons* Case.

Where upon an Affidavit made, that the Sheriff in a vi laica removenda, had removed one, and put another in, there this was debated, whether upon this shewed to the Court, the first man removed, should be restored again or not; and there resolved by the whole Court, the second man to be displaced again, and the first to be restored.

Coke. We are to judge upon a Record, and not upon Affidavits; therefore you cannot have a Certiorare, for that neither this Writ, nor the Writ, de excommunicato capiendo, are returnable by the Sheriff, until the Statute of 5 Eliz. cap. 23. If a Justice of Peace do remove a force, this is well done by him, but he cannot put another into possession, if he cannot do this upon an Indictment on the Statute of 8 H. 6. cap. 9. of Forcible Entries, we cannot do this upon an Affidavit.

Stat. of 5 *Eliz.* cap. 23.

The Court being then informed, that this was in the Case of Sakar, they answered, that he ought not in this Case be restored, neither can he have any remedy, he being for ever disabled by reason of the Simony. This was so agreed by the whole Court.

The Judgment of the Court against *Sakar*.

Robins Plaintiff, against *Sambel* Defendant.

Entred Pasch. 13 Jac. B. R. Rot. 21.

A Writ of Error. 2 Cro. 386. 1 Ro. R. 278. 1 Ro Abr. 771.

IN a Writ of Error to reverse a Judgment, given in an Inferior Court; the Error assigned in the Judgment, this being, Ideo concessum est per Curiam, quod prædictus Johannes Sambel recuperet, whereas it ought to have been, Ideo consideratum est per Curiam quod, &c.

Glanvil. As to this, First, it is to be considered, what was the ancient word used in the entring of Judgments: As to this, in the Book of Entries, all the Entries are in this manner (S) Ideo consideratum est at large; or else, Ideo cons. short, Coke 8 pars, in the Princes Case, and in the Case of Suttons Hospital, Coke 10 pars, the Judgments are, ideo cons. other Presidents there are with concessum est, in which the Printers did mistake in writing concessum for cons.

Coke 8 pars, The Princes Case, &c.

The reason of this word (consideratum) is very significant, (S.) That the Judges were to have consideration.

Also

Also this word doth import in it two meanings, (S) 1. This to be a granting and an award of the Court. 2. This was so done by them upon very good consideration.

Also the Law hath divers words which are appropriated, to be used to a special purpose, as the words which are called vocabula artis, as warrantizo & hoc paratus est verificare, for an averrment: If instead of this, the word (probare) be used, this is not good.

Trin. 5 Jac. B. R. Rot. 228. Seamors Case: In a Writ of Error, the Error assigned in the Judgment, being, ideo Inconcessum est, there urged, (In) to be void, and concessum good; but it was there said, that if it had been (concessum est) a question it would be, whether that were good, or not, and thought not good if it were so. Trin. 5 Jac. B. R. &c.

For the Judges there said, that by this, if it might be so, in time they would come to Aggreatum, & concordatum est, & videtur Curiæ, which ought not to be suffered, and that Judgment was reversed for that and for other Errors.

Termin. Pasch. 9 Jac. B. R. In one Fullers Case, this matter came again to be questioned, touching the validity of this word (concessum est) and there Yelverton Justice observed, that this word (concessum) is not a word of gravity, fit for a Judgment. Term. Pasch. 9 Jac. &c.

It was urged by Henry Finch for the Defendant, and agreed, that the usual course is, and so hath been, ideo consideratum est, but yet concessum est is a form of Entry, and also good; and so is Coke 1 pars, in Alton-Woods Case for the Queen, and in Porters Case against the Queen, the Entry of the Judgment in both these being, Ideo concessum est: The President cited in 5 Jac. Inconcessum, that not good, but reversed; and so videtur Curiæ, this not good. Coke 1 pars, &c.

Mich. 5 Jac. B. R. Rot. 358. Bentrise against Barbar, the Judgment was there entred in this manner, (S) ideo videtur Curiæ, this assigned for Error, and for this Error the Judgment was reversed. Mich. 5 Jac. B. R.

Coke Chief Justice. I should be very loath to change the ancient form and course of Presidents, for the Entry of our Judgments, for that Innovations of this kind are very dangerous, and not to be suffered.

As to the Entry, (S.) (videtur Curiæ) there is no such special Judgment: But there is a videtur Curiæ first, and then presently after, as a good and necessary consequent of this, ideo consideratum est per Curiam quod, &c. this being an answer to the point of the Verdict; and so in this manner, the Entry of videtur Curiæ is usual, and not to be reversed for this: Concessum & proviso are good words, and used in Parliaments.

As in the Statute of Marlebridge, cap. 1. where it is Provisum est, concordatum, & concessum est quod tam majores, quam minores, in Curia Domini Regis, justitiam habeant & recipiant: This is good in an Act of Parliament, but not so to be in the entring of our Judgments, in the same, neither to be concessum nec concordatum, for in these Cases we ought not to go, and to respect æquipollencies, but we ought still to observe the old and ancient order herein used. Stat. of *Marlebridge*, cap. 1.

Bracton observeth, That Originals are made by Parliament, and therefore they are not to be changed but by Parliament. Bracton.

The observation of the manner of Entring of the old Presidents, is very excellent, (S.) Ideo in misericordia, can you have another word as good and significant as this, as Imprisonetur.

But of this I will be advised, and see the Presidents.

Haughton Justice. We are not to permit or give way to any new device in the entring of our Judgments.

Croke Justice. We do not dislike of the Entry, (videtur Curiæ) but new Inventions, novitates are most dangerous: It is not good for us to digress from the usual form of Presidents, herein we will proceed, lento pede.

Dodderidge

Dodderidge Justice. Videtur curiæ, concessum, & ei conceditur, all these are the award of the Court, and so used, but they ought to be so used in their proper and particular courses, where pronounced in French, as (S.) (Le Court agards) that is, the Court adjudges.

The Court then said to Hen. Finch, being for the Defendant, that it rested on his side to search for Presidents, and produce them to satisfie the Court, they inclining to be of opinion against him, upon this Error assigned.

Coke. If we shall give way to this, by allowance of this manner of entry of our Judgments, we shall not then know where to rest; and in time we shall come to this kind of entry also, (S) Concordatum, & adjudicatum est per Curiam, but these are not good: That one shall be (in misericordia) there is no other word for this: we must not give way or countenance to these new inventions, for this should be a means to introduce Barbarism.

Adjudicatum est per Curiam, this is not good; and so if an Entry be, (& sic si in pœna) for in misericordia, this is not good nor to be allowed of: The ancient forms of our Judgments are by no means to be altered, or varied from, nor yet our Originals.

The Clerks being then demanded by the Court, touching the manner and forms of entry of Judgments, made this answer, That there was no President of any such Entry, (S) ideo concessum est per Curiam, neither here in B. R. nor yet in C. B.

Dodderidge. The usages in Inferior Courts, shall not lead or direct us here: If the Entry had been, Ideo adjudicatum est per Curiam, this may be a good Entry of a Judgment here, and it is somewhat hard for to reverse a Judgment, for an improper word used in the entring of it: If it had been ideo curia sententiam dedit.

Coke. If it had been so, it would have been erroneous, for this had been a very bad form of entry of a Judgment; we are to respect Ciceronian Latine, more than our ancient forms of entry here used: If it had been Provisum est, this had not been good, no more here in this principal Case of ideo concessum est.

The whole Court agreed herein, that this was no good entry of the Judgment, and that for this Error the Judgment is erroneous; yet the reversal of the Judgment was not pronounced, but a further time given to the Defendant to search for Presidents, but none were ever after produced to satisfie the Court, neither was the same ever moved again.

Judgment erroneous, *per Curiam.*

Baily Plaintiff, against *Merrell* Defendant.

A special action upon the Case for a deceit.
2 Cro. 386.
1 Ro.Rep. 275
1 Ro. Abr. 97.

IN a special Action upon the Case for a deceit, the Case appeared to be this: The Plaintiff being a common Carrier, using to carry Wares out of Essex into Northampton-shire; the Defendant having a Cade of Wood to be carried, came unto the Plaintiff, and bargained with him for the Carriage of this, and by agreement he was to give him 2 s. for every hundred weight of this, and being demanded by the Plaintiff, how many hundred weight this did contain, he said it was about 8c weight; upon this, he giving credit unto him, did cause this to be put into his Cart, and he afterwards perceiving by the hardness of the draught, that his Horses did overdraw themselves, and by reason of this Carriage he did kill two of his Horses, and then he did presently weigh the same, and found the same to be 200c weight, and so for this his deceit used, by reason of which he was so much damnified; for his remedy herein, he brought this Action, to which the Def. pleaded

No

Non culp. all this matter appearing so to the Jury upon the Trial, and the loss of his Horses, they gave a Verdict for the Plaintiff, and 20 Marks damages.

Harvey Serjeant. Moved for the Defendant in Arrest of Judgment, that the Plaintiff had no cause of Action by this given unto him, because that he at his own peril ought to take notice of the weight, and he is the party who ought to weigh this, as appears by the Case in 9 E. 4. fol. 3, 4. the Case of the Veil to be new cast, where it is said, that by the Law, he which hath the skill is to do it; and so is Perkins, fol. 153. placito 786. a Taylor is to shape the Gown; here the Bargain was for him to carry this from his House in Essex to such a place: The Plaintiff in his Declaration saith, that the Defendant falso affirmavit, that this did not exceed 800 weight, and that he fidem adhibens, &c. did carry the same; this is not good. 9 E 4. f. 3, 4.

Dodderidge Justice. Here is a plain default in the Carrier, that he did not weigh this; if he had carried this home for him, he would then have had for it according to the weight of it, after the rate of 2 s. a hundred weight, as they agreed for, and that there it ought to be weighed; he himself at his peril ought to have looked unto this before.

Croke Justice. The difference will rest upon the absence and presence of the party: If one lends his Cart to another to carry a load of Wood, and that he will have for it 10 s. a load; if he overload the Cart, an Action lieth for this fraud without damage, for damage without fraud gives no cause of Action; but where these two do concur and meet together, there an Action lieth; so here these two do both contur, for here he hath dealt fraudulently, and also deceptive with him in the weight.

Dodderidge. The difference will be, if absent, and where he is present and weighs this, and so receives this into his charge, 11 E. 4. the warranty of a Servant who sells Mares, if he sells Purple to one, and saith to him that this is Scarlet, this warrant is to no purpose, for that the other may perceive this, and this gives no cause of Action to him; no more here in this Case hath the Plaintiff any cause of Action, for the Carrier ought to weigh this, because he is to have the recompence for the Carriage of it, according to the weight of it, and he ought to endeavour to know the certainty of this; but in the Case which hath been put of the Cart, one saith, Send your Cart to me to carry Wood, and I will give you so much a Load, and trust me with it; there if he overload the Cart, here is a manifest deceit, and for this an Action well lieth; otherwise it is, where the Carrier is there present, for it is then very easie for him, for to see the difference between 800 and 2000 weight.

Haughton Justice. To warrant a thing that may be perceived by sight, is not good, by 11 E. 4. but here the weight may be well perceived by the view of it; here the deceit is no parcel of the Bargain, but the matter of weight to have 2 s. for every 100 weight, and this allegation of the weight comes by the averrment of the party, upon the demand of the Plaintiff, and therefore he can have no Action for this; for here the agreement is to be so much for the pack, and the surplusage of the weight is only averred, so that the Plaintiff hath no cause of Action here.

Croke. If he had laid here, that he had lent him his Cart and Horses, and that he had overloaded his Horses, by reason whereof he lost two of them, here had been a just cause of Action.

Haughton. He ought here to have weighed this.

Dodderidge. If we shall give way to this, then every Carrier would have an Action upon the Case; this belongs properly to the Carrier to weigh this, if he demands of him what the weight is, and he saith about 100 weight, and it is 1000 weight; if he will not weigh this himself, but kill his Horses with the carriage of it, he shall not have any Action for this, because it is meerly his own default that he did not weigh it.

Haughton.

Haughton. If one sells to another a Horse, and warrants him to be sound, and he is not, an Action upon the Case lieth for this: otherwise it is, where he sells the Horse generally without any such warrant, and he is not sound, no Action lieth for this, because this was no part of the Bargain, and so it is here in this Case.

Tota Curia, (absent Coke Chief Justice) that the Action by the Plaintiff lieth not because the default was in himself, that he had not weighed this.

Curia against the Plaintiff.

By the Rule of the Court, this matter to stay till the Plaintiff move the same again, and no Judgment pronounced one way or other; but the Plaintiff perceiving the Opinion of the Court to be against him, never moved the Court again herein.

Withers Plaintiff against *Henly* Defendant.

An Action for false Imprisonment.

IN an Action for false Imprisonment, the Case was this; The Plaintiff being taken by the Sheriff, and in Execution at the Suit of another, and so by him delivered over to the new Sheriff in Execution; afterwards Brown, the party himself, (at whose Suit he was then in execution) came to the Sheriff, and told him that he had made and sealed a Release of the Debt unto the Plaintiff, and that therefore he should deliver him out of execution: The Sheriff doth not so, but keeps him after this still in his Custody in Prison; upon this the party in execution (being the Plaintiff) brings his Action of false Imprisonment.

It was urged in this Case for the Defendant by Geo. Croke, That this Action here lieth not, for that the Sheriff here had no cause to deliver him, he being lawfully taken, and in execution, and the detainer now of him is only in question.

If a man be taken in execution at the Suit of the King, afterwards a Supersedeas comes to the Sheriff: By 2 H. 7. fol. 19. he may return the Supersedeas with the Body, as there he made the return of the Capias, Supersedeas, & Corpus in custodia, there held by all, that he should return this to the Court; that the Sheriff hath done well not to deliver him, he may here return, Quod ante adventum brevis, he had done Execution, and so he may return both, ea de causa, & non alia.

19 H. 6. fol. 43. placito 88. If a Capias comes to the Sheriff to take the Body of such a one, afterwards a Supersedeas is granted, that he shall not take him, Whether a false Imprisonment lieth, or not; if he had taken him, he ought then to return both together, so that the Court may adjudge upon it.

13 H. 7. fol. 1. b. where the difference is put between a Capias ad satisfaciendum and another Capias in process: Here the Imprisonment was lawful, and so no Action lieth for this.

As to a second Point here, by a Latitat out of this Court, the Plaintiff was arrested, the Sheriff had him in execution for Debt, and so delivered to the new Sheriff: afterwards one comes to the Sheriff, and tells him, that he had released the Debt of the party, being then in execution for the same, and that therefore he might suffer him to go at large; the Sheriff answers, that he did not know this to be so, but that he would return this unto the Court: The Sheriff is an Officer of the Court, and he is not bound to believe the verbal report of any one; he ought to answer for all Escapes, and therefore though this matter was shewed unto him yet he was not bound to discharge him.

27 H. 8. fol. 24. b. &c.

In 27 H. 8. fol. 24. b. in Tatams Case it is there questioned, Whether he may be discharged by assent of the party, or not, being delivered to him in execution by

the Court, and therefore he is to be discharged of this by the award of the Court, and not otherwise; the Sheriff here may and ought to answer him in this manner, (S.) I have taken him, and I will return this at the day with the Body, by 9 E. 4. fol. 3. If the Sheriff arrest one upon a Process, he ought to return this with the Body at the day to him given by the Court to do this: It is there said, If the party discharge him, this is a good excuse, for that volenti non fit injuria, here it is only for his not believing of him, but detained him in Prison after; this is no false Imprisonment, nor cause of such an Action.

Coventry for the Plaintiff prayed Judgment: The Action here is for a false Imprisonment, 11. Aprilis, 11 Jac. that a Capias issued to Arrest the Plaintiff, this came to the Sheriff out of the Exchequer, and a Latitat out of the B. R. for to take him; one Henley was Sheriff, and the Defendant his under-Sheriff: as to the Capias, he saith the Supersedeas came unto him, that if he had not taken him, that then he should not take him; and if he was taken, to let him go at large.

Obj. It hath been Objected, that the Imprisonment was lawful, and therefore the Action lieth not.

Resp. As to this, notwithstanding there was a lawful taking, yet when there was a sufficient discharge, and a detainer afterwards, this amounts in Law unto a new Imprisonment, and a tortious detainer.

As to the matter moved, Whether the Supersedeas be a good discharge of the Judgment in the Exchequer: There is a great difference between this Case here, and the Case in 2 H. 7. fol. 19. here because the Debt of the King was satisfied; this was a good discharge, being to have him delivered, if taken.

Then as to the Arrest by the Latitat out of this Court, after this, the party at whose Suit, by writing under his Hand and Seal, discharges Withers the Plaintiff of the said Debt for which he was arrested; he came unto the Sheriff the Defendant, and said so much unto him, that he had made a Release to him of the Debt, and wished him to let him go at large; that he may discharge him, appeareth by 13 E. 3. Fitz. tit. Bar, placito 253. and by 27 H. 8. fol. 24. agreed there by all, that the party may discharge him when he is taken. 13 E. 3. Fitz. tit. Bar, &c.

In 10 H. 7. fol. 3. a. It is there questioned, Whether he may discharge him by Parol: but there it is put, that without any question he may discharge him by Writing when he is taken, and not in Execution; here was shewed to the Sheriff an express Discharge by writing, and also a Prayer of the party himself to discharge him.

Coke Chief Justice said unto Coventry, that he inclined to be of his Opinion, that the Action here well lieth.

By the Statute of 1 R. 2. cap. 12. one being in Execution, shall not be suffered to go out of Prison by Mainprize, Bail, or by Easton, without making gree to the parties, unless it be by Writ, or other Commandment of the King: If a Writ of discharge be lawful, then to keep him afterwards will be a false Imprisonment, he is not to stay till he return this: If he be discharged of the matter for which he is taken, he is then to be put out and set at liberty, and the detaining of him after this, amounts in Law unto a new taking, for the restraining one of his liberty, where he ought to have it, is a Caption in Law; here the Sheriff ought to take notice of the party Plaintiff, and also at whose Suit he is in his Custody. Stat. of 1 R. 2. cap. 12.

The liberty of a man is a thing very precious in the Law; here was a good discharge shewed unto the Defendant, and he ought not after this to have kept him any longer in Prison, and therefore for this the Action well lieth.

Haughton Justice. The Supersedeas is not to be denied, he ought to obey this though erroneous; the Sheriff in case of discharge of the party, if he do believe this, he is charged with a third matter, (S.) to have the Body in Court.

Coke. This is only ad respondendum, and if the party do discharge him before, this then ought not to be done.

Dodderidge Justice. If the party will, he may then well discharge him, and upon this, he is to be set at liberty.

Coke. One being in Execution, the Plaintiff comes, and says to the Sheriff, set him at large out of prison, if he will detain him afterwards in prison but by the space of an hour, an action for false Imprisonment will well lie against him for this. The Statute of 1 R. 2. saith, Nisi gree soit fait al partie. Also interest Reipublicæ ut sit finis litium, and shall it be in the power of a Sheriff to detain one in Prison, after such a lawful discharge made by the party himself, at whose suit he was imprisoned? this shall in no wise be, by 49 E. 3. a continuance of an Inclosure is a new Nusans. If one comes into the house of another to eat and to drink, or for any other lawful matter; and he detains him there in his house, for this an Action of Faux Imprisonment well lieth, by 21 E. 4. a Sheriff shall not take any advantage of an Error, for he ought not to argue the Authority of the Court.

49 E. 3.

Dodderidge & Croke agréed with him herein.

Coke. Every restraint of Liberty implies a taking in Law. If the Sheriff doth arrest one, or kéeps one in Prison at the suit of another, he ought at his peril to take notice of the Plaintiff or Party at whose suit he is in his custody. This here is a very clear and a plain Case, if he would have helped himself here, he ought to have set forth, that he knew him not to be the Plaintiff, who told him of the release; but he hath not so done, and so it is clear against him.

The whole Court agréed with him, that the Plaintiff here had good cause to have this Action of Faux Imprisonment. And so the Rule of the Court was, Quod judicium intretur pro querente.

Judgment for the Plaintiff.

Blamford Plaintiff, against *Blamford*. Defendant.

Entred Termin. Trin. 8 Jac. B. R. Rot. 1671.

Action of Trespass. 1 Ro. Rep. 318. Godb. 266. Cro. Jac. 394. Mo. 846.

THomas Blamford an Infant, by Henry Blamford his Guardian by Will, brought an Action of Trespass against Laurence Blamford for entring into and breaking of his Close, for treading, spoiling, and consuming of his Grass, and this laid with a Continuance, till the bringing of the Action ad damnum 10 l. upon Non culp. pleaded, this came to a trial at the Assizes in Wiltshire, and the Jury there found a special Verdict to this effect. They find that long time before the trespass, one Thomas Blamford the Grandfather 40 Eliz. was possessed of a Tenement called Gowens, of which the Close where the trespass was done called Easthayes was parcel, which term was for 32 years then to come; and that he being so possessed, made his last Will and Testament. The which the Jury finds in hæc verba. Item, I give to Alice my Wife my Living called Gowens. Ita quod, she do not sell it: but she to have this for her life only, and not otherwise, nor any longer. And after her death, I devise the same to Thomas and Laurence my Sons, equally and joyntly, if they have no Sons. And if it shall please God to send them, or either of them any Men-children; Then my Will is, that shall be reserved and put out for the benefit and behoof of such Child or Children. But if it shall please God to send them no Men-children, then my Will is, that after their decease, it shall descend and come to two of Henry Blamfords Sons (S) Robert and Stephen.

The

The Jury find that he made Alice his Wife and Thomas his eldest Son his Executors, and after died (S) 1. Martij 43 Eliz. being then possessed of the same term, and that after his death they proved the Will, &c. And that Alice did enter, enclaiming the same as a Legatee, and not as Executor, and that afterwards she died, being thereof so possessed; and that Thomas and Laurence did enter, and enjoyed the same for three years without any issue Male. And that afterwards Thomas the Executor had Issue Thomas (the now Plaintiff,) who entred upon the Possession of Laurence (the now Defendant,) who 26. Aprilis did enter and break the Close pro ut, &c. upon whom Thomas the Plaintiff did re-enter, &c. And so the Jury did say, that if the Entrie of Laurence shall be adjudged lawful, then they do find him Non culp. but if otherwise, then they find him culp. and assess damages, ad &c.

The questions in this Case arising rest only upon the construction of the Will of Thomas Blamford the Grandfather, and whether the issue of Thomas Blamford, one of the Sons, and first Devisees after the death of Alice the Wife, shall by this devise have and enjoy this Lease presently, and put out his Father and Uncle, or not.

It was urged, that he should not.

Coke Chief Justice demanded, That if they had Sons living at the time of the death of Alice the Wife, who should then have this Lease?

George Croke answered, That the two first Sons should have this, and not their Sons; they by this devise are not to have this presently, but after their deaths. Reserved, is as much as to say, as this is to be reserved for them.

Coke. Without all question, his meaning here was, that if his Sons had, or either of them had issue Male, that such issue ought to have the Lease presently, after the death of his Wife: but if they had no issue Male, then they (S) Thomas and Laurence to have this equally and joyntly, until they or either of them should have issue Male.

Dodderidge Justice. By this Will, the scope and aim of the Testator here was chiefly to make provision for the issues Male of his two Sons, but not for themselves. But if they had no issue Male at the time of the death of his Wife, then his intent and meaning was, to have this setled in his two Sons, until they or either of them should have such issue Male, but not any longer; for then this was to be presently after put out and imployed for the profit of such Issues, or of such issue Male which they or either of them should have.

Coke agreed with him herein, for the Will is (if afterwards) it shall please God to send them any Sons, then, &c.

Dodderidge demanded, If they had such issue Male at the time of the death of the wife, whether Thomas and Laurence should then have the same Lease or not? Clearly they should not have it, but their Sons.

Haughton Justice agreed herein with him, for that Thomas and Laurence by this Will, were not to have this Lease absolutely, but with a (Si) and if no issue Male, they not to have it absolutely, but they were then to have the same only conditionally, and that with a (Si) also (S) and if afterwards it shall please God to send them issue Male, &c. then, &c.

Croke Justice to the contrary, The case here is, one having a Lease for years, makes his Will in and by which he makes a disposition of this his Lease, and that in this manner following, he had two Sons, Thomas and Laurence, 1. he devileth this to his Wife for her life, and if she dies within the term, then he devises this to Thomas and Laurence his two Sons equally and joyntly; if they have issue Male (for this clause next before he speaks only de modo habendi,) if they have no Sons, then they to be joint-tenants, but if they have Sons, then not to be so, but to be then as Tenants in Common; if both of them have Sons; this then to be reserved for

the benefit of such Sons, (but this so to be, after the death of the Father,) But here one of them hath a Son, and the other hath none, what is now to be done here in this Case? Whether this Son shall take presently or not, as to this he shall not have this Lease presently.

Coke. This is a plain Case in my Judgment, that if they have Issue male living at the death of the mother, the Sons then are to take nothing by this Will, but their issue male to have all; his purpose here was not to prefer his own Sons, with this provision, who then were ante oculos suos, but their Children.

Haughton. The immediate gift, by this devise, is to the issues male of his two Sons, (if they have such issues to take) if they have not so, then to themselves, until they, or either of them, shall have such issue to take. And if they die without such issue, then to others, &c.

Dodderidge. His two Sons Thomas and Laurence to have this; if they have no Sons, but if they have Sons, then (as it hath been said) they should be as Tenants in common of the whole term: If this should be so, then this should never come to their Sons after them; but the several moyeties then to go to their Executors.

Haughton. Here when one of the Sons hath issue Male, he shall take this presently, and if the other Son also afterwards hath an issue Male, he shall then also take and enjoy the same with the other.

Coke. The Wife here is the first, to whom the devise of this was made for her life. If the devise be made in this manner, (S) that if J. S. shall pay 1000 l. to my Executors, that then he shall have my land to him and his Heirs, this is good so by devise, but not so by a Conveyance at the Common Law. If one doth devise his Land to another, until his debts are paid, the Executors have a term. But if one doth Lease his Land to one, being of a certain yearly value until his debts are paid. It was Resolved, Termin. Pasch. 24 Eliz. in C. B. as appears in the Bishop of Baths Case, 6 pars, fol. 35. b. that this is but a Lease at Will, without livery made, but if he makes livery, then he hath a Freehold.

Term. Pasch. 24 *Eliz. C. B. &c.*

Dodderidge demanded at what time the Sons of Tho. and Laur. should have this Lease? According to the devise they should have it at no time, by that construction which hath been made.

Croke. They are to have this after the death of their Ancestor.

Coke & Dodderidge. There is no word at all in the Will to warrant this to be so, but they are to have it presently, and not their Fathers.

Croke. This is not to be so, for by this Will they are not to have this till after the death of their Fathers, and this is so by the forsque de modo habendi.

Coke. Clearly they are here the immediate Devisees, if in esse at the death of the Wife.

Dodderidge demanded at what time this should be put out and imployed to their use, where they are not in esse at the death of the Wife?

It hath been said, that this shall not be till after the death of their Fathers; this cannot be so, being not to be warranted by the words of the Will, the words being, that presently after their birth it shall be so imployed.

Coke. This is as plain a Case as any can be, for the sole scope and intent of the Testator, as appears apparently by his Will, was to prefer the Sons of Thomas and Laurence, and this to go to Thom. and Laur. equally and joyntly, if they have no Sons, otherwise if they have any; and if one of them have issue Male, he to have this alone; and if the other afterwards hath issue Male, he then to have this with him also: The very words of the Will make this plain, being (but if it shall please God to send them afterwards any Men-children, then, &c.) when they shall have any Men-children, then presently the same to be put out and imployed for the sole benefit of them.

Dodderidge.

Dodderidge. To maintain that which hath been said, there is no way but this, to refer the words to the possession, if they have no Sons, to make them joynt-tenants; but if they have Sons, then to be Tenants in common.

Croke. If the words had been, if they have Sons, that then there should be no Survivor between them.

Coke. Lay-men do not know what a Survivor means.

Croke. Put the case that they both of them have Sons, and they both afterwards do die. Whether this shall be setled in them till they die, and who shall have this afterwards?

Coke, Dodderidge, & Haughton, made answer, That clearly their Executors or Administrators shall have this after their death, for by the words of the Will, the Sons of the Sons had this devised to them absolutely.

Coke. If a man makes a Feoffment in fee to the use of himself for life, after to the use of every one of his issue Females, and to the Heirs of their Bodies, after to the issue of one Daughter at one time, of a second Daughter at another time, and of a third Daughter at another time, so that this to vest severally in them, and yet afterwards to all; they are here Joynt-tenants, and yet they come in at several times: But the reason of this is, because the root was joynt; this hath been so adjudged, and so here in this Case.

Dodderidge. If one hath a Lease for years, and doth devise that after his death, the Profits of this shall be put out to the use and benefit of J. S. this is a devise of the Lease it self to him.

Coke. Agreed this to be so; and so is 45 E. 3. tit. Feoffments, & Faits for this doth tant amount unto a devise of the Lease: For if one doth grant unto another the profits of his Land, and makes Livery, this shall be a Lease for life.

In this Case all the three Judges were of Opinion against Croke Justice, and so without any further debating of this matter at this time, this Case was by the Court adjourned to a further time, for the resolution of the Court herein.

Afterwards, (S.) Termin. Hillar. 13 Jac. B. R. this Case was moved again, and argued at large by the Council of both sides, and afterwards by all the four Judges. Termin. Hill. 13 Jac. B. R. &c.

It was urged for the Plaintiff, That this putting out to the use of Infants, is a Devise to them by Implication, as appears by 38 H. 8. Brook devise, placito 48. & Brooks Cases, fol. 71. placito 316. 15 Eliz. Dyer, fol. 323. 23 Eliz. Dyer, fol. 371. & 13 H. 7. f. 17. one deviseth, that after the death of his Wife, his Heir shall have the Land, this is a Devise to the Wife by Implication. 38 H 8 Brook Devise 48. &c.

Then as touching this possibility of a Term, that this by limitation, as it was urged, may come from one to another, as is warranted by Mannings Case, Coke 8 pars, fol. 94, 95. Coke 10 pars, fol. 46. Lampets Case, Coke 6 pars, fol. 16, 17. Wildes Case, 14 Eliz. Dyer, fol. 304. and 16 Eliz. Dyer, fol. 333. Chapmans Case: Then as touching the first assent, to take as a Legatee, Whether this shall go to the others? Coke 8 pars, f. 94, 95. &c.

It was urged, that it shall so do, as it is resolved in Lampets Case, and in Mannings Case before remembred.

It was further urged, that this Devise being to the use of the Son, is all one as if it had been a Devise to him.

Coke demanded of Noy for the Defendant: If Thomas and Laurence had issue two Sons, living at the death of the Wife, who then should have this Lease.

Noy said, That to this he would speak afterwards.

First he agreed, The assent to the first Legacy, to be an assent to all the others in remainder.

Coke. This is very clear to be so of it self, and needs not any further Argument.

Noy

Noy for the Defendant urged. 1. That the Verdict here is imperfect: The Jury do find, that Thomas the Grandfather was possessed of the Tenement for 32 years; but whether this had continuance at the time of the re-entry of the Wife, or at the time of his death, is not found; it appears not by this Verdict, when the Lease did begin, nor yet when the same was to end.

Coke. If it be found (as here it is) that he was possessed of the Lease for 32 years: It shall be intended to be so at the time of his death.

Noy. As to the matter in Law, which rests upon the construction of the Will; Whether by this Will, the birth of the Son determines the Estate and Interest of the Fathers: This it doth not do, for the meaning of the Will is, the Fathers to have an Estate therein for their Lives, without being evicted of this by their Sons, when they should be born: Here they had not any Son when this devise was first executed in them (and if they shall have any Men-children) my Will is, that the same be then reserved, &c. to the use of &c. after one of them hath Issue a Male-child, Whether he is to have this now presently: He is not to have it, for the Grand-father did intend by this his Will, first to advance his own Sons, before the Sons of his Sons, upon this reason is 16 Eliz. Dyer, fol. 331. Clatches Case, and 17 Eliz. Dyer, fol. 342. and Trin. 2 Jac. C. B. between Pool and Spencer, where the Devisor had three Daughters and a Son, the Son was to have but for life, there adjudged the Son to have it in satisfaction of an Annuity; here in this principal Case, by the Will it is shewed when every one is to take; he had a purpose by this his Will to continue a means of living for his own two Sons, and not to strip them of the possession, upon issue Male had by them.

16 Eliz. Dyer, fol. 331. &c.

Haughton Justice. In this Case Judgment ought to be given for the Plaintiff: The question here rests upon the construction of a Will, in which the Devisor hath explained himself in these two courses; the Devise to be conditional to his two Sons, (S.)

If they have no Sons, and two, if they have Sons, then to be reserved, and put out, &c. so that he hath here by this expressed himself. The first is plain by the words of the Will, (S) if they have no Sons, &c. It hath been objected. Quando when this should be. It hath been urged, this to be taken at the death of Alice. If they have no Sons, then they to have this Lease equally and joyntly.

In answer to this, if it should be taken so, then it would be against the Plaintiff but the same ought not so to be taken, neither by the words, nor yet by the meaning of the Will. To make a true construction of this Will, the same is to be taken and considered altogether, both that which preceeds, and also that which follows, if afterwards they have issue Male, &c. this to be at any time without any limitation; and this appears to be so out of the parts of the Will. For after in his Will, he hath another clause, (S) If it shall fall out that they shall have no issue Male, then this is to come to the two Sons of Hen. Blamford, and therefore this is to be taken in answer to the objection made, Quando. If they have issue Male at any time, then; For he did intend by his Will to have this to come to a stranger, rather than to his own Sons. Also the Will is, If Thomas my Son have any Son, then he to give up his Estate into the hands of the Son, or to pay so much.

This is an Argument out of the Will, which doth satisfie me that the Son is to have this at any time when he shall be born, and this is to be collected out of the words of the Will. 2. Arguments to satisfie me against the former Objection and in reason this also follows. For here is not one Interest depending upon another, but here is an Interest which may of it self commence at any time, and this Estate so commencing is not like unto a remainder, depending on a particular Estate.

Also the form of the words of the Will do satisfie me, being (if it please God) to send them Men-children. Then my Will is that this shall be set forth, and this

to be so, if at any time they or either of them hath issue Male. 28 H. 8. Dyer, fol. 16, 17. Bowles Case, the condition of an Obligation for Marriage-mony, being that if the Wife died before Mich. without Issue of her body, then living, that the Bond should be void, she had issue, and died, and the issue died before Mich. adj. the Bond to be void; for (tunc) referrs to the last time, and relates ad proximum antecedens (S.) Mich. and not to the death of the Wife (tunc) significat tempus extremum. So here in this Case now in question. (Then) this stands with the matter and intention of the Will to be thus, (S) if any issue Male at any time be.

28 H. 8. Dyer fol. 16, 17. *Bowles* Case.

The second part of the Will, if they have issue Male; this rests upon the words of the Will, these words in Wills are unusual, yet as nearly as we can, we ought to take them according to the intent of the Testator; these words do give an interest, the intention of the Testator, &c. by the words, being. It shall be then reserved, and put out, &c. reserve, &c. this to restrain that which was given before; and this is the natural meaning of this word (reserved) this to be put out, for his benefit, and this is all one with a gift. If one gives to another the profit of his Land, this is in Law as a gift of the Land it self. So here these words in this Will do tant amount as an express gift to him, of this, and if such words have been by Law allowed for a grant of the thing it self, a fortiore it shall be so in case of a Will. 18 E. 3. fol. 18. A Lease made for life, & post decessum reverti debuit, a remainder taken for a reverter, being all one, the one taken for the other.

18 E. 3. f. 18. 33 E. *Fitz. &c.*

33 E. 3. Fitz. title Accompt, placito 130. A Lease made of Land for three Crops, this by necessary intendment to be a Lease for three years. 36 H. 8. Brook Feoffments al Uses, placito 52. Brooks Case, fol. 62. placito 282. Lease to one for life, and that after his death another shall have the profits; this is a grant of the thing it self: If it be so in grants, by such unusual words, a fortiori, it shall be so in case of Wills. A devise made to one of Lands imperpetuum, this is a good Fee-simple. Littleton, fol. 133. placito 586. but not so in case of a grant, there but for life; so here in this case, it is all one in Law as if he had said, that he should have this Lease, and so upon the whole matter the Plaintiff here hath a good title, and Judgment ought to be given for him.

36 H. 8. *Brook* tit. *&c.*

Littleton, fol. placito 586.

2. Dodderidge Justice. It is in this Case to be considered in whom the interest of this Lease for years is, and this is the only question, Whether this shall be so vested in Thomas and Laurence, as that the same shall not be devested again out of them by the Son afterwards born? As to this, it is not so setled in them by this Will, but that their Interest shall be determined by the Son after born, this so happening at any time during their lives. And for proof of this, I shall not insist upon many Cases, it being very difficult to find Cases for to match with this particular Case. But many Cases there are upon the general Rules for the construction of Wills, but every thing is to be ruled according unto the particular reason of the same.

As touching the general Rules to be observed for the true construction of Wills. In testamentis plenius testatoris intentionem scrutamur. But yet this to be observed with these two Limitations. (S.) 1. His intent ought to be agreeable to the Rules of Law. 2. This his intent ought to be collected out of the words of the Will. As to this it may be demanded how this shall be known. To this it may be thus answered. (S) 1. To search out what was the scope of his Will. 2. To make such a construction, so that all the words of the Will may stand, for to add any thing to the words of the Will, or in the construction made, to relinquish and leave out any of the words, this is maledicta glossa. But every string ought to give his sound; as I shall make the same to do in the course that I will pursue, for the true construction of this Will. First, we are to see and examine what was the scope of this Clause. First, he intended with this to advance his Wife In præsenti, in futuro,

to advance his Grand-Children, if he should have any, so that his Grand-Children Male are within the scope of this Will to be by this advanced: And this to be so, is plain by very many Circumstances in this Will.

First, He hath here in part advanced Thomas and Laurence his Sons in his life, by act executed; and if Thomas had Issue, then he to take the Interest of Laurence, in other Tenements (given to him before) (S) Holts, he to surrender this into the hands of friends, or otherwise, to give 20 l. to the Son of Thomas.

A second Circumstance, I bequeath it and my term to Thomas and Laurence, (if they have no Sons) equally and joyntly: And if they have any Men-children, then my Will is, &c. The first Clause is without any limitation of time, being indefinite, for he cannot restrain the Will of God to any time certain; he therefore speaks indefinitely, with a reference of his Will to the pleasure of God, which cannot be restrained by men.

And so he doth afterwards, when he limits this to his Son in laws Children; if it fall out that my Sons shall have no issue Male, Then my Will is, that after the death of my two Sons, it shall descend and come unto the two Sons of Henry Blamford my Son in law, (S) Robert and Stephen; so that every word of the Will speaks to advance and make good this Construction.

Here are two questions to be considered, and this is the main, Whether this term, after the death of the Wife, be absolutely then setled in Thomas and Laurence as an absolute devise or not? And as to the word (have) this is not to be referred to the death of the Wife, but indefinitely, whensoever they shall have, &c. If they shall have Men-children, then when? whensoever they shall have: By this Clause of the Will there is no present devise, but a cautionate provision for the Grand-Children, they to have this Lease then when they are born: His own Sons to have this no longer, but until they have Issue male.

I shall frame three Cases out of this Will, which will make an end of this question.

1. I bequeath it and my term to Thom. and Laur. my Sons, if they have no Sons; put the case that at the death of the Wife they have no Sons, but the Wife of Thom. had been great with child with a Son, yet they are to enter and to retain this until the Son be born; and if Thom. dies, Laur. to have this by Survivor, after the Son of Thom. is born, he shall now oust Laur. who had this by Survivorship.

Also admit, that Thomas had a Son, who had this by Judgment of Law, and after Laur. also hath a Son, shall the Son of Thomas retain this? he shall not, but the Son of Laur. Quandocunque he shall be born, he shall be Joynt-tenant with him by the words of the Will, they having a joynt title, and therefore they shall be joynt tenants according to the meaning of the Will: He deviseth it and his term to Tho. and Laur.

Obj. Hence it hath been Objected, that Thom. and Laur. were by this to have the whole Term.

Resp. This cannot be so: But they are by this Will to have this for so many years as they shall be without issue Male, and then their Interest to be determined.

It is the office of a Judge, in the Interpretation of a Will, to give unto every word in the same its true force and strength; so that by this Construction, this is to be done here, that by this Will the Lease is to be to Thom. and Laur. until the or either of them shall have issue Male; for the Estate of Tho. and Laur. herein, is to be taken with this limitation, (S) until, &c. But if any other construction should be made of this Will as for the Defendant, they would have it to be, this should be to make the Testator to speak things contrary in themselves: If they would have this to be setled in Thom. and Laur. by this they should offer great violence unto the Will, and should by this infringe the intent and meaning of the Testator.

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For first, if this should be so, by this no provision should be made for the Grandchildren, and so this should be taken away, which was the chief scope of the Will.

Also if it should be so, they would by this infringe the later part and scope of the Will, which was to have this Lease to come to the two Sons of Henry Blamford his Son in law, for default of issue Male of his own Sons; and this should be altered, if by the construction made, this should be setled in Thom. and Laur. absolutely: This should be by way of diminution, and to abridge the words of the Will.

Also by such a Construction as would be made, they must add words to the Will, (S.) they must add the word (then) and where the clause was before indefinite, by this construction they are to make it so, (S.) If they then have no Sons, and so by this they will restrain the generality of the Will unto a time certain: But such construction shall be to make a clog to the Will, and this shall be to offer violence unto the Will; and to this it may be said, maledicta expositio, quæ corrumpit textum, either by addition to the Will, or by any diminution of the same: And this shall suffice for the first part of the Will: And this is not unusual in our Books for Judges to make construction of Wills, according to the intent and meaning of the parties, as appears in Plowdens Commentaries, fol. 541. in Paramor and Yardleys Case, where one in the first part of his Will did devise his Land to J. S. and afterwards devised a rent out of this Land unto J. D. The Judges there in construction of this Will, to make all the words to stand according to the intent of the Devisor, did interpret this, First, to be a devise of the Rent to J. D. and afterwards to be a devise of the Land to J. S. charged with the Rent; and so there, if a man in the first part of his Will doth devise his Land to J. S. and in the later part of his Will he doth devise the same to J. N. The only way to make all the words of this Will to stand, is to make them both to have a joynt Estate in this Land; and this is the office of a Judge. *Plowdens Commentaries fol. 541, &c.*

And as touching the like construction made, appeareth Coke 1 pars, fol. 76. b. in Bredons Case, and in 19 Eliz. Dyer, fol. 357. where Chick deviseth a House in Soper-Lane to Alice his Cousin in Fee-simple, and after her decease to W. her Son, which W. was Heir apparent unto A. and no Estate limited unto W. the Judges there found a way to make all the words of the Will to stand, they there adjudging Alice to be but Tenant for life, the remainder to the Son for life, the remainder unto Alice in Fee; so here in this Case. *Coke 1 pars, f. 76. b. &c.*

It is one of the most difficult things in the Law, to make a true construction of a Will, when one by construction makes all the words in the Will to stand, by this he hits the true intent and meaning of the Devisor.

2. The second Point arising upon the words of the Will, (S) Then my Will is to have this reserved and put out: In which it is to be considered what manner of Will this is to his Grandchildren; he gives no Estate to them, he hath limited an Estate.

In this I will not seek Cases to insist upon, as where a gift of the Profits of the Land, to be a gift of the Land it self, this is a plain Case: But it appears here by the words of the Will, he devised this to Thom. and Laur. (if they have no Sons) but if they have, then their Sons to have this: By this a plain Interest is given to them; so lay these words together, (S.) the putting forth, with the gift to the Fathers, and so all will well follow consequently.

30 H. 6. Brook, tit. Estates, placito 74. Fitz. tit. Devise, placito 22. A man devises Land to three men, and that one of them shall take the Profits, and dies, this makes a use in him, and this is but an Estate for life. *30 H. 6. Bro. tit. &c.*

3. A devise of the Profits of the Land, is a devise of the Land it self: A Feoffment in Fee made, reserving the Profits, is a void Reservation; and so upon the whole matter, the Plaintiff here hath a good title to this Lease by the Will, and Judgment ought to be given for him.

3. Croke Justice. It is a very hard thing to draw a perspicuous sense out of dubious words; as this Case here is upon this Will, Judgment ought to be given for the Defendant; and that the Plaintiff, the Son of Thomas comes here ante tempus petere, secundum nomen, ita res est: Testamentum est testatio mentis. Thomas the Plaintiff is not to have this during the life of his Father.

It must be agréed, that subtilis constructio is not to be, and that Turpis est pars, quæ non convenit cum suo toto.

It must also be agréed, that such a construction ought to be made of a Will, by which all the words may well stand together.

Coke 3. pars, &c. It is a good Rule put in Borastons Case, Coke 3. pars, fol. 20. b. for construction of Wills grounded on this reason, Quia testator est inops consilij.

In the argument of this Case, I will by my construction, make all the words and parts of the Will to speak and stand well together; Whether these words in the Will are to be referred to a conditional bequest, or to the taking of Thomas and Laurence joyntly?

These Gradations ought to be observed in every Will, (S) First, Quid. 2. Quibus, & 3. Quomodo.

And in these steps I shall go in the construction of this Will.

This old Thomas Blamford the Grandfather observed a good course, Statutum est omnibus semel mori, & dispone domum tuam, nam morieris; here he makes his disposition.

1. Quid, (S.) his Living called Gowens; this is in peace.
2. Quibus, He had here four persons in his Eye.
1. The Wife of his bosom, chara uxor, chara conjux.
2. His Children, grati liberi, grata pignora.
3. The Sons of his Sons. And
4. He had a purpose to continue this in his name, and this was the intent of old Thomas Blamford.

1. To his Wife, Quomodo, this is in peace: In secunda quæstione quæro; Quomodo, this was not absolutely to her for her life, but upon condition that she should not sell it, and not otherwise, and this De modo habendi.

If it had bèen demanded, but who shall have this after the death of his Wife? he would then have answered, my Sons Thomas and Laurence: But this may last longer than their lives; if he had bèen demanded, who shall have it after them? his answer, If they have no Sons, then they to have the same joyntly: Qui bene interrogat, bene docet: In one degrée they are to have it, if they have Sons, and in another degrée if they have no Sons.

If they have no Sons, there they to take it joyntly, and the Survivor to have it; otherwise if they have Sons, there no Survivor to be; and by such construction there will be no contrariety. The which will be, if any other construction be made of this Will; and this would be vim literæ, & vim naturæ secare; here he did sée ante oculos suos, that his Sons had no Sons, and therefore they Simpliciter & absolute were to have this. Intricacy and inconveniency would ensue, if any other construction should be made. This Thomas here an Infant would put out his Father, this is ante tempus petere, & filius ante patrem, and to make this to be so, would be subtilis constructio: But ex præcedentibus & consequentibus, construction ought to be made, and so by this construction it would not be to offer vim Literæ, nor yet vim naturæ. Another thing to be observed in this Will. (S.) If they shall have any issue Male; then this shall be reserved and put out, &c. this Clause hath an Emphasis in it (reserved) for whom, and from whom? from him who was to have this by Survivor. Ne jus possessionis, Ne jus proprietatis, by this Will is given to this Infant. And by Implication, an express devise to his two Sons, is not to be controuled; and such construction to be made of a Will appears by Frenchams Case, in 2 Eliz. Dyer, f. 170. Another thing is also to be observed in this Will. (S) The Sons of the Sons to have this, loco

suo

& ordine (S) in the third place. And in the fourth, others to have it, who are named in the Will. And so by this Will, the Defendant hath a good title; and consequently Judgment ought to be given for him.

4. Coke Chief Justice. Virgil in his Georgicks well saith, that there is no ground so barren, but by fruitful Husbandry it may be made good; and this is very true, so here, in this barren Case which hath been made a good Case. I do agree all the grounds before put for construction of Wills. But vita regulæ est applicatio. This Case hath been very well argued, In this case upon the Will, I conceive the Plaintiff to have a good title, and that Judgment ought to be given for him. If the Rule be true, every special case hath its special reason. They which do put many cases upon general grounds, do the least hurt to the case in question.

These Rules are to be observed for construction of Wills.

First, The intent of the Devisor is to be observed.

2. This intent ought to be taken and collected out of the Will it self. And

3. This intent ought to agree with the Rules of Law.

In this Will I shall examine the meaning of this good old man here, Whether the Sons of his Sons to have this Lease, and his own Sons nothing? As to this, Grandfathers sometimes have as great an affection to their Grandchildren as to their own Sons. He hath here provided for his Sons in his life time.

1. By this Will his Wife is to have this Lease for her life.

In this Will, this is to be observed, that none hath any absolute Estate given unto them by the same. (But the Sons of the Sons only) The Wife she hath a conditional Estate, his Sons also have a conditional Estate. But as for his Grandchildren they are to have this Lease by the Will absolutely: and by their death the same is not to revert again unto Thomas and Laurence, but unto the Administrators of the Sons; after her death, I bequeath it (S) Gowens, and my term to Thomas and Laurence, if they have no Sons; if he had been demanded this, (what if they have Sons) then it is plain that by the words of this Will, Thomas and Laurence ought not to have this omnino, (equally and joyntly) this goes unto the Estate if they have no Sons; this is not to be referred to Children.

As to the interest in Gowens, (if they have Sons) there is then no question that Thomas and Laurence are not to have it; this is as a Condition precedent to them. In the construction of Wills, we are to construe words according to Etymologies; they two are not to have joynt-Sons: his intent by the scope of this Will, was to prefer his Grandchildren (by the construction which hath been of this Will) if they have Sons, or have no Sons, the Fathers to have this Lease first before the Sons.

The first point in this Case material to be considered, who was originally intended to be advanced by this Will. The Sons of his Sons. If they have no Sons at the death of the Wife, his Sons then to have it: How long are they to have it? The Will clears this (S) But if it please God to bestow on them Men-children, Then my Will is, that it be reserved and put out, &c. Then when born, to the use and profit of them. There is no doubt at all to be made of this. Maledicta expositio quæ corrodit viscera textus. By the construction which hath been made of this Will, they would couple this (S) if they have no Sons, to the death of the Wife. This was no distinction in his intent, the time of the birth of the Sons is not here material. But quandocunque, this shall happen, they then presently to have it, and this is the reason given in Shellyes Case 1 pars. So that no reason can be made from the time of the birth, for the act of God shall never breed any Calamity to one who is not born. It is to be observed for a Rule, generalia verba,

generaliter sunt interpretanda, and this is a Rule in Law: If it shall please God to, &c. then. There is no reason to prejudice these Grandchildren if born one hour before or after his death. His intent by this Will was, when they should be born, then to have it. He died 1. Martij he made his Will in January before; when the first Thom. Bl. died, the possibility did then vest presently in his Sons Thomas and Laurence, and he did know this, that they had no Sons at the time of his death, by the Will Thomas and Laurence to have this Lease, if they have no Sons; But here they have Sons, ergo.

By this construction, I shall make every word in this Will to speak. If they have no sons, then they Thomas and Laurence to have this. But how long? The Will answers, when they have Sons, then they to have it; they are born, then they, the Sons of the Sons to have it, and they have an absolute Estate therein, their Father had but a limited Estate in this Lease, and no Estate at all therein, if they had Sons. If they had no Sons, then after their deaths, the same to go to Henry Blamfords two Sons, in manner as before, maledicta expositio quæ corrodit viscera voluntatis. As to the words in the Will of Reservation. It shall be reserved and put out, &c. Here is a possibility upon a possibility; how this can be, may be questioned upon the Opinion of Popham Chief Justice. As touching this, sée 1 pars, fol. 155. in the Rector of Cheddingtons Case, where Welkdens Case, Plowdens Commentaries, fol. 520. is cited.

Coke 1 pars, fol. 155, &c.

I agrée, that sometimes one possibility shall not beget another, as touching this, sée 7 H. 4. fol. 16,17. one gives Land to a man not married, and to a woman, and to the Heirs of their bodies, this is an estate tail in them vested, there is a future possibility of a marriage; they intermarry, afterwards they are divorced: their issue not to inherit by the divorce, their estate is now turned into a frank-tenement. No possibility executed, & possibilitas dissolutionem executionis, shall not be revived. If Land is given to a married man, and to a married woman, and to the Heirs of their bodies, by 15 H. 7. fol. 10. 40. Assisar. placito 10. Plowdens Commentaries, fol. 35. a. in Colethirsts Case, and in Chidleighs 1. pars, this Resolved to be a present Estate tail; this is more remote than the other, and yet a present Estate tail. If Land be given to two married men, and two married women, and to the Heirs of their bodies, by 24 E. 3. fol. 29. this doth vest in them, questioned whether they shall have an Estate tail presently, upon this possibility, of cross marriages, they have joynt Estates, and several Inheritances not upon the possibility, post executionem status, lex non patitur possibilitatem. If Land be given to a man, and to two women, and to the Heirs of their bodies, here duplicationem possibilitatis Lex non patitur, 44 E. 3. Fitz. title Tail, placito 13. ruled accordingly, where Land was given to two Men, and to a Woman, and to the Heirs of their bodies but for life. But we here in this Case are out of all these grounds, We are upon the vesting of a possibility. It is a plain Case, that this may so be, as this case is, for otherwise this would shake all common assurances, here 1. to one Son, 2. to another, and so if there be a good ground-work to support this, it shall be good. If a Lease for life be made to one, the remainder to the right Heirs of another, and afterwards to, &c. in Paramour, and Yardleyes Case in Plowdens Commentaries, express authority for this, where all the remainders are allowed to be good. Mich. 34 & 35 Eliz. Locrafts Case, put in the Rector of Chedingtons Case, 2 pars, to this purpose, 7 E. 6. Brook Grants placito 154. Brooks Cases, fol. 95. placito 437. if one grants his term after his death, this is not good, but if it be by way of Lease, it is good. So E. 3. fol. 27. a Lease made to one for life, reserving for the first seven years a Pepper-corn, and if he will hold it after then 20 l. and binds him to reparations for the first seven years, after the first seven years he will not hold longer, an Action of Covenant lieth for not repairing:

15 H 7. fol. 10. 40, &c.

24 E. 3. fol. 29.

44 E. 3. *Fitz.* title Tail, placito 13.

Paramour & Yardleys Case, *&c.*

An

An Executory Devise is good, as appeareth in Matthew Mannings Case, 8 pars. Coke 8 pars, &c.

Obj. It hath been objected, that changing of the words makes a change of his meaning.

Resp. As to this: 1. He here gives it unto his two Sons. 2. If they have Sons, then the same to be reserved and put out for them, &c.

This Reservation amounts unto a Grant, as appears by 8 E. 4. fol. 8. b. 20 E.4. fol. 13. b. so resolved 26 H. 8. fol. 2. 21 H. 7. fol. 11. 35 H. 6. fol. 34. that a reservation amounts unto a Grant, a fortiore it shall be so in case of a Will; reserved, this is as much as to say, preserved for the Sons of his Sons; reserved, put out for the profit, &c. all these words do give an Interest. 8 E. 4. fol. 8. &c.

The reason of this Case, his own Sons not to have any Interest by this Will, if they have Sons; if they have no Sons, the meaning of the Testator by these words appears to be, that by the birth of the Sons, the Interest of the Fathers to be by this presently determined, (as there were Censores morum, & tutores in Rome) so we here are for the Subjects.

I move this, in regard that the Infant here is but of eight years of age, and he is likely to have Judgment given for him; and therefore we are to take the same course for him, as we did in Requishes Case here, by way of provision for him; here will be 13 years before he will come to have a disposing power of the term, and his Guardian or Bayliff may die before, and therefore they ought here to put in good Security to be answerable for this, 45 E.3. by the Grant of the Profits of the Land, the Land doth pass.

Coke & Dodderidge. If the two Sons had ten Sons, they all shall have the Lease joyntly.

Croke. By this Will it is thus to be, that if they have no Sons, then the Survivorship to take place between them, but otherwise if they have Sons.

By the Rule of the Court the Bayliff to be bound to answer the Profits to the Infant.

And so by the Rule of the Court, by three Judges, (S) Haughton, Dodderidge, & Coke, Judgment was given for the Plaintiff: But with a Cessat of Execution until Termin. Pasch. next ensuing. Judgment for the Plaintiff, &c.

Codd Plaintiff against *Turback*

Defendant.

Codd being brought to the Bar by a Habeas Corpus upon the Return, it appeared that he was committed by the High Commission Court, for refusing to allow Alimony, for maintenance of his Wife, and for speaking diversa opprobriosa verba: The Court was moved to have him bailed, the return being insufficient, it being not shewed what the words were, nor when they were spoken, and so no certain cause shewed of the Imprisonment. A *Habeas Corpus*, Alimony. Mo. 840. 2 Bulst. 300. 1 Ro.Rep.245. Post 146.

Coke Chief Justice. The return here is not good, the cause of the commitment in this return, ought certainly to appear, it is here altogether uncertain, the time uncertain when the words were spoken, it might be in the time of Queen Eliz. and so the same pardoned.

The Court all clear of Opinion, That the Return here is not good.

Coke. By the Law of God, none ought to be Imprisoned, but with the cause expressed

pressed in the return of his Imprisonment, as appeareth in the Acts of the Apostles.

The whole Court agréed, that the return was not good, and so by the Rule of the Court he was bailed.

Coke. This kind of Imprisonment is much to be disliked, being a very great grievance and vexation to the Subjects.

The KING against the University of *Cambridge*.

Indictment. 1 Ro Rep. 245

By an Indictment for a Riot, prosecuted against the University of Cambridge, for the imprisoning of one there by the Proctors, for matter of Incontinency, this prosecution was for a Riot, made by the Proctors in their search.

Coke Chief Justice. They have a Charter to Imprison there for Incontinency, but this their Charter is void: They have also an Act of Parliament to enable them to do this, (S.) 32 H. 8. cap. 10. and this is the reason that the Proctors of Oxford and Cambridge may Imprison for Incontinency.

Stat. of 32 H. 8. cap. 10.

This matter was at the Council Table, but they there could not determine of Riots.

The Lords of the Council are the Representative Body of the King: If the Council-Table do order that the Kings Attorney-General shall enter a Non vult prosequi, this is good (but this Power which they have doth not appear unto us) and the Rule of the Law is, Quod de non apparentibus, & non existentibus, eadem est ratio: Here there hath been very great negligence in them, & negligentia semper habet infortunium comitem: Here the Indictment was against the University of Cambridge, and prosecuted against them by their negligence, almost to an Utlary.

The Court all agreed in this, that their best way is now to plead to the Indictment, and to shew their Charter, and also to plead the Act of Parliament: And then the Kings Attorney-General may confess this to be so; and this is the best way now for them, it being three years since, and so very great negligence in them.

And they all agreed in this, that this is clearly the suit of the King, and there is but one Complaint, and the King may surcease this when he will, and the Kings Attorney may enter a Non vult prosequi.

Coke. The Council-Table doth not use to meddle with Riots: This was the direction given by the Court, the which was followed, and so ended this way, the same being never after moved again.

Flint Plaintiff, against *Langhorn* & *Al.* Defendants.

Entred Hillar. 12 Jac. B. R. Rot. 1256.

A second deliverance. 1 Ro. Rep. 246 2 Ro. Abr. 406.

In a second deliverance against the three Defendants, as Conusees, who did make Conusans as Bayliff to one Leak: The Case was this, A Rent-charge was granted unto Leak, to be paid at the two usual Feasts of the year, &c. and if the same was behind at any of the Feasts, or 21 days after, then to distrain, &c. The three

three as the Conusées, for this Rent behind, did take the Distress; afterwards before any Avowry made, one of the three Conusées doth release unto the Plaintiff all Suits, Actions, and Demands, Whether this release be good, or not, was the only question.

It was urged, that this Release was not good, for that a Release made, ought to be to determine something; but here, when this release was made, there then was nothing to be by him released, here Leak was the Grantée of the Rent; the Distress was taken 4. Januarij, 11 Jac. 3. Novembris 12 Jac. the Release made, and Hillar. 12 Jac. the Conusans made and pleaded; so that here nothing is released, being of all Demands, there was no Action, no right being made by one of the Conusées; these three Conusées were as Servants to Leak the Grantée, and nothing is discharged by this Release. And this is so warranted by Ruddocks Case, Coke 6. pars, fol. 25.

Coke 6. pars, fol. 25. in *Ruddocke* Case.

Coke Chief Justice. If I do lose my goods, and another finds them; if I send my Servant for them, and he refuses to deliver them; afterwards my Servant doth make a release to him, quid operatur, by this? Nihil. In Ruddocks Case. A Replevin brought against six, one of them avows, the other five do make Conusance as Bailiffs to the first. Judgment given against them; the sixth brings a Writ of Error, the Defendant pleads a release made by one of the five, this is a void Release, and to no purpose, as it is there adjudged: Here in this case the Release is clearly void, he which doth release being but a Servant; what award shall be made here? nothing doth pass by this release, he which doth release hath no manner of demand to release, and this is warranted by 21 E. 4. fol. 43. b. by Fairfax.

21 E. 4. f. 43. 6.

It was urged for the Release, that this should be good, because they are intituled to an Action to have a return, and also to sue execution, and their Master to have an account of them, and this is the act of the Master, who hath made them his Bayliffs, the release here is but to bar him, as to have any return and damages for the Bailiffs, petunt retornum & damna, they all three are intituled to the Action.

Coke. The time of the Release here is to be considered, then he had nothing in him, but as a Servant unto Leak, he had nothing to demand, but by the command of such a one he had taken the Distress; then they come to make Conusans as Bayliffs to Leak (but before this Conusans so made) one of them doth release all Demands, (whereas he hath nothing to demand.) By 49 E. 3. fol. 25. If a Bailiff doth avow one way, and the Master another way, the Avowry of the Master shall be taken, and it is a very plain Case, that the release here of the Servant is not good, for he hath nothing to ground a release upon, if this release had been made after the Avowry, there peradventure it might have been another Case, but here the release is made before the Avowry, and so without any colour of question, the same is void.

49 E. 3. f. 25.

Haughton Justice. The Case in 21 E. 4. fol. 43. will go very far in this Case.

The Court all clear of Opinion, That this Release was not good, i. and therefore by the Rule of the Court a Return was granted, this Release being no bar at all; upon this——.

Jermin moved the Court pro Retorno habendo, and by the Rule of the Court this was granted, there being no colour (as the Court observed) to maintain this Release to be good, when as the party which made this Release had nothing in him at that time to release.

A Return granted *per Curiam.*

Slingsby

Slingsby Plaintiff against *Lambert* Defendant.

Entred Termin. Mich. 12 Jac. B. R. Rott. 540.

Error Sur Judgment in an Action upon the Case for an escape. 2 Cro. 394. 1 Ro. Rep. 276. Godb. 262.

IN an Action upon the Case brought by the Plaintiff as Executor against the Defendant being Sheriff, for an Escape, and had a Judgment given for him per nomen of Executor.

Which Judgment passed by Non sum Informatus; upon this Judgment, a Writ of Error brought, and for Error assigned, because the first Judgment was given for him as Administrator, and this Action for the Escape, and the Judgment upon it was per nomen of Executor, and so a variance.

It was urged, that the suit was first commenced by the Plaintiff in the Action as Administrator, that afterwards he found the Will, by the which he himself was made Executor, and therefore by the name of Executor he had Judgment, and the party in execution who was suffered to escape, and upon this escape, the Action upon the Case was brought by him, which was well brought, and the Judgment well given, and for the per nomen, this appears by 9 H. 6. fol. 1. and 31 E. 3. fol. 1.

9 H 6. fol. 1. 31 E. 3. f. 1.

The first Action here was as Administrator, and so he had his Judgment against Brown as Administrator, and had him in Execution, who was suffered to escape.

Against this it was alledged, that this Action upon the Case for an Escape was brought by him as Executor, grounded upon a former Judgment given for him as Administrator, which cannot be good.

Dodderidge Justice. The Case is this, one recovers in Debt as Administrator, hath Judgment, and the party in execution, who escapes; Afterwards he finds the Will, by which he himself was made Executor, whether he shall have an Action upon the Case, or an Action of Debt upon this escape as Executor is the question: the Administration is granted upon no Will found, he recovers the Debt, afterwards the Will is found, by which he is made Executor to the same party, and proves the Will; clearly this shall now be assets in his hands. But such an Executor shall not have a Scire facias upon the first Judgment, because he is not party to the Record.

Haughton Justice. The Executor here hath no privity to sue Execution, upon this Judgment, because the Scire facias depends upon the first Action, and to this he is not privy.

Dodderidge. I agree that he can have no Scire facias, he hath him here in Execution as Administrator, so that now he remains in Execution as a pledge for the Debt; after he finds the Will, and perceives himself to be made Executor, pro ut by the Will: put the Case that the party pays the mony recovered to him, may he not now well discharge him, declaring so much unto the Sheriff? clearly he may, and if the Sheriff upon this matter shewed thus unto him, will not yet deliver him, he may then clearly have against him an Action of false Imprisonment.

Croke Justice. By this probate of the Will by the Administrator, who recovered, by which he is made Executor, is the Execution upon the former Judgment, by this gone? clearly it is not; though the Book of 2 R. 3. fol. 8. hath been cited to the contrary.

Dodderidge.

Dodderidge. That is where another man is made Executor, and not where the party himself is made Executor, as here in this case. If the Administrator hath one in execution for Debt, the Sheriff suffers him to escape, he brings his Action of Debt against the Sheriff for this escape, and herein recovers; after all this, he finds a Will, by the which he himself is made Executor, shall not this recovery thus had now be good? clearly it shall, and this mony thus recovered against the Sheriff, shall be assets in his hands; and no Audita querela in this Case lieth for the Sheriff.

Croke. If he be suffered to escape, the mony not paid, and all this at his suit, as Administrator; afterwards he finds the Will by the which he is made Executor, and proves the same; shall this mony now be lost which was recovered, and the party in execution for it? clearly it shall not.

Haughton. Now upon the matter this is a void Administration, and how can he discharge the execution of the Body, there being no satisfaction given of the Debt? The Executor here is to have an Action of Debt for the mony due, but he is not to have execution of that which was done upon the suit, commenced by the Administrator; here it is like unto a Scire facias, a thing Executory begun by one as Administrator, an Executor cannot prosecute this, nor have an Execution upon it.

Dodderidge. If the party in Execution stands as a pledge for the Debt unto the Administrator, shall he not do so to the Executor? clearly he shall. If an Executor recovers a Debt, and hath the party in execution, who is suffered to escape, the Executor makes his Executor, and dies, shall not this Executor of the Executor have an Action of Debt upon this escape? without all question he shall have it, for he is now Executor unto the first man.

Haughton. If the first Executor dies intestate, his Administrator shall not have an Action of Debt against the Sheriff for this escape, no more shall the Executor here in this principal Case have his Action against the Sheriff for the escape of him who was in execution at the suit of an Administrator.

The Court divided, two against one, ended by agreement.

Dodderidge & Croke were clearly of a contrary opinion, and so without any further debate, this Case was adjourned to a further time, but was never moved again, but the parties perceiving the opinion the same (ut audivi) was ended by agreement.

The KING against Sir *Nicholas Poynes* and his Son.

WHo were indicted for murder, and committed to the Marshalsey, without Bail or Mainprize.

1 Ro. Rep. 268. Endictment for murder.

Trotman moved the Court to have them bailed, because they were not indicted but by the Coroners Inquest, and no Verdict as yet given up by them, and that as he urged, it was se defendendo.

Coke Chief Justice. If one do kill another, it is not known at the first, whether this be murder or not.

By the Statute of Westminster the first, cap. 15. for the death of a man, in such a Case he is not to be bailed, By the Statute of 1 & 2 Philip and Mary, cap. 13. a man is to be bailed in case of Man-slaughter, if he be bailable by the Law. But in case of Man-slaughter he is not bailable in all Cases. If he confess the same, he is not bailable. For the death of a man, I will not bail any one, (unless it be by the Command of the King.) We may bail one here for Treason, but this we will not do.

Stat. of *Westminster* the 1. cap. 15. & 1 E. 2 *Phil.* & *Mar.* cap. 13.

Haughton Justice. If he do confess this to a Justice of Peace, that he did the fact, he is not to be bailed.

Bail refused to be taken.

Coke. So shall it be for a notorious Man-slaughter, he is not to be bailed.

The Court refused to bail him, and so by the Rule of the Court they were sent back again to the Marshalsey.

Nota.

Nota, That one having a Judgment in this Term, upon which Judgment a Writ of Error brought, bearing Teste the last Term, returnable in this Term, the which had the Judgment, came to the Clerk to have out his Execution; the Clerk upon view of the Roll, and finding no mark thereon for a Writ of Error, took out the Execution, after Execution granted, the Roll was then marked for the Writ of Error, with an Antedate and a Supersedeas delivered before Execution done, the Sheriffs Deputy makes his Warrant out for doing of execution.

Coke Chief Justice & Curia. We will not allow of these Antedates. This is a very great abuse to the Court, for to enter a Writ of Error with a recipitur of the last Term; this course cannot but be very much disliked by us: this is the second we have known of this kind, take heed of the third, for this is a very great abuse, and not to be suffered; For the preventing of which hereafter, by the Rule of the Court an Order was entred, That the Clerks do mark the Roll presently, (S) that is to say, the same day that the Writ of Error was taken out.

Nota. 1 Ro.Rep.272.

Nota, That in an Ejectione firmæ the Jury found for the Plaintiff, and gave one shilling damages, and one shilling costs, and de Incremento 17 l. The Clerk in the entring of this, enters it all right, (S) 1 s. Damages, 1 s. Costs, and 17 l. de Incremento, quæ in toto se attingunt, to 17 s. and omits the two shillings.

Thomas Crew moved the Court to have this amended.

The Court granted this being in the same Term, and the omission of the Clerk only in the Account, and casting up of the quæ in toto, which is not so much material. And so by the Rule of the Court the same was amended.

Nota, Error. 1 Ro.Rep.272. 2 Ro.Abr.669.

Nota, Upon a Venire facias ret. for trial of a Cause, the Pannel was challenged, because the Under-Sheriff who returned the same was Cosin to the party, &c. and therefore a Venire facias de novo granted to the Sheriff, Ita quod, that the Under-Sheriff non se intromittat, upon this a Trial was had, Verdict and Judgment given for the Plaintiff, for reversing of which Judgment, a Writ of Error was brought, the Error assigned was, because the Venire facias was Vici-comiti, whereas the same should have been Coronatoribus.

The Writ of Error quashed, Execution granted.

Curia. This is only an Error to delay Execution, and not to be maintained; and therefore by the Rule of the Court the Writ of Error was quashed, and Execution granted.

Nota.

Nota per Curiam. That the whole Term is but as one day. And that all the Judgments here are entred as upon the first day of the Term & per Curiam, and by all the Clerks all common Bails are entred upon a day certain. But as for special Bails there is no certain day when to be entred, & per Curiam it is no error to say that there was no Bail entred.

Nota.

Nota per Curiam. If a Parson do libel for Tythes of Coal digged out of a Mine, or for Stone out of a Quarry, a Prohibition is to be granted.

The

The KING and Doctor *Gouge*.

DOctor Gouge being committed to the Prison of the Fleet, by the Court of Chancery, was brought to the Bar by a Habeas Corpus, and the return was read: By which it appeared, Quod commissus fuit, virtute cujusdam ordinis Cancellariæ, for his contumacy and contempt, in refusing to answer unto a Bill there exhibited against him, and he being by order of the Court to answer it.

A *Habeas Corpus.*

1 Ro Rep. 277
1 Ro. Rep. 351.

Baughtrey Serjeant moved the Court to have him delivered, he having a Judgment at the Common Law in this Court, for the same matter now complained of against him in Chancery: That the return here is insufficient, the same being altogether uncertain: For Non constat Curiæ, what Bill this was: And there to question a Judgment given in this Court, is against the Statute of 4 H. 4. cap. 13. that Judgments here given are not to be avoided, but by a Writ of Error, or by Attaint.

Stat. of 4 H. 4. cap. 13.

Against this, It was alledged that this Bill preferred against him, is for other matters, and not for any thing touching the Judgment here given.

Coke Chief Justice, & Dodderidge Justice. Consider the Statutes of 27 E. 3. cap. 1. & 4 H. 4. cap. 13. It would tend to the downfal of the Common Law, if Judgments here given, should be suffered to be called in question in Courts of Equity.

Statute of 27 E. 3. &c.

Coke. It doth not here appear unto me, that the Bill was there exhibited for the same cause as the Judgment here was; and 9 H. 6. f. 44. leads me to this; we are to meddle with the cause, Warrain was here Plaintiff in the Cause where Judgment was given, and the Bill of Chancery was inter Henric. Comit. de Oxon Plaintiff, and others Defendants; if they receive any hurt there, they may then pursue the Book of 9 H. 6. and have an Action upon the Statute; if the Bill there be for the same cause, we would then bail him: But it doth not appear here unto us judicially this Bill to be so: And the Rule then is this, Non refert, quid notum sit judici, si notum non sit in forma judicij: There is no Act of Parliament which prohibits any thing, but the party grieved may for his remedy have his Action grounded upon the same Statute, and so is the Register, inter brevia super Statut. where a thing is done contrary to a Prohibition by Statute, the party grieved may well there have an Action upon the same Statute, where the Judges cannot otherwise aid him, and this may be observed for a rule.

It appears not here unto us by any thing in this return, that this Bill there exhibited against him, was for the same cause for which the Judgment here was given, and therefore we cannot now aid him; we are now to give our Judgments upon the return, as it is here before us, and not otherwise: The Bill there is between other parties, than the suit here was: The Count. de Oxon is there Plaintiff against others, and here Warrain was Plaintiff, and so it doth not appear to be the same Cause.

Dodderidge. We have power to see this Bill what it is.

Haughton Justice. The Bill is not to be shewed, pro non comparendo, the Decree there was for his Commitment, and this is good.

Afterwards by the Rule of the Court, the Bill was produced and read in Court, and the Cummin-Garden therein contained, is the same thing for which the Judgment was here given.

Coke. We have given our Judgment, and a Writ of Error is brought, therefore Execution to stay, and this is just.

If they do not shew another Bill between this and Friday next, then in this Case I shall do my Conscience, and in the interim we will confer together upon it, and afterwards we will herein do our Consciences.

If one doth disseise me of Land, and builds a House upon this Land, I shall have a Judgment for this, and he is not to go into the Chancery to be relieved for this; no more shall he so do in this Case, for in such Cases the Rule of Law is this, (S) Caveat emptor.

Dodderidge. As to our Judgment formerly given here in this Case, there never was any learned man (if he were an honest man) that was of another Opinion than we were of, in the giving of this Judgment (unless he was a time-server.)

And so there was no further debate at this time of this matter, neither was the same ever moved again.

Vaudry Plaintiff against *Pannel* Defendant.

A Prohibition to *Chester*. 1 Ro.Rep.246.

IN a Prohibition moved for by Sir Laurence Hide, to be granted unto the County Palatine of Chester.

Dodderidge Justice. Can you have a Prohibition to a County Palatine? there breve Domini Regis non currit, they there have Courts within themselves for to redress all matters: If they do err there in point of Equity, the way to remedy this, is to go before the Chamberlain.

The Court inclined to be of Opinion at this time, against the granting of any Prohibition in this Case.

13 E. 3. Fitz. tit. &c.

Afterwards at another time this matter was moved again, and 13 E. 3. Fitz. tit. Prohibition, placit. 11. was cited for the ground of every Prohibition.

Coke Chief Justice. The Kings Bench of Ireland is subject to be controul'd by this Court: If one be turned out of his Freehold by the Court of Chester, hath he no remedy for this? no Error certainly; he ought to have Justice done him in some place or other.

Dodderidge. I do not remember any motion ever made for a Prohibition, to stay proceeding in the Court of Chester, for there breve Domini Regis non currit: they have there several Courts to redress their Errors, if they do err, and the Bishop of Durham may reverse his own Judgment if he do error; if he do err in Law, a Writ of Error lieth here; and if we do reverse the Judgment, the Judge is to be fined for the same.

Coke. A Writ of Error lieth here upon a Judgment given in the Stannary Court, and so is Dyer, and all the Books, go to Presidents: To appeal to the Warden, and if they like not of him, then to the Lords of the Council.

Dodderidge. This was so when there was no Duke: But if there be a Duke, then to appeal to him: But I have never heard of any such Writ of Error brought, and therefore the Judges use to confer about this, they use to appeal to others, if they like not the former Judgment.

Coke. They are certainly to have remedy in one Court or other: and this Court hath the survey of all other Courts, the Kings Bench in Ireland is subject to be controuled by this Court, where there is cause: This is a great and leading Case, we will therefore be well advised herein: And so for this time, without saying any more, it was adjourned to a further time.

Termin. Hill. 13 Jac. &c.

Afterwards, (S) Termin. Hillar. 13 Jac. B. R. this Case was moved again by Sir Laurence Hide the Queens Attorney, for a Prohibition, and to inforce it,

Trin.

Trin. 13 Jac. B. R. between Davis and Jones. A Prohibition was granted by this Court, to the great Sessions at Denbigh, and that the last Term a Prohibition was granted into Wales, and therefore prayed to have a Prohibition to the County Palatine of Chester. Trin. 13 Jac. B. R. &c.

Coke Chief Justice. By the Statute of 27 & 34 H. 8. Wales is made parcel of this Realm of England, and therefore a Prohibition may well be granted thither: But as for Chester, where breve Domini Regis non currit, if my Predecessors have not granted this here, neither will I do it. Stat. of 27 & 34 H. 8.

A County Palatine is an exempt place, and by the general rules of Law, breve Domini Regis ibi non currit, but come you in, and we will advise well of this, and see the Presidents in this Case how they are: The County Palatine is not like unto Wales.

At another day this being moved again.

Coke. As to the Jurisdiction of Chester, and Prohibitions to be thither granted, Hillarij 11 Jac. in Cancellaria, in a great Case there between Sir John Egerton Plaintiff, against the Earl of Derby and Kelly: The Earl of Derby was Chancellor of Chester, and was also party to the Suit there in question, between Egerton and Kelly, the same being for a Lease: He having this Lease, Decreed there the possession of this Lease for Kelly, so that he was here Judge of his own proper Cause, and made the Decree in effect for himself, being for Kelly; with which Decree, Sir John Egerton finding himself grieved, being thereby put out of Possession, exhibited his Bill here in Chancery against them, for to have redress. Hill. 11 Jac. &c.

To the hearing of which Case, I and my Brother Dodderidge were called, where Dodderidge did cite the Case of 18 E. 2. Fitz. tit. Assise, placito 382. where in an Assise of Novel Disseisin brought against &c. the Writ of Assise was directed to the Sheriff of Glocester, and this was de libero tenemento in Gours; the Assise did pass before Sir John Gowens and his Companions, Justices assigned to take the Assise in the Marches of Wales; the same passed against the Tenant, who brought a Writ of Error, and assigned for Error, because the Writ was directed to the Sheriff of Glocester, a Sheriff of England, and the Tenements put in view were in Wales; also that Gours is out of the power of the Sheriff of Glocester, by reason whereof he could not execute the Writ: Also the Statute is, that Assises shall be taken in their Counties, and Gours is no County. Also the Writ is, de libero tenemento, in ville or in hamel. and Gours is neither villa nor hamel. but is all a whole County: Scrope there answers to all, that Gours is a Barony in the Marches of Wales, and that every Barony in the Marches hath a Chancery, and their own Writs; and where one of his Tenants doth wrong to another, he shall do him right: But when the Baron is ousted of his whole Barony, he cannot have remedy by his own Writ, because he is ousted of all. Trin. 18 E. 2. &c.

And therefore it is ordained in Parliament, That when a Baron is ousted of his whole Barony, in the Marches of Wales, that he ought then to go to the King for to purchase his remedy, and to have a Writ in the Kings Court of Chancery, and the Writ shall go to the Sheriff of the next County, so that the Sheriff of Glocester did serve the Writ, because that he was the next Sheriff; and so for this cause the Judgment was affirmed.

And 13 E. 3. Fitz. tit. Jurisdiction, placito 23. In a Writ of Cousinage, and demanded the Castle of K. and the Commote of J. (this being parcel of a Shire in Wales, as a Hundred there) it is there said, that the Castle was in Wales, where the Kings Writ non currit, and so to oust the Court of Jurisdiction. 13 E. 3. Fitz. tit. &c.

It is there said, that the Castle and Commote were in Wales, answer made, that this should not oust the Court of Jurisdiction: For by a Commote they demanded a great Seignory, as Lands, Services, and Rents, and this Castle and

Commote

Commote were held of the King in chief, as of his Corone; and that these Castle which were thus held of the King in chief, as of his Corone, shall be pleadable here and not else where, &c. And in this great Case in Chancery, we were of opinion that proceedings might be here in Chancery in the same Cause. Afterwards, the Lord Chancellor did agree with us in opinion; and so the suit went on in the Chancery here, after the Decree passed in the Chancery at Chester. Also it was there resolved, that a man inhabiting out of the County Palatine of Chester, hath right to Land lying in Chester. That for this, he may sue in the Court of Chancery here for he ought to have means to come unto his Right. But here we are out of this matter of equity.

13 Eliz. Dyer, not printed, 11 H. 8. &c.

13 Eliz. Dyer, (but not in the printed Book.) A diem clausit extremum, returnable in the County Palatine of Chester, 11 H. 8. Kellaway, fol. 202. a. b. where it is said, that the Isle of Man is no parcel of the Realm, neither do they there use the Laws of the Land. It is like unto Tourney, when the same was in the Kings hands. And unto Normandy or Gascoigne, which are meerly out of the power of the Chancery.

The Isle of Wight was by Act of Parliament made parcel of the County of Southampton. As Wales and Ireland made parcel of England. And a Writ of Error lieth here, for erroneous Judgments given there: But otherwise it is for erroneous Judgments given in the Isle of Man, in Gascoigne, or in Calice, because they are not parcel of this Realm.

Also, if a Court of equity, in case of equity, do wrong to a party, by their Decree made against him. He is not in this Case without remedy, for he ought to sue unto the King by Petition, who may give unto him redress by his Judges, referring the matter to them. And this was a great Case between Sir Moyle Finch, and the Lord of Worcester, and others, Mich. 42 & 43 Eliz. where the Earl of Worcester and others, upon a Feoffment were seized to the use of a Noble Lady, (S) the Lady of Southampton. The Earl was Plaintiff in the Chancery on the behalf of the said Lady, against Sir Moyle Finch, which suit was concerning the Manors of Raimestone and Stoke-Goddington. The Decree in Chancery was for the Earl, and against Sir Moyle Finch, with which Decree he found himself much grieved; and upon this, he preferred his Petition unto Queen Eliz. to have some redress. The which matter she referred to her Judges. And by them the said Decree was reversed.

Mich. 42 & 43 Eliz. &c.

And so in such a Case, the sole and proper remedy is to go, and as in that Case, to prefer a Petition to the King. And if he will, he may refer this matter to his Judges; and so by them (as in the former Case) it was done, (if there be cause for it) the Decree made, may be by them reversed.

And this was so set down, and agreed upon by all the Judges, under their hands, That the Lord Chancellor is not to meddle there in Chancery, after a Judgment at the Common Law, and the same affirmed in a Writ of Error; and yet there may be equity as in that Case, being in Case of a Morgage; he by whom the mony was sent to be paid, for the redemption of the Land, was by the way robbed of the mony; but yet the same was paid presently after, but at the Common Law, he is barred, and this was the principal Case.

It was also resolved in Kelleys Case before remembred, That one may lay a transitory Action in what County he will, as if one be beaten in a County Palatine, he may lay his Action where he will.

Where a man is wronged by a Decree, his best and only way to have remedy, is by his Petition to the King, and so here in this Case you ought to make your address to the King by your Petition; and so he may then refer this to his Judges for your redress herein. Here you are in a Case of equity; and a Decree is made against you; you may now do, as in the Case before of the Earl of Worcester; and this is that which I have observed, as touching the County Palatine of Chester.

Sir

Sir *Henry Warner* Plaintiff, against *Suckerman* and *Coates* Defendants.

IN a Prohibition to the Court of the Dutchy; because they there go about to question the validity of Letters Patents, granted to Sir Henry Warner, of the Manor of Milney in Comitat. Suffolk.

A Prohibition to the Dutchy Court.
1 Ro.Rep.252.
1 Ro.Abr.381. 2.
2 Ro.Abr.317. 8.

George Croke, For cause of a Prohibition shewed, that heretofore (S) in 43 Eliz. the Court of Dutchy did then think this matter to be fit for a Trial at the Common Law, and accordingly we had a Trial at the Common Law; and adjudged for Sir Henry Warner; and upon a Libel formerly against them for Tythes, and adjudged against them; and now by a new Suit in the Dutchy Court for the same matter, and by the same parties, and there would question the Letters Patents to him granted, which is a cause for a Prohibition. The Case formerly was this (S) Upon a Libel for Tithe-Hay against Coates and Suckerman, they prayed a Prohibition, because they were under-tenants to the Abbot of St. Edmonds-Bury, who prescribed for himself, his Freeholders and Occupiers to be discharged of payment of Tythes, and shews that he was a Freeholder of the Manor, and had Common of Turbary there, they were held not to be within the prescription of discharge, being no Freeholder, and so by this Court a consultation was then granted for Sir Henry Warner. And now they begin in the Dutchy Court again, and there seek to avoid the Letters Patents; and therefore prayed a Prohibition.

Against the Prohibition, it was urged by——

Sir Robert Hitcham. That the Proceedings in the Dutchy Court is meerly as an Information for the King: that Sir Henry Warner had a grant of the Tythes by Queen Mary before the suit for Tythe-fodder; that such a kind of Tythe is not used to be paid in Suffolk nor in Cambridgeshire, which the Queen had pro bono publico.

Coke Chief Justice. An Abbot may prescribe for himself in Non decimando. But to prescribe for himself and for all his Freeholders in non decimando, clearly this Prescription is not good.

Dodderidge Justice. What equity can be there suggested against the payment of Tythes? it is against the Law of God not to pay them.

Coke. Tythes are due jure divino, mes quota pars jure humano. The Patent granted to Sir Henry Warner had relation to matters before granted by Queen Mary; how will they avoid this Patent in the Dutchy Court? if none to pay Tythes of this, then the Patent is void.

Dodderidge. There can be no equity against the payment of Tythes; but there may be a Prescription, which is matter of Law.

Coke. This Court hath power to prohibit them. And so to prohibit all other particular Courts, which do hold plea, by reason of their particular Jurisdictions, or if they have a general Jurisdiction by Act of Parliament, if they do exceed their Authority, they are by the Common Law to be prohibited by this Court. And so if a Court-Baron do hold Plea of a sum above 40 s. to be prohibited by 19 H. 6. and Fitz. Nat. Brev. A Prohibition is to be granted by this Court; quia placita &c. where they hold Plea of a thing which belongs not to them, then a Prohibition to be granted, (S) vobis prohibemus quod, &c. By the Register; If a Corporation holds Plea of any matter out of their Jurisdiction, then vobis prohibemus, quia extra Jurisdictionem. And so of the Court of Marshalsey. This Court is to curb them also. And this so by the Common Law, That all particular Courts, either in respect of the place, or of the Causes to be there determined, if they do exceed their Authority, they are by the Common Law to be prohibited by this Court, being

Prohibition to a Court Baron.
19 H. 6. *Fitz. Nat. Bre.*
Register.
Prohibitions.
To a Corporation.

To the Exchequer.

To a Justice of Assize.

being a particular Court, erected for particular purposes. It appears by the Register, A Prohibition granted by this Court to the Court of Exchequer. If they hold Plea of Common Pleas without a Writ of Priviledge, as appears inter brevia de Statuto, if deal against Statutes, Prohibition to a Justice of Assise to be granted, quia magna indiget examinatione; this is the Act of Parliament.

Stat. of 2 H 5. To the C B.

And so if the Judges in the C. B. do hold Plea of an Appeal, a Prohibition is to be granted by this Court, as Register; The Statute of 2 H. 5. by which a Libel is to be delivered to the party, where need shall be, where a Statute doth prohibit malum prohibitum, to be prohibited.

We here in this Court may prohibit any Court whatsoever, if they transgress and exceed their Jurisdiction. And there is not any Court in Westminster-Hall but may be by us here prohibited, if they do exceed their Jurisdictions, and all this is clear, and without any question.

Here in this principal Case you are not to go into the Dutchy Court, and there to examine the validity of this Patent made to Sir Henry Warner. There is no equity against the Law of God; and there is no reason, but we ought here to prohibit them in this Case: for they have there no Jurisdiction to meddle with the validity of these Letters Patents, as now they would do. And if they will not walk within their proper Limits and Jurisdiction, we will here prohibit them. As touching these matters, complaint was made by them to the King of me, when we in this Case were before agreed to grant a Prohibition, but before this was granted, they complained to the King; and I then before the King did justifie our proceedings, and that we well might grant a Prohibition in this Case. The King then said unto me, that he was well satisfied herein; and he then said further unto me, do you Justice, and bring in no Innovations.

Croke Justice. This Writ of Prohibition, it is Breve Regium & jus Coronæ, and if this Writ shall be denied in such Cases, this would then be in Læsionem, exheredationem, & derogationem Coronæ; where any Court comes to be exorbitant, in their proceeding we have Sacramentum that lies upon us, not to suffer any Encroachments by any Court.

Term. Trin. 12 Jac. B. R.

Dodderidge. It is a part of our Oath to maintain our Judgments here given, and this is no Innovation; and so I shall ever do. A Consultation hath been here granted by us in a Prohibition upon a Libel for Tythes, Termin. Trin. 12 Jac. and between the same parties. And you now in the Dutchy Court do suggest matter of equity; but what this matter is, the same is unknown to us. They are not there to judge upon the validity of these Letters Patents; whether these Letters Patents be good or not, this is to be determined by the Common Law, and not to be there tried in point of equity.

Haughton Justice. Nothing is here shewed unto us to give Jurisdiction to the Court of Dutchy of this Cause. If it be touching the natural right of Tythes, this then properly belongs to the Spiritual Court. If it be touching the validity of the Letters Patents, this is not to be tried there. And we ought to maintain the Judgments of this Court. And the Court there formerly made orders for them in this Case, to go to the Common Law. And now they fall from this again. It hath been here formerly adjudged by us for a Consultation to the Spiritual Court. And no cause there is here to suffer this proceeding in this Case in the Dutchy Court. And therefore a Prohibition ought to be granted.

Coke. We are here agreed, not to suffer our Judgments here given, to be shaken, but by an Act of Parliament. And all Counsellors hereafter are to be take heed how they do advise any of thir Clients to go into Courts of equity, after a Judgment given here in this Court; and he which is præmonitus, is præmunitus. This is said as a Caveat, ne forte, an example be shewed on them.

A Prohibition granted *per Curiam.*

The whole Court agreed, una voce, nullo contradicente, for a Prohibition. And so by the Rule of the Court, a Prohibition was granted.

Jones

Jones Plaintiff against *Stenor* Defendant.

IN an Action upon the Case for trover and conversion. Sur non culp. pleaded, a Verdict for the Plaintiff. Harris Serjeant moved in Arrest of Judgment, that in the Venire facias a Juror was named Harewood, in the distress and jurati he was named Harrwood, and so for this variance he prayed a Venire facias de novo, this being like another Case here adjudged, where in the Venire facias a Juror was named Swift, in the Distringas and jurati named Swift, and this was here resolved to be bad. A Trover and Conversion.

The whole Court agreed in this, that where there is an S. for an F. this is bad clearly; for they have not the like pronunciation, and therefore this is apparantly bad.

Croke Justice, Baxster and Baxter, this is all one.

The whole Court agreed this to be no variance. For that Harewood and Harrwood idem sonant, and they are all one. And so by the Rule of the Court Judgment was given for the Plaintiff. Judgment for the Plaintiff.

Gough Plaintiff against *Howarde* Defendant.

Entred Trin. 12 Jac. B. R. Rot. 832.

IN an Action upon the Case for a Rescous, the parties were at issue, and upon the trial, a special Verdict was found; upon the Verdict, the question did arise upon the construction of Butlers Will. The Case hereupon appeared to be this, John Butler being possessed of a Lease for 28 years of two Tenements, in the Parish of Saint Saviours in Southwark, the one of them in his own occupation, the other in the occupation of another, makes his Will, and by this doth devise both these Tenements unto Elinor his Wife for the whole term, if she shall live so long, and remain a Widow, and not married; and if she do marry, Then he devised to her only his dwelling House, and also 20 l. rent per annum out of the other house, not mentioning what estate she should have in the rent; whether she should have the same during the continuance of the term, (the which he had before disposed of) or whether she should have this only for her life (if the term so long should continue.) Of this Will he made his Wife his Executrix, and died; she enters as a Legatee, and afterwards takes to Husband the Plaintiff, and dies; the rent is behind, and he coming to take a distress for this, Rescous was made, upon this the Action brought. An Action upon the case for a Rescous. Bridg. 52. 1 Ro. Rep. 247. 1 Ro. Abr. 610. 620.

Three matters at the Common Law moved in this Case to be considered of. Points in the Case.

1. First, Whether here be any good rent at all at the beginning?

2. Secondly, Whether here be any sufficient agreement, to take this as a Legatee? If this be so. Then——

3. Thirdly, How long this rent shall have continuance? whether during the life of Elinor, or during the 28 years?

This Case was argued at large this Term, and in Termin. Pasch. 14 Jac. B. R. by Heath and Thom. Crew for the Plaintiff, and by Coventry and Noy for the Defendant.

After which Arguments, the Judges delivered some Opinions touching the seve-

ral Points moved in the Case, and Termin. Pasch. 14 Jac. B. R. this Case wa argued by all the four Judges.

Dodderidge Justice demanded of Coventry, Whether he thought this Rent t be extinct or suspended, 34 Assisar. the Father seised in fee of Land, had issue tw Daughters, he grants a Rent-Charge to one of his Daughters in fee, and dies the Land out of which the Rent was granted, did descend unto the two Daughters so that they had as great an estate in the Land, as the one of them had in the rent partition is made between them; after this the Rent shall be revived, the same no extinct by this. Here the Rent granted is but a possibility, (S.) if she marry. So that she hath an election, whether she will marry or not, and until she doth marry she is to have the whole Lease; but after marriage, then the election is to be, an then this Rent is to have commencement, and no extinguishment of this before. If a man deviseth a Rent to another, and afterwards makes him his Executor, there this Rent shall be extinct. But where he doth devise the term to one, and a Rent out of this to another, and afterwards makes him to whom the Rent was devised, his Executor, he may now elect to have this as a Legatee. 2. It hath been said, that it is impossible for him to give his consent, this is not so, for he may very well consent unto this, if a Rent be devised to one out of a Lease, and the Lease to another, if he assent first unto the Rent, this he may well do, and if he assent that the Devisee shall have the term, clearly this is a good assent to the Rent for to charge the Devisee of the term with this Rent, for he assents to have the Land charged with the Rent. But the assent to the devise of the Rent is no assent to the devise of the term; and this is clear, and it is as clear that an assent to the devise of the term is an assent to both.

34 Assisar.

Croke Justice. It hath been said, that he cannot devise the term to one, and a Rent out of it to his Executor; this is not so, for the Law by construction shall make this which ought to be last to be first, and that which ought to be first to be last, and that so this to be a good devise of the Rent to the Executrix.

Haughton Justice. The chief matter here appears, that she is to have it but for life.

This Case was at another time in this term moved again, and argued by George Croke and Bridgman.

Coke Chief Justice. As large an Estate as she hath in the Rent, she hath also as large an estate in the distress; as to the pleading and the exceptions taken to it; this ought to be possessionatus. As to the matter in Law, being what estate she shall have in the Rent, I will not at this time deliver any resolute opinion therein.

Dodderidge. One hath a Lease for years, he grants out of this a Rent to J. S. and limits no estate in the Rent.

1. This is a Chattel out of a Chattel, he can have no Free-hold, he shall have this for all the term, if he lives so long.

Coke. He shall have the Rent during all the term; for this gift shall be taken strongest against the Donor, and shall not determine by his death, (if the term hath continuance) but after his death his Executors shall have this during the residue of the term. But if one do grant a Rent out of his Land to another, and limits no estate in this Rent, he shall have this Rent for his life.

Dodderidge. If one grants a Rent to another, without saying any more, this shall be for life, but if he goeth further, and says that his Executors shall distrain for this for ten years, by this it shall only be a Rent for ten years; and this is warranted by 5 Assisar.

Coke. I do agree this to be so, for this is an explanation of his meaning.

Dodderidge. Here he did never intend that a second Husband should have this, but that the same should be determined by the death of the Wife.

Haughton. We ought to expound the words by the whole Will, (and also such a Rent) the exposition of a Will ought to be by coupling the later clause with the former

former (and also) and therefore she to have this Rent for all the term.

Coke. I incline to be of the same opinion, but if he had devised the Rent to her without such a clause, it had bæn otherwise.

And so without any further debate at this time, it rested upon a Curia ulterius advisare vult.

Afterwards (S) Termin. Pasch. 14 Jac. B. R. this Case was moved again, and argued by Thomas Crew for the Plaintiff, and by Mr. Noy for the Defendant, and afterwards by all the Judges. Term. Pasch. 14 Jac. B. R.

Coke Chief Justice. Two Points have bæn moved in this Case, and all of us have clearly over-ruled one of them, (S.) for the assent unto the second devise of the Annuity; that an assent unto the first part of the Will is an assent unto all, to all the Will, and to all which is therein contained, and this we hold clear, and without any colour of question.

And as to the Exceptions taken to the Declaration, we have over-ruled them all to be bad, and of no force.

But as to the first Point, This for the generality of this Case, I have known this to be formerly adjudged, That if one hath Fee-simple Land, and doth devise this unto his Wife generally, by this devise she hath but for her life.

Also if one hath a term in a House and Land, as in Black-acre, if he deviseth this to one generally, the Devisee by this general devise shall have the whole term.

Also if he doth devise a Rent out of this generally, by this the Devisee shall have the Rent during the whole term, if he lives so long; and all these Cases are very clear.

Now whether in this Case here there shall be any thing in this Will by way of retraction from the first devise (as to the having of an Annuity?) this is the question here now only considerable, and as I think she shall have this Annuity during the whole term to come; we are not to detract from, nor yet to add any thing to the Will.

Croke Justice. That which is here, is to be by way of detraction.

Dodderidge Justice. If I have a Lease for years, and I do grant the term, this shall be for all the term; but if I do grant a Rent out of this to one, this shall be for his life, if the term shall so long continue.

Afterwards at another time——

Haughton Justice. The question here ariseth upon the parts of Butlers Will, who was possessed of a Lease for years of two Messuages, made his Will, and by this he did devise both of them unto Elianor his Wife for the whole term, if she lived so long, and remained unmarried; but if she happened for to marry, then he devised to her his dwelling-house during the whole term: And also I devise unto her an Annuity of 20 l. per annum out of the other House, without limiting what Estate she shall have in this Rent, and then deviseth this House to another Butler his Nephew.

Also there being a Proviso in the Will, that if the Annuity be not paid unto her, but be in arrear, that then it should be lawful for her and her Assigns into the said Messuage to enter and distrain, and to detain this Distress until she be satisfied of the said Rent; afterwards he makes his Wife his Executrix, and dies, she proves the Will, enters as a Legatee, afterwards takes the Plaintiff to Husband, and dies during the term, and then for Rent behind Gough the Plaintiff distrains.

The only Point here is, Whether Gough the Plaintiff hath any Interest in him, so that he may distrain for this Rent? As this Case is, he hath a good Interest in the Rent, and therefore Judgment ought to be given for him.

In this Case, for the true construction of this Will, the course and substance of this Will doth very plainly demonstrate the intent of the Testator as to these his two Messuages: If she do not marry, then she to have all, but if she do marry,

then for his dwelling-house; it is clear, that she shall have this for all the term: But as to the Rent limited to her out of the other house, this is not so plain, the same being generally without limiting what Estate she should have in this.

The general scope and purpose of the Will here doth consist upon two parts: And the first part of the Will here doth declare his purpose and intent, in the later part of the Will, which is, that she should have the same Estate in the rent, as she had in the house limited unto her in the first part of the Will, for here there is a dependency of the one upon the other; and the second clause doth necessarily depend, and ought to be expounded by the former, the same being all for the provision of the Wife after Marriage.

And to this purpose there hath been a good Case put at the Bar, which was cited to be, Trin. 20 Eliz. in the C. B. where a man did devise Black-acre to his eldest Son and his Heirs for his part, and White-acre to his younger Son for his part (and omits to him and to his Heirs) yet this shall be also to him and to his Heirs, because the same hath dependency upon the former devise, and in the construction of this; it shall be guided by the same.

Trin. 20 Eliz. C. B.

For the true understanding of this Point here: If this clause had been single of it self, without any dependency on the other clause: As if a Termor for years deviseth a rent out of this term unto his Wife generally, what Estate this shall be, if it had been so; Whether this should be for her life, or for all the years?

If this had been the single Point: In this Case, for my opinion I hold, that she should have this during the term, if she so long should live; this should be for her life, if the term so long continued, and this should be determined by her death; notwithstanding the term had continuance, there she should not have a greater Estate than for her life.

The reason of a general Livery is this, because the Deed of every man shall be taken strongest against himself: But there is no such reason in the Case of a Will, for there we are to judge according to the words; and to collect and gather the intent of the Devisor out of the words of the Will.

And so if the clause here had been solely of it self, and without any dependency on the other part, there by a reasonable construction this should be for life.

I agree, that the term generally taken, includes the whole term: If it had been so that the Devise had been only to her, and to continue for her life (being not to her and her Assigns) and notwithstanding the addition of the clause here in this Will, That if it be behind, that it shall be lawful for her and her Assigns to distrain for the same; this shall not enlarge the first Devise, (if this had been a distinct and a several Clause of it self) but in this principal Case here it is otherwise.

For here are two clauses in this Will, and the later clause for the Rent hath a dependency upon the former, and for this reason I do hold, that here she shall have this Rent during the continuance of the term to come; so that after her death, Gough the Plaintiff her Husband hath a right and good Interest to have this Rent, and the distress by him taken for it is lawful, and the rescous illoyal: And so Judgment ought to be given for the Plaintiff.

2. Dodderidge Justice. To the contrary, that Judgment ought to be given for the Defendant: That this Rent here shall determine by the death of the Wife, and therefore the Plaintiff here to recover nothing.

As to the words of this Will, which are as before; upon which words of the Will, the question here is, What Estate the Wife shall have in this Rent by this Will, limited so generally unto her, without any certain limitation of any Estate.

In this Will we ought to search out the intent of the Devisor, what this was.

First,

First, It hath been agreed unto me, that if the Case had been so, and without any other Circumstance: That if Tenant for years grants a Rent to another out of his Land by Deed, that this should be for years, but determinable with his life; and so it should be in case of a Will, as it hath been agreed: This here only depends upon the intent of the Testator himself: And by this Will his intent appears, that he did intend a greater benefit unto his Wife, if she remained unmarried, than he did that she should have if she did marry.

If she did not marry, then she was to have both the Houses, but if she married, then she was only to have his dwelling-house, and an Annuity of 20 l. per annum out of the other House, and this Rent was to have an end by her death; for he intended the one to be more beneficial to her than the other.

If she did not marry, she then was to have the greater benefit by the Will, but if she married, he then intended to be less liberal unto her.

And this by way of restraint; for if she marry, he then doth countermand his Will, as to one of the Houses: And in lieu of this, he gives some recompence to her, (S.) an Annuity of 20 l. per annum out of this other House, the which he intended to be less beneficial for her.

Now to examine the words of this Will, by these she is not to have this Rent any longer than for her life, if the term continues so long; if she dies, then he intended with this House for to advance a Kinsman, (S) Thomas Butler his Nephew: And this purpose of the Devisor here directs me this way in my Judgment.

Now to come to the restraint it self being this, (S) If she marry, then, &c. she to have his dwelling-house for her habitation, and the Rent for her maintenance, and this for her life (if the term continue) there being here no Estate limited in certain, how long she should have this Rent.

As to the construction of such general Grants, without any limitation of Estate.

As touching this, four Circumstances are to be regarded by the Law. (S.)

Four Circumstances touching Grants.

1. The Law will always have a regard to the Estate of the Grantor, so that such a general grant shall not be of longer continuance than the Estate of the Grantor. As if one be seised of Land in fee, and grants a Rent to another out of this Land, without expressing any certain Estate, the Grantee shall have this for his life, as appears by 7 Assisar. placito 1. & 17 E. 3. fol. 45. And so if Tenant in tail grant a Rent-Charge out of his Land, without expressing what Estate, the Grantee shall have this for his life (but yet with this limitation) to be determined by the death of Tenant in tail.

7 Assisar. placito 1. &c.

If the King by his Letters Patents grants a Rent unto another, without limitation of any Estate, this shall be but at will where it is in the Kings Case, for this shall be taken most beneficial for the King.

If Lessee for years grants such a Rent, not limiting any Estate, the Grantee here shall not have any Freehold, because this is derived out of a Chattel, but he shall have this for so many years as the other hath in the Land, if the Grantee so long shall live, as appeareth in Plowdens Commentaries, fol. 524. in Welkdens Case; he cannot grant this for any longer time than he himself hath it.

Plowdens Commentaries, f. 524.

As if Lessee for years grants a Rent out of his Land for the life of A. he shall have this for such a time if the Lease continues, but not otherwise; for the Law, for the true construction of such Grants, hath respect to the Estate of the Grantor.

2. The Law hath respect to the ability of the Grantee, and this sometimes shall rule and direct the Grant, where no Estate is expressed: As a Grant made to an Abbot and Covent, without saying any more, they have a Fee-simple, by 11 H. 4. fol. 84. and so if a Grant be made of Land to a Major and Comunalty, they have a Fee-simple, by 11 H. 7. fol. 12. and so if it be to a Dean and Chapter, they have a Fee-simple, by 27 H. 8. f. 15.

3. The

3. The Law sometimes hath regard to the consideration which leads the estate. As a devise made of Land to one paying 100 l. this shall make a Fee-simple, by 29 H. 8. Brook, title Testaments, placito 18. & 4 E. 6. Brook, title Estates, placito 78. And so it is in Case of a Bargain and Sale of Land for mony, without limiting of any estate, he shall have a Fee-simple, because of the consideration, by 27 H. 8. fol. 5, 6.

29 H. 8. *Brook*, &c.

4. The Law also sometimes respects the recompence and loss which is sustained. As if Lessee for twenty years makes a Lease for ten years, rendring Rent, and no time for the continuance of the Rent, expressed by construction of Law, the same shall have continuance during the ten years, because the Rent is the consideration for the term.

And therefore in 39 E. 3. fol. 1. If Tenant in Dower doth exchange the Land which she hath in Dower with the Reversioner for other Land, and no estate expressed for what time she shall have this Land, there ruled, because the same was given in exchange for her Dower, in which she had an estate for her life, and having lost this, she shall have the same estate in the Land exchanged, as she had before in the other Land; and so it is ruled also in 2 H. 7. fol. 5. and 15 H. 7. fol. 14. Two Coparceners, Tenants in tail, make partition, in this more is allotted to the one than the other; and therefore a Rent is granted for egalty of partition, without limiting what estate she should have in this Rent there ruled, that she should have such estate in the Rent as she had in the Land with which she parted, 15 H. 7. fol. 14. If three Coparceners be, and they make partition, one of them grants twenty shillings to her two Sisters for egalty of partition, there by Frowick and Vavisour this Rent shall be in the nature of Coparcenery, and by the death of one the Rent shall not survive, but shall ensue the nature and course of Coparcenery. So that in such general Cases, the Law is the best Expositor.

39 E. 3. fol. 1.

2 H. 7. f. 5.

15 H. 7. fol. 14.

Now as to the Case here of a Will, First he advanced his Wife with all the term in both the houses, (if she should live sole) but if she married, then he devised but one (S) his dwelling-house unto her absolutely for the whole term, with a Rent only out of the other house. I agree with that which hath been said, (S) If there had been but one clause in this Will, That she should have one house, and a Rent out of the other generally, that there she should have this Rent for such time as the Devisor himself had in the Land. But here in this Case there are two several clauses, having no manner of dependency the one upon the other, but are in themselves several.

The first clause being a devise unto his Wife for all the term in both houses, if she do not marry.

The second clause, (S) if she do marry, Then, as before it is expressed. Then, this is a new devise of the dwelling-house to her absolutely. And then also I devise to her an Annuity of 20 l. this is a new devise by it self, having a new verb. So here are two clauses, and new devises. I will and devise to her, this shall not go beyond his limitation. If he had said, if she marry, I devise unto her a Rent out of a house in which J. S. did dwell, this shall be a Chattel determinable upon her death.

As to the matter subsequent in this Will, that if it be behind, it should be lawful for her and her Assigns to distrain.

This Distrels thus limited to her and her Assigns, shall not inlarge the former Estate to her devised.

19 H. 6. 22 H. 9. f. 15. 19 H. 6. and 22 H. 6. fol. 15. If Land be given to two & hæredibus, with warranty to them; & hæredibus suis, adjudged that this doth not inlarge the Estate.

31 H. 8. *Brooks* Cases, f. 35. &c. And so is 31 H. 8. Brooks Cases, fol. 35. placito 156. Brook title Estates, placito 4. So here in this Case, where there is a former Estate limited by this Will; this addition in the Distrels, for her and her Assigns, shall not any ways enlarge

large her estate; no more than in the Case of the warranty before. But if the words of the Will had bæn, (And also I devise to her an Annuity of 20 l.) there she shall have such an estate in this Annuity as she had in the first house to her devised. But here in our Case it is not so, for here are two several Devises. And his purpose here was to restrain and abridge her if she married, which cannot be, if by such a construction as hath bæn made she should have this Rent for all the term. For then by this means her estate should be as great, or greater than the same was before; which doth not stand with the intention of the Testator by this his Will; and for this cause this Rent shall determine by her death. And so the Plaintiff hath no right to have this; and therefore Judgment ought to be given against him for the Defendant.

2. Croke Justice. In this Case Judgment ought to be given for the Defendant: By the first part of this Will here, the Wife is to have all, both the houses, and that for the whole term, but this with a restraint, if she should live so long, and unmarried. But if she marry, then otherwise.

Here the Plaintiff had no cause to distrain for this Rent, the continuance of this being but during the life of the Wife. I agræ to this also which hath bæn said before, that she hath this with a condition tacite annexed unto her estate; she shall have this for all the years, if she lives so long; and her estate shall be determined, if she dies within the term; this is to be so, if in case of a Rent-Charge granted out of a term for years; this is to be taken pro concesso.

The point here in this Case rests upon the construction of this Will. And as to the due construction of all Wills, these three things are herein to be observed. (S.) This to be observed in construction of Wills.

First, Res. 2. Persona. Et 3. Tempus. For that Testamentum is but testatio mentis.

First, To observe, Dispositio rerum, quæ.

Secondly, Personis, quibus, and in this Will they are two, (S.) his Wife and his Nephew; and both these the Testator here had for his Object. To his Wife his devise was of the two Houses, so long as she should remain a Widow, and to continue his house and name. He devises to her both his houses. But if she marry, then he will adhibere correctionem testamenti, in the abridging of her former Estate, and this is correctio testamenti. Yet he devileth his dwelling-house to her, whether she do marry, or not marry, this she is to have by the Will. But as to the other house, (if she marry) He will have another consideration for the disposing of this unto his Nephew. Yet his Will is, that his Wife should yet have quid pro quo. Not to lose all, but to have some recompence for this house which by his Will he takes again from her, and therefore for this he doth devise unto her a rent out of his house, in recompence for this house, he devileth to her his dwelling-house absolutely for all the years to come, and the expressing of this certainty of estate in the first clause, and the omitting of this presently after in the clause next following, this is in a manner a negation, that he did intend the contrary, (S) to have this to continue but during her life, if the years so long did last. Otherwise he would have added this, if he intended that she should have the same estate in the Rent as she had in the house, and because he doth not add this in his Will expressly, it is as much in Law as to say, that she should not have this rent absolutely for all the years. Like unto the Case remembred at the Bar. A man devileth Black-acre to his eldest Son, to him and to his Heirs, and White-acre to his younger Son, omitting these words (S.) to him and to his Heirs) this omission is in Law as a direct Negation, that he should not have it in the same manner as the other had Black-acre, but otherwise it shall be, as I agræ the case before remembred, where a man devileth Black-acre to his eldest Son and his Heirs for his part or portion, and White-acre to his youngest Son for his part (omitting Heirs) that yet here he shall have it in the same manner as the other hath Black-acre. Here in this principal Case, this

estate

estate of the Wife in the rent, shall determine by her death: otherwise this should be to offer violence to the Letter of this Will, and to the intent of the Testator, who did by this his Will intend upon her Marriage to abridge and lessen her estate. And so the Rent in this Case is determined by the death of the Wife, and the Plaintiff hath no right to have this Rent, and so Judgment ought to be given against him.

4. Coke Chief Justice. This is an Action upon the Case for a Rescous of a distress: my drift is always, if by any means I can by the Law, to maintain the right for the blood of the first Purchasor, and I shall be glad to do this, so here in this Case of a Will, as in Cases of Purchases; But as this Case is upon this Will, I do hold that Judgment ought to be given for the Plaintiff, my first reason shall be upon that which before hath been observed.

Inferences for the true construction of Wills.

Three Inferences I have observed in Wills; and for the true construction of Wills.

First, There is Temeraria expositio; this is not to be allowed of, but the contrary.

Secondly, There is Probabilis expositio, and this is to be least.

Thirdly, There is violenta præsumptio, for to guide the exposition of this, and this is to be imbraced; and so by this to shew and to find out the meaning of the Testator, 21 E. 3. If a man doth devise Land to one for ever and ever, this is a Fee-simple.

I do very well like of a violent, plain and perspicuous Exposition and meaning of a Will. But what is the reason objected to the contrary, It is meerly a foreign exposition to say, that upon her marriage he did intend to give a greater or a lesser estate unto his Wife, this is a foreign exposition, and therefore to be avoided.

In this Will, and in the construction thereof, I will observe both the words precedent and subsequent; if marry, then.

I will also in this Will observe the two Adverbs of time, (then) In this Case the Wife by this devise to her, is to have an estate in the Rent absolutely during the continuance of the whole term to come; she hath now a greater estate by this second devise than she had before by the former; there being this limitation, (S) (if she shall live so long.) Marriage is lawful, Ordained in Paradise, and it is there said, Non est bonum homini esse solum, and therefore she is not to be punished by constructions of Law, for this her lawful Act. And because she hath married, shall we argue that she shall have a lesser estate (for this lawful cause) that she had before, this we are not to do. It is well said, Si à jure discedis vagus eris, and then omnibus omnia erunt incerta. Discretio est discernere per Leges, Quid est verum. And I dare not say, that here he meant to punish her if she married, by the abridging of her estate, first limited to her by this his Will. Then observe the words, during all the term, these words rule all. If marry, then, will during the residue of the said 28 years, these words spoken before he devised any thing to her. For he doth not begin in this manner (S) I devise my dwelling-house, but indefinite he here begins with the limitation of the estate, quamdiu. And then also, when marry, to the same unity and indivisibility of the time devised to her his dwelling house and 20 l. per annum, then also, this is to be taken as in the same manner in a Will. 1. Devise 20 l. per annum of Rent unto her during the term; here it is in a Lease, this clearly shall go to the whole term; and this I will make clear, and iterating verbs in a Will work nothing. A man grants a Rent to one for life, and afterwards that he and his Heirs shall distrain for this: this limitation of the distress to him and to his Heirs shall enlarge the estate, and make it to be a Fee-simple, and this without all question, by 8 H. 4. & 46 E. 3.

8 H. 4. 46 E. 3.

My first reason here shall be upon the composition of the Will, and upon this clause of distress, to her and her Assigns.

That

That she shall have this rent for the whole term to come absolutely. It hath bæn said, and in a manner agræd, That if a Termer for years doth devise a rent out of this unto his Wife, that she shall have this for all the term, if she lives so long, and that the same shall determine by her death. But I deny this to be so, as it hath bæn said. And first I will break this Case. If he devise two Messuages to his Wife, which he had for years; and if she marry, then he deviseth one of them to her, this shall be for the whole term, and this is res judicata, and so resolved by all expressly, in 14 Eliz. Dyer, fol. 307. a Termor of a house for forty years deviseth this to J. S. without limiting what Estate he shall have, there per Curiam, the Devisæ shall have this for the whole term; and the reason there given is, because he cannot have this for life, at will, nor for a lesser term, and therefore he shall have it for the whole term. 14 Eliz. Dyer, fol. 307.

It hath bæn objected (that this is true) but with this limitation, (S) (if she shall so long live) I deny this, for it shall be for the whole term absolutely. And in such a Case, if he devised the Land to his Wife, this shall be for the whole term; and if she dies within the term, her Executors shall have the residue of this. And if it be so, where he deviseth the Land, by the like reason it shall be so where he deviseth a rent out of the Land generally, this shall also be during the whole term; for there is no difference betwæn these Cases.

Now as to the Authorities to prove this, which I have said.

10 E. 4. fol. 18. 27 H. 8. fol. 19. 21 H. 7. 11 Assisar. A Lease made for years, or for life, reserving rent generally, this rent shall go to his Heir, the Law shall so direct this; and the Cases before remembred, of partition made betwæn Coparceners, and a rent allotted to one for egalty of partition doth well prove this to be so; the rent to continue as long as the estate out of which the rent was granted; and this is according to the reason of the Law; the Rule being ipsæ etenim leges cupiunt, ut jure regantur, and with this agræs 2 H. 7. fol. 5. 15 H. 7. fol. 14. 22 Assisar. placito 78. Two Coparceners make a feoffment in fee, reserving rent generally, this rent shall be unto them as the estate in the Land before was. 10 E. 4. fol. 6. &c. 2 H. 7. fol. 5. 15 H. 7. fol. 14. &c.

And so is Shellys Case, 1 pars. If a rent be reserved generally, this shall go to the reversion; if this be left to the consideration of Law. But if the party will make a special reservation to himself, there it shall be otherwise, and not to be extended beyond the special reservation of the party; for there the words make the Plea, where the party speaks specially for himself.

Termin. Pasch. 27 Eliz. B. R. Constables Case, where one made a Lease for years, reserving rent unto himself, and died within the term; there it was questioned, whether his Executors should have this rent, or not? And it was adjudged, that they should have this rent in the right of their Testator, and this was there so agræd by all; but the difference was there taken and agræd betwæn Fee-simple or Freehold, with such a special reservation, and a Lease for years. And the reason why the Executors shall have the rent is there given, because they do represent the person of the Testator; and they in this relied very much upon Littletons Case, in his Chapter Of Conditions, fol. 77. placito 337. that the Executors to pay the mony upon a Morgage, because they do represent the person of the Testator. But the Heir doth not so represent the person of his Father. And Wray there put the difference, and the Case upon it, that for the salvation of the estate, the Executor did represent the person of the Testator. Term Pasch. 27 Eliz. B. R. *Constables* Case. *Littleton*'s Conditions, fol. 77. placito 337.

But it is not so to be always; for where it tends to the destruction of the Will, there it shall not be so. As if a Villein hath goods, makes his Executors, and dies, here the Executor doth not so represent the person of the Testator, as that the Lord may seize these goods, as the goods of his Villein; in this Case the Lord shall not seize the goods, because this should tend to the destruction of the Will; and therefore no representation here in this Case of the person of the Testator by the Executor, and this is proved by 3 H. 4. 30 E. 3. & 12 Assisar. A Lease made of two 3 H. 4. 3 E. 3. 12 Assisar.

Acres for the one, reserving a rent to him and to his Heirs, and for the other reserving rent unto himself.

As to the principal Case here in question, if it shall be so, as I have proved. That if he devise the term generally, that he shall have this for the whole term; so it shall be also, if he devise a rent out of this Lease-Land generally, this rent he shall have for the whole term; my major Proposition for the Land, my minor for a rent out of the Land.

And if it shall be so in Cases of Reservation, à fortiori, it shall be so in Cases of Grants; and if so in Grants, so it shall be in construction of Wills; and herein we are not to relinquish the rule of Law. For as before, Si à jure discedis vagus eris. As to the other Clause in the Will, That if the rent be behind, that it shall be lawful for her and her Assigns to distrain for this, her Estate is enlarged by this distress, as before I have shewed.

But in this Case, notwithstanding we do herein differ in opinion, yet there is here digitus Dei. For the Will here is not truly found, and if so, then it is to go to the blood; by this Will the Plaintiff hath a good right to this Rent, and so Judgment ought to be given for him.

Dodderidge. If a Rent be granted to one for life, with a distress limited to him and to his Heirs. I agree that this shall now be a Fee-simple. But if he grant that J. S. and his Heirs shall distrain for this, otherwise it is. But when one doth limit an Estate in Rent to one for life, and doth also further express, that if it be behind, that it shall be lawful for him and his Assigns to distrain for this Rent, this shall not enlarge the former Estate.

The Court divided two against two.

And so without any further debate this Case rested; the Court being divided, two against two, for the main Point (S) the time for the continuance of this rent. And in some other Collateral Points they differed in Opinion. As appeareth before in their Arguments.

Daniel Plaintiff against *Waddington* Defendant.

Entred Hillar. 12 Jac. B. R. Rot. 1163.

An Ejectione firmæ. 2 Cro. 377. 1 Ro.Rep.309. 2 Ro. Rep. 89. 1 Ro.Abr.831. 2.

IN an Ejectione firmæ the parties at issue, upon Non culp. pleaded, the Jury found a special Verdict, upon which the Case briefly was this, (S) three joynt-tenants for life (S) William Daniel the Father, Cicely the Wife, and William the Son; the Father dies, Cicely the Wife make a lease for 60 years to the Defendant, if she and William the Son shall so long live, William surrenders his Estate, and takes a new lease of the Lord of Hartford, and makes a lease to the Plaintiff, Cicely dies.

The Point considerable, Whether this lease so made shall be now determined, or not?

It was urged for the Defendant by More and Finch Serjeants, that this Lease should not be determined. And that three matters are considerable in this Case. (S)

Points in the Case.

2. Two joynt-tenants for life, the one of them makes a lease for years, (if he and his Companion so long shall live) the other dies during the lease. The first Point, Two joint-tenants are, one of them makes a Lease for years, and dies; whether the lease be by this determined, or not:

Coke Chief Justice. This was Collyers Case, where this was adjudged to be a good Lease.

Second Point, Cicely and William being joynt-tenants for life, Cicely makes a lease for years, if she and Willliam shall live so long; omitting these words (S) (or either of them) whether this lease shall be by the death of Cicely determined, or not?

Coke

Coke. If tenant for life makes a lease for years, if he and another shall so long live; clearly this lease shall be determined by the death of one of them.

That this Lease ought to continue notwithstanding the death of Cicely, the lease being made by her, if she and William her Companion so long shall live. Wherein the difference will be betwéen a mér collateral limitation, and where the same is mixed with an interest, as appears Coke 5 pars, fol. 9. in Brudnells Case, Littletons Case, in his Chapter Of Joynt-tenants, fol. 64. placito 289. Two Joynt-tenants in fée, the one of them makes a lease for 40 years of that which to him belongeth, and afterwards dies either before the lease begins, or during the same, yet this lease shall have still continuance.

Coke 5 pars, f. 9. in *Brudenells*, &c.

Pasch. 37 Eliz. B. R. Rot. 244. Harbin and Bartons Case was urged.

Pasch. 37 *Eliz.* B. R. Rot. 244. &c.

Dodderidge Justice. In Harbin and Bartons Case, the Judges here were divided in Opinion. Two against two, but afterwards it was adjudged at Serjeants-Inn, that the lease for years should have continuance, notwithstanding the death of one of the Joynt-tenants.

It was further urged in this Case, as touching the manner of this limitation, if the lease here should determine by the death of one of the Joynt-tenants; the words of the limitation being, if she and William should so long live, (and doth not say or any of them) Termin. Pasch. 29 Eliz. Rot. 1410. betwéen Baldwine and Cox, where the limitation of a lease for years made by Sir Richard Wayneman to Trupenny, Habendum for 40 years, if Trupenny, his Wife, or any Issue so long should live, it was adjudged, that by the death of one of them the lease was not determined; because an interest passed to the Lessée. The limitation here is no more than the Law implies, this being as much as if it had bén said, if Cicely or William so long shall live, and à fortiori it shall be so here, because this lease was made by one who had an interest. If two Joynt-tenants for years do make a lease for years, if they shall so long live, if one of them dies, yet the lease shall continue; 30 Assisar. placito 8. A Lease made to two for their lives, & diutius eorum viventi, so much is tacite implied by the Law without these words.

Pasch. 29 *Eliz.* Rot. 1410. &c.

30 Assisar. placito 8.

As to the Point of the surrender, Two Joynt-tenants for life, the one of them makes a Lease for years, with the limitation as before; the other surrenders his Estate, afterwards he which makes the Lease dies; whether this Lease shall have continuance, being made before the surrender. It was urged, that this Lease should have continuance, being derived out of both their Estates, 20 E. 4. fol. 13. touching an interest setled in a third person, there tenant for life grants a Rent-Charge, and afterwards surrenders, yet the rent shall have continuance. In Harbin and Bartons Case, where two Joynt-tenants for life being, the one makes a Lease for years, the other surrenders; afterwards he which made the Lease dies, there held the Lease to have continuance.

20 E. 4. f. 13.

It was further urged, that this Lease grows out of the power which the Law gives to every joynt Estate; and this Lease is derived out of this. And the surrender here is the act of the other, the which shall not destroy this Lease; but it shall continue good. This Lease not being derived out of the possibility of survivorship, but out of the power which the Law gives to a joynt Estate to grant a present interest. Which cannot grow out of a possibility.

For the Plaintiff, it was urged by Hide and Davenport, that the Joynt-tenancy here is severed, and that there is no difference whether the Lease was made before or after severance of the joynt-tenancy.

It is to be examined, Quid in rei veritate doth pass here, each of them hath a moyety to pass; this Lease must be agréed to be good against the Survivor, where there is a Survivor, but not otherwise.

And Brudenells Case, Coke 5 pars, fol. 9. was much insisted upon: A Lease made to one for his life, and the life of J. D. if he dies, yet the Lease hath continuance, because he hath this for two lives; but if a Lease for years be made with

such a limitation, that if he and J. S. shall live so long, this is a limitation collateral, and here by the death of one, the Lease for years shall be determined.

And so it is, if a Lease for years be made to one, if the Lessor and another shall so long live; this is meerly collateral in both; upon the surrender it was urged, that by this act of the other the survivorship is determined; the Lease made by the other, by his death is determined, and shall not have continuance, for that this act, (S) the surrender doth now so far operate, as that it doth now turn the Lease made by Cicely, to be a Lease out of her moyety, and so determinable with the same, and not to have continuance after this ended, being by her death.

Coke 6 pars, fol 79.

And the Lord Aburgavenies Case, Coke 6 pars, fol. 79. much insisted upon; where two Joynt-tenants in Fee, the one grants a Rent-Charge in Fee, and after doth release to the other; by this Release the right of Survivorship is quite taken away, and the Rent-Charge not avoidable by the death of him that did release; and by the acceptance of this Release, he hath deprived himself of the means to avoid this Rent-Charge, (being jus accrescendi) and taken away by the Release; and so this Lease here is not to have continuance after the severance of the Joynture, by the act of him which did not make the Lease.

Croke Justice. Cicely and William being here Joynt-tenants for life, Cicely makes a Lease for years (if she and William so long shall live, omitting these words, (or either of them) Whether this Lease shall be determined by the death of Cicely, or not?

The reason of the continuance of the Lease is to be examined, being, because there is a continuance of the Estate; and therefore if this Estate be determined, the charge also shall be gone.

Haughton Justice. Two Joynt-tenants for life, if one of them makes a Lease for years, if he and J. N. shall so long live; if one of them dies, the Lease is determined.

Croke. If they both joyn in this Lease, and with this limitation, if they shall so long live, this Lease shall be for both their lives.

Dodderidge Justice. If this Lease at the first shall issue out of the whole Land, and the Survivor be once chargeable with this, the severance of the Joynture afterwards shall not determine this Lease; if two Joynt-tenants be for life, one of them makes a Lease for years of the whole; if this Lessor survives, it shall be good for all.

Haughton. This Lease here is issuing out of the whole Estate, but upon a condition in Law.

Dodderidge. In Harbin and Bartons Case, there the Lease was made, which did charge the Survivor with a moyety.

Nota. That on another day this matter was moved again.

Coke Chief Justice recited the Case as before: If one doth make a Lease for years, if J. S. and J. D. shall so long live; one of them dies, the Lease by this his death shall be determined.

Here in this principal Case, two Joynt-tenants are for life, one of them makes a Lease for years, if he and his Companion shall so long live; the Joynture betwéen them is afterwards severed, then the party who made the Lease dies, Whether this Lease shall still have continuance, or not?

As to this, an Estate surrendred may have continuance to divers purposes; here the Lease is good for both their times, and if one of them dies, it shall be good during the life of the other.

But here in this Case the Joynture is severed: As for this the Case is, Two Joynt-tenants for life, the one makes a Lease of his part for years, if he and his Companion so long shall live; the other surrenders his Interest unto the Lord in reversion, and takes from him a new Estate, Quid operatur by this?

This is a good Case, and well to be considered of.

Haughton.

Haughton. If two Coparceners are, one of them grants a Rent out of the undivided moyety: Partition is afterwards made betwæn them, the Rent shall then issue out of this divided moyety.

Coke agreed this to be so: And so it shall also be in case of a Lease, where an Interest doth pass.

Dodderidge. The matter here resteth wholly upon the continuance of this Lease, Whether the same shall in this Case still continue, or not, after the death of Cicely the Joynt-tenant who made the Lease.

Coke. As to Harbin and Bartons Case before remembred, I did very much doubt of it before the same was adjudged, but now I am well satisfied herein.

Dodderidge. This was so adjudged but by one voice.

Coke. This Case was not then argued by the Judges judicially, but only in this manner, (S.) Each of the Judges being demanded their Opinions, (S.) What say you? and so to the rest, and in this manner it was adjudged.

Afterwards, upon consideration had of this Judgment, and of the manner of it, one then said, Quod major pars vicit meliorem, the same Judgment being but by one casting Voice: Before this Judgment, I was not well satisfied herein, but now I am.

And so without any further debate at this time, the same was adjourned unto a further time.

Afterwards, (S) Termin. Hillar. 13 Jac. B. R. This Case was moved again, and argued.

Coke Chief Justic. Harbin and Bartons Case remembred was this; An Estate for life made unto two, The one of them made a Lease for years, to begin after his death, here a present Interest passed to the Lessee; if his Companion died the Lease not good, but otherwise if he himself died; here in this Case, if he surrendred who made the Lease, then the Lease not good, for that it rests upon a mær contingency, and if this be prevented, the Lease shall not then have continuance.

If two Joynt-tenants in fee be, one of them makes a Lease for years, rendring Rent, and dies, his Companion shall not have the Rent: The Lessor may distrain upon any part of the Land: And if they make partition, and the Cattel of the Lessee come upon the part of his Companion, he may there distrain them for the Rent.

Two Joynt-tenants be, the one of them makes a Lease for years, if they two so long shall live, the life of man is collateral to the Estate for years, no drowning of Estates.

Termin. Pasch. 28 & 29 Eliz. Rot. 1410. A Case betwæn Baldwin and Cox was cited by the name of Trupenny's Case, with which I was of Council, where the limitation of a Lease for years made by Sir Richard Wainman unto Trupenny, was in this manner, (S) Habendum for forty years, if Trupenny, his Wife, or any Children of his so long should live. Pasch. 28 & 29 Eliz.

It is plain here, that the last (or) disjoyns all, the Copulative there disjoyned, by the Disjunctive subsequent: If he, and his Wife or Children, this last (or) doth disjoyn all, as in that Case it was agreed.

Dodderidge Justice. The difference will be, where it is parcel of the Estate, and where it is mærly collateral.

It appears by Littleton, that in Case of Joynt-tenancy, survivorship is given by the Law of the Land, as an incident unto the Estate by Law; and you now draw this Estate for years, to have a continuance, where there is no survivorship to take place betwæn them: This cannot so be by any means.

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The Court then demanded to have the Lease shewed, to see whether these words were in it, (S.) (or any of them) which makes the other point.

Dodderidge. If two Joynt-tenants be for life, the one of them makes a Lease for years of his moyety (if he and his Companion so long shall live) the other surrenders up his Estate to the Lord in Reversion, who takes a new Estate of him, and makes a Lease to the Plaintiff.

The Defendant in this principal Case claims under the Lease made by Cicely, the Plaintiff under the Lease made by the Joynt-tenant who surrendred, and took a new Estate.

The whole Court clear of Opinion, that in this Case the Lease made by Cicely, by her death was determined, and should not have continuance after her death, and that the Plaintiff here hath a good title.

Judgment for the Plaintiff.

And so by the Rule of the Court, Judgment was given for the Plaintiff.

Barbara Harbert Plaintiff against *Bynion* Defendant.

A Writ of Error to reverse a Fine.
1 Ro.Rep.323.
1 Ro.Abr.140.
Cro. Ja. 392. 111.
Mo. 342. 847, 848.

IN a Writ of Error, to reverse a Fine levied of two Houses and Land, by Richard Harbert the Husband, and by the Plaintiff in this Writ of Error unto Robert Bynion and his Heirs, at the Great Sessions held for the County of Montgomery, before Lewknor and Townsend Justices of the Great Sessions, die Lunæ 24 Julij, 7 Jac. which was a fine sur releas of the Husband and Wife, and their Heirs, unto R. B. and his Heirs, dated 9 Novembris, 11 Jac. The Justices upon this certified the Record hither, the Writ of Covenant, the Return, the Dedimus potestatem, the Concord, and all Requisites: The Error assigned, because the Writ of Covenant port date after the Test of the Dedimus potestatem, and so prayed a Scire facias against Tho. B. the Son of R. B. the Conusee, who said, that by this Fine R. B. was seised of this Land in Fee, and died so seised, by and after whose death the said Land did descend unto him as Son and Heir of the said R. B. and that he being within age, was in the Custody of the King, as his ward, by reason of the tenure of the said Lands. And for his non-age, he prayed his age, and that the Parol might demur till his full age.

Barbara Harbert counterpleads this age, and saith, that long time before Rich. and Barbara had any thing in &c. Rich. H. the Father of the Conusor and Eliz. his Wife were seised of this Land in the right of Eliz. and being so seised, they made a Feoffment unto two, to the use of R. H. the Son and Barbara, and to the Heirs of their two Bodies, leaving the Fee in the Heirs of Rich. the Father, virtute cujus, &c. & vigore Statuti, of 27 H. 8. they were seised in tail, and being so seised, this Fine was levied to Robert Bynion, to the use of him and his Heirs.

And also that the same day the Husband alone of the same Land, did levy another Fine to the same Conusee, with Warranty, to the use of him and his Heirs; afterwards the said Robert Bynion died seised, and this descended to Tho. Bynion his Son and Heir, and demands Judgment; Whether as this Case is his age shall be allowed; this being by this Writ, if reversed, to be restored unto her Writ of Dower, in which age is not to be granted?

Upon this Counterplea Tho. B. demurred in Law.

This Case was long argued at the Bar, and after by all the Judges.

These Cases were urged against the age.

9 H. 6.

9 H. 6. fol. 46. In an Attaint age lieth not, 40 Assisar. placito 16. in a deceit age lieth not. 9 H. 6. f. 46. &c.

Coke Chief Justice. One Action grounded upon another, shall ensue the nature of the same Action upon which it is grounded, 35 H. 6. if summons and severance shall be in the first Action, it shall be so also in the second.

This Writ of Error here brought, shakes the Inheritance.

If one hath two Fines, a Writ of Error is brought upon the first, Will you oust him of his age, because the second is erronious?

Jones, cited 44 E. 3. that in Dower the Heir shall not have his age.

Coke agreed this to be so, and it is very clear.

Haughton Justice. By the Replication here, she makes a title to have Dower, and this shall be quite lost, if age shall be here allowed.

Dodderidge Justice agreed herein.

Coke. There is no authority for this, she was therefore unwise to joyn in Demurrer.

Dodderidge. This Writ here is but to restore her unto an Action, in which Action no age lieth.

Coke & Croke. What is this to all strangers which have the Inheritance, this shall be very prejudicial to them.

Haughton. Here she hath title of Dower, the which shall be lost, if age be here allowed.

Coke. If the Fine should be shaken only as to him alone, which is not so. I agree if the same had regard only to the Wife, but here in this Case if it be reversed, the Ter-Tenant shall lose his Inheritance.

Dodderidge. He hath another Fine.

Coke. Clearly the Ter-Tenant in a Writ of Error shall have his age: In a quod ei deforceat, he shall have his age; we are here in a Case in which he shall have his age, (S) in a Writ of Error.

Haughton. In an Attaint age shall not be granted, by reason of the mischief that may ensue, because the Jurors may all die, and so the same mischief may be in this Case; and it is a clear Case, that in Dower executed, age shall not be granted.

Dodderidge. We are to weigh the mischief here in this Case, both are matters of delay, she may here lose her title of Dower.

Coke. We ought here to weigh the right of the Infant.

Dodderidge. He shall not lose any of his right in this Action.

And for this time this Case was adjourned for further argument herein.

Afterwards, (S.) Termin. Hill. 13 Jac. B. R. this Case was moved again, and long argued at the Bar, and after by the Judges, and by the Judgment of the Court age was allowed. Termin. Hill. 13 Jac. B. R. &c.

It was urged, that age should here be granted, otherwise the Heir who hath possession by descent of a Freehold, should lose this his possession, if age denied him.

In 21 Eliz. between Worsley and Charnock, B. R. Age allowed by the Court for this reason, because that by the Wives reversal, the whole Estate by this shall be reversed. 21 Eliz. B. R. &c.

It is no reason to proceed against an Infant in a Writ of Error, for he may have a Release to plead; and also it is uncertain, whether she will bring a Writ of Dower, or not, if she do reverse this Fine.

Obj. As to the Objection made, that the Infant by this reversal shall not lose his Inheritance, because he hath another Fine that was levied to him, and the Writ of Error here is brought upon the first Fine, and he hath a second Fine.

Resp.

Resp. In answer to this, this is no reason, for the second Fine may be also erroneous, both of them being levied on the same day, and this may tend to the loss of his Inheritance, if his age be denied him, 4 Mariæ, Dyer fol. 137. in Bassets Case the reason there given, why an Infant shall have his age, because he cannot discern his own right, and by 8 E.3. fol. 10. The Court ex officio, ought to speak for an Infant.

4 Mariæ, Dyer, fol. 137. &c.

It was urged by Jones, that age ought not to be granted.

In the Bar, here a Fine is shewed to be levied to his Father, and a descent to him within age. The other replies; that her Husband was seised, and that she joyned with him in the Fine, by which she was barred of her Dower, confesseth the descent, after her Husband dies, and to be restored to her Writ of Dower, this Writ brought upon the first Fine levied, 27 H. 6. fol. 1. 43 Assisar. placito 21. In Quare Impedit no age to be allowed, because in the mean time laps may incur, also in this Case, in the mean time, by this the Action of the party shall be lost; And this is the reason here given why age is not to be granted, because the party may lose her Dower. It was also urged, that this Writ here is in the nature of Writ of Dower, because it is to restore her unto this; and this being of the same nature, she is to have the same priviledge. The Writ of Attaint and Error do follow the nature of the first Action, and therefore if no age be to be allowed in the first Action, none shall be allowed in the other by 9 H. 6. fol. 47. the reason there given in the Attaint against the age, because in the mean time all the petit Jury may die, 47 Assisarum placito 4. & 47 E.3. fol. 7. an Infant shall not have his age in a Writ of deceit, and with this agrees 35 H. 6. fol. 44. where the Case put of a Writ of Error, and no age to be allowed.

27 H. 6. fol. 1. &c.

9 H. 6. fol. 47. 47 Assisar. placito 4.

Coke Chief Justice denied the grounds before put, for if Tenant pur auter vie disseised, and brings a Writ of Entry against the Heir of the Disseisor, he shall have his age; and yet the tenant is to have but an estate for life. The point here is this; the husband and wife levies a Fine, and the Writ of Error here is brought to reverse the whole Record; whether age in this Case is to be allowed, or not.

Dodderidge. Lands are given to the Husband, and to the Heirs of the Wife, recovery by default is had against them, the Husband dies, the Wife brings a Quod ei deforceat against the Heir of the Recoverer (who being within age, prays his age) he shall not have his age in this Case.

Coke. He shall in this last Case put, have his age. Also if it be not in the Case of Dower, in a real Action, he shall have his age; and here is no Dower settled to the Wife.

Haughton. She shall have a Quod ei deforceat, when Dower is executed.

Object. Coke. The Writ of Error doth pursue the nature of the first Action; and if summons and severance be in the first Action, by 35 H. 6. it shall be so in the second Action. It hath been objected, that here there is a second Fine. If so, yet this Objection is of no force. But here it appears unto us visibly, that the Inheritance of the Infant is to be lost; this is visible, and in bar of age you never ought to bar a title of Dower in question, which is but a possibility of Dower, and not known whether she will have any Dower, or not, there being none executed.

Resp.

Dodderidge. That which staggers me in this Case is, to see what prejudice this should grow to the Infant, if his age be disallowed; If no prejudice, why ought we not then to speed this Action? For the wife may die before the full age of the Infant, and then her Action shall be lost. If she doth reverse this Fine, what shall she then to have by this, nothing at all? Age is to be allowed to an Infant, where he is to defend his right. But where he is to have no prejudice by the denying of it, there the same is not to be allowed to him in prejudice of another.

Coke. One being seised in Fee-simple, makes a Feoffment in fee to one, and his Heirs; afterwards he levies a fine to him and his Heirs; the Conusee dies, the descends unto his heir within age; the Heir of the Conusor brings a Writ of Error

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against the Heir of the Conusée, to reverse the Fine, who prays allowance of his age, if the other saith against this; you ought not to have your age, because you have a Feoffment made by my Father to your Father and his Heirs; shall this Plea oust him of his age? clearly it shall not; No more here in this Case, by saying he had a second Fine.

Haughton. This Land here is held of the King in capite, and this is so confessed by both sides; so that now by this, here is a title appears for the King; and it is shewed, that the Heir was in custodia Regis, but doth not shew that the Lands were seised into the Kings hands, and therefore we now ex officio, ought to send you into the Chancery.

Coke. If it be so, we then ought to look unto this.

And so at this time, The whole Court (Dodderidge excepted) were of Opinion, for the allowing of Age.

Coke & Dodderidge. This which is moved for the King is no matter.

Afterwards, on another day in Hillar. 13 Jac. the Judges argued this Case.

1. Haughton Justice. Rehearsed the Case, as before, the sole point being, whether age ought here to be allowed, or not? That here he ought to have his age granted unto him, according to his prayer.

In this question, which is very copious in our Books, many questions are determined by Statutes, and by the Common Law, as to this matter of age to be granted. Stat. ousting age, &c.

The first Statute for this is Westminster the first, cap. 47. which doth oust the Heir of the disseisor, from having of age.

The second Statute is the Statute of Glocester, cap. 2. which doth oust the Heir of his age in a Writ of Ayel and Besayel.

The third Statute of Westminster 2. cap. 44. in a cui in vita.

Upon these three Statutes divers questions have risen, of which I will not speak.

At the Common Law sometimes age shall be denied, for the nature of the Action. As in an Attaint, and for the losing of the Action, which may so be by the death of the petit Jury, as in 9 H. 6. fol. 47. 47 E. 3. fol. 9. 44 Assisar. placito 4. 9 H. 6. fol. 47. &c.

Sometimes he shall be ousted of his age, and sometimes granted in Scire facias. If one do recover in a Præcipe quod reddat against one; the Tenant dies, his Heir within age; here he shall not have his age, because his title is bound by the recovery, as appears by 24 H. 6. fol. 3. 6 H. 6. fol. 46. Also sometimes age lieth not, in respect of the loss of the Infant, as by 21 H. 7. fol. 41. In a Writ of Annuity brought against a Parson, who prays in aid of the Patron, who had the Patronage by descent, and was within age, and prayed that the parol might demur; here he was ousted of his age, because that this was an annual rent, and the wrong began in the Parson: and the charge was to fall on the Parson, and not on the Patron. And with this agrees 10 H. 6. fol. 10. ousted of age, because loss to fall upon the Heir. Also the Law doth less estæm of delay than loss of Inheritance for ever; for delay may be remedied, but disinheritance not; 45 E. 3. f. 5. In a Quid juris clamat against Tenant for life, who pleads that this was leased unto him without impeachment of wast, shews this, and if he will confess, then he will attourn; it is there said, that rather than the Infant shall make such a confession, age shall be granted him; and so it was. 21 H. 7. fol. 41.

The Law doth weigh matter of delay and of disinheritance in a ballance. But I will not prosecute these Cases, but come to the Point now in question. In the which, These two things are to be considered.

1. First, The nature of this Action here being a Writ of Error, whether in this Action age shall be granted, or not? Things here considerable.

2. Secondly, In respect of the title of Dower here, which she hath after the

reversal of the Fine, whether this shall be such an impediment, as that a ge here shall not be granted.

As to the first, being in the Case of a Writ of Error, in the which age is not grantable (but yet with this difference, (S) if it be brought against the Heir alone, age is not to be granted, if he be not tenant of the Land; but if he be tenant, then age is to be granted; and this is proved by 47 E.3.fol.8. a Writ of Error brought against tenant by the curtesie, and the Heir in reversion prays in aid of the Heir, and this granted, but ousted of his age, because he was not tenant of the Land. With this agrées 47 Assisar. placito 4. & 19 H. 6. fol. 25. adjudged, that the Heir of the tenant in a Writ of Error shall have his age, for so much as descended unto him. Here in this Case it is plain that he is tenant, and that his Inheritance might be lost, therefore the Law will protect him until his full age, so that in the interim he shall not sustain any loss.

37 E 3. fol. 8.

As to tht second Point, touching the title of Dower, alledged here to be.

I agrée, that at the Common Law, in a Writ of Dower, age shall not be granted; and this is in favorem dotis, and so is 5 H. 5. fol. 13. In a Writ of Dower, the tenant doth vouch an Heir within age, and in Ward to the King, this shall not be delaid for the nonage, as it is there adjudged, 12 E.4. fol. 17. accordingly, 44 E. 3. fol. 43. In a quod ei deforceat by tenant in Dower, to recover title de Dower, age prayed, and denied, this brought to reduce her to her eigne title, she shall not be delayed by the age of the tenant; and so is 16 E. 3. Fitz. title Dower, placito 56. & 6 H. 3. Fitz. title Dower, placito 181. that in Dower age not to be allowed. But as this principal Case here is, age ought to be granted. There is no express Case in the Law to make good my opinion, this being a new Case, but I am satisfied by the reason which I shall give.

16 E. 3. *Fitz.* Dower 56. &c.

Notwithstanding age be not to be granted in Dower, the reason of this being, because the Law gives such a priviledge unto Dower, (in Case where the Dower it self is in question) but not so where the same is not in question. Here it is said, that at the time of this Fine levied, she was intitled to have her Dower, (S) if this Fine should be reversed; but whether this shall be so or not is doubtful, and she may have another right to the Inheritance; she may have title of Dower, and also title to the Inheritance, and it is in her election how she will have it. So that this Case here in question is very much different from the Case, where title of Dower is immediately in question. If one recovers against tenant in Dower, in a Præcipe quod reddat, and she brings a Writ of Error to be restored to this again (were this upon a title of Dower once executed) there age shall not be granted in delay of this.

But this is a Case of more question than this principal Case here is. For here it stands indifferent unto us, whether unquam or nunquam, her title of Dower shall come in question, and this reason gives me satisfaction.

Object. It hath bén Objected, that by the disallowance of age, the Heir here shall not be disinherited, because that Herbert the Husband had levied a second Fine unto Bynion and his Heirs, and this to bind the Husband and his Heirs.

Resp. This is so said, But this doth not so appear to us, as Judges; but if it be so, there may be means also to avoid this Fine; there may be error also in this Fine, and this is a very forceable reason; that before Dower be executed, or directly in question, there shall be no cause for this, to oust the Heir of his age.

Another reason may be, because this is in the Kings hands; as to this, I shall say no more, but as this Case here is, age ought to be granted to the Defendant, pur cause del son nonage.

2. Dodderidge Justice. The point here only is, Whether age shall be granted to the Defendant, or not? In this Case I have much staggered in my opinion. I do not find this Case in all the Law, and therefore this is not to be discussed by multitude of Cases, but by Reasons. In this Case there is a sure way, but this is not

not a safe way: For to grant the age here is a sure way, and no Error shall be for this: But this (in my conscience) is not a safe way, for in this we shall do wrong.

Coke 6 pars, fol. 3, 4. Markams Case, as touching this learning in general; but I will not insist upon general Cases, which concerns the Plaintiff or Defendants; many differences there are to be observed in them, according to the difference of Actions. *Coke* 6 pars, fol. 13 &c.

But to proceed now unto my Reasons, whereupon I do ground this my opinion against the granting of age in this Case.

First, If here be no detriment to come to the Heir, nor any loss; and if a loss be to no purpose, if it be so, to what purpose shall it then be for us to grant him the benefit of his age, when as by this Grant there is a manifest mischief on the other side? And we in this, and in all other Cases, ought always to prevent the greatest mischief. Reasons against the granting of age.

If the Fine here at this time be erronious, the same will be also erronious at the full age of the Infant: If age be here granted, this is but matter of delay for the tenderness of the Infant: The Wife here seeks her Dower for her life, she may die before the Heir comes to his full age, and then her Dower is lost, and she remains impoverished in the interim for her life; and it belongs properly unto us to see and consider which shall be the greatest mischief, and so to use our best endeavours to prevent this.

In this my Argument, I will pursue that course which was last taken, As (S.)

1. First, I will speak unto the Writ of Error, and whether age shall be granted in this, or not?

2. Secondly, If the title of Dower be considered in this Case, whether then age shall be granted, or not?

1. In a Writ of Error, in some Cases age shall be granted, and in some Cases not: And this doth not rest only upon the difference before put, where he is Ter-Tenant, and where not.

In 9 H. 6. fol. 18. & 19 H. 6. fol. 25. in Dudleys Case this Rule is crost.

47 E. 3. fol. 7, 8, 9, 10. Sir Richard Woldgraves Case, a notable Case (and the best Case argued in all the Quadragesf.) there the difference is put, where it is an error in Law, and an error in Fact, and many differences are there put, where the Heir may plead in discharge of the Error, and where not. 9 H. 6. f. 18. &c. 47 E. 3. f. 7. &c.

And 47 Assisar. placito 4. the same Case, Error sur un scire facias, upon a Fine levied of a Manor, with a fore-prise. 1. Tenant in tail died without Issue, he in remainder in tail, port un scire facias, to execute this without the fore-prise, he had Judgment to recover the Heir in by descent; a Writ of Error brought upon this against Three, age there prayed; and whether the Heir shall have his age to him allowed, is there very well debated, and that by notable Reasons drawn out of the very foundations of Reason; and there a good difference is put, where he is Ter-Tenant, and where not, and prays his age.

And the reason there given why he shall have his age, where he is Ter-Tenant, is because the Law supposes him to be of such an age, as that he cannot be Conusant of his right, that he cannot make a good defence of his right, and so for this cause it should be very prejudicial to him, if his age there should not be granted to him, (and this is upon the difference there, where it is an error in Fact, and where an error in Law) where it is an error in Fact, as before, and upon the former reason he shall have his age: But for him to know how to defend his right, against an error in Law, this is not in his Conusance to do, but this belongs to the Judges to do for him, and they are to see to this on his behalf, that nothing be done in this, but that which is right.

Obj. But it hath bèen here further objected, That he may plead in Bar to the Error, with more ability when he comes to his full age.

Resp. But in this Case, what he can plead here, we do sée it all by the pleading it self.

Obj. It hath bèen further objected, That he may plead a release of all Errors in far better manner at his full age, than before, (the release of which, of the Demandant, is not in this Case) for the Husband died after the death of the Father of the Infant, and then she was a feme Covert.

Resp. But if he pleads a release of Errors, what ought the Judges then to do? shall we affirm the erronious Fine? this we are not to do, neither the good to the one, nor the ill to the other.

2. It is now to be examined here, what the Heir shall lose if this Error assigned shall be presently examined, and the Fine upon this reversed; by this he shall not lose his Land, the Plaintiff by this her Writ demands nothing.

Obj. But it hath bèen objected, That by this he hath lost one of the strings of his Bow, (S) this assurance by Fine, which is reversed.

Resp. If he do lose this, it is but a broken Staff, and this would not have pleasured him at his full age, and so by this he hath lost but a broken Staff.

If this Fine be not erronious, he shall then have no harm by the procèedings in this.

This Case is a new Case, and very much differing from all the other Cases before put.

Where delay is on the one side, and a particular mischief on the other side, we who are Judges, ought rather to regard the mischief, than to suffer and give allowance to matter of delay, which in such a Case ought not to be suffered.

No mischief is here unto him, if the Fine be reversed, for he hath another Fine of the same Land.

Obj. But as to this, there is an Objection also made, (S.) That this Fine also may be erronious.

Resp. As to this, the same is only conjectural, and we do not sée this to be so, neither ought we to imagine it to be so.

If this Fine be erronious, the same will not benefit him now, nor yet at his full age.

If the same be not erronious, it will no ways hurt him to have this to be presently examined: And as this Case is, he cannot plead any thing against this, for this Case runs betwèen all the other Cases.

In a Writ of Error, where age shall be granted, and where not, appears by 47 E. 3. fol. 7, 8. 9 H. 6. fol. 18. 19 H. 6. fol. 21. 30 H. 6. fol. 2. b. age lieth not in Error, by Fortescue, as the Case may be, 9 H. 6. A Writ of Error brought the Heir in Ward to the King, and the Lands seised into the Kings hands (as it is not here in our case) and therefore age was there granted to the Heir; this Case is argued in 9, 18, and in 19 H. 6.

47 E. 3. f. 7. &c.

Now to exemplifie this, with the reasons of other Cases.

So is an Attaint to reverse a faux Verdict, in manner as a Writ of Error: These two have a restoring property in them.

All our Books agrèe, that in an Attaint, an Infant shall not have the benefit of his age: (but this is questionable in a Writ of Error) And the reason of this is, to prevent a mischief which shall be great; if all the Petit Jury should die, for then by this he hath lost his Action.

And this mischief is here in our Case, for if the Wife who is Plaintiff here should die, in the interim, she hath lost her Writ of Dower.

In an Attaint it shall be so as before, and for the same reason before remembred.

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By 40 Assisar. placito 27. 9 H. 6. fol. 47. & 47 E. 3. fol. 8. there is a resolution of all the Judges, that he shall be ousted of his age: In a Writ of Deceit, Whether he shall have his age, or not? 40 Assisar. plac. 27. &c.

All these three Writs, (S) Error, Attaint, and Deceit, are to restore the party to that which he hath lost. Writs of returning.

1. By erronius Judgment, upon reversal to be restored.
2. For a faux Verdict upon the Attaint.
3. Upon the Deceit.

All these three are of one and the same nature.

Deceit in non-summoning of the party-Tenant as he ought to do: And these Cases are as like unto our Case as any can be.

In a Scire facias against the Heir, upon a Recovery by the Ancestor of, &c. by an erronious Judgment; the Heir being in under this, a Scire facias brought to execute this against the Heir, upon a Judgment given against his Father, he shall not here have his age, by 18 E. 3. fol. 34. 22 E. 3. fol. 22. 27 E. 3. fol. 88. 47 E. 3. fol. 13. 18 E. 3. f. 34. &c.

It may be here demanded, for what cause, for he is in by descent, and may lose his Inheritance; the same Objection there made, as here in our Case: He may have a Release to plead, but he shall not have this here; there it is said, we ought to give credit to a Judgment given; this Bar here pleaded was a Judgment, and therefore for non-age he ought not to be delayed of his execution; there it is said he may plead by his Guardian, and Judgments given ought to be credited, being given against the Ancestor, and the Heir in under this, and Execution ought not to be delayed.

So here in this principal Case, you are in under an erronious Fine, you may plead your Plea to this by your Guardian.

2. The second matter here considerable is, Whether in regard of the title of Dower which appears, and this Writ being to restore her to her Writ of Dower; Whether in this Case age shall be granted, or not? age is not here to be allowed.

In a Writ of Dower, age ought not to be granted, as appears by many Cases, as 17 E. 3. f. 59. 44 E. 3. f. 43. 5 H. 5. f. 13. 12 E. 4. f. 17. and many other to prove this. 17 E. 3. f. 59. &c.

Two Reasons are given for this in the Old Books, and admitted of in the later Books.

1. Reason, Because that Dower is very much favoured in the Law.

Obj. As to this it may be here said, That she hath no Dower.

Resp. In answer hereunto, she shall be favoured in the bringing of this Writ, for if the Law do so much favour the Estate of Dower, it doth also favour the means of coming unto this, and this of necessity; and so for this cause no age is to be allowed in this Writ.

2. A second Reason, because this is a speedy suit, and therefore no delay to be admitted of in this.

Also no mischief by this shall come unto the Heir, for she shall recover but a particular Estate for her life; and to be attendant upon the Heir, she is to be in of the Estate of her Husband: And if she shall have this favour by the Law, when her Dower is setled she shall have this favour also in the means to come unto it.

44 E. 3. fol. 43. A Feme hath an Estate in Dower, she takes a second Husband, they are impleaded, she brings a Quod ei deforceat against the Heir, who proved to have his age, there ruled, that he should not have his age in Dower, and therefore not in this Action, being only to restore her to her Dower.

43 Assisar. placito 22. the Heir in ward, the Manor of Dale descends unto him, where it is said, if he be ousted of his age in one Action, he shall be also ousted in 43 Assisar. placito 22.

another

another Action, being of the same nature there ruled, that age shall not be allowed, being in the nature of a Quare Impedit, for the avoiding of delays by laps: And this may be another reason for it, because that by this the Inheritance of the true Patron may be lost.

In 44 E. 3. it is there adjudged, that if Dower be setled, he shall not have his age: The same reason shall be in an Action, which is only to bring him to this Action.

So here in this Writ of Error, the same is to be as much favoured in Law, as the Writ of Dower it self; this being the only means to enable her to have a Writ of Dower, and so by this to come to the Estate of Dower: For one shall never come to an Estate, if the Law will not favour him in the means.

Obj. It hath been objected, That it is uncertain whether she will bring her Writ of Dower, or not?

Resp. As to this, let us do right, and let her do then as she will, the election being in her self: let us give unto her wings, her liberty in denying of the age, the which if we shall not do, we take away this her election from her: Also this is no harm to the Heir, to have a present proceeding herein, and so this Objection is of no force.

Obj. Another Objection hath been made, (S) That this Land may be her Inheritance, and she may afterwards have and make divers other Titles to this Land, and to prevent which age is to be allowed.

Resp. As to this, it appears to be otherwise, in and by the pleading here expressly, that it was not her Land; this is but an imagination, and that beyond imagination, for we do see the contrary.

This is a new Case, and therefore the same is to be argued upon new Reasons, and the best Reasons are to be gathered and collected out of the old Books; and of these more especially out of the Quadrages. of E. 3. and so upon the whole matter, the Defendant in this Case ought not to have his age allowed unto him.

3. Croke Justice. In this Case my desire carries me one way, but my Judgment leads me another way.

First, my desire is succurrere viduæ: But then my judgment saith to me, that we ought not to take away such benefit from the Infant, which the Law hath given unto him, and that is, to have his age to him allowed; and of this he ought not here to be ousted.

These three things are very much favoured in the Law, (S.)

Dos, vita & libertas, of which I will not speak.

Nor yet of this to shew how much the Law doth hate delays.

In Cases of necessity, & pro bono publico, no age is to be granted.

As in Case of a Presentment, where laps may incur before his full age: And so where an Infant doth a thing in auter droit, as if he be an Officer, or an Executor: In such Cases the benefit of his age, being but for delay, shall not be allowed to him.

And so where an Infant doth a thing of his own wrong, being questioned for this, he shall not here have his age.

But as to the present Case now in question, Whether age shall be here allowed, or not? In this Case he ought to have his age, and the authorities of our Books will uphold this: And if this be a safe way (as so it is) it is also a true way, otherwise it cannot be a safe way.

9 H. 6. 47 E. 3. 12 E. 4. Whether one shall have his age in a Writ of Error, or not? see for this 9 H. 6. 47 E. 3. 12 E. 4. before remembred: In a Writ of Error, he shall not have the benefit of his age where he is not Ter-Tenant; otherwise where he is Ter-Tenant: And so here, I will thus frame my Argument: Here he is Ter-Tenant, Ideo ex consequenti, he is to have his age.

But

Object. But here it hath bèen Objected, that this Fine is erroneous; and if so, it is either for matter in Fact or in Law, and that no prejudice by this can come to the Infant.

Resp. That which hath bèen said in this, doth not satisfie me; the imbecillity of the Infants is such, as that he hath not knowledge to take the best way for himself, this is unus error, but it cannot be unicus error. Here I sée a particular mischief, one way, to the Wife; but another way, a general inconvenience to the Infant; and the Law, as Littleton observeth, will rather suffer a particular mischief, than to open a gap to a general inconvenience.

All the Cases before remembred, of Attaint, Disceit, and Scire facias, come not to the reason of this Case, (pro bono publico, ne maleficium remaneat impunitum; this another Reason, why Age shall not be granted in an Attaint. Also it is not here shewed, this Writ of Error to be brought to restore the Wife, quoad breve de dotis, but also to all; and by the reversal of this Fine, this lays him open unto any demand that shall be against him, non quoad this only, sed quoad omnes & ad omnes intentiones propositas: this will lay him open unto all.

In this Case, I dare not here to decline, à via trita, quæ est via tutissima, the reversal of this Fine will lay him open unto all manner of Impeachments. And so for these reasons, as this Case is, age ought to be allowed unto the Defendant, being an Infant.

4. Coke Chief Justice. The pleading here is very barbarous, being that Baron and Feme were seised as in right of the Wife, and made a Feoffment by parol to Two, to the use, &c. this is absurd pleading; for this is not good as to the Wife. Also the plading is (John for Richard,) Also virtute cujus finis, whereas it was a Feoffment. Also when the Fine is pleaded, it is virtute cujus & vigore Statuti for the Fine, where it was by the Common Law.

In this principal Case, age ought to be allowed.

In the Argument of this Case, I will divide my Argument into three parts. (S.)

1. First, To examine the reason, wherefore age is to be granted.

2. Secondly, To consider this present Case in respect of the nature of the Action, being a Writ of Error.

3. Thirdly, To consider this Case in respect of the title of Dower here; to come unto which, this Writ of Error is the mean, in respect of the nature of the title.

For six Reasons generally, I hold that the Infant in this Case ought not to be ousted of his age. Six Reasons for the age.

1. First, In respect of the end of granting age by the Common Law, (The Civil Law is against this) for by them the Guardian may bind or loose, and therefore at the Civil Law he is bound to answer presently.

But by the Common Law he is to have the benefit of his age, Quia durante minori ætate, respondere non potest nec debet.

2. He cannot be party to any averrment during his minority, the Law will not suffer him to take any Issue, he cannot during this time put his title upon an Issue.

3 E. 3. placito 49. new print. In a cui in vita, age granted upon this reason. 3 E. 3. placito 49.

15 E. 3. Age there granted, because that an Infant cannot have Conusance of his title, nor yet of the title of his Adversary, (Speculum artis est vitrum, as the Opticks hold) I say, that Speculum corporis est oculus, & speculum animæ est scientia, but an Infant wants this, & ideo respondere non potest; Bracton, Britton, & Fleta, are expresly so in this, (S) Minor non tenetur respondere, durante minori ætate. 15 E. 3.

ætate, because that he is altogether misconusant what thing to plead. (But there they also except the Case of Dower.)

3. A third reason drawn from the Counter-plea, of the nature of it, contra placitum, To bar one of this, which the Law gives unto him, this Counter-plea ought to be very plain and certain, as appears by our Books. The same ought to be certain to every intent. And in this, the same is like unto Estoppels, 3 E. 3. 49. the same ought to be full, 4 E. 3. fol. 40. by Wilby, a Counter-plea of age ought to be plain, the reason there given, because this doth bar one of the privileges which the Law gives unto him, 27 H. 6. fol. 11. an Infant prays his age, answer there made unto him, you have an elder Brother living; and for this see 4 E. 3. fol. 40.

3 E. 3. 49. 4 E. 3. fol. 40. 27 H. 6. fol. 1. &c.

And as touching these Counter-pleas, see 25 E. 3. fol. 43. 41 E. 3, fol. 28. 7 E. 3 fol. 27. Roberts Case, 43 E. 3. fol. 18. there a Counter-plea by Argument not good and so is 40 E. 3. fol. 14.

But here in this principal Case there is none of these, for here is a present possession in the Infant; and you would oust him of his age here, in respect only of a future possibility to have a Writ of Dower.

A Lease for life made, the remainder to the right Heirs of two in fee; the one of them dies without Issue before the Fine executed, the other sole shall sue execution of the whole by the survivorship; and this by the better opinion of 24 E. 3 fol. 29. Fitz. Joynder in Action, placito 10. 30 Assisar. placito 47. 18 E. 3. fol. 59.

24 E. 3. fol. 29. Fitz. &c.

4. A Fourth Reason, Rich. and Barbary here have released with warranty, and by this Writ of Error the Fine shall not be reversed, quoad the Dower only, but all quoad the warranty, and quoad the release of the Fee-simple here.

5. A fifth Reason. The Counterplea here wants trial, and this ought to be issuable: by 43 E. 3. fol. 18. Not upon possibilities, to put possessions in issue. The right of Action is not sufficient for this. No issue can be of this; for an issue shall never be made only upon a right, this is not here issuable, here it is averred, that she had title of Dower, if the other should say, she had no title of Dower, this is not issuable; and so this is a plain Rule, That a Counterplea ought to be issuable. But a right is not so. Also here, she hath neither right nor yet title of Dower, she hath neither jus in re, nec ad rem, as long as this Fine stands in its full force, and during this time she hath only a possibility of Action.

43 E. 3. fol. 18.

And this may be another Reason. If you cannot put a right in issue, à fortiori you cannot put a bare possibility in issue, and a Counterplea ought to be issuable. And so for this reason drawn out of the nature of the Counterplea of the age, her age ought in this Case to be allowed.

6. A sixth Reason, for the allowance of age here; It appears by all the Books of Law, that these three things are very much favoured in Law. (S.)

1. Dower; (if it be in esse.)
2. Infancy; and
3. Fines; for that finis finem litibus imponit.

An Infant, respondere non potest, non debet, notwithstanding it be against Dower. When Infancy, and a Fine on the back of it comes in question, this shall not be tried nor determined during the minority of the Infant. Here you have given her a slippery title to the Infant, for the Inheritance is left in Eliz.

Pasch. 32 E. 3. in the Manuscript.

Pasch. 32 E. 3. In a per quæ servitia, an Infant shall have his age allowed him (this in the Manuscript of the said Book not printed) but afterwards he shall have all his arrearages from the time of the Action brought; if you cannot bar him in Attornment (as the Book is) the Law will not put him to any prejudice, and this is a good Case.

2. As touching the second part, in respect of the nature of the Action here, being

Wr

Writ of Error, the Father ought to die in possession, seisie & morust seisie. Not to travers the Feoffment, but if he be in by descent, 2 H. 5. f. 13. the Law is careful to protect an Infant, and his right, 47 E. 3. fol. 8. a good Case, 8 E. 4. fol. 19. b. by Coke, In a Faux Judgment against an Infant, he shall have his age, quia respondere non potest. It ought here in this Case to have been shewed, that the Father was seized, and died seized, and that he was in by descent, and so to travers the descent. 2 H. 5. fol. 15. &c.

Object. As to the Cases Objected, Of Attaint, that in this Case an Infant shall not have his age allowed him. As touching this, it is true, he shall not here have his age, but this is upon another reason.

Resp. No age to be here allowed, because this is to punish a Perjury, for this is not brought against one as Heir. And therefore Non-tenure is a good plea in an Attaint, and this lieth against one, being no party to the Record; and this so appears by all our Books.

In 5 H. 7. fol. 22. b. where the difference is put between an Attaint and a Writ of Error, as to the having a Supersedeas granted, the same not to be in an Attaint; otherwise in a Writ of Error, the reason of the difference is there given. 5 H 7. fo. 22. b.

The Case of the Writ of Deceit is not like unto our Case here.

In a Quare Impedit age shall not be allowed, for there a wrong is done, and it is a personal Action; and therefore——

But no wrong is here done in our Case, there the Advowson is to be recovered, not ex directo, sed ex obliquo.

3. Now as touching the third part, in respect of the title of Dower.

Object. The title of Dower, it hath been Objected here, which the Wife, the Plaintiff here hath, and that she cannot take knowledge of the Feoffment to Williams, and to uses, &c,

Resp. Notwithstanding this, yet here he is to have his age; this being but a possibility, and the same not to be put in issue, as before.

The first Case that I was of Counsel in of the like nature, was Pasch. 35 Eliz. and this Case I then argued, where Williams brought a Writ of Dower against Drew, Williams the Son had recovered a Writ of Error brought upon his Judgment; all the Tenants made default, one of them was an Infant. If an Infant makes default, she shall recover Dower. But here, because damages entire were given, if to be reversed, it shall be as against him alone. *Pasch.* 35 *Eliz.* &c.

Trinity 4 Eliz. between Harvey and Wood, in a Writ of Dower brought in the C. B. the Tenant makes default, and Judgment upon this given against him, a Writ of Error brought, Judgment against him, his default shall not aid him, being within age. Trin. 41 *Eliz.* C. B. &c.

But for this, Hillar. 17 E. 2. Fitz. title saver default placito 80. est instar omnium, his default in Dower shall not aid him being an Infant; the reason there given, because in Dower he cannot have his age, and therefore he cannot for this cause save his default. Hillar. 17 E. 2. *Fitz.* &c.

Fleta, lib. 6. cap. 42. Non respondebit minor, nisi in casu dotis, & hoc propter favorem dotis. And with this agrees Bracton, fol. 252. propter favorem dotis, and for the danger, that if age should be allowed, she might lose her Dower by this; and so here. *Fleta*, lib. 6. c. 42. *Bracton*, f. 252.

Britton, fol. 217. cap. 101. and the Register, fol. 249. She ought to have Dower against an Infant: and if he assign more to her than she ought to have, he shall have a Writ of Admeasurement of Dower. *Briton*, f. 217. cap. 101. *Regist.* f. 249.

Now to examine the reason of that, and of this Case.

In a Writ of Dower, she is to recover an Estate only for her life. This is no disinherison; the Law gives this unto her, and she hath nothing to debar her self of it.

But here in this principal Case she will disinherit the Heir: here is beneficium viscatum, the other is beneficium simplex: Here she hath released her Dower by the Fine and Warranty: And this is the first reason. Another reason, the reason of Dower proves this clearly, that in this Case non-age is here to be allowed: Here she now goes about, and that against her own act, to intitle her self to Dower.

Another Fine was also levied unto this, respondere non potest.

Obj. The Cases of Scire facias have been objected of 24 E. 3. and 11 H. 4. that age shall not be allowed him, because his title was disaffirmed; he said, his Father was seised, and died seised, the other shewed a Judgment had against his Father.

Resp. This is a plain Counterplea of the age, by 24 E. 3. where it is in affirmance of the title by Fine levied, and divers descents; there in a Scire facias he shall have his age, where he hath his possession by descent.

But we are here now in Case of a Fine, and therefore age to be allowed; and the reason of the Dower makes against this, for here by this she would not only gain to her self a title of Dower, but would reverse the Fine for all, even as to the release with warranty. And so upon the whole matter I conclude, and in this my Conscience goeth with verity and safety; for it is not safety, unless it be with verity, that age in this Case ought to be allowed to the Defendant, being an Infant.

Age allowed *per Curiam.*

And so according to their Resolutions, Judgment was entred, that age should in this Case be allowed to the Defendant, and that the Plea should stay until the full age of the Defendant.

Hodd Plaintiff against the High Commission Court.

Habeas Corpus. 1 Ro.Rep.245. Mo. 840. 2 Bulst. 300. Ante 109.

SAmuel Hodd being committed by the High Commission Court, was brought to the Bar by a Habeas Corpus: It appeared by the return, being read, that he was committed for words, (S) That he had used divers contemptuous and reproachful words, touching their proceedings, the which they had drawn into Articles against him, unto which he did refuse to answer, and therefore they did commit him to Prison.

Barker Serjeant moved the Court for his discharge, upon the insufficiency of the return, it not appearing thereby what the words were which he spake.

Hales Case.

Coke Chief Justice. Hales Case, who was called Club-footed Hales, of which Case I have the Record: He said, That the sentence of Divorce, by them given, was against the Law.

It was in this Case questioned, Whether they themselves might punish this there or not? and held, that they could not, but that he was punishable for this at the Common Law, for slandering of their proceedings.

Here in this principal Case, it doth not appear by the return, what the words were which he spake, and they may be such as ought to be determined by the Common Law; and for this cause the return is not good, and therefore by the Rule of the Court the party was discharged.

Cockeril

Cockeril Plaintiff against *Apthorp* Defendant.

Entred Trin. 13 Jac. B. R. Rot. 1624.

IN an Action of Debt upon the Statute of 5 Eliz. cap. 9. for Perjury, upon Nil debet pleaded, a Verdict was given for the Plaintiff.

Debt on the Stat. of 5 *Eliz.* cap. 9. for Perjury.

Richardson Serjeant moved the Court for the Defendant in arrest of Judgment, That the Venire facias was not well awarded, the same issuing without any Warrant; the Sheriff having returned the Jury without any Warrant, and so no good trial: Also the Declaration here is not good, wherein he hath not observed nor pursued the words of the Statute, the same being, That if any one, either by the subornation of, &c. or by their own act, consent, or agreement, wilfully and corruptly commit any manner of Perjury; this he hath omitted in his Declaration.

And so upon the Statute of 8 H. 6. he ought to observe the words, and to lay the expulsion to be vi & armis, and also manu forti, or not good: The Oath here laid to be, That the Defendant being brought as a witness, did swear, that the Plaintiff, succidit & effodit, a Pear-tree, (ubi revera) there was no Pear-tree there growing the precise day of the trespass, (whereas he should have said, ubi revera, Non succidit) in this the Perjury laid.

Coke Chief Justice. Ubi revera, at the time of the Trespass there was no such Pear-Tree there: These Exceptions are but chips: It is very fit and necessary, when one will perjure himself, that he should endure the punishment of the Law.

Here Apthorp, as it is laid, being testis productus at the Assizes of &c. before the Judges there, falso voluntarie & corruptive juravit, quod prædictus Cockerel succidit, &c. in the manner and form as the Plaintiff had declared; this is the same day, ubi revera, &c. & ulterius prædictus Apthorpe, coram Justiciarijs prædictis, ad Assisas, dictis juratoribus, juravit, quod maremium, valebat 40 s. ubi non valebat, above 13 s.

The Declaration here is good, and the Verdict well given, and he ought to be the party grieved, or he cannot have an Action upon this Statute, but ought to have him punished for this in the Star-Chamber.

The whole Court agreed herein, and so by the Rule of the Court, Judgment was given for the Plaintiff.

Judgment given for the Plaintiff.

Prinston and others Plaintiffs against the Court of ADMIRALTY.

IN a Prohibition, prayed by Coventry, to stay proceedings in the Court of Admiralty, and upon cause shewed, the Case appeared to be this, That divers Merchants set out Ships to Sea, and they in their coming home did commit Piracy; and the Ships being here upon the River of Thames, the Admiral did seize them, to have the Goods as to him forfeited, having in his Patent these words, (S.) bona Piratarum; this he did, the Ship being upon the River of the Thames, and

A Prohibition to the Admiralty.
1 Ro.Rep.147.
1 Ro.Abr.532.

and so infra corpus comitatus: The Owner of the Ship did offer to put in good and sufficient Surety to answer for these goods, if it passed against him; this being refused, and he being in fear lest he should lose his Tackling, took them from the Ship, and for this contempt he was there fined at forty Marks.

Coke Chief Justice. When I was Attorney-General, I had occasion to search into the Patent of the Lord Admiral; and true it is, that in his Patent he hath bona Piratarum granted unto him: But it was then in question, what Goods he should have by these words, Whether he should have all the Goods which the Pyrat had stolen and taken away from others, or not?

And the Opinion of all the Judges then was, that he should not have these goods which the Pyrate had stolen from others, but only his own proper goods; and that the Owners of the rest should have their Goods to them restored again, if they came for them; and if they came not, then they were to be forfeited to the King, the Rule being, Quod non capit Christus, capit fiscus: Also that the Pyrate ought to be attainted of Pyracy, before the forfeiture of his own proper Goods to the Admiral.

And so it shall be, if one by the Grant of the King is to have bona felonum, by these words, he is not to have those Goods which the Felon hath stolen, but only his proper Goods: But here the Admiral ought not to sue for these Goods which he ought to have in his own Court, but at the Common Law.

A Prohibition granted *per Curiam.*

The whole Court agreed herein, and so by the Rule of the Court, a Prohibition was granted.

Moorwood Plaintiff against *Dickens* Defendant.

Entred Termin. Mich. 12 Jac. B. R. Rot. 474.

IN an Action of Debt, upon an Obligation of 20 l. conditioned, that if the Obligor shall deliver to the Obligée before such a day a Powder of Lead, that then, &c. for not delivery of this, the Action brought.

The Defendant pleads in Bar, that after the entring into the Bond, and before the day, for delivery of the said Powder of Lead, at the request of the Plaintiff himself, he had paid unto one Sheldon 10 l. for another Powder of Lead, for which the Plaintiff was indebted unto him; and this he had paid for the Plaintiff, in full discharge of the first Bond, and that so the Plaintiff had accepted of it; upon this Plea the Plaintiff demurred in Law.

The only question was, Whether by this Plea this Obligation may be discharged?

It was urged for the Plaintiff, that it cannot be thus discharged; upon the difference, where the condition is for payment of mony, there he may accept of any other thing in satisfaction and performance of the condition, but otherwise it is, where the same is for doing of a collateral thing, as in this Case.

Debt upon a Bond. *Perkins*, f. 146, &c.

And this difference is so agreed in Perkins, fol. 146. placito 753. 12 H. 4. fol. 23. 4 H. 8. Dyer, Coke 9 pars, fol. 79. Peitoes Case, and 32 H. 6. 9. & 31. there the condition of the Obligation was to make a Feoffment of the Manor of Dale, he there pleads the doing of another thing in performance of the Feoffment; this there adjudged to be no good Plea. The reason of the difference: Where the condition is for payment of mony, there this is a duty presently, but not payable till the time; otherwise it is, where the condition is for the performance of a collateral thing.

Coke

Coke Chief Justice. There is no great doubt to be made of this Case. It is but a by Opinion which hath bèen cited, that when the condition is not for mony, but to do a collateral thing; this cannot be satisfied by the payment of mony: and I shall answer you in this Case as Thorpe did, (S.) we will not change the Judgment of our fore-Fathers.

Dodderidge Justice Where the condition of a Bond is to pay, or to do a collateral thing; this cannot be discharged by the performance of another collateral thing.

The first difference, where the condition of a Bond is for payment of mony, this may be performed by the payment of another thing, because it is of value certain, and therefore this may be performed by any other collateral thing; otherwise it is, where the condition of a Bond is to do a collateral thing. 1. Difference.

A second difference, Thée are bound to deliver a collateral thing, they pay mony for this; this is no good satisfaction, notwithstanding that Nummus est mensura rerum commutandarum, as if a man is bound to deliver to the Obligée so much Lead, of the value of 7 l. certain, and he delivers to him 7 l. this is no satisfaction of the condition, because that Lead may be worth more, the price of this may rise, it may be dearer, or it may be cheaper. 2. Difference.

A third difference, A man is bound to pay a sum of mony, or a powder of Lead. If he delivers this to another, by and with the consent of the Obligée, this is a good performance of the condition. 3. Difference.

These are the differences warrantable by our Books.

Croke Justice agréed with him herein, for time may make a Commodity to rise or fall, but mony is certain. We ought not to change that which hath bèen trita opinio.

Haughton Justice agréed herein, but if one sells by Contract to another, so many fodders of Lead, if he pays mony for this, this is a clear discharge of the contract.

Coke. Mony is the measure of all things, much mony makes all things dear, 33 E. 1. Fitz. title Annuity, placito 50. Annuity brought against the Heir, upon the dèed of his Father, granted until he should be advanced by the Grantor, or his Heirs, unto a Covenable Benefice; the Defendant saith, that after the death of his Father, his Mother did give unto the Plaintiff, at his procurement, and to discharge him, the Deanery of T. and of which the Plaintiff is now seized; there Objected, that the Writting was, till he was advanced by the Grantor, or his Heirs, which is not so here, but there this answer given, (S.) qui per alium facit, per seipsum facere videtur; and therefore award was, that he should answer over: but I do doubt of this Book, this being mèer collateral, 36 H. 6. aid. A man is bound to pay mony at Coventry; a stranger unknown to him pays this mony for him, he agrées unto it, by this he shall be discharged. 33 E. 1. *Fitz.* title *Annuity.* placito 50.

Dodderidge. Where the condition is to do a collateral thing, there in the performance of this you ought as it were to hit the Bird in the eye, and to perform this truly.

Coke. If one be bound in a Bond of 40 l. to pay 20 l. if the Obligée command him to pay this to J. S. he ought to plead that he paid this to the Obligée, by the hands of J. S. but is not to plead, that he paid the same to J. S. by the command of the Obligée.

The Court was all clear of Opinion, That the Plea of the Defendant was not good; that the Plaintiff had good cause of demurrer. And so by the Rule of the Court, Judgment was given for the Plaintiff. Judgment for the Plaintiff.

Apthorpe

Apthorpe Plaintiff against *Cockerell* Defendant.

Action upon the Case for words. 1 Ro Rep. 287. 1 Ro. Abr. 40.

IN an Action upon the Case for scandalous words, upon Non culp. pleaded, a Verdict was given for the Plaintiff. It was moved for the Defendant in Arrest of Judgment, that the words were not actionable, being these: Old Apthorpe is a perjur'd Knave, for he did swear that such Wood was worth 40 s. whereas it was dear of a Mark.

Coke Chief Justice. The words are not actionable as they are laid here, for it is laid in the Declaration, that he said, That he was forsworn at the Assizes; the words only are, that he said, He was an old and false forsworn Knave, and I Cockerell will prove it.

Haughton Justice. Your meaning here is to make your Declaration go to Perjury, you ought to have said, whereas it was not worth a Mark: you say here, whereas it was dear of a Mark, this cannot be good, for he may pay 40 s. for it, and yet it may be dear of a Mark; for the maintenance of the Action, the words should have been laid to make this Perjury.

Coke. An Innuendo shall never give cause of Action, this which is here alledged in the Declarati n, is but argumentative by way of Argument, and so not actionable. The Court all agreed herein against the Plaintiff, and therefore the Rule of the Court was, quod querens Nil capiat per billam.

Judgment *quod querens Nil capiat per billam.*

Wood and *Mary* his Wife Plaintiffs against Doctor *Suckliffe* Defendant.

A Trover and Conversion. 2 Cro. 439. 1 Ro. Rep. 204. 293. 1 Ro. Abr. 5. 215, 771. 2 Ro. Abr. 621.

IN a Writ of Error, to reverse a Judgmen given in an Inferior Court at Norwich, In an Action upon the Case for a Trover and Conversion of certain goods; the goods laid to be in the hands and possession of Mary the Wife, in Parochia Sancti Petri, in Warda de Mancroft; a request laid to be made, and that the Husband and Wife refused to deliver them, and afterwards Mary the Wife did convert them to her use; upon Non culp. pleaded, a Verdict and Judgment was given for Suckliffe the Plaintiff; upon this Judgment, a Writ of Error brought.

Coke Chief Justice. First observed in this Case, that a Gailer shall be charged for the escape of a feme Covert, when her Body is in execution.

It was urged, that this Judgment should be erronious.

First, In this, the Venire facias is erronious (this being De Parochia Sancti Petri, omitting in Warda de Mancroft) for the Parish might extend it self into divers Wards.

Also the Verdict was not good, there being divers several sums specified in the Declaration, (S) 40 l. in mony, 800 shillings, and other sums, the Verdict was for 30 l. of the 40 l. pecunijs numeratis, and doth not mention what sum this was. Also the Judgment is erronious, being that the Wife alone shall be in misericordia, where the same ought to have been, That the Husband and Wife should be in misericordia; for the conversion of the Wife, the Husband shall be amerced, and so is the Book of Entries; the first President in trespass, Judgment against Baron and Feme, for a trespass done by the Wife; and so there in title Executors, a feme Executor, Judgment shall be against them both, and 42 Eliz. B. R. inter Percy & Bardolfe. It was resolved upon the same reason, that both of them are to be in misericordia.

Old Books of *Entries*, &c.

42 *Eliz. B. R.* &c.

Coke.

Coke Chief Justice. The Judgment here is not to be maintained. It is not for the wrong, that the Judgment shall be (in misericordia.) In case of pleading, an Infant shall not be amerced, as in 16 Eliz. but if he comes to his full age, and doth not then presently confess, he shall then be amerced for the delay. And so it was held clearly by the Judges, when I was a Reporter in the Court of C. B. the Husband to be amerced, and for the battery of the Wife, the Judgment to be quod capiantur, and if so, à fortiori here, in misericordia shall be for both of them; here they were both of them requested to deliver the goods; and afterwards the Wife converted them.

Also there ought here to have bèen a Judgment for this (for which eat inde sine die) as to the 40 l. for there is 40 l. with an addition, and 40 l. without an addition, and this Judgment is for 30 l. parcel of the 40 l. in pecunijs numeratis. As to the Venire facias (touching the Ward.) A Ward to common intent is more than a Parish; but we are not to intend pluralities, and it belongs to the other side to prove this to be so. Where a thing is laid to be in a Parish and Ward, the Venire facias there shall be De Parochia, we are not here to intend a plurality; the Venire facias here was well awarded, for we will intend this Parish to be within the Ward, if the contrary doth not expressly appear to us, that there is a plurality of Wards. We are not to shake a Verdict, if it be not for good and sufficient cause in Law to us shewed. But the chief matter here, for which this Judgment is erroneous, and that very clearly is this, because the Husband being requested to deliver the goods, with his Wife, and refused, and the Wife alone (is in misericordia) whereas the Husband and his Wife ought both of them by the Judgment to have bèen in misericordia.

If a Writ of Error be brought by two, one of them dies, the Writ shall abate by 3 H. 7. fol. 1. b.

The whole Court agréed this Judgment to be erroneous, because the Wife alone, and not the Husband, was in misericordia, and for this Error, by the Rule of the Court, the Judgment was reversed. Judgment reversed, &c.

Thomas Long Plaintiff against *Elizabeth Baker* Defendant.

IN an Ejectione firmæ, upon a Lease made by Sir John Brown, for the trial of the title of a Copyhold Estate, upon Non culp. pleaded, a trial was had at the Assizes in Comitatu Dorset. The Jury found a special Verdict, upon which Verdict the Case appeared to be this; That a Colledge dissolved by the Statute of 1 E. 6. betwèen the Statutes of 37 H. 8. cap. 14. and 1 E. 6. did grant a Copyhold Estate in reversion, there being one in possession, whether this be a good grant or not? and whether a Copyhold Estate be within those Statutes, or not? *Ejectione firmæ* 1 Ro. Rep. 202. Stat. of 37 H. 8. &c.

This matter rests upon these two Statutes.

It was urged, this grant to be mèerly void, upon the Statute of 37 H. 8. and not revived by 1 E. 6.

It was further urged, Whether the Statute of 37 H. 8. should extend unto an Hospital, that was not dissolved by the Kings Commission; but afterwards by the Statute of 1 E. 6. as touching avoiding of Leases, the words of 37 H. 8. were observed, containing in them two Clauses. (S.) 1. Inheritance or Frèehold. Secondly, Leases or Grants, or otherwise, which (as it was urged) should extend unto Copyholds.

Coke Chief Justice. It hath bèen resolved, that if they were not dissolved by 37 H. 8. then these Leases not to be avoided.

Dodderidge Justice agréed herein, and demanded whether they would avoid such grants?

grants? which they could not do, for that this Statute did not go unto customary Estates, and so was it held.

17 Eliz. *Haselbridg's* Case.

17 Eliz. in Haselbridges Case, where the condition was, that he should not grant arte vel ingenio, that this should not extend unto Copyhold Estates granted.

Coke. The Statute was made for the benefit of the King; and if so, not to be extended unto Copyholders, granted, and no grant to be avoided by the said Statute, but against the King. And this I have known to be so resolved upon the Statute, and not as to others.

Stat. of 31 H. 8. cap. 13. *Coke* 3 pars, fol. 8, 9 &c.

It was urged, that in the Statute of 31 H. 8. cap. 13. Of Monasteries, in the end of it (S) placito 13. There is a Proviso, that the same shall not extend to Copyhold Estates, to Grants by Copy; and to this purpose see Heydons Case, Coke 3 pars, fol. 8, 9. and as touching the Statute of Limitations, a Copyhold Estate is not within it.

But if a Statute be made for the peace of the Kingdom, and without any prejudice to the Lord, a customary Estate shall be within this.

Coke 9 pars, f. 105. &c.

Coke 9 pars, fol. 105, 106. in Margaret Podgers Case, whether a Copyhold Estate be within the Statute of 4 H. 7. cap. 24. Of Fines? and there within what Statutes such Estates shall be.

Coke 4 pars, fol. 24. Murrels Case, by the severance of the Inheritance of the Copyhold from the Manor, the Copyhold is not by this destroyed.

Coke 8 pars, fol. 63, 64. in Swaynes Case to the same purpose, touching a Copyhold Estate, and the firmness of it.

As to the words in the Statute of 37 H. 8. Leases and Grants; it was urged, this to be extended to things of the same nature, (S.) to Land at the Common Law.

Coke. If a Parson or Chantery Priest make a Lease for years, this is void by his death, but if for life, then voidable. If such a one before the Statute of 1 E. 6. had made a Feoffment in fee of parcel of his Glebe, or a Lease for life; after comes the Statute, the King shall avoid this. This would make a great garboil in the Commonwealth if such Grants by Copy should be avoided.

Stat. of 4 H. 7. c 24. &c.

As to that which hath been urged out of the Statute of 37 H. 8. Leases or Grants, or otherwise (that this word otherwise) should be extended unto Copyholt Estates; this cannot be so, but to be intended of Land at the Common Law, and not to Copyhold Estates, which are not within that Law.

The whole Court agreed with him herein.

Dodderidge. Before 37 H. 8. made, a Lease made of the Manor of Dale, of which J. S. is a Copyholder; the Lessee of the Manor grants this Copyhold, then comes the Statute; by this the Copyhold Estate shall not be overthrown. No more shall it be in this Principal Case, so that the whole Court did overrule this Case; that a Copyhold Estate was not within the Statutes Of Monasteries and Chanteries, to be avoided by any of the Statutes.

Atkinson Plaintiff against *Buckle* Defendant.

A Writ of Error. 1 Ro. Rep. 312. 1 Ro. Abr. 464.

IN a Writ of Error to reverse a Judgment given in the C. B. in an Action upon the Case for a promise, where the Case was, that Buckle the Plaintiff there being a Boat-man; Atkinson did contract and agree with Buckle for the carriage of 100 Quarters of Barley, and did assume and promise to deliver unto him the 100 Quarters of Barley on Shipboard, at Barton Haven in the County of York, to

to carry this for him, and for the carriage of it, he did assume and promise to pay him so much; and the other did assume and promise to carry the same for him, for so much as was agréd betwéen them; the which he did assume to pay: Buckle accordingly brought his Ship to the said Haven, expecting there the delivery of the 100 Quarters of Barley to him, but the other came not at all to deliver the same to him; upon this Buckle brought his Action of the Case upon the promise, and upon Non assumpsit pleaded, he had a Verdict and Judgment. For the reversing of which Judgment, a Writ of Error is brought.

First Error, Civitas Eborum, on the margent, 1. Error, because it is not shewed, that this is a County in it self; nor yet is it shewed, in quo comitatu civitas eborum est.

The whole Court over-ruled this to be no Error, for that as Judges we know this.

Coke Chief Justice. If one do promise to deliver so much to such a one, he ought to seek him out, to deliver this to him; here in this Case, the one hath undertaken to come with his Ship to Barton Haven to carry the 100 Quarters of Barley, and as he by his Assumpsit, is bound to come thither with his Ship, so the other is also bound to come thither with his Barley, 9 E. 4. fol. 3. b. 4. a. the Case of the Bell-Founder, and so the Case of the Taylor, who is to measure the Cloth; for that every one is bound to do that which properly belongs to him to do. If one assumes to pay unto another so much within a year, but no certain time limited when this shall be, he ought here to give him notice of the time when it shall be, that so he may then attend it. 9 E. 4. fol. 3. b. 4. a.

A second Error, the Issue was Non assumpsit, if no good breach by him laid, then there was no cause of Action for him to have; this he hath not done, having not shewed any place where Barton Haven is, as he ought to do, for this may extend it self into divers Créeks: To this it was answered, that it is laid to be at Barton Haven, in comitatu Eborum.

Coke, 7 H. 6. An Action of Trespass brought, for a Trespass done in portu de Cicester; and no Town laid, the Venire facias shall be de Cicester, the contrary shall not be intended, if it be specially shewed; so that clearly this is no Error; for we are not to intend pluralities. 7 H. 6.

The whole Court agréed, the Judgment to be well given, and no ways erroneous. And so by the Rule of the Court, the Judgment was affirmed. Judgment affirmed *per Curiam.*

Moodie Plaintiff against *Garnance* Defendant.

Entred Trin. 13 Jac. B. R. Rot. 1055.

IN an Ejectione firmæ, upon a Lease made by Thomas Cordell, for trial of a Title, upon Non culp. pleaded, the parties were at issue, and went to trial at Norfolk Assizes, where the Jury upon the Evidence given, found a special Verdict, which was to this effect, (S) That Thomas Cordell was seized in fée of an acre of Land, and likewise possessed of another acre of Land for years; That he made a Lease of both these acres to the Defendant for 21 years, rendring one entire rent of 61 l. at the usual Feasts, &c. upon condition in this manner (S) Provided always, if it shall happen the said rent to be behind by the space of 40 days after the days in the reservation, for payment thereof, &c. That then it shall be lawful for the said Thomas Cordell and his Heirs to Restrain, and not being sufficient on the ground, to re-enter into the demised premises. Ejectione firmæ. Cro. Ja. 390. Mo 848. n. 1151. 1 Ro. Rep. 330. 367. 1 Ro. Abr. 410.

Two Points moved in this Case. —— (S.)

1. Whether this Proviso do make a Condition, or not?

2. If this be a Condition, then whether it shall be here apportioned? the Fée-simple Land being to go to the Heir, and the Lease for years to the Executor; then whether the word Restrain shall be said to be of the nature of Distrain? whether this shall be a sufficient word to make a Condition?

It was urged for the Plaintiff, that this should make a good Condition? for that every Distress is a Restraint.

6 E. 2. *Fitz.* title Entrie, &c. 8 E. 3. *Coke.*

6 E.2. Fitz. title Entrie congeable placito 55. and put in the Commentaries, fol. 159. b. in Throgmorton and Tracyes Case. If the Feoffor doth pay such a sum, quod tunc bene licebit for him, recipere terram, this taken to be as a re-entry, and so 8 E. 3. if the Rent be behind, that the Land shall return back again; this is a Condition to give a re-entry.

Coke 10 pars, fol. 130. Osburnes Case, Unproper words to be taken for proper words.

Coke, 10 pars, fol. 130. &c.

10 E. 4. fol. 4. Brook title Leases, placito 30. Brook title Licenses placito 19. & 5 H.7. fol. 1. a License taken for a Lease, and so a Reversion; by the word Remainder, where the sense and meaning carries it so.

Coke 4 pars, fol. 119. &c.

2. It was urged, that the Condition here should be apportioned, as Coke 4 pars, fol. 119. in Dumports Case, not by the act of the party, but by the act of Law; and in two Cases a Condition may be apportioned; as there appears, and this very Case is one of them there put; and with this agrées 24 H. 8. Dyer, Rushdens Case, and 14 Eliz. Dyer, fol. 309. Also by the act and wrong of the Lessée himself, there shall be an apportionment.

Coke Chief Justice. Here the Rent is reserved to be paid at two Feasts; and if it be behind, it should be lawful for him to restrain; and if not sufficient, then to enter, Distringo & Restringo are not proper Latine words, never mentioned in Tully.

The Court demanded, Whether the Jury had made any apportionment of the rent, or not?

Coke. If a man makes a gift in tail of two Acres, reserving a Horse, one of the Acres being Borough-English Land, and the other Land at the Common Law; he shall not multiply the Horses, clearly he shall pay one Horse, for which of them he will, but not two Horses.

Dodderidge Justice. In things which are odious in the Law, as Conditions in this Case, we ought not by construction to make restrain all one with distrain, but in other matters, we may do this very easily.

8 E. 3.

Coke, 8 E. 3. If rent be behind, that then the Land shall return again, this in Case of a Condition, and shall be taken for a Condition.

9 H. 6.

Haughton Justice, 9 H. 6. Renunciavit Communiam, not shewing to whom, this taken for a good release of it.

Coke. We ought to take this in a reasonable construction, and so by these words he may distrain.

Dodderidge Justice. In Case of setling of an Estate, if not sufficient. It should never trouble my Conscience to make (restrain) to be taken for (distrain) If it be not in a matter odious in Law as Conditions are.

Coke. As for the second part of the Case we do all of us agrée in this clearly, upon the apportionment of the Condition, that by the act of Law this may well be, and no doubt there is of this, and notwithstanding it be here, that he shall (restrain) yet by the Common Law of the Land he may well distrain, and the Proviso, if he do not pay, makes a Condition, for which he may enter.

The whole Court, vivus redditus, we will always favour this. But not the Condition, more than the Law will.

The

The Jury here hath found, that there was no sufficient Distress, for the moyety of the Rent: And so without any further debate, this Case was adjourned over to be argued again, and for the Court to be better advised herein.

Afterwards, (S.) Termin. Pasch. 14 Jac. B. R. this Case was moved again, and argued at the Bar. Term. Pasch. 14 Jac. &c.

Coke Chief Justice. This condition is absurd, and repugnant in it self: He may distrain, but not by this condition; by the word (restrain) he may distrain 11 E. 4. every restraint of liberty is an Imprisonment; that he shall restrain the cattel upon the Land, this is good; but here it is, that he shall restrain, (quid?) nothing is mentioned for him to restrain, and so not good, as the word recipere, if he doth not say the Land, (S) (recipere terram) this is not good: here it is, that he shall restrain, because nothing is here mentioned for him to restrain.

If it be said, that it shall be lawful for him recipere, he ought also to say, terram prædictam, or not good; if such pleading should be suffered, this were the way to bring in Barbarism.

Also it is here further said, If there be not sufficient, and doth not shew what.

Also it is said, (S) The Lord to re-enter into the demised premises, this is very insensible, and no ways to be made good.

As to the other matter, if the Case here would bear it, the act of Law would divide the condition, 4 Assisar. the Jury are to set down the rent arrear; but when one doth demand a rent upon a condition, there he ought to be sure, as it were, to hit the Bird in the eye; the just sum to be demanded, or not to re-enter, for conditions are odious in the Law, and are therefore to be taken strictly: here the condition is universal, without any conclusion at all, which is very absurd; there is a remedy by Distress, or by Action of Debt for rent.

Croke Justice. He would here re-enter without shewing any certainty at all for what, this condition here is insensible.

Dodderidge & Haughton agreed herein, that this condition is not good, but very absurd and insensible.

The whole Court agreed all in opinion against the Plaintiff, and accordingly the Rule of the Court was, (S) Quod querens nil capiat per billam. Judgment, &c.

Nota. That in this term, upon the death of old Fetherstone, the chief Cryer of the Court, his Son was by the Court admitted, and sworn in his place, to be the principal Cryer of this Court.

Coke Chief Justice. It appears by the resolution in 36 H. 6. That the gift of this place of Cryer of right belongeth to the chief Justice; and so it is there resolved, yet I will not oust an Officer of this Court, after so long a possession in the Father: But (with a Salvo jure) I shall give my consent to have him now admitted into the same place, he being the Son of our old Officer now dead, and he also having a Patent from the King of this Office for him and his Son.

And so the Court did admit him (with a Salvo jure) notwithstanding the said Resolution by all the Judges in 36 H. 6. and so in this manner he was by the Court admitted, and sworn to execute the place of principal Cryer of the Court.

Farrar Plaintiff against *Snelling* Defendant.

IN a Writ of Error to reverse a Judgment given in the C. B. in an Action of Covenant, which Covenant was for the payment of yearly Annuity of 20 l. this behind for four years and a half: In Covenant for non-payment of this, being behind, the which amounted unto 100 l. in toto, and so in this mis-recites it Error. 1 Ro. Rep. 335.

(in 10. l. more than he ought to have) resolved there to be good by the Judges; the Court there agreed this to be good, and the Plaintiff there to have no more than what of right he ought to have; this mis-recital was assigned for Error, to reverse the Judgment there given.

Coke Chief Justice. This is no Error, for in this Action he is to recover nothing, but all in damages; and nothing in damages shall be allowed unto him for the overplus; but otherwise it shall be, where it is so in Debt for Rent, upon a Lease for years: And so the difference will be plain betwéen Debt and Covenant, for that in an Action of Covenant, damages only are to be recovered, and to be struck off for the overplus.

But if one brings an Action of Debt for Rent behind, and demands more than he ought to have, this shall abate his Action; otherwise in Covenant, (unless that the Writ of Enquiry of damages issued, and enquiry made of the Surplusage also, and damages for this given.)

It was also resolved this Term at Serjeants-Inn: If in an Action upon the Case, upon an Assumpsit, to deliver divers things which amount to so much; if in an Assumpsit in his demand, he doth over-reckon this, yet adjudged, that he should have his Judgment, this being only to recover damages, and good for that which he ought to have, and to be struck off for the residue.

Judgment affirmed.

The whole Court agréed, That in this principal Case the Judgment was not erronious, and so by the Rule of the Court, the Judgment was affirmed.

The KING against the Bishop of *Durham*.

A *Quo warranto*, Durham. 1 Ro.Rep 399. 1 Ro.Abr. 540.

IN a Quo Warranto, to shew how he claimed to have the goods of Felons, and of Felons de se, and of persons that stand mute within his Manor of Dale; he shews that Durham is a County Palatine, and that he hath Jura regalia, temps dont memorie, and that this Jurisdiction doth extend it self inter Tyne & Tese, and that this Manor is within the same; upon this Plea, a Demurrer joyned.

Coke Chief Justice. If he prescribes in a County Palatine, and to have Jura regalia within this; this for matter of Treason, and extends to all which the King himself may have, 11 H. 4. By the Grant of Felons Goods, such a Grantée shall not have the Goods of those which do stand mute; yet in a County Palatine he shall have these, if within the County Palatine; and this is as clear a Case as may be, this is alledged to be within the Manor of Seton, inter Tyne & Tese, which Manor came to the King by Attainder, and he granted this over, and that the Bishop of Durham hath this.

Dodderidge Justice. Others also have Land within the County Palatine.

Coke. If I have Felons Goods within the Manor of another, and he Grants this Manor to the King, I shall not by this lose the Felons Goods that I have.

Dodderidge. No Jurisdiction is to have any force against the King, as I have séen it in a Record, in 5 E. 2. betwéen the King and the Bishop of Durham, but it is not so here.

The Court gave time in this Case, to shew good cause the next Term, or Judgment to be given for the Bishop.

Term. Trin. 14 Jac. &c.

Afterwards, (S.) Termin. Trin. 14 Jac. B. R. this Case was moved again.

1. It was urged, That the Bishop could not have Goods of Felons by Prescription.

Coke

Coke & Dodderidge. Though one cannot have the Goods of Felons by Prescription, yet the Bishop having a County Palatine, he may very well have these, for he hath Jura regalia within his County Palatine.

2. It was then secondly urged against the Bishop, That if he shall have Felons Goods, yet he shall not have the Goods of Felons de se, for this is a special Felon.

Coke. I agree, That by the Grant of Goods of Felons, the Goods of Felons de se shall not pass; but otherwise it is in Case of a County Palatine, where he hath Jura regalia, and so shall have the Goods of Felons de se.

3. It was thirdly urged against the Bishop, That the place where he claims to have this liberty, is a Manor, and so this liberty shall extend only unto the Demesns.

Coke. He shall have the Escheats of his Tenants for Treason (unless it be of an Estate-tail) which by Statute is given away, and therefore it is clear, that the liberty extends further than the Demesns.

4. It was fourthly urged against the Bishop, That the place where this liberty is claimed, is the Manor of, &c. the which is the Manor of Sir Jerome Boes a Stranger, and therefore the Bishop cannot have this liberty within this Manor.

It was answered for the Bishop, that it is here averred, this Manor to be inter Tine & Tese, the which is so confessed by the Demurrer.

Coke. But we will yet be ascertained of this, before we give any Judgment herein.

It was then urged for the Bishop by Hutton Serjeant, that 46 E. 3. in Agards Office; in Scaccario there is a Record, where it was found upon an Issue, that the Bishops Jurisdiction did extend it self inter Tine & Tese. 46 E. 3. &c.

And this appears to be so by the Statute of Prærogativa Regis, cap. 1.

Coke cited a Record which was read in Court, and it was 21 E. 1. Rot. Parliamenti 5. inter recorda turris, that the Archbishop of York did excommenge the Bishop of Durham in remotis agendis, and sent his Summoners to the Bishoprick to pronounce this; and the Servants and Officers of the Bishop of Durham took the Summoners of the Archbishop of York and did imprison them, for that they would have pronounced this Excommengement against their Lord; upon this the Bishop of York did cite the said Officers to make answer to this, for which the Bishop of York was afterwards sued in Parliament, and fined at a great sum, and imprisoned for this; and he cited them for the Imprisonment, which was a Temporal matter; and the Archbishop of York had no Jurisdiction Temporal over another Bishop, but only Spiritual. 21 E. 1. &c.

It is there said in this Record, That the Bishop of Durham Duplicem statum habet, (S.) Temporalem & Episcopalem, an Episcopal Estate, and the state of a Baron, and that he hath as large Temporal Jurisdiction as he hath Episcopal, the one being as large as the other, by reason of his County Palatine.

The Record, Incipit, (S.)

Episcopus Dunelmensis habet duos status, unus Episcopi, alter of a Baron, (this is so specified in the Record) (these were then called the Pleas of the Parliament.)

It is also there said in the Record, That this Jurisdiction he hath not only in his demesn Lands, but also the same doth extend it self to Tine & Tese, and this is the limits of his County Palatine, (12 Eliz. Dyer, fol. 289.) hath something as touching this.

At this day, if one be there attainted of Treason, (if it be not an Estate tail) the Bishop of Durham shall have it.

There were in ancient time, Placita Parliamenti, (veritatis & vetustatis vestigia) and

and these matters which were not there determined, were sent to the Justices de B. R. to be by them determined.

Another Record was shewed for the Bishop of Durham, which was 46 E. 3. in Agards Office before remembred, Quod Episcopus Dunelmensis habet omnia jura regalia, quæ ad comitatum Palatinum pertinent; and by this he claims to reverse Errors; for this sée 14 E. 3. tit. Errors.

Coke. I have a note of a Claim of the Bishop of Durham, in 25 E. 1.

Dodderidge. In 5 E. 1. There was a great Case betwéen the Bishop of Durham and a Prior.

The Court clear of Opinion, That the Jurisdiction of the Bishop of Durham did extend it self throughout the whole County, and the Plea of the Bishop allowed by the Court; and so by the Rule of the Court Judgment was given, and so entred for the Bishop.

Judgment given for the Bishop.

Wrathbone Plaintiff against *Newbery* Defendant.

Trespass and Ejectment. 1 Ro.Rep.287. 1 Ro.Abr.850.

IN an Action of Trespass and Ejectment, to try the title of a Lease made by a Parson of his Rectory: The Case appeared to be this, A Parson made a Lease of his Rectory to one for thrée years, and so from thrée years to thrée years, and so from thrée years to thrée years, duringhis life.

The whole Court clear of Opinion, that this is a good Lease for twelve years.

Dodderidge Justice. If he had said, and so from the said thrée years, for thrée years, this had bén a Lease but for nine years, but the same being, as before is expressed, it shall be a good Lease for twelve years.

28 H. 8. Dyer, fol. 24. &c.

Sée for this in 28 H.8. Dyer, fol.24. and Plowdens Commentaries, f.273. b. bottom, by Brown and Dyer, in Say and Fullers Case.

Kwowl & Al. Plaintiffs against *Harvey* Defendant.

A Prohibition. 1 Ro.Rep.335. 2 Ro.Abr.813.

IN a Prohibition, the Case appeared to be this: A Vicar lops and cuts down Timber-Trées growing in the Church-yard: The Church-wardens hinder him in the carriage of the same away, and they being in trial of this suit: The Church-wardens by their Council, moved the Court for a Prohibition to the Vicar, to stay him from felling any more.

Coke Chief Justice. This is a good cause of Deprivation, if he fell down Timber-Trées and Wood, this is a Dilapidation, and by the Resolution in Parliament, a Prohibition by the Law shall be granted, if a Bishop fells down Wood and Timber-Trées.

The whole Court agréed clearly in this, to grant here a Prohibition to the Vicar, to inhibit him not to make spoil of the Timber, this being (as it is called in Parliament) the endowment of the Church.

Coke. We will also grant a Prohibition to restrain Bishops from felling the Wood and Timber-Trées of their Churches.

A Prohibition granted, &c.

And so in this principal Case, by the Rule of the Court, a Prohibition was granted.

The

The Spanish Ambassador, by the name of *Don Degoe Servient de Acuno*, Plaintiff, against Captain *Gifford* Defendant.

IN an Action upon the Case for a promise, upon Non assumpsit pleaded, a Verdict was found for the Plaintiff; the Case appeared to be this: The King of Spain did give unto Captain Gifford, Decem mille Ducatus monetæ, for to go for him in bello against the Barbarians before such a day; the Defendant did assume and promise, that if he did not go before the day, he would then repay the mony; he did not go, nor yet pay the mony according to his promise: upon this the Spanish Ambassador, for the King of Spain his Master, brought the Action upon the Case, and a Verdict found for the Plaintiff. 1 Ro.Rep 339.

It was moved for the Defendant in arrest of Judgment by Harris Serjeant, touching the consideration, being in consideration of Decem mille Ducatus monetæ, of the value of 5 s. 6 d. every Ducket, and doth not shew when they shall be of such a value, for they may be more, or they may be less.

Dodderidge Justice. They are to be of this value at the time of the payment.

The whole Court agreed in this, that the Jury may give more or less than the value in damages, if they will.

Coke Chief Justice. If one do assume to pay to another Decem mille Ducatus monetæ, and every one of them to be of the value of 5 s. 6 d. this ought specially to be averred: Here the promise was, that if he did not go before the last day of June, for the Spaniards against the Barbarians, then he would repay the mony: If he goes not, this ought then to be repaid within a convenient time after the day past, and he go not: No request is to be made of this, neither ought the Plaintiff to seek him, but at his peril he ought to pay this without any request.

If one do promise to pay so much at his coming from Rome to another, he shall have a convenient time to pay this after his return from Rome, and this payment is to be without any request; here the Case is upon Non assumpsit pleaded, and a Verdict against him, that he did assume & una lex alienigenis & indigenis: And therefore by the Rule of the Court, Judgment was given for the Plaintiff, and a Capias granted to take the Defendant.

Termin.

Termino Paſchæ,

14 Jac. *Banco Regis.*

Randal Cook Plaintiff againſt *Matthew Lancaſter* Defendant.

Entred Termin. Trin. 13 Jac. B. R. Rot. 80.

IN an Action upon the Caſe, upon an Aſſumpſit, for the delivery of Corn; upon Non aſſumpſit pleaded, a Trial was had, and a Verdict given for the Plaintiff. 1 Ro Rep. 353. 1 Ro. Abr. 202.

Richardſon Serjeant moved the Court for the Defendant in Arreſt of Judgment, for a variance betwæn the Writ of Niſi prius and the Record, in matter of ſubſtance, and not amendable, being the day of the Aſſumpſit, which was ſuch a day, 10 Jac. in the Writ of Niſi prius, and in the Declaration upon the Record, laid to be ſuch a day, 11 Jac. and the party that made the promiſe was dead, and this Action is brought againſt the Executor; this miſtake is matter of ſubſtance, and ſo not amendable, for by this miſtake the very matter is altered; and to this purpoſe is the Caſe in 11 H. 6. fol. 11. In Debt againſt J. S. Husbandman; there they were at Iſſue, whether he was Husbandman or Mercer, jour de brief purchaſe: In the Writ of Niſi prius for trial of this, (jour de brief purchaſe) was omitted, and not amendable, becauſe matter of ſubſtance, and therefore a Venire facias de no novo was there awarded.

And this is not like the Caſe that is in 9 Eliz. Dyer, fol. 260. placito 24, & 25. in a Writ of Partition by Wotton againſt Anthony Cook and Temple, who appeared; Temple confeſſed the Partition, Cook conveyed Title in ſeveralty to the whole Land: there in the Record of Niſi prius, this word (Anthonius) by negligence of the Clerk of the Treaſury, was omitted in the joynder of the Iſſue; this was there amended, being but a mer miſpriſion.

Coke Chief Juſtice. If the Niſi prius vary from the Roll in a thing which doth alter and change the Iſſue, it is plain that this ſhall not be amended: But times are not always matters of ſubſtance; but in the principal Caſe here, the ſame is matter of ſubſtance, and ſo not amendable.

Paſch. 20 E. 3. Fitz. tit. Amendments, placito 67. a good Caſe upon the ſame difference, where it is matter of ſubſtance, and where not: If matter of ſubſtance, then the ſame is not to be amended.

It hath bæn taken, that if one do bring an Action of Treſpaſs, for a Treſpaſs done 1 Maij, and this was done 3 Maij, that this had bæn a material matter to make

all to be bad, but as to this, I think that in this Case the day is not material, as matter of substance, but the same shall be good, if it be so, that in such Cases he hath good cause of Action before his Action brought; and so it hath been often times adjudged. Here in this principal Case, there is another matter which is material, and makes the matter bad.

Here it is Randulpho for Randall, where there is not any English name for Randulpho, there is Ranulphus for Randall, and Randulphus for Rafe; but Randulphus is not good: and when I was a Pleader, in an Action of Debt upon a Bond, in such a Case here, Non est factum pleaded and avoided, for this cause only, (of Randulphus) for Randall; here in this principal Case, the day is a material part, and makes an alteration of the Verdict. And therefore by the Opinion of the whole Court, this is not to be amended; and for this cause, by the Rule of the Court, the Plaintiffs Judgment was stayed.

Judgment stayed *per curiam.*

Bagge Plaintiff against *Slade* Defendant.

Entred Mich. 11 Jac. B. R. Rot. 872.

A Writ of Error. 1 Ro.Rep.354. 1 Ro. Abr. 20.

IN a Writ of Error to reverse a Judgment given against him in an Action upon the Case for a promise. In the Town-Court of Yevell, in Comitatu Sommerset. The Error assigned and insisted upon was this, because there wanted a good consideration to raise the promise, and so no cause of Action.

Coke Chief Justice. The Case was this, Two men were bound in a Bond for the Debt of a third man; the Obligation being forfeited, so that they both of them were liable to pay this; the Plaintiff here in this Writ of Error said to the other, pay you all the Debt, and I will pay you the moyety of this again, the which he paid accordingly, and so made his request to have a repayment made to him of the moyety according to his promise, which to do he refused; upon this he brought his Action upon the Case against the Plaintiff upon his promise; and upon Non Assumpsit pleaded, he had a Verdict and Judgment; and upon this Judgment a Writ of Error was brought. In this Case, and in the Declaration, there is a good consideration set forth; the parties own contract here shall bind him, he hath no remedy for the mony paid, but when this is paid, here is a good Assumpsit grounded upon a good consideration for repayment of the moyety by the Plaintiff.

Haughton Justice. Notwithstanding this Contract, he is still least in danger of the first Bond.

Coke. I have never seen it otherwise, but when one draws mony from another, that this should be a good consideration to raise a promise.

Dodderidge Justice. If the consideration puts the other to charge, though it be no ways at all profitable to him who made the promise, yet this shall be a good consideration to raise a promise.

Coke agreed with him herein: Also if a man be bound to another by a Bill in 1000 l. and he pays unto him 500 l. in discharge of this Bill, the which he accepts of accordingly, and doth upon this assume and promise to deliver up unto him his said Bill of 1000 l. this 500 l. is no satisfaction of the 1000 l. but yet this is good and sufficient to make a good promise, and upon a good consideration, because he hath paid mony, (S.) Five hundred pound, and he hath no remedy for this again.

Another matter was moved, that the entry of the Judgment was not good; the

the same being in this manner, (S.) Ideo consideratum fuit, adtunc & ibidem, hic ad eandem Curiam, quod prædictus querens recuperet.

The whole Court agréed this Judgment to be well entred; and that the consideration here is good and sufficient to raise the promise, and accordingly the Rule of the Court was, Quod judicium affirmetur. Judgment affirmed *per Curiam.*

Sir *John Brett* Plaintiff against *Cumberland* Defendant.

Entred Trin. 13 Jac. B. R. Rot. 1496.

IN an Action of Covenant, for not repairing of certain Mills to him demised for term of years. The Case was this, (S.) Quéen Eliz. was seised of these Mills, and 10 Julij, 26 Eliz. by her Letters Patents, she made a Lease of these Mills for 31 years unto William Cumberland, in which Letters Patents there was this clause (S.) for him, his Executors and Assigns, to repair the said Mills, and to leave them sufficiently repaired at the end of his term; afterwards this reversion came to the King, who did grant this unto Sir John Brett and his Wife, and for breach of Covenant, upon the clause in the Letters Patents, for not repairing of the Mills, the Husband alone brings this Action of Covenant. An Action of Covenant. 1 Ro. Rep. 359. Cro. Ja. 399. 1 Ro. Abr. 517.

Upon a demurrer, the matter came to be argued, and the points insisted upon to be opened.

Four Points moved in this Case. (S.) Points in the Case.

1. First Point, The Patent of the Lease was to have the same from Mich. following, and doth not say in the Letters Patents when this Lease should begin. It appears, that the next day after he entred by vertue of the Lease, so that this was to begin at Mich. he entring the day after, as it was urged.

2. The second Point, Whether these words having no express words of Covenant, shall be taken for a Covenant? It was urged, that these words in the Letters Patents should be taken for good Covenant, without express words of Covenant, for that every party to the Letters Patents shall be bound, as well as if the same had béen by Indenture, to this purpose is 4 Mariæ Dyer, fol. 150. a Lease for life is made by Indenture, in which there are these words (S.) Provisum est quod, if the Lessee dies within the term of 60 years next ensuing, that his Executors and Assigns shall have this as in the right and title of the Lessée, pro termino totidem annorum, as shall amount to the number of 60 years from the date of the Indenture, there held by the Court, that this is but a Covenant, and no Lease; and so is 40 E. 3. fol. 5. sub conditione, taken there for a Covenant and not a Condition; and because the matter here is to be done at the end of the term, that in this Case this shall be a Covenant, being an agréement. 4 Mariæ Dyer, fol. 150. 40 E. 3. f. 5.

3. The third Point, Whether an Action of Covenant lies, without sealing of the Counterpart? It was urged, that an Action of Covenant well lieth, and to this purpose was cited the Case of 38 E. 3. put by Knightley, in 28 H. 8. Dyer, fol. 13. placito 66. and so it is also in the Book at large, a Feoffment made by Déed, with divers Covenants, and one of the Feoffées seals this, and the other not, but yet occupies and survives, adjudged, that he shall be bound by the Covenants, and seal of his Companion. Mr. Littleton also hath the same in his Chapter Of Conditions, fol. 88. placito 374. An estate for life made by Indenture, the remainder over, upon certain conditions, Tenant for life puts his seal to part of the Indenture, and dies; he in remainder enters by force of the remainder, he is bound to perform the con- 38 E. 3. cite 28 H. 8. Dyer, f. 13. &c. *Littleton*, &c.

ditions in the Indentures, as well as the Tenant for life, and yet he never sealed, and so is 59 E. 3. fol. 22. the reason is, because he takes by the writing in which the Covenant is comprised, and therefore he shall be bound by the Covenant.

59 E. 3. fol. 22.

4. The fourth Point, The Action of Covenant is here brought by the Husband alone, without his Wife; whether this be well brought, or not? It was urged, that this Action is well brought by Husband alone; for in all Cases where the thing to be recovered, is in the power of the Husband to make a present disposition thereof, in such a Case he may bring the Action in his own name, without his Wife; upon this reason is the Case in 37 Assisar. placito 11. the Husband without his Wife shall sue to the King by Petition, because he may make disposition of the thing sued for, which he had in right of his Wife; to this purpose is 2 H. 4. fol. 7. 38 H. 6. fol. 3. & 4 E. 3. fol. 13.

37 Assisar. placito 11.

2 H. 4. fol. 7. 38, &c.

Coke Chief Justice. You shall seldomtimes see Leases by Indenture, made by the King, but by his Letters Patents; this is a Covenant here by agreement, 38 E. 3. in the Book at large before remembred, though not sealed the Counterpart, yet a Covenant.

As to the later Point, The Husband alone may well have this Action, or if he so will, he may joyn his Wife with him, 37 Assisar. the Husband alone may have an Ejectione firmæ; the Husband hath a term in right of his Wife, he is ousted of it; he brings his Action, and recovers the same again, and hath his Judgment; how shall he be now possessed of this? he shall have it statu quo.

37 Assisar.

In this principal Case, I hold it to be a very strong Case, that the Action of Covenant here brought by the Husband alone is well brought, though the interest in the reversion was in him and his Wife, and there are express Books in the point, that he may either joyn his Wife with him, or bring the Action alone.

Dodderidge Justice. This is to be observed for a rule, (S.) That which the Husband may discharge alone, and of which he may make disposition to his own use. For the recovery of this, he may well have an Action in his own name without his Wife.

Coke agreed herein, That this is a true and a good ground.

Haughton Justice. Here he is to have the Covenant of an Assignée of the Reversion, and this was assigned to him joyntly with his Wife, and they are Assignees of the Estate, and for this cause the Wife ought to be joyned with him in this Action.

Dodderidge. He may joyn her with him in the Action if he will, or sever. And the Action, as it is here brought by him alone, is well brought, and that also because he only here is to have all the profit, and therefore this Action brought by him alone is well brought.

Coke agreed with him herein, and this to be for a Rule observed, that where the Husband is to have the sole profit of that which is to be recovered, and may himself alone discharge this, there for recovery of this, the Husband alone may have his Action, as here in this principal Case he hath done, and the Action of Covenant here by him brought, is well brought. If Baron and Feme do joyn in a Lease of the Land of the Wife, rendring rent, the Husband doth release the rent, and dies. Whether this be gone, or not? by 29 E. 3. the rent is not gone.

29 E. 3.

The whole Court (except Haughton) did hold it as a strong Case, that the Action of Covenant brought by the Husband alone, without his Wife, was well brought; But because Haughton of this dubitavit, therefore it rested upon a Curia advisare vult.

Afterwards this Cause was moved again, and it was urged for the Defendant, that there is no time limited when the Lease should begin, being à Festo Sancti Micaelis Archangelis, without saying adtunc proximi sequen.

The Court over-ruled this, being of no force; and it being alledged to be by force, where he entred the next day.

It

It was then urged, that this Action by the Husband alone, without his Wife, was not well brought, this being upon the Statute of 32 H. 8. the Assignée of the King to have an Action of Covenant, and they are both of them Assignées of the Estate; and therefore to joyn in the Action. 32 H. 8.

Coke Chief Justice. If one grants the Wardship of a Ward unto a Feme, it is adjudged, 29 E. 3. f. 48. in Simkin Simons Case, put in Spencers Case, 5 pars, f. 18. that the Husband shall have an Action of Covenant. And so it is also very clear, that if a Bond be made to Baron and Feme, the Husband alone for this may have an Action of Debt, and this doth induce me to be strongly of this opinion, that this Action of Covenant here is well brought by the Husband alone. 26 E. 3. f. 48. &c.

Haughton Justice. If the Case had bèen, that an Action by Statute Law had bèen given unto the Husband and Wife, they ought to joyn in the Action, and here they are both of them Assignées.

Coke. This is for a Rule, where the Husband alone may have an Action, and the damages to be recovered, he alone to have them, there he alone may have an Action of Covenant, or Debt on a Bond.

But in all personal matters, to joyn his Wife with him, yet the baron sole may in such Cases release.

Haughton. In an Action of Wast, in the tenuit, he is to joyn his Wife with him; yet he recovers only damages.

Coke & Dodderidge. This is in the realty, and locum vastatum is there also to be recovered, and therefore they are to joyn.

But here this Covenant is at the Common Law, and an Assignée may have benefit of any Conditions and Covenants at the Common Law; and the difference in this will be betwèen a Lease for years and for life; in the last, the same is voidable, and there privies only are to have of this advantage.

The whole Court (except Haughton) were clear of Opinion, That the Action of Covenant here was well brought by the Husband alone, without his Wife; and so the Rule of the Court was, Quod judicium intretur pro querente. Judgment for the Plaintiff, *per Curiam.*

Witt Plaintiff against *Buck* Defendant.

In a Prohibition upon the Statute of 2 E. 6. cap. 13. the clause touching barren and heath ground, of which, after Improvement, no Tythes to be paid during the space of seven years after the Improvement; for the Prohibition, it was shewed by Trotman, that this Land for which the Parson libelled for Tythes, was marsh and sandy Land, and covered with salt-water, so that time out of mind no Grass had bèen there known to grow, nor any profit at all made of this, until now of late time, by and with the great costs, charges, and industry of the Tenant; this ground had bèen lately gained from the Sea, and from its overflowing, by repairing and making new Banks and Sea-walls, and by continual repairing of them, and so he had now converted the same into arable Land, whereby he had Corn, and of this Land the Parson libels for Tythes in the Spiritual Court; and upon this matter thus shewed, a Prohibition prayed, being to be discharged from payment of Tythes for this ground for seven years; this Statute being thus made for the encouragement of Tenants to make improvements of their Lands. Prohibition upon the Statute of 2 E. 6. 1 Ro. Rep. 354.

Coke Chief Justice. It was resolved in one Farringtons Case, upon this Statute of 2 E. 6. That Wood ground is not barren ground within this Statute, this was there adjudged in point, that if one do stock and grub up Wood ground, and after

after converts this into arable ground, he hath by this meliorated his Land, but this with great cost and labour, yet he shall pay Tythes for this ground presently; for that Heath and barren ground, intended to be within the Statute, the same ought to be such Land which is suapte natura sterilis, and barren.

Dodderidge Justice. A salt Marsh, if this be fenced, and so made good Meadow, clearly he shall pay Tythes of this presently; yet before this was so fenced and made firm, no Tythes were to be paid of this.

Coke. The Isle of Dogs, (juxta Greenwich) they are at great costs and labour, and that continually to keep and uphold this, yet they are to pay Tythes for this; here it appears unto us, this to be very good Land, but all the charge is, in the gaining and defending of this from the overflowing of the Sea (this Land shall be out of the Statute, out of the clause of discharge for seven years, notwithstanding this charge the Tenant hath been at in gaining of this Land from the Sea) for to have this to be within the Statute, and the clause of discharge, this Land ought to be suapte natura barren, which here it is not, but by accident, by the overflowing of the Sea thereon.

Haughton Justice. This Land, if the salt-water came not upon it, though it be sandy, would yet have born good grass without any labour, for this is very good Land of it self.

Coke. If a mans Land be overflown for two, three, or four years, during this time the Parson can have no Tythes here; but if he afterwards regain this his Land from the overflowing, though this be at his great charge and labour, and this afterwards, by his industry bears Grass or Corn, he shall pay Tythes of this, for this barrenness, as here in this Case, is not so of it self, but by accident.

The whole Court agréed in this, That by this Statute barren ground is such ground as will not bear Corn of it self, without very great cost in the extraordinary manuring of it.

But if the same will bear Corn without any great labour and manuring (but only with charge in regaining of it from being overflown) he shall pay Tythes for this presently, for the same ought to be suapte natura barren, or else the same shall not be within this Statute, and the clause of discharge: For if one do gain Land from the Sea, which afterwards bears good Corn, of this he shall pay Tythes.

The whole Court also agréed in this, That if one do gain Land from the Sea, and that by his great cost, and he afterwards turns this to arable Land, for this he shall clearly pay Tythes, notwithstanding his cost, and notwithstanding that time out of mind no grass had been there growing; yet because the same is not barren Land of it self, but only by accident, (S.) by reason of the sand and salt-water flowing over it, therefore so soon as this shall be regained and sowen with Corn, Tythes shall then presently be paid for this Land, for this Land bears good Corn, being regained, and that without any marling, or any great cost in manuring of the same, which proves evidently that this is not barren ground within the scope, intention and meaning of the said Statute, by which the same ought to be suapte natura barren, or not within the Statute.

And in all this the Court agréed clearly, and therefore the Case appearing to be thus, that this is no such barren ground within the Statute, as ought to be discharged from payment of Tythes, but Tythes ought to be paid for the same, and that the Parson had just cause to sue there for his Tythes, and so a Prohibition denied by the Court.

Sir

Sir *Harbert Crofts* Plaintiff against *Brown* Defendant.

IN an Action upon the Case brought for scandalous words, spoken by the Defendant of the Plaintiff; upon Non culp. pleaded, a Verdict was found for the Plaintiff: It was moved for the Defendant in arrest of Judgment, that the words spoken were not actionable. Action upon the Case for words.

The words being these, Sir Harbert Crofts keepeth men to rob me, (the truth appeared to be, that the Defendant was robbed, and that by two of Sir Harbert Crofts men,) and upon this he spake the words (but doth not say, that he did keep them to do so.) A Case was cited, where Sir John Harper was Plaintiff against Sir Francis Beaumont, in an Action upon the Case for words, which were, That Sir Francis Beaumont should come to the House of Sir John Harper, and that he and his Servants should go about to kill him, and that he did maintain them; but did not say, that he did so, to the same intent, nor that any thing was done: Upon motion in Arrest of Judgment, it was adjudged, that these words were not actionable.

It was urged by Coventry, That these words are actionable, and to this purpose divers Cases remembred which are put, Coke 4 pars, fol. 16. b. in Æton and Allens Case, as the Lady Cockeins Case, being my Lady Cockein offered to give poison to one, to kill the Child in her Body; and the Case of Tibbots there remembred. Coke 4 pars, &c.

The Court agreed this to be so, for there an act was done.

Coke Chief Justice. We will not give more favour unto Actions upon the Case for words, than of necessity we ought to do, where the words are not apparently scandalous, these Actions being now to frequent, but they were not so in former times, for from 1 E. 3. unto 5 E. 3. there are not three Actions upon the Case for scandalous words.

Here in this Case the words are very barely laid, (S.) He keps men to rob me, Insidiator viarum.

In ancient time, by the Law, voluntas reputabatur pro facto, 3 E. 3. one lay in wait to kill another, and upon resistance hurts him, but doth not kill him; this was Felony by the Common Law, and ousted of his Clergy; there it was once a Felony, but now the Law is otherwise, a fact is requisite to be done; an overt act makes Felony at the Common Law: And this which is Treason at this day, with an overt act is Felony at the Common Law.

But here in this principal Case there is no act done, no way-laying, no overt act; here it is to be intended his keeping of them to be lawful, (to rob me) this is but an intent, no act which is not Felony at this day, and therefore not actionable: And an intent without an act is not punishable by the Law, as it is resolved in Æton and Allens Case before remembred.

If one saith of another, You have murthered J. S. who is still living, these words not actionable, yet these are very bad words.

And so it was resolved, Hillar. 39 Eliz. in the C. B. between Snag and Gee, in an Action upon the Case for words, being, Thou hast killed my Wife, and it appeared that his Wife was then living, and adjudged not actionable, Coke 4 pars fol. 16. a. Hill. 39 Eliz. C. B. &c.

Haughton Justice. If the words were, such a one did hire a man to rob me, these words would be actionable; but as the words are laid to be in this principally, I doubt whether they be actionable.

Coke.

Coke. In the Case last put, there it is very plain that the words are actionable, for there an act was done by him, but not so here in this Case.

Curia. The reason, De scandalis magnatum is upon another ground, for that by reason of the words spoken, they bring them hereby in odium.

The whole Court was of Opinion against the Plaintiff, that these words are not actionable, and so by the Rule of the Court, Judgment was arrested.

Allen Plaintiff against *Wedgewood* Defendant.

1 Ro.Rep.373. 1 Ro.Abr.421. 424. Bridg.Rep.39.

IN an Action of Covenant, for not performing of certain Articles agréd betwéen them according to the Covenant; one Article being, that the Defendant did covenant to make a Lease to the Plaintiff, or to his Assigns, for thrée lives, as he should name: He nominated himself and two others; the Defendant refused to make the Lease, whereupon the Action brought.

George Croke for the Defendant demurred in Law upon the Replication, because that no sufficient breach was assigned by the Plaintiff: The Lease to be made to him for thrée lives, which he should nominate, so that he himself ought to be one of the Lessées, and to have the sole interest.

Coke Chief Justice. To him or to his Assigns the Lease to be made, these to be such as he should name; the point here is, Whether he hath here an election to make the Lease to him, or to his Assigns? it had been otherwise clearly, if it had been to be made to him and to his Assigns, but here he hath an election to him given, to whom he will make this Lease, as if you are to make a Lease to me, or three which I shall name.

They being in doubt, whether there was a Lease then in esse, or not; therefore for this there was an Article, that if there was a Lease in esse, then at the end of this, he was to make the Lease to him, or to his Assigns for three lives; and if no Lease was then in esse, then by another Article he was to make this Lease at the time prefixed.

It was urged, that this Lease ought to have been made to Edw. Allen, and such three lives as he should nominate, for that ex præcedentibus & consequentibus, a Deed ought to be construed; and to this purpose is 14 E. 3. Fitz. tit. Debt, placito 138. If one be bound to grant a Rent, he ought to grant this before Michaelmas day.

If a man be bound to make a Lease before the Feast of the Annunciation, to such a one as the Obligee shall name, he ought to name before our Lady-day: Also he is to nominate three persons, he ought to nominate them, and to say, that they were upon the Land ready to receive the Lease, being a Lease for three lives, as it was urged.

It was also urged, that he was to make such a Lease, as by Council was to be advised, this ought to be by the Council of him who was to have the Lease; this appears not to be done, nor any good nomination made, and so the Replication not good.

It was urged for the Plaintiff, that here he did nominate himself and two others, for the Lease to be made to them; the Defendant refused to make this Lease, and for this breach the Action brought.

As to the Exceptions taken to the Replication, (S.) 1. That the request is not laid to be in time: This is made pursuing the Articles of Agreement, and so made in due time.

Second

Second Exception, That the Assignées ought to be upon the Land to take the Lease; this is not to be so, the request is to be where the Defendant is, no place nor time being appointed; and so it was here, he brought the Assignées with him when he made the request, he ought then presently to have made the Lease, his act being the next, he ought to have gone to the Land, and if they came not to take the Lease of him, then he had bèn excused; but if he goes not to the Land, this shall be a breach.

To this purpose is 22 E. 4. fol. 43. A man is bound that a Stranger shall enfeoff the Obligée before such a day, he shews that the Stranger was upon the Land ready to make the Feoffment, and the Obligée came not to take it; so that he which was to make the Feoffment at his peril, ought to attend there to make it, because he is to make the Estate; so here the Defendant upon request made unto him, ought to go to the Land, to be there ready to make this Lease.

Coke Chief Justice. The time of the entry and the words here are material: If no Lease in possession, then to enter by the Articles at the Feast of the Annunciation of our Lady, which should be Anno 1612.

This is the Point. The Covenant is to make to you, or to your Assigns a Lease, &c. and to enter at our Lady-day next ensuing, and this is to be done upon request; it is to be to you, or to such as you shall name, and mony to be paid for rent, and 20 l. to be paid at the Entry for a Fine or In-come; this is to be done by the Lessée to the Lessor, and this is as much as that the Lease should be made before this Feast, and that you should name the persons to take before this time; but here you let the Lady-day pass, and two months after you nominate the persons, and request the Defendant to make the Lease, the which he refused, whereupon this Action is brought.

Here the Plaintiff who ought to have the Lease, hath not done well; if the other should make a Lease after the time past, this would be prejudicial to him, for he ought to have 20 l. given unto him at our Lady-day, being the time prefixed for his Entry.

As touching Cromwel and Androse Case, I heard that argued in the C. B. being then a Reporter there.

If one be bound to grant to another an Advowson, he hath time to do it during his life, if the other do not hasten it by request; but if it fall void, then he ought to grant it presently, for it is now a fruit fallen, and if it should be otherwise, it should be prejudicial to the other party.

And so if one be bound to grant a Rent to another, he ought to do this before the Rent-day come.

In this principal Case here, you are confined to nominate before the Feast of our Lady-day.

As to the other Point, (S.) the Lease to be made to him, or to his Assigns, or to pay to one, or to his Assigns.

The Law will never hunt for an Assignée in Law, where there is an Assignée in fait. A man doth Covenant to make a Lease to you, or to such as you shall name, you nominate such to go to the Land, and afterwards in time convenient to make the Lease: If one doth Covenant to make a Feoffment in Fee to another, this is to be done upon notice; here the Lease is to be made upon the nomination of the parties to take, where a time is set down for the Entry, as in this Case; the nomination ought to be before this time, and the Lease to be made also before the time.

As to the other Points moved, they come too late, this matter being very strong against the Plaintiff.

Croke Justice. This is a very strong Case against the Plaintiff; when is this 20 l. In-come to be paid? at our Lady-day, when the Entry is to be by vertue of the Lease, this Lease is to be made before, so that the Plaintiffs request to have the

Lease made after the time past, this request comes too late. As to the other matter, (S.) The Lease to be made to him or to his Assignées, the Lease is to be made by Covenant. He may name all at the first that are to take, for that frustra fit per plura quod fieri potest per pauciora, the intention here was, that Edward Allen was to take originally; here the request to have the Lease made comes too late, and so no breach of the Covenant by the Defendant.

Dodderidge Justice. At the first it was indifferent to him, whether the Lease was made by him for the life of three, or to such three as he should name; it might be to himself, and to two others, or to three others, which he should name.

As to the other matter, he agréed in opinion, for that if he should make the Lease after the time past, he should by this lose his 20 l. absolutely: No entry being at our Lady-day, if the Lease had bèen made afterwards, he could by no means have his 20 l. and therefore he was not bound then upon this request after the time to make the Lease; the Plaintiff ought to have had the Lease drawn in time, and to have tendered the same unto him, which was not done in this Case; and the refusal here by the Defendant to make this Lease upon the Plaintiffs request, after the time, is no breach of Covenant, and so the Plaintiff had no cause of Action.

Coke. The Lease was to be made, as it should be advised by the Council of— not devised, but to be as effectual as might be advised by Council, and this to be to Edward Allen and his Assigns; he was to enter at our Lady-day, and then to pay the 20 l. the day past, no request made for the Lease till after, the Defendant then not bound by his Covenant to make it, for then he had no remedy for his 20 l. and so this refusal coming upon a request, after the time past, is no breach of Covenant, and so the Plaintiff had no cause of Action, Judicis officium est ut res, ita tempora rerum, &c.

The whole Court inclined to be of Opinion against the Plaintiff: And so for this time it rested upon a Curia advisare vult.

Afterwards this Case was moved again.

Coke. The Plaintiff here alledges, that the Defendant hath not made the Lease in June, according to his request, if no good breach assigned, no cause of Action, when he shall enter to pay the 20 l. that is, when he is to enter by their mutual agrèement; and if the Plaintiff will not come, and request him in due time to make the Lease according to their agrèement, he may well provide himself of another Tenant; the Plaintiff ought to have come upon the Land, and there to have been ready to receive this Lease, and so to enter; and here the Defendant is not bound to make the Lease by his Covenant, until the Plaintiff do nominate to whom the same should be made, and this nomination and Lease accordingly made, ought to be before our Lady-day, being the time certain prefixed for the doing of it.

Haughton. This Lease ought to be for three lives, and to be made at our Lady-day; and if the Plaintiff do surcease this time, and demands of the Defendant after this Feast to make this Lease; he is not bound by his Covenant to do it, and his refusal then to make is no breach of Covenant, to give the Plaintiff cause of Action.

The Court then said unto Bridgman, who was for the Plaintiff, that the Plaintiff might discontinue this Action, and that this would be his best way.

The Judgment of the Court against the Plaintiff.

Curia. We will be of this matter better advised, and by the Rule of the Court, the matter to rest as it is, and advised the Plaintiff and Defendant to make an end betwèen themselves before the next Term, the Court being all clear of Opinion against the Plaintiff, and in default of an end, the Rule of the Court to be, Quod querens nil capiat per billam.

The

The KING against *Taverner.*

Richard Taverner was indicted, arraigned, and now tried at the Bar by a Jury of Middlesex, for the killing and murdering of one John Bird 3. Martij, 6 Jac. Angliæ & Scotiæ 42. The Endictment was taken at Hartford Assizes, before Wamsley and Croke Justices of Assize and Goal-delivery, for the killing of him in Theobals Park, Thomas Musgrave being present, and his Second, but fled, and stands Outlawed. Taverner also was Outlawed, but returned, and was taken, and Termin. Hillar. 13. brought a Writ of Error, and reversed the Utlary, because there were but 14 days between the two County days, and pleaded to the Indictment, and now he was tried at the Bar for his life; one Hughes was Second unto Bird, who was also killed; a Brother of Bird did prosecute this business: And there being a good and sufficient Jury sworn, he produced his Witnesses to prove a former Quarrel, and a falling out between them; upon which, and upon a mutual Challenge the one to the other, they joyned in single Combate, in the which Bird was killed; and this they shewed, to prove a continuing malice, to make this Fact to be murther. 1 Ro.Rep.360.

It was further shewed, that the cause of difference between them, and of the subsequent Challenge was first by Bird, who sent the Challenge unto Taverner, who did accept of it upon very forcible provocations, and then sent him a Letter, appointing therein the time when, and the place where they were to meet, and the Weapon to be single Sword, and withall sent him a patern thereof, and to have a Second; accordingly they met on Sunday in the Afternoon, and there did fight; the greatest part of the Witnesses produced, did shew unto the Jury that all the provocation was on the part of Bird, who sent the Challenge, and that Taverner would have had a Reconcilement made betwæn them, being very unwilling to fight upon such a slight, or rather no cause at all, being only for his refusal to pay mony unto Bird, which was owing by him to him, he being then minus sufficiens to pay this, but promised to pay him afterwards so soon as he could what was due to him; this would not satisfie Bird, but he would be revenged on him by single Combate.

The Judges perceiving the Circumstances, the which if they only were to be considered without the Law, would make the matter much favourable on the part of Taverner, therefore in this Case they directed the Jury as to the matter in Law, touching the Murther.

Coke Chief Justice. It is well said by one, Infœlix pugna, ubi plus periculum victori quam victo, (S.) (Loss of his Goods, of his Land, of his Life, and the jeopardy of Soul, without true Repentance.) This I say for Law, that if one only do give the cause and provocation, and sends the Challenge, and the other accepts of it, and upon this they enter Combate, and he which sends the Challenge is killed, this is clearly Murther in the other; for it is not material in the Law who begins the Quarrel, (so as there was a former Quarrel) and the malice still continuing until the last stroak given; for the difference will be this, if they are once reconciled for the first matter, and afterwards they happen to fall out again suddenly, and do fight, and the one kills the other, this is but a Man-slaughter.

Croke Justice agreed with him herein, and no palliating of the matter, at the place by them appointed to fight, will make any difference or alteration of the Case.

Dodderidge Justice. The place was here appointed by Taverner himself, he did fight upon the Sunday, having heard a Sermon in the morning, and the Text was, Non occides, so that it is altogether forbidden by God, because that juxta

imaginem Dei, factus est homo, No lawful cause can there be for one to fight in single Combate, but only in defence of his Country or State: He agrée in all with the other.

Coke. This is a plain Case, and without any question, if one kill another in fight, upon the provocation of him which is killed, this is Murther; here Taverner sends his Weapon, appoints the place and time, for no private provocation he ought to fight in such a manner, for it shall be Murther in him if he kills him in the defence of his Reputation. And we do all of us agrée in this, that it is clearly Murther in him, notwithstanding he kills him upon the provocation of the other, and not on his part; where time and place is appointed, they stéep upon it, and so they fight, and he kills the other, we do all agrée that this is Murther in him.

Haughton Justice. Two matters are here considerable: 1. Whether here be any excuse and extenuation of the Murther, the provocation being only by him that was killed: wherein I shall deliver my opinion, and herein I agrée to that which hath been before delivered, that when there is a mutual consent to go to a place, and there to perform the fight, where they come not for their defence, but for to fight; each of them carries Malice along with him, the one of them is killed, this is clearly Murther in the other: So I agrée herein, the Law to be as it hath bèen said.

The second matter, Whether here be any clearing of this, here a day is appointed, and a place, and two days after they do mèet, according to their appointment, this is in discharge of the malice. Taverner then said, that he did confess his error, that he did not acquaint the Judges with this matter at the first, to have had an Order by them taken therein; and he being so forcibly urged to this by threats, to proclaim him a Coward, and that he would kill him in some base manner, this error in defence of himself and of his Reputation, had caused him to fall into this inconvenience: And he said also, That the Kings Edict was not then extant, and that therefore he did very much bewail his miserable and unfortunate chance, to be the first president in this Case, to have the Trial of Law.

To whom the Court answered, You are not the first president by many hundreds, for this was the Common Law before the Kings Edict, which was but Declaratio juris antiqui & non Introductio novæ legis.

And so with this direction of the Court, the Jury found the Prisoner guilty of Felony and Murther, of which he was Indicted and Arraigned, but that he had neither Goods nor Chattels.

Upon demand of the Prisoner, by the Clerk of the Crown, what he had to say for himself, why the Court should not procéed to give Judgment upon him.

The Prisoner said, That he had nothing further to say upon this.

Croke Justice. To the Prisoner, you have bèen Indicted for this Fact, and have pleaded Not guilty, and have had a fair Trial: The Jury have found you guilty, wherein they have done very discrètly, and with good advice and judgment, they have well weighed and pursued their Evidence: And now Taverner take into thy heart with serious Meditation, all the Errors of thy life past, Turpe enim est, bene natis, & bene educatis, male vivere, as you have bèen: Now you are to prepare your self for your appearance at the Judgment-Seat of God; neither good nor ill comes to any one by chance, but by the Divine Providence of God, as touching this offence of which you are found guilty, it is an offence of Blood, a crying Sin: For offences in other matters, Gen. 3. ver. 13. Dixit Deus ad hominem, Quare hoc fecisti? But in matters of Blood, Gen. 4. ver. 10. The question there is not, Quare hoc fecisti? sed dixit Deus ad Cain. Quid fecisti? vox Sanguinis Fratris tui clamat ad me de terra. No answer to this could be made, no excuse, (in defence of his Reputation) as here hath bèen made, but this is no excuse, this matter is prosecuted, and so now to be punished, ut pœna ad paucos, metus ad omnes perveniat, for this offence of effusion of Blood, no stèveless

less excuse can serve; Cain answered to Gods question of ubi est Abel, Frater tuus? with a Nescio, Nunquid custos Fratris mei sum ego? Homo homini Deus, non lupus, None of these will serve his turn, but O quid fecisti! Infœlix victoria, where more damage comes to him which doth overcome, than unto him who is vanquished; his punishment is secret, inter pontem & fontem, he may find mercy: But as to the Murtherer, Quid fecisti for him? vox Sanguinis Fratris tui clamat ad me, &c. maledictus eris super terram & profugus eris, super terram, The civil Sword of Justice hangs now shaking over your head, Judicia Dei sæpe sera semper certa, as one well observeth, Blood it is a crying Sin, the which doth pollute the Land.

The Observation of the Barbarians, out of the light of nature, was admirable, where seeing a man to escape one danger, and to have another overtake him, as St. Paul, Acts 28. having escaped the danger of the Sea, upon the Land a Viper fastened on his hand; they censured him presently, saying, He had provoked God, that he was a Murtherer, whom though he had escaped the Sea, yet vengeance suffereth not to live; this they collected out of the Light of Nature, (but there they were mistaken in the person, but not in the matter): Here make your Repentance correspondent to your offence, Quid verba audiam cum facta videam? a Quarrel offered, and the same entertained, (on the Sabbath-day) you heard before a Sermon in the Pulpit, and the Text, Non occides; notwithstanding this, you did undertake this Quarrel, this doth much aggravate your offence, that you have not sucked so good juyce out of so good Herbs, as you ought to have done: But if you will now cry unto God truly in sincerity of heart, Domine libera me de Sanguinibus, he will then hear thee, and he hath sent his Son to this purpose, for to deliver thee, who hath said, Come unto me all that be weary and heavy laden, &c.

The Jury here have done discretly and wisely, you are now justly condemned, inasmuch as the Jury have found you guilty; the Court doth therefore adjudge, that you shall be carried from hence to the place from whence you came, and from thence to the place of Execution, and there to be hanged per collum until thou art dead, & diu à mercy de vostre ailme. Judgment.

Coke Chief Justice. If the Cause be never so important, yet it cannot allow one to draw blood of a Subject; if this were lawful, who should then live? If all be so as you Taverner have said, yet by the very letter of the Law, this Fact is Murther in you: Here a Challenge sent, accepted of by you, the Weapon, time and place agreed on, and Seconds to be, and Chyrurgions to be ready; if this be not Murther, what then shall be Murther? misera servitus, ubi jus est incognitum, you are punished here, ut pœna ad paucos. Nemo prudens punit, ut præterita revocentur, sed ut futura præveniantur; maledicta est terra propter effusionem sanguinis, nec aliter pacificatur ira Dei, nec placatur, nisi per effusionem ipsius sanguinis.

Nota, In the Case of Taverner, the Coroner gave evidence to the Jury, super visum corporis, but they would give up no Verdict, wherefore he adjourned them from time to time, and from place to place, but they would not agree upon a Verdict; upon this a Letter was sent to him from Flemming Chief Justice, not to take a Verdict of them; upon which he went to the Assizes at Hartford, and did acquaint the Judges with it; for his discharge the Jurors were fined, and the Indictment there taken at Hartford.

Coke. The Jury are to be Fined, if they will not give up their Verdict.

Dodderidge. If such packing be, the Indictment then is to be found before the Justices of Assize, as here it was: The Court commended the Coroner for his care in this business.

Grange

Grange Plaintiff against *Denny* Defendant.

Entred Mich. 13 Jac. B. R. Rot. 165.

Error in a *Quare Impedit.* 1 Ro.Rep.363. 1 Ro.Abr.772. 784.

IN a Writ of Error to reverse a Judgment given in the Court of C. B. In a Quare Impedit brought there against the Archbishop, the Bishop, and three others Defendants. The Archbishop pleads, that he claims nothing but as Metropolitan; the Bishop pleads, that he claims nothing but as Ordinary, and the three others, as disturbers, make their Title; Judgment for the Plaintiff, three Errors here assigned for reversing of the Judgment (S.)

Errors.

1. In the Quare Impedit here, Costs were assessed by the Jury; this Error was waived, being an Error only in the Jury, but no Judgment given for Costs, and the penalty of Damages include Costs. Another matter moved for Error, because there is no release of the party, of the Costs given by the Jury. The whole Court clear of Opinion, That this ought not to be, being not at all material.

2. The second Error insisted upon, That the Judgment given for the Plaintiff against the two first, (S.) the Archbishop and the Bishop, being without a Cessat executio, until the other be tried against the other three Defendants, this being one intire Quare Impedit, and for this omission, being an essential and principal part of the Judgment, therefore all to abate and to be reversed for the whole. And for this was cited 20 E. 4. fol. 1. A Quare Impedit brought by the Quéen against divers, a recovery by default against one of them. The Judgment was to have a Writ to the Bishop, and Damages for half a year, but Execution to stay till it be tried betwéen the other Defendants; otherwise this Execution against one alone would abate the Writ against the other Defendants; as in trespass against Two, the Issue is tried against One, the Plaintiff prays Execution, the Writ shall abate against the other.

20 E. 4. fol. 1.

Coke Chief Justice. If he had taken Execution against the other, it is true then, and shall be so as it hath béen said.

To prove that such a Cesser of Execution is material, and part of the Record, these Books were urged, (S.) 24 E. 3. fol. 61. Tower recovered with a Cessat executio, during the minority of an Infant, and 36 H. 6. fol. 13. in a Forger of Faux faits. So that (as it was urged) this is a material part of the Record, this being omitted in the Judgment in the C. B. being a material part of the Judgment, shall make the same to be erronious; and the entring of this at the Assizes will nothing at all aid it.

24 E. 3. f. 61. 36 H. 6. f. 13.

3. The third Error, the Plaintiff here hath Judgment, & Breve Metropolitano granted to him, where it ought to have béen Breve Episcopo. It was urged, the difference to be where the Archbishop and Bishop be Defendants, and claim nothing but as Ordinary; there it ought to be Breve Episcopo; but if the Bishop si Episcopus est pars, there it shall be Breve Metropolitano, Authorities and Presidents urged for this, Coke 6 pars, fol. 48. 6. In Boswells Case, In a Quare Impedit against the Bishop of London, and John Lancaster; the Bishop pleads, Quod ipse nihil habet, nec habere clamat in Ecclesia prædicta, nisi admissionem, institutionem, & inductionem personarum, upon this Plea, the Plaintiff had a Writ to the Bishop, sed cessat executio quousque le Plea betwéen the Plaintiff and the other be determined; and with this agrées 26 E. 3. fol. 75. Fitz. Nat. Brev. fol. 38. B. A man recovers his Presentation in the C. B. against the Bishop, he may have a Writ to the same Bishop, to admit his Clerk, or to the Metropolitan, if he will,

Difference.

Coke 6 pars, f. 48. b. in *Boswels* Case.

26 E. 3. f. 751. &c.

will, and Coke 5. pars, fol. 36. b. in Baynhams Case, Wray Chief Justice cited a Case adjudged in B. R. between Goodwin and Franklin, where a Venire facias was awarded to the Coroners, where it ought to have been to the Sheriff, and so Jurors returned by one who had no authority, that this was in the nature of an insufficient trial, and that therefore upon consideration had of 22 Eliz. Dyer, fol. 367. and of the Statutes they resolved, that this was not remedied by any of the Statutes, and therefore a Venire facias de novo was awarded. So here, as it was urged in this Case, the Writ being awarded Metropolitano, where it ought to have been Episcopo, and the party put out of possession by this misawarding of the Writ; therefore this is erronious. Coke 5. pars, fol. 58. b. in Specots Case, there Breve Johan. Archep. Cantuar. totius Angl. Primat. Loci illius Metropolitano eo quod prædictus Episcopus est pars, & Episcopus in misericordia. It was urged, that this misawarding of the Writ here, is error in Boswells Case, Coke 6 pars, fol. 52. a. that the Metropolitan shall never present by laps, but when the inferior Ordinary might have collation by laps, and surceased his time, and so is 11 H. 4. fol. 8. and Fitz. Nat. Brev. fol. 48. C. So that it was urged, the difference to be where the Ordinary is a disturber, and where not; if he be a disturber, then it is in the election of the party, to have the Writ to him, or to the Metropolitan; but where the Ordinary doth no wrong, there the Writ ought to go to the Ordinary, without any such election in the party.

22 Eliz. Dyer, fol. 367.

Coke 5 pars, f. 58. b. &c.

11 H. 4. f. 8. &c.

2. To maintain the Judgment, It was urged, the second Error to be no Error, (S.) the omission (quod cessat executio quousq;) because there was a respite of the Execution, until the Judgment given against all; therefore it was urged this omission to be no Error, these being only words of form, and not of substance, the same being only as a Caveat to the Court, that no Execution to be granted until, &c. it is but a respite of Execution, but no part of the Judgment.

3. As to the third Error, the Writ being to the Metropolitan, where it ought to be to the Bishop; this is no Error, it being here in the election of him who recovers, to which of them he will have his Writ. And if he be a disturber, or not, all is one.

The whole Court agreed in this, and made answer, That all the Books are so, that he may have his Writ to the one, or to the other, at his Election, where the Ordinary is a disturber.

It was then urged, that in this Case the party who recovered, hath election to have his Writ to the one or to the other, as appears by Fitz. Nat. Brev. fol. 38. B. It is in his election to have his Writ to the Bishop or to the Archbishop, and that without any distinction there put, 7 H. 4. fol. 37. the Bishop party to the Writ, ideo breve Metropolitano: and in his default, sede vacante, then to the Guardian of the Spiritualties, as 19 Eliz. Dyer, fol. 354. Blowers Case, and 38 E. 3. fol. 12. the Writ awarded Metropolitano, quia Episcopus Hereford fuit pars. Ut Blowers Case.

Fitz. Nat. Brev. f. 38. b.

19 Eliz. Dyer, f. 354. &c.

8 H. 4. fol. 22. The same Error there assigned, that the Writ was directed Metropolitano, whereas it ought to have been Episcopo, he not being a disturber; there it was questioned, and Norton there assigned the same Error, as here in this Case; and yet the same there held to be good. And according to this, the Presidents were urged to be so. As the old Book Of Entries, fol. 278. & 478. where the Bishop claims nothing but as Ordinary, and yet the Writ there awarded Metropolitano. Also in the new Book Of Entries, fol. 498. 501. 507. 509. & 598.

8 H. 4. f. 22.

Presidents.

Old Book Of *Entries*, f. 278. &c.

Coke Chief Justice. When the Bishop here had angred him, by accepting the Clerk of another, it is a plain Case, quia pars, he may well distrust him, and so have his Writ Metropolitano if he will. But I have always observed this, if he be party to the suit or not, it is in the election of the party to have his Writ to the Bishop, or to the Metropolitan. But I will now move another matter, not touched before; allow this Writ to be Episcopo (which seems unto me prima facie,

to

to be very hard.) There is Error in redditione judicij, and Error in executione. If you will have a Writ awarded to the Metropolitan, or to the Bishop, this is but only in point of execution; and therefore you ought to have had your Writ of Error as to this only (being but an Error in Execution, if any at all,) by this the Judgment shall not at all be shaken or reversed, (if at all, only quoad;) the Presidents in this Case will lead and direct us.

Haughton Justice. Whether may the Judges of Assise give Judgment there in a Quare Impedit?

Coke & Curia. They may so do in a Quare Impedit, and in an Assise.

Dodderidge Justice. This Rule is to be observed, (S.) That you shall not take away the Jurisdiction of any man without good and just cause, as here of the Bishop who claims nothing but as Ordinary, and no amerciament shall be here against him; for what cause therefore will you here take away from his Jurisdiction, and gives this to another? If the Bishop be a disturber, yet as to the execution of the Writ to him directed, the Law will trust him, if you which are the party will leave this unto him, but because in this Case he may delay you, it is therefore in your election either to have the Writ to him, or to the Metropolitan. And this is so where the Ordinary is a disturber; and this appears to be so by all our Books. But here the Archbishop also est pars, both of them being now in an equal degree, whether here in this Case you may take away the Jurisdiction of the Bishop; and there will be a difference betwæn this Case, and the Case of the Sheriff and Coroners, the return by the Sheriff, where it ought to be by the Coroners, is not good. For they are of so great Antiquity, that their commencement is not known, otherwise it is of a Bishop, &c. But the reason which may be made here for the allowance of this Writ to the Archbishop is this, for that he hath primam Jurisdictionem, and the Bishop hath a Jurisdiction under him, and the same drawn out of his Jurisdiction. In all the Presidents before remembred, the Archbishop is not party.

Coke & Haughton. This shall make no difference at all as to the parties election, to which of them he will have his Writ directed, he hath his election in both Cases.

Coke, 5 pars, f. 30. &c.

Coke. In Vere and Jefferies Case, put 5 pars, fol. 30. in Princes Case, I did first move this matter, where one had goods only in one Diocess, and the Metropolitan of the same Province, pretending that he had bona notabilia, in divers Dioceses commits the Administration, this is not void, but voidable by sentence, because he hath Jurisdiction throughout the whole Diocess, within his Province he hath the first Cathedral-Church, and is the Ordinary, and all other Bishops within his Province are derived from him; otherwise it is, where the Ordinary of a Diocess doth commit the administration of goods, when as the party hath bona notabilia in divers Dioceses, this is void for all; this reason doth induce me in this Case to be of opinion, that this Writ here Metropolitano is well awarded.

Dodderidge. Austine the Monk was the first Convert, and the first Archbishop of Canterbury; and he constituted one Paulinus the first Bishop of Rochester.

Richardson Serjeant. For the maintenance of this Writ here to the Archbishop, cited 8 H. 4. fol. 22. 3 Eliz. Dyer, fol. 194. Old Book Of Entries, fol. 525. placito 50. quia pars & nominatur in breve.

8 H. 4. f. 22. &c.

The whole Court agreed, If the Bishop be a disturber, that yet the party hath his election, to whom he will have his Writ.

Coke. Where the Bishop admits another man to my Benefice, this will trouble and anger me; and in a Quare Impedit against him and the other, he pleads, that he hath nothing but as Ordinary, I shall yet have my election, to have my Writ to him, or to the Metropolitan, or sede vacante, to the Guardian of the Spiritualties. And as touching the Guardian of the Spiritualties of common right, by the Common Law, the Dean and Chapter sede vacante of the Bishop, is Guardian of the Spiritu-

Spiritualties, as appeareth by Term. Pasch. 17 E. 3. fol. 23. but now the Archbishops have used to have this by way of composition, as great Lords will incroach all into their own hands. Term. Pasch. 17 E. 3. f. 23.

Dodderidge. Every Archbishop hath a Diocess and a Province, and of his Diocess he is a Bishop, and of his Province he is Archbishop, and within his Province he is to be Visitor of all the Churches within his Province, and sede vacante, of any Bishop within his Province, he himself is Guardian of the Spiritualties, of all the Bishopricks within his Province, sed sede vacante of his own Diocess, the Dean and Chapter of this is Guardian of the Spiritualties.

Coke. This did commence by way of Composition, but Originally it was not so, but the Dean and Chapter was Guardian of the Spiritualties.

Dodderidge. It doth not appear to be so by our Books, no mention being made of any such composition, but the Guardian of the Spiritualties to be according to the difference before put between a Province and a Diocess.

The whole Court clear of Opinion, That the Writ here directed Metropolitano, is well awarded, and so this no Error; but yet it rested for this time upon a Curia advisare vult. Termin. Trin. 14 Jac. B. R. This matter moved again.

Afterwards (S.) Termin. Trinit. 14 Jac. B. R. this Case was moved again, and argued. And the former Errors insisted upon; 1. Because the Judgment was without any cesser of execution, until the other matters tried.

Coke. This is no Error; for that Execution was never sued out.

The chief and main Error insisted upon, was the awarding of the Writ Metropolitano, whereas it ought to have been Episcopo, as it was urged by George Croke, if both of them had been disturbers, then he had his election to have his Writ to the one of them, or to the other. If in this Case, as it was urged, the Bishop had been condemned upon a Nihil dicit, the Writ then might have been to the Archbishop, by Fitz. Nat. Brev. fol. 38. the only Book insisted upon, being (if the Bishop be party, the Plaintiff there hath his election to have his Writ either to the Bishop, or to the Archbishop,) but as it was urged, this is to be intended where, the Bishop is a disturber, and not where he is only pars nominata, and so is the Book of 5 H. 7. fol. 22. where he claims only as Ordinary, the Writ shall be directed to him, unless there be a special disturbance shewed; with this agrees 33 H. 6. fol. 14. Bohuns Case, and 21 E. 3. fol. 30, 31. where the Rule is given, That if no disturbance be found in the Bishop, the Writ shall be directed to him, but if any disturbance be found in him, then the Writ to be at his election, to him, or to the Archbishop; and so is 20 E. 3. Fitz. title Proces placito 42. that the Writ shall not be taken away from the Bishop, but where there is a wrong assigned in his person as Ordinary, by reason of his Office; for that admission and institution belongs unto him; and as it was urged, the president in the old Book Of Entries, fol. 427. is mistaken. Fitz. Nat. Br. f. 38. 5 H. 7. fol. 22. 33 H. 6. f. 14. *Bohuns* Case, 21 E. 3. f. 30, 31. 20 E. 3. *Fitz.* &c.

On the other side, 38 E. 3. fol. 12. was cited, where by Thorp, as this principal Case is, the party hath his election, to have his Writ either to the Bishop, or to the Archbishop. 38 E. 3. fol. 22. by *Thorp.*

Coke Chief Justice. The Writ is here awarded to the Archbishop, because the Bishop is named in the Writ of Quare Impedit, and also it appears by the Record, that he had admitted the Clerk of the other, and this before the Writ brought

Denny brought the Quare Impedit against them all, and joyned therein the Archbishop also. If the Archbishop had not been named in the Writ, yet I think it had been very clear, that the Writ might have been awarded to the Archbishop, quia Episcopus est pars, and named in the Writ. And I also think, that the naming of the Archbishop in this Case shall make no alteration at all of the Case. But the reason of this is not as it hath been said, because of his supream Power and Authority, for if none of them were named, he ought to have the Writ to the Archbishop, he being the Diocesan, and not unto the Bishop, and this is clear. But the Reason is, quia pars & nominatur in Breve; It is to be considered, whether

here the joyning of the Archbishop doth make any alteration in the Case, Non quia Episcopus impeditur ideo breve Metropolitano, sed quia est pars, & nominatur in breve If this be Error, yet the same is only Error in redditione executionis, and it shall be very dangerous to reverse this Judgment for this Cause. And here also the Bishop is not an indifferent person, to whom the Writ ought to be directed.

And so without any further debate, this Case was adjourned till a further day.

At which time Richardson Serjeant moved the Court for affirmance of the Judgment.

Coke. The Law in this Case is very clear. If the Metropolitan is no party and the Ordinary is a party, he may have his Writ Metropolitano; and the joyning of them both in the Quare Impedit shall not at all hurt the matter, so that I am of opinion, that the party here in this Case may well have his Writ to the one of them, or to the other, as he pleaseth, and so his Writ here awarded Metropolitano is well awarded.

Haughton Justic. I have seen some Presidents in which the Writ hath been awarded to the Metropolitan, quia Episcopus est pars.

The whole Court, nullo contradicente, agreed clearly, That in this Case the Writ being awarded Metropolitano, is well awarded, and that the Judgment is no ways erroneous for this, and accordingly the Judgment of the Court was, Quod judicium affirmetur.

Judgment affirmed *per Curiam.*

The KING against *Rivett.*

Indictment upon the Stat. of 23 *Eliz.* c. 10.

By Indictment upon the Statute of 23 Eliz. cap. 10. for taking of Partridges, exceptions taken to the Indictment, the taking being therein laid to be cum retijs &c. & alijs, whereas there is no such words, as (cum retijs) and so the Indictment not good.

The whole Court clear of Opinion, That the Indictment was bad for this Cause.

Another matter was then moved upon this Statute, Whether such an Indictment may be taken before the Justices of Peace, or not? The Statute being that Justices of Assize in their Circuits, and Justices of the Peace in every Shire, County, and Town-Corporate within this Realm, in their Sessions, shall and may, by vertue, &c. hear, enquire, and determine of all, &c. To this it was said, Shall be examined before two Justices of the Peace, this to be by examination of Witnesses, but if the same be at the Assizes, then the same to be according to the Law by way of Indictment.

Dodderidge Justice. By this construction, both parts of the Statute do well stand together, if at the Sessions, then to pursue the course of proceedings there by Indictment, and so the Law is to be taken. But if to be examined before Justices of the Peace, this then to be taken by examination of Witnesses. Here the Indictment being cum retijs, the same is not good, and so by the Rule of the Court, for this exception the Indictment was quashed.

Indictment quashed.

Bennet

Bennet Plaintiff against *Belfield* Defendant.

IN an Action of Debt upon a Bond taken of the Defendant, being an Apprentice for to deliver up a just and true account of all such Wares to him delivered to Merchandize withall. Debt on a Bond.

The Defendant demurs in Law upon this Declaration, and for cause sets forth the Statute of 5 Eliz. cap. 4. That all Indentures, Covenants, Promises and Bargains, of or for the having, taking, or keeping of any Apprentice, &c. shall be void, and that this Bond here was so taken of the Defendant, being an Apprentice, and so void by this Statute.

It was urged, that this Bond is out of the Statute, the same being for him to yield a good and just account for all Wares to him delivered, the which to do, every one is bound, as Merchants, for Wares to them delivered, and as a Baily, to make a good account, this Case is not within the intendment of the Statute of 5 Eliz. Here are two several Deeds (S.) the Indenture for Service, which is void by the Statute of 5 Eliz. but not this Obligation by him entred into for this collateral matter, the same being for the yielding of a just Account; the intent of the Statute was to make Bonds taken for Service, to be void and of no force by this Statute, but not other Bonds.

The whole Court agreed clearly in this, that all such Contracts are out of this Statute; this Statute being to make Contracts void for the having of an Apprentice, but this Bond here is clearly out of the Statute, being for the making of a just Account.

It is a desperate way to demur in such a Case, but he ought to have pleaded, that he had made a just Account, and thereupon to have come to a fair Trial.

Haughton. Justice. This Bond here is entred into for the performance of a collateral thing, and of such a thing as of common right ought to be done, and therefore the same is out of this Statute.

Dodderidge Justice. This Bond is not for the retaining, nor for the having of him as an Apprentice. Here the Contract to make him his Apprentice is void by this Statute; but as to the Wares to him delivered, the Bond here is taken of him to render a just account of these; this is a good Bond, and out of this Statute here, the retaining is void by this Statute, but this Bond taken to deliver a just account for the Wares to him delivered is a good Bond, and clearly out of this Statute, both out of the words, and also out of the intent of the same.

And so the Court all agreeing in this, by the Rule of the Court, Judgment was given, and so entred for the Plaintiff, with a stay of Execution till the next Term. Judgment for the Plaintiff.

Fowkes Plaintiff against *Childe* Defendant.

IN an Ejectione firmæ, by Robert Fowkes against William Childe, upon Non culp. pleaded, they went to trial, and a Verdict passed for the Plaintiff. It was moved in Arrest of Judgment, that there was no good trial, the Pannel was right but the Distringas was not so, the same being between Robert Fowkes and John Childe, so that in this was the mistake, a contrary Distringas being by the Sheriff Ejectione firmæ. Cro. Ja. 396. 1 Ro. Rep. 374.

put to the right Pannel; the trial was by a right Pannel. It was moved, if he had put in the Pannel, and no Distringas, and a trial had, whether this trial had bèen good, or not? Here the Case was, that the Sheriff had two Writs, the one good, the other bad, and he returns the right Pannel; but the bad Writ, whether this be now amendable, or not?

Haughton Justice. We may here well amend Error in the Court, but not the Error of the Sheriff. If the Distringas be Album breve, it hath bèen adjudged, that this shall be aided by the Statute.

Dodderidge Justice. If there had bèen no Distringas returned, and upon this Pannel tried at the Assizes, and no Distringas returned, this is good after a trial by the Statute of 32 H. 8. cap. 30. But here it is objected, that a Writ is returned, and therefore, &c. In the Case cited it is true, there was a Writ, but unserved, because not returned; but here the Writ is returned, and the same is betwèen one of the parties and a mèer stranger, and therefore this is as no Writ, and then this aided by the Statute, being after a Verdict; here the Venire facias is well, and rightly returned, but with an ill Writ. Clarke and Walkendens Case cited, where there was Album breve.

Stat. of 32 H. 8. c. 3.

Clarke and *walkendens* Case.

Haughton & Dodderidge. This was there agrèed by the Court to be bad, (no amendment to be here in this Case) but if the trial be good, Judgment is not then to be stayed.

Dodderidge. The Trial here is good, and the false Writ is as no Writ; and so the same is aided by the Statute.

Haughton. This Trial here is not good, and therefore as touching this matter. Curia advisare vult.

This Case was afterwards moved again, the Court being full.

Coke Chief Justice. Upon the matter here, there is a Distringas in Judgment of Law, notwithstanding the Sheriff hath filed a wrong Writ, this is not material, and if it be so, that here is no Distringas, then after a Verdict, this is aided by the Statute.

It was then urged by G. Croke, that here are two Writs awarded, one for William Childe, the other for John Childe, if no Distringas be, or no Venire facias, this is aided by the Statute, but this Case is not so.

Coke. If there be a faulty Writ at any time, this is not aided by the Statute; if there be a good Venire facias well returned, though no Distringas, yet this shall be a good trial; but if it do not appear the party to be according to the Venire facias, the trial then not good, a faulty Original shall make the trial bad, No Writ there is here between the parties; as here the return is, this Writ returned is between the parties or not, if between them, then aided by the Statute, if not, yet it is safe. If one Process doth issue out for another, as a Capias for a Scire facias, if the Defendant appear, this is no Error, it is but a Discontinuance, there being a Discontinuance and a Discontinuance; also if the Coroners name be not to this, yet it is good enough, for this is out of the Statute.

Dodderidge & Croke agreed with Coke, that the trial here was good, and no cause for that which hath been moved, to arrest Judgment after the Verdict.

Haughton Justice differed in opinion, that the trial was not good.

Judgment for the Plaintiff *per Curiam.*

And so the Rule of the Court was, Quod judicium intretur pro querente.

Nota, That it was assigned for Error, that an Infant Executor did appear by Attorney, whereas he ought to appear by his Guardian.

Nota.

Haughton & Dodderidge Justices. He ought to sue by his Guardian, for though he be an Executor, and so in auter droit; yet he is, and still remains an Infant, and by consequence he is to have the priviledge of his Infancy, which is to sue by his Guardian during the time of his minority. For otherwise by Haughton Justice, it may be very greatly prejudicial to him, and he may be triced by conspiracy, if to appear by Attorney (and the usual course in such a Case is) as all the Clerks informed the Court, was for him to sue by his Guardian.

Denham

Denham Plaintiff against *Cumber* Defendant.

IN a Writ of Error, to reverse a Judgment given after a Verdict in an Ejectione firmæ, the Case appeared to be this: In an Ejectione firmæ, upon Non culp. pleaded by Dauborn the Attorney for the Defendant; a Verdict was found for the Plaintiff, who had his Judgment, for the reversing whereof a Writ of Error brought; the Error assigned was, because that no Bail was put in for the Defendant: But the Court was informed, that the Attorney had a Warrant from the Defendant to put in Bail for him, that he retained him, and paid him his Fée for this, and that the Attorney did reckon this unto him in his Bill of expences, and therefore it was prayed in maintenance of the Judgment to have this Bail now to be entred, (the same being but common Bail) which was to have bèen entred, but not done by the Attorney.

A Writ of Error. 1 Ro Rep. 372. 1 Ro. Abr. 207.

It was moved for the Plaintiff in the Writ of Error, that as this Case now is, the Bail cannot be entred, because that the Attorney which was so retained by the Defendant is now dead, and therefore no entry of the Bail now to be, but if the Attorney were living, Bail might then now be entred.

Coke Chief Justice. When the Attorney is once retained, and hath taken his Fée to do this, and doth it not, it shall be very mischievous, if for such an Error the Judgment shall be reversed, and this ought to have bèen but common Bail; and therefore to prevent such a mischief, I do agrée that this Bail shall be now entred, as of the same time in which the same should have bèen entred.

Dodderidge Justice agréed with him herein to have the Bail now entred: If the Attorney were living, we would then compel him to do this.

Coke. Here is a ground to have this Bail entred and filed, and this to be now entred, as of the same time according to which he had given his mony to have this entred, and here to have one to become Bail, great inconvenience will ensue.

Haughton Justice agréed herein, we have here ordered this before, if a Bill remains in the hands of an Attorney, and not filed; after Execution taken out, to have this filed.

Coke. We ought here of right to make a rule for the Entry of the Bail, when as the Attorney was paid for it, and did not do it as he ought to have done.

Dodderidge. Hereafter we will have common Bails viewed at the end of every Term, and if any Attorney will not enter their Bails, we will then turn him out of the Office (divers other Writs of Error are here hanging for the same matter) all which by the Rule of the Court shall now have an end.

Coke. When an Attorney appears for the Defendant, this doth include, that he is to put in Bail for him, and for the future we will certainly view the Bails at the end of every term, and take that course herein as hath bèen observed.

Judgments are not to be reversed for such Errors, if they should, it would be very mischievous: In this principal Case, notwithstanding the Attorney who had taken his Fée for the entring of Bail be dead, and no Bail as yet entred.

By the Rule of the whole Court, Bail was now entred, as of the same time in which the same ought to have bèen entred.

Bail entred, &c.

Biggs

Biggs Plaintiff against *J. S.* Parson *de D.* Defendant.

A Prohibition. Mo. 917. n. 1305. 1 Ro.Rep.378.

IN a Prohibition, a Libel being against him in the Spiritual-Court for Tythes, a suggestion there made by him for a modus of 2 s. for all Tythes; upon this a Prohibition granted; the parties at Issue upon this, went to Trial, and in this Trial, the Plaintiff in the Prohibition became non-suit, because he could not prove the modus; upon this a Consultation was granted to the Spiritual-Court, for them to proceed there; afterwards a Sentence there passed against him, against the modus; from this Sentence he appeals to another Court, upon the same Libel there against him, he suggests a new modus of 2 s. for Tythe-Corn and Hay, and upon this prays to have a new Prohibition upon the Statute of 50 E. 3. cap. 4. and this upon his own surmise, there being the same Libel as before.

Stat. of 50 *E.* 3. *cap.* 4.

Coke Chief Justice. With them double Pleas are not disallowed: This Appeal here being in the same Cause, shall not make us to grant a new Prohibition; the Statute is, after a Consultation duly granted: If a Parson do libel there for Tythes of Trees above twenty years growth, if a Consultation be granted, and he libels there again for Tythe of great Timber-Trees, he shall here have a new Prohibition, because the Consultation was not duly granted; this Act of Parliament ought to have a reasonable Construction, (S.) to be before the same Judge, and for the same Cause.

Dodderidge Justice. The Appeal doth only suspend the Sentence, but yet the same stands still in force: In this Case it would be very mischievous, if a new Prohibition should be granted; for so upon several Appeals three or four Prohibitions might be granted, which would be very inconvenient; notwithstanding the person of the Judge be here altered, yet it is for the same cause as before.

Haughton Justice. The intent and purpose of this Statute was, that he which hath but one suit, should not be infinitely troubled.

Prohibition denied.

The whole Court against the Prohibition, for the great inconvenience that might ensue, and so a Prohibition in this Case was denied.

The Spanish AMBASSADOR for his Master Plaintiff, against Captain *Gifford* Defendant.

The Bail brings in the Principal, &c. Mo. 850. 1 Ro.Rep.371. 2 Ro.Abr.491.

THe Plaintiff having a Judgment in an Action of Debt in the C. B. against the Defendant, and a Capias for the taking of him; because he could not be taken, a Scire facias was granted to him against the Bail, upon which a Nihil was returned; afterwards Gifford the Defendant brought a Writ of Error to reverse the Judgment, and by this the Record was removed in B. R. after a second Scire facias granted against the Bail, who before the return of this, in his discharge, brought in the principal, and prayed to have this here allowed; and whether this should be now allowed, or not, was the question?

Coke Chief Justice. In Sir George Bowes Case: It was resolved, That if the Bail do bring in the principal upon the first Scire facias, this de jure ought to be

be allowed; but if he will sleep, and do nothing herein till the second Scire facias, and then will bring in the principal, this is not then to be allowed of, as in that Case it was Resolved; and this was in the time of Quæn Eliz. in this Court: And so as all the Clerks did now inform the Court, it is now so used, the Recognizance forfeited for doing nothing upon the first Scire facias.

Haughton Justice. The Judgment was in Debt, a Capias returned, the new Sheriff had not executed this; a Writ of Error brought to reverse the Judgment, after the Writ is executed, this Writ of Error shall not be a defeating of the Execution; the Scire facias is for him to shew why he doth not answer, he saith to this, here is the party for whom I am Bail, this is good upon the first Scire facias.

Coke. The Court of C. B. and this do differ in this manner, there in the C. B. they have but one Scire facias, but here we have two; the Record is here removed before the second Scire facias, and therefore he is not to bring in the principal, after this is removed by a Writ of Error, and so this is not now to be allowed; and this the Clerks did affirm to be the ancient use in this Court, to allow of this bringing in of the principal upon the first Scire facias, but not upon the second: But yet of later time they have here used the contrary (in the time of Popham Chief Justice) to allow of this bringing in of the principal by the Bail, before the return of the second Scire facias, (as in this principal Case it now was) but otherwise it was resolved in Bowes Case, the same to be allowed upon the first, but not upon the second Scire facias.

Dodderidge. State super vias antiquas, this is a sure and the best way, and therefore this is not to be allowed upon the second Scire facias.

And so by the Rule of the Court, this was disallowed, being upon the second Scire facias, according to the resolution in Bowes Case.

The bringing in of the principal by the Bail, &c.

Langworthy Plaintiff against *Scott* Defendant.

Error.

IN a Writ of Error to reverse a Judgment, given in the Manor Court of Tiverton, where they prescribed to hold Plea of any sum, if it be in any matter touching the Stannary. Nota, there were two Courts, (S.) The Manor Court of Tiverton, and the Fee-Court: The Manor Court was in Cornwal, and the Fee-Court in Comitatu Devon.

Langworthy brings his Writ of Error upon a Judgment given in the Manor Court, whereas in verity the principal Judgment was given in the Fee-Court in Comitatu Devon, so that herein he hath mistaken himself.

Dodderidge Justice. Upon a Judgment given in the Stannary-Court, the course is, 1. To appeal to the Vice-Warden, 2. From him to the Warden, and after to the Duke himself of Cornwal, when he hath had his Livery.

Coke Chief Justice agreed with him herein, but before this, that he hath his Liberty to appeal: 1. To the Warden, and afterwards to the Council: But no Writ of Error lieth upon a Judgment there given, for any matter touching the Stannaries; but upon a Judgment there given upon collateral matters, a Writ of Error well lieth, and this hath been so before resolved, as the same is to be seen recorded in the Chancery, in the Petty-Bag Office, by all the Judges, upon a Conference had.

The whole Court of Opinion, That this Writ of Error, as it is here brought, is not good.

Termin.

Termin. Trin. 14 Jac. *Banco Regis.*

Cowper Plaintiff against *Frankline* Defendant.

Entred Termin. Trin. 13 Jac. B. R. Rot. 941.

Trespass and Ejectment. 1 Ro.Rep.332. 384. Cro. Ja. 400. Mo. 848. n. 1152. Godb. 269. 1 In.19.6. the Limitation of the use is void 2 Ro.Abr.719.

IN an Action of Trespass and Ejectment, upon Non culp. pleaded, the parties were at Issue, and went to Trial; the Jury found a special Verdict, upon which Verdict the Case was briefly this, (S) One John Walter being seised of Soccage Land in Fee-simple, conveys this Land by Deed of Feoffment, unto Thomas his Son in this manner, (S.) To him, and to the Heirs of his Body, Habendum to the use and behoof of him and his Heirs for ever; who afterwards deviseth all this by his Will to one, under whom the Plaintiff claims: The points moved in this Case were.

First, What Estate Thomas the Son had by this Feoffment limited in this manner, Whether he hath an Estate tail, or in Fee-simple.

The second question, Whether Tenant in tail may be seised to another use.

Term. Hill. 13 Jac. B. R. &c.

Nota, That this Case was argued, and long debated by Counsel of both sides, Termin. Hillar. 13 Jac. B. R. with some Opinion of the Judges herein. And then,

Coke Chief Justice. Whether Tenant in tail may be seised to an express use? I have much staggered herein (but in this, Mr. Plowden was always confident that he could not) to an implied use, without all question he cannot stand seised: In this Case we are to judge, like Judges, upon the Fabrick of the Deed.

A Feoffment at the Common Law made to one, and to the Heirs of his Body, was a Fee-simple conditional; afterwards the limitation is, to the use of him and his Heirs; these are to be such Heirs as were named before.

As if a Feoffment be made to one, and to his Heirs, as long as J. S. shall have Heirs of his Body, to the use of him and his Heirs; no new Heirs by this is to have this Land, but the Heirs of his Body.

If a man be seised of Land, to him and to his Wife, and to the Heirs of him who levies a Fine without any consideration, this shall be to the use of such Heirs as the Estate before was; and so in this principal Case, upon the composition of this Deed, the meaning was, that he should have but an Estate tail, and no Fee-simple.

Dodderidge Justice. If Land be given to one, and to his Heirs, as long as J. S. shall have issue of his Body, the remainder over, this is a Fee-simple determinable, and the remainder is void.

Croke Justice. Here his meaning was to make a restraint, hæredibus prædictis.

Stat. of 32 H.8. &c.

Dodderidge. Is not this here a Fee-simple within the Statute of 32 H. 8. cap. 1. Of Wills? clearly it is.

Coke agreed herein with him, for a determinable Fee-simple is devisable within that Statute: But if the same be limited to one and to his Heirs, during the life of another, this is not devisable within the Statute, and so is the difference.

And

and to this purpose, see 8 Eliz. Dyer, fol. 253. placito 99. & 100. Cassandras Case. We are here Judges of the Law. To this purpose is the Case of Odiham remembred 8 pars, fol. 118. b. in Doctor Bonhams Case, where Carter was Plaintiff against Ringstead, Hillar. 34 Eliz. C. B. Rot. 120. where A. was seised of the Manor of Staple in Odiham, in Comitat. South. in fee, and also of other Lands in Odiham in fee, suffers a common recovery of all, and declares the use by Indenture, that the recoverer shall stand seised of all the Lands and Tenements in Odiham, to the use of A. and his Wife, and to the Heirs of his body begotten; he dies, and his Wife survives, and enters into the Manor, by force of the general words, adjudged that these shall not extend to the Manor, which was specially named here in this principal Case, it is to the use of him and his Heirs; these shall be the Heirs of his body.

8 Eliz. Dyer, f. 253. &c.

Coke 8 pars, f. 118. b. &c.

Dodderidge. Before the Statute of 27 H. 8. cap. 10. of Uses (S.) in 24 H. 8. Brook, title Feoffments to Uses, placito 40. it was held for clear Law, that Tenant in tail could not stand seised to the use of another. It is now to be considered, whether the Statute of 27 H. 8. cap. 10. hath made any alteration in this, or not?

Stat. of 27 H. 8. c. 10. Of Uses.

Coke. The Statute of 27 H. 8. doth only execute old Uses, but doth not create any new Uses.

Dodderidge. The Case in 2 Eliz. Dyer, fol. 186. is good Law.

Coke agreed with him herein.

Dodderidge. By the Use, another Estate may be than what was before.

Coke. I have always thought, that Tenant in tail by express limitation cannot stand seised to the use of another.

Dodderidge. Without all question he cannot be seised to an implied use, but the question here will be, whether he may be seised to an express use. If Land is given to one and to his Heirs, and if he dies without Heirs of his Body, the remainder over, this is a good remainder by 35 Assisar. placito 14.

Coke at this time inclined to be against the Plaintiff.

Afterwards (S.) Termin. Pasch. 14 Jac. B. R. this Case was moved and argued again; with some opinion of the Judges further herein.

Term. Pasch. 14 Jac. B. R. &c.

It was urged for the Plaintiff by George Croke, That quacunque via data here is a good Estate tail; and if one brings an Ejectione firmæ for the whole, having title but unto a moity, yet as it hath been here adjudged against Bracebridges Case in Plowdens Commentaries, he shall have Judgment for a moity.

Dodderidge. In 24 H. 8. Brook before remembred, it was adjudged by all, that Tenant in tail cannot stand seised to the use of another.

Croke. By express limitation it may be to the use of another.

Haughton Justice. This is a great question, and very considerable.

Croke. The intention of the party is here to be regarded.

Haughton. It is agreed, that before the Statute of 27 H. 8. this was no good use.

Dodderidge. The Case in 24 H. 8. was before the Statute Of Uses. The reason then was, that if he did execute an Estate according to the use, the issue may reduce this back again by his Formedon.

24 H. 8. Brook.

Haughton. The Law will not suffer nor compel one to do a void thing.

Dodderidge. This Case is put in Walsinghams Case, in the Commentaries.

The whole Court then said to the Plaintiff, That his best way would be to have a Judgment for a moity as a Coheir. The Court inclining to be of Opinion, that Tenant in tail cannot be seised to the use of another. And so for this time the Case was adjourned.

Afterwards (S.) in this Term of Trinit. 14 Jac. B. R. this Case was moved again. And the Judges briefly delivered their Opinions herein.

Term. Trin. 14 Jac. B. R. &c.

Coke. The Estate here is an Estate tail, and this subsequent use thus limited,

 doth

doth not alter the Estate, and this is the stronger, being made to the party himself; and I am very clear of this opinion, and this is stronger than if it had been to a stranger, this here is to the use of him, and the Heirs of his body. It is an ill office of an Interpreter to confound the intent of the party who made the Deed. The Statute of donis conditionalibus, saith, finis ipso jure sit nullus.

I also am of opinion, that tenant in tail cannot be seised to a Use; he cannot execute any Use, no more than a Corporation, 24 H. 8. Brooks Cases before remembred, and 27 H. 8. fol. 10. in Dockwrayes Case to this purpose.

Croke agreed with him herein, and for the same reason, and that these last words in the Deed are more by way of explanation than of limitation; and these words ought to be applied to the sense and meaning of the party, and do not enlarge the precedent Estate no more than a warranty shall do, and so of the use here.

And as for the second point, It is very clear, that Tenant in tail cannot be seised to the use of another.

Dodderidge agreed with him herein.

1. It is clear, that this Estate, as the same is limited by the Deed, is an Estate tail.

And for the second Point, be it by way of limitation, before the Statute of 27 H. 8. or after the Statute, Tenant in tail cannot be seised to the use of another. Before the Statute (S.) 24 H. 8. Brook before remembred, being a Resolution of all the Judges, that he cannot be seised to the use of another.

24 H. 8. *Brook.* *Plowdens Com.* f. 555. &c.

In the second part of Plowdens Commentaries, fol. 555. in Walsinghams Case, it is there said by Manwood, That if one be seised in fee, and at this day makes a gift in tail to one, to the use of another in fee, now by this the cesty que use, who hath the Land, by the Statute of 27 H. 8. hath one Fee-simple in the Land determinable, upon the Estate tail, and the Donor another. But Note there by Plowden, that this cannot be so by Law, for that a use cannot be limited upon an Estate tail. As it is adjudged in 24 H. 8. Brook Feoffment to uses, placito 40. and Brooks Cases, fol. 11. placito 60. And the true reason why before the Statute of 27 H. 8. Tenant in tail cannot stand seised to the use of another, is because he cannot be compelled to execute this, and if he do execute it, his Issue may fetch it back again by his Formedon. For as it is in the Statute of Westmin. 2. cap. 1. De donis conditionalibus, voluntas donatoris in charta sua manifeste expressa, de cetero observetur, and this is not to be altered. Here it is limited to be to the use of his Heirs; this ought to be such Heirs as before were expressed in the first part of the Deed, and this to be so is a very plain case. And so this Land then is to descend and come unto the two Daughters as coheirs, and so the Plaintiff ought only to have Judgment for a moyty; as for that which belongs unto one of the Daughters under whom he claims.

24 H. 8. *Brook* Feoffments &c.

The Stat. of *Westmin.* 2. c. 1. *De donis.*

Haughton agreed herein in opinion with him, upon the Resolution in 24 H. 8. and no difference there will be, whether the same be before or after the Statute of 27 H. 8. Of Uses, the Case in 24 H. 8. over-rules this Case; also this use here doth not alter the nature of this Estate, contrary to the first limitation.

Coke. I was always of this opinion, That Tenant in tail cannot execute a use, and that by the Statute of Westm. 2. cap. 1. if a Fine be levied, finis ipso jure sit nullus.

Judgment for the Plaintiff for a moyty.

The Court all agreeing clearly herein. Judgment was entred for the Plaintiff, but only for a moyty, which belonged to one of the Daughters and coheirs, under whom the Plaintiff claimed the whole.

Cotten

Cotton Plaintiff against *Wescott* Defendant.

IN an Action upon the Case for a promise, upon Non assumpsit pleaded, a Verdict was given for the Plaintiff, George Croke moved the Court in Arrest of Judgment, that the Declaration is not good, there being no good consideration therein set forth to raise the promise, the same being for a consideration past, and so not good. The Case for this being, That the Defendant was a Suter to a young Maid, who did sojourn in his house, afterwards the Defendant did marry her. And did then desire the Plaintiff, that his Wife might still continue to sojourn with him for a year longer, to which the Plaintiff agreed; and that afterwards, (S.) such a day and month, &c. which was then about the middle of the year, the Defendant did promise, that in consideration that he would suffer his Wife to continue there as a sojourner for the whole year, that he would then pay him for the whole year, (as well as for that which was past, as for that which was to come.) And so it was urged, that this Assumpsit was grounded upon a consideration past, which is not good in Law, and so is 10 Eliz. Dyer, fol. 272. the Case of the bailment of the Servant.

Action upon the Case on a promise. 1 Ro. Rep. 381. 1 Ro. Abr. 12.

10 *Eliz.* Dyer, f. 272.

Coventry for the Plaintiff; If the Case had been so, that the whole year had been past; and then the Defendant had come to the Plaintiff and made this promise, that in consideration he would sojourn his Wife for a year longer, he would then pay him for this year, and for that which was past before; this had been a good consideration to raise a promise, for that he is at a prejudice by this, for peradventure he would not have sojourned his Wife for this last year, if it had not been for the promise of payment of the first mony.

Coke Chief Justice agreed this to be a good consideration to raise a promise.

Coventry. This doth not differ from the principal Case; for although the Plaintiff had agreed to sojourn the Defendants Wife for a year, yet there was no certain Sum agreed upon to be paid for the same, and therefore it was in his election to keep her till the end of the year, or not; and therefore if the Defendant had not made this promise in the middle of the year to pay him so much, he would not have sojourned his Wife until the end of the year.

Croke. I agree the Case in 10 Eliz. of the bailing of the Servant to be so, and I agree also, that if all the year had been past before the Assumpsit had been been made, that this had not been good: But here, inasmuch as this was before the year was ended, this is a good promise, grounded upon a good consideration.

Dodderidge Justice agreed with him herein; and here the sojourning of the Wife was at his request in principio anni. If upon request, one becomes bail for J. S. in an Action against him; if afterwards, hanging the Action, he doth promise to discharge him of this; this is a good consideration to raise a promise, by reason of the request precedent.

Coke agreed with him herein, because the Action here was continuing.

It was then urged, that here is another consideration for another promise in the Declaration (S.) In consideration that the Plaintiff should board the Defendant for a quarter of a year to come, he did assume to pay him tantum, quantum meritus esset, and doth alledge, that he did board him for eleven weeks, and so of his own shewing; it appears that he had not boarded him for the whole quarter.

Coke & Dodderidge. This is good enough, for if he would not come to board

to the Plaintiff after the eleven weeks, yet he shall pay him for the time that he had been with him.

It was then further urged, that the Plaintiff in his Declaration sets forth divers promises to pay, tantum, quantum meruit, for the doing of divers things, and hath set forth performance of them, and that he deserved so much for every one of them in particular, the which in toto, amounts to such a sum, which the Defendant, licet sæpius requisitus, hath not paid, so that it appears that here are several promises, and but one demand made.

Coke. Yet this is good, for the words licet sæpius requisitus; and contractus est quasi actus contra actum; and if one contracts to pay unto another for any thing, tantum, quantum meruit, as for a quarters board, if he will go away two or three days after, he shall pay for the residue.

Judgment for the Plaintiff *per Curiam.*

Nota, That in this it was agreed by Coke and Croke, that an Infant shall not be charged, upon his promise for the board of a stranger, but otherwise it shall be for his own board.

The whole Court agreed the Declaration to be good, and the promise grounded upon a good consideration, and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

18 E. 1. *Waylands* Case. 1 Ro.Rep.400. V Mo. 851. 1 In. 132.

Nota, Upon a motion made in Court, It was questioned, whether the Wife of a banished man should have her Joynture?

Coke Chief Justice. In 18 of King E. 1. there was a famous Case, and it was Waylands Case a Judge, and banished by Parliament. Then they held Pleas in Parliament. There were then three things offered unto Wayland.

1. Whether for the offence laid to his charge, he would be tried by Parliament? Or second, to be perpetually imprisoned. Or third, whether he would be banished?

He made his choice of Banishment; and so he was accordingly banished by Parliament; and his Wife then brought her Writ of Dower. It was held the same did not lie, but an Action by her brought for a personal wrong done to the Estate which he had conveyed to her, was held well to lie, but not Dower. It was then questioned, whether after the banishment of her Husband, she should then enjoy her Joynture setled on her for her life, or not? To the debating of this Case, all the Kings Council, and all the Judges were called. And it was then upon good advice and great deliberation Ruled, and Resolved by them all, That she should have her Joynture, and enjoy the same during her life, after the banishment of her Husband; which she enjoyed accordingly.

Presidents, &c.

And three other Presidents, there are as touching this matter, (S.) one in the time of King R. 1. and two in the time of King H. 3. so that the Case of the Wife of Sir Robert Belknap, in the time of King H. 4. was not the first Case, though it was there said, Ecce modo mirum, quod fœmina—— that a Wife brought a Writ without her Husband, yet this was no great marvel, for she shall have an Action, and be accounted of as a feme sole, when her Husband is banished by Parliament, or abjures, and no other kind of banishment there is of which our Law takes Conusance. Belknap was banished, and his Wife had her Dower.

10 E. 3.

Dodderidge Justice. This is not the first nor the second President, for in 10 E. 3. the Wife of one Matravers brought a Writ of Dower, her Husband being in banishment, and held maintainable.

The

The KING against the Major and Burgesses of the City of *Glocester*.

A Writ of Restitution being directed to the Major and Burgesses of the City of Glocester, for to restore Taylour to the place of Alderman, he being by them removed from his said place; upon this a return was made by them, wherein they express several causes of his removal, exceptions taken to this return, and argued by Coventry for Taylour, That the return was not good, Termin. Pasch. 14 Jac. B. R. The causes therein specified, for his removal being not sufficient. The one cause being, for his lending of mony unto young men by the hands of his Wife. This as it was urged was no cause at all, being but a collateral cause, and not trenching to things incident to his place as an Alderman, and for this he is to be punished by other means, and not by removal, as it was here adjudged in Bags Case, Termin. Trin. 13 Jac. and Reported, Coke 11 pars, fol. 93. and the other causes specified in the return are of the same nature; Also it is there expressed for a cause that he was a Drunkard. This is no cause to remove him. Also the return in this is insufficient, expressing therein, that by their Letters Patents, of their Incorporation, it is specified, That the Major and the Common Council may remove him; and that they ought to be 30 of the Common Council. But it doth not appear by their return, that any Common Council was held by them for this business; In the return it is specified, that he called unto him 30 of the Common Council, & in domo consilij, being assembled, they there for these causes did remove him. But it is not shewed by them in the return, that this was so done by them at a Common Council.

A Writ of Restitution, *Glocester*. 1 Ro.Rep.409. 2 Ro.Abr.455.

Term. Pasch. 14 Jac. B. R. argued.

Trin. 13 Jac. B. R. &c.

Croke Justice. A common Drunkard, is an unfit person for Government.

Dodderidge Justice. Bags Case, which was here cited, was for undecent words spoken. But take heed of overt acts, as here in this Case. And so further time was given by the Court in this Case; for the reading of the Record, and for further argument of this.

Afterward, in this present Term of Trinity, 14 Jac. B. R. this Case was moved again, upon the insufficiency of the return, and a Writ of Restitution prayed. It was now urged, that their Common Council ought to consist of 30 Burgesses at least. It is set forth in the return, that he was called before 32 of their Common Council, and because he did not give sufficient answers to the matters objected against him, they did therefore remove him. If he had cause to be restored, and they did not restore him, he may well have (as it was urged) his Action upon the Case at the Common Law; he having a Freehold in his Burgership, by the Law of the Land. Also this Charter may extend to one that is elected an Alderman, after the Charter, but not to him that was one before, and this is not shewed by them in their return to be so; that he was elected an Alderman after their Charter; their Charter also is, That the Major and the Common Council, this ought to be done by them, at a Common Council, but it is not so set forth to be. It was therefore prayed, upon the insufficiency of the return, to have him to be restored.

Term. Trin. 14 Jac. B. R. &c.

Coke Chief Justice. The Charter is the Major and the Common Council, &c. This ought to have been done by them at a Common Council. And of this there ought to be given to him a lawful warning, for if they will assemble themselves together in a corner, or at an Alehouse, there they cannot displace him: But this ought to be done by them in their Common Council-house, and also at a Common Council there held, otherwise the same not good.

If one be a Magistrate, being a common Drunkard, this is a personal offence, and a good cause to remove him, because this goes to the point of his Government, and therefore this is a good cause to remove him, for that such a person gives an ill example to others, and for this cause is an unfit person to Govern; otherwise it is if he be drunk by accident.

Dodderidge. In Glocester they have a large and great Precinct, six miles, and the Aldermen there are Justices of the Peace within the City, and at the Assizes they have a place to sit by themselves.

Haughton Justice. Here the removing of Taylor was in the Council-house, but in the return, it is not said to be at a Common Council there held, as it ought.

The Court all agreed, the return not to be good, and so by the Rule of the Court, a Writ of Restitution was granted, to have him restored to his Burgesship.

Afterwards, Mountague the Kings Serjeant being not satisfied with this, moved the same again, and took exception to the Writ of Restitution, being directed to the Major and Burgesses, whereas the same ought to have bèen to the Major and Common Council, who removed him; the Writ to have him restored, ought to be directed to them who removed him, and to them the power is given by their Charter to remove, and not to the Major and Burgesses.

To this it was answered, That the Writ was well awarded; for whosoever hath power to remove, yet the Writ of Restitution ought to be directed to them who have power to elect and place, and these are the Major and Burgesses, and therefore the Writ being directed Majori & Burgensibus is good.

Coke. The Writ of Restitution ought always to be directed to them which have the Inheritance, and this is in the Major and Burgesses, and therefore the Writ here is well awarded, for the Major and Common-Council do make but a part of the Body, and so the Writ well awarded.

As to the other matter, clearly this removal ought to have bèen at a Common Council, and not as here it is in the return, for a return ought to be as certain as a pleading.

Coke 8 pars fol 122. &c.

Wagganors Case, Coke 8 pars, fol. 122. was then objected, to prove that such precise certainty is not requisite to be in a return.

Coke & Curia. Yet there ought always to be a convenient certainty in a return.

Haughton. It is said, that this removal was in domo consilij, but not apud commune consilium, as the same ought to have bèen, and so not good. As if one should say, Judicium redditum in Aula Westmonasterij, this is not good, but he ought to say in what Court, and before what Judges; this is the chief matter, and therefore the certainty of this ought to have bèen alledged in the return.

Coke agreed with him herein, and therefore by the award of the Court he ought to be restored to his place.

Mountague then moved the Court, Whether notwithstanding this Writ of Restitution, they may not proceed there again against him at a Common-Council.

Coke. This they may well do, if they have good cause, but yet with this observation, That they are to do that which is justum and juste; justum for the matter, and juste for the manner: And clearly if a Magistrate, an Alderman be Ebriosus, common, and not by accident, he is an unfit person for Government, and this is a good cause to remove him.

A Writ of Restitution, &c.

The whole Court agreed herein: By the Rule of the Court, a Writ of Restitution was awarded for the restoring of Taylor to his place of Alderman, because that by the return, it appears that he was removed from his place, in domo consilij, but not apud commune consilium.

Austin

Austin Plaintiff against *Monk* Defendant.

Entred Termin. Pasch. 14 Jac. B. R. Rot. 544.

IN a Scire facias upon a Recognizance, the Case was this: Austin recovered in Debt in this Court against one Down, who brought a Writ of Error to reverse this Judgment in Camera Scaccarij, which was returnable 3. Februarij last, and did find Bail, according to the Statute of 3 Jac. cap. 8. the Defendant Monk being his Bail, and bound in a Recognizance, that Down should prosecute his Writ of Error with effect, and to satisfie the Debt and Damages, if the Judgment was affirmed, and that 12. Februarij the Scire facias was brought against him upon the Recognizance, to know why he should not have his Execution, in regard that Down did not prosecute his Writ of Error.

A *Scire facias.* Mo. 853. Poph. 186 1 Ro.Rep 392. Cro. James 402.

The Defendant to this pleads, that whereas the Writ of Error was returnable 3. Februarij, Down the principal 2. Februarij, venit hic in Curia, & reddidit se in eadem Curia, in discharge of his Bail, & per mandatum Curiæ committitur Mariscallo, & adhuc remanet, in the Prison of the Marshalsy in the Execution; upon which Plea the Plaintiff demurred in Law.

It was urged by Davenport for the Plaintiff, that this rendring by the principal of his Body, in this Case shall not discharge the Bail, because he is bound to satisfie the Debt and Damages.

And the intent of the Statute of 3 Jac. was to give a certain remedy against the Bail, and here the Recognizance is forfeited, for that the principal did not prosecute his Writ of Error, for the purchasing of the Writ of Error was a delay of the Execution, ab initio, because he did not prosecute the same.

Coventry for the Defendant: If this be within the words of the Statute of 3 Jac. yet it is not within the intent of it: For here the principal renders himself in Execution, before the return of the Writ of Error, and so before any delay was by him; and also in this Case the Judgment was never affirmed, and therefore upon this Recognizance he is not to be charged; the Statute was made for the avoiding of unnecessary delays, here the principal party renders his Body, and it is not the meaning of the Statute, to give a double satisfaction for one and the same thing.

Coke Chief Justice. I think that this Recognizance upon the Statute of 3 Jac. and a Recognizance at the Common Law, in which the Bail is entred, are all one in Judgment of Law, the same being to pay the Debt, and satisfaction, if the Judgment be affirmed.

In 16 H. 7. fol. 2. If the Plaintiff in a Writ of Error at the Common Law be bailed, yet he may afterwards render himself in Execution; so that here in this Case, the principal rendring himself, shall discharge the Bail of his Recognizance, upon the Statute of 3 Jac. as well as it should do at the Common Law.

Haughton Justice, to the contrary, for upon this Statute the Bail shall not be discharged by the principals rendring of himself, for this was never the meaning of the Statute.

It was then further urged by Davenport, That here by the Plea of the Defendant himself, it appears that the principal did not render himself to prison in Execution, for the Plea is, that the 2. Febr. Down the principal venit hic in Curia, & reddidit se in eadem Curia, & quod per mandatum Curiæ Committitur, to the Marshalsy,

Marshalsy, & adhuc remanet in the Marshalsy in Execution; and it is apparent, that the said second day of February was Candlemas-day, and so non dies juridicus, and then he could not render himself the same day, and this appears so to the Court judicially.

To this it was answered, that though he cannot render himself in Court upon this day, yet he may well this day go to prison, and so he may on this day well render himself to prison; and it is said further in the Plea, that he still remains in the Marshalsy.

It was then urged, that it is expressly here pleaded, that he did render himself, hic in Curia, & quod per eandem Curiam Committitur, and so the Plea not good.

The whole Court agréed herein, That the Plea was not good.

Coke. He doth not in the Plea here say, Quod reddidit se prisonæ, sed venit hic in Curia, & in eadem Curia, reddidit se prisonæ, and this is here impossible to be so, for here ought to be a Court-day, or no render of himself could be in eadem Curia.

Also it ought to be, in eadem Curia reddidit se, & per eandem Curiam Commissus, for the Court ought to commit him; and it is not sufficient for him to render himself, but he ought to be committed in Execution per Curiam, and this to be so, is here impossible, because it appears to us, that this second day of February, non fuit dies juridicus, and therefore this is without any help; and if this Commitment be bad, the same being, as it is alledged, to be on the Sabbath-day, this clearly is not good, because this was no Court-day, & quod ab initio non valet, in tractu temporis non convalescit, & quæ mala sunt inchoata in principio, vix bono peragantur exitu.

Haughton agréed with him herein, for if he be in prison, yet if this be so, without a render of himself, and a commitment by the Court, all is void; and as it is here alledged, it is void in Law, and therefore by the Rule of the Court for this default in pleading, Judgment was given for the Plaintiff.

Judgment for the Plaintiff, &c.

Webb Plaintiff against *Herring* Defendant.

Entred Termin. Hillar. 13 Jac. B. R. Rot. 544.

Trespass and Ejectment. Bridg. 84. Cro. Ja. 415. 75 1 Ro Rep. 398. 436. Hob. 32. 1 Ro. Abr. 843. Mo. 7. 13. 852. 864. 1 Ro. Abr. 835. Cro. Eliz. 21.

IN an Action of Trespass and Ejectment, and upon Non culp. pleaded, the Jury found a special Verdict, upon which the Case appeared to be, That a man being seised of certain Houses in Fée, held in Soccage, having a Wife named Barbery, a Son called Francis, and three Daughters, and being thus seised, he makes his last Will and Testament in writing, and thereby devileth his Houses and Land in this manner, (S.) To Francis my Son, after the death of Barbery my Wife: And if my three Daughters do fortune to overlive their Mother, and Francis and his Heirs, then I do devise the same Houses to them for their lives, and after their deaths, I do give them to my two Nephews, John Wittenbury and William Wittenbury, and that they and their Successors shall pay 3 l. Rent yearly to the Company of Merchant-Taylors in London for ever; and if they fail of payment, then I devise that the said Company shall have the said Houses for ever.

The Points moved and insisted upon in this Case.

1. Point,

1. Point, Upon the words of the Will, being to Francis his Son, (after the death of the Barbary his Wife, and Mother of Francis, and if he dies without Heir, that then his three Daughters, and Sisters of Francis, (S.) Annice, Alice, and Margaret,) to have the same for their lives.

The question is, What Estate Francis the Son hath by this Will, whether by the Devise and the Words of the Will he hath an Estate-tail, or a Fee-simple.

In this Case it appeared, that Barbary the Wife and Francis the Son were both dead, and Francis dead without Issue; the Plaintiff claimed under the Title of the two Nephews, and the Defendant under the Title of Margaret, as Sister and Heir unto Francis.

George Croke for the Plaintiff, urged for the first Point, That Francis by this Will had but an Estate Tail, and no Fee-simple, 27 H. 8. fol. 27. devise to one, and to his Heirs Males is an Estate tail: If Land is given to one and his Heirs, Habendum to him and to the Heirs of his Body, this is an Estate tail, by 22 H. 6. 22 H. 6. f. 25. &c.

25 Assisar. placito 4. Land given to one and his Heirs, Habendum to him and his Heirs, if he have Issue of his Body, adjudged to be an Estate Tail, and so is 27 Assisar. placito 15.

43 Eliz. Hortons Case, Lessee upon Condition, that he shall not assign this to his Wife, he devileth this to his Son after the death of his Wife: Resolved, that by this devise no Estate was given to the Wife, for that then this would have been a forfeiture; otherwise it had been if it had not been for the forfeiture. 43 Eliz. &c.

Here in this Case (as it was urged) when the Devise is to the Son after the death of the Wife, and if the three Daughters survive the Wife, and the Son, and his Heirs, then the Devise is to them for life, with the remainder over; this had been a Fee-simple in the Son, if it had not been for the limitation of the remainder over: But by the limitation of the remainder over, his intent appears, that it should be an Estate tail in the Son; for that, if it should be a Fee-simple, the Daughters should have had this after the death of the Son, without Issue, without any new limitation, for the Son cannot die without Heir, as long as he hath Sisters; and it shall not be intended, that they were but of the half-blood, and therefore to make these remainders good, this shall be but an Estate tail in the Son.

It was then urged, this to be a Fee-simple in the Son; as if a man having two Sons, devileth his Land to his eldest Son and his heirs, and if he dies without Heirs, the remainder to the other Son; this is a Fee-simple in the eldest Son, and the remainder to the youngest Son is void.

Coke Chief Justice denied this to be so, upon the reason before given.

The whole Court agreed this difference, where the remainder (as in this principal Case) is limited unto a collateral Heir, and where the same is limited to a meer Stranger: If it had been to a meer stranger, then this had been a Fee-simple in Francis the Son, and so the remainder there had been void, because that one Fee-simple cannot be thus limited upon another; but otherwise it shall be, where the remainder is limited unto a collateral Heir, there the same is good, being but an explanation of the form.

Dodderidge Justice. As to this first Point, this of necessity ought to be an Estate tail in Francis the Son, and it cannot be otherwise taken, without great absurdity.

Coke. Every man hath lineal and collateral Heirs, (if any) and here in this Case, it is as much as if he had said, That he devised these unto Francis and his lineal Heirs; and if he die without such Heirs, then to his collateral Heirs, and this clearly is but an Estate tail in Francis.

If a man hath two Sons, and devileth his Land to his youngest Son, and if he dies,

dies without Heirs, then to his eldest Son in fée; this had been an Estate tail in the younger Son, for that otherwise the remainder should be void.

The whole Court clear of Opinion, That Francis the Son, by the words and meaning of this Will, had but an Estate tail in him.

2. As to the second Point, What Estate the two Nephews, John and William Wittenbury have by this Will, the devise being to them, and that they and their Successors shall pay so much yearly to the Poor of such a Company in London for ever, and if they do not pay this, that the Company then to have this for ever.

It was urged, that this is a Fée-simple in them, because it is that they and their Successors shall pay such an annual Rent perpetually: And that by the word Successors, is intended Heirs, 4 E. 6. Brooks Cases, fol. 87. placito 406. Brook tit. Estate, placito 78. Land devised to one, paying 10 l. this is a Fee-simple.

Haughton Justice. This is Fée-simple in them; the word Successors shall be intended Heirs.

Coke. Here the Land is devised to them, paying yearly so much for ever; the profits of the Land is not here found.

It is a plain Case, if Land be devised to one, and that he shall pay so much yearly to another, and to his Heirs, this is a Fée-simple in the Devisée, for he ought to pay this for ever, and to be enabled to do this out of the profits of the Land, he ought to have a Fée-simple in the Land: Also the word Successor in a Will is sufficient for Heirs; and therefore if one doth devise Land to a man, and to his Successors, this is a good Fée-simple to him.

Croke Justice agréd with him herein.

Coke. It appears by Bracton, that Successor is a good word to make a Fée-simple in a private person, because the Heir succedit patri; and therefore if one deviseth Land to a private man, and to his Successors, this shall be a good Fée-simple; so here in this Case, the Nephews, John and William have a Fée-simple, being in a Will where the word Successor will imply Heir; otherwise it would be in Case of a Grant, and so is the difference; and here the words, paying so much perpetually unto the Company, to be given to the Poor of the Company perpetually, and the Condition annexed, that for default of payment, the Company then to have this for ever; this doth well shew and manifest the intent of the Devisor, that this should be a Fée-simple in the Nephews.

Haughton agreed with him herein, for here he ought to be his Successor in the Estate; for if a man doth devise Land to one and to his Successors, this is clearly a good Fée-simple in him, because his Heir is to succéd him in the said Inheritance.

The Court all agreed herein, and therefore by the Rule of the Court, Judgment was to be entred for the Plaintiff according to this resolution, (both the Points being over-ruled by the Court.)

But upon the motion of Hutton Serjeant, being of Council with the Defendant, by the Rule of the Court, this Cause was adjourned till the next Term.

Term. Mich. 14 Jac. B. R. &c.

Afterwards, (S.) Termin. Mich. 14 Jac. B. R. this Case was moved again, and argued on both sides.

Coke 8. pars, fol. 85. &c.

It was urged, that the two Nephews should have a Fée-simple, by reason of the annual payment limited to be made by them for ever, to such a Company in London; and Sir Richard Pexhalls Case, Coke 8 pars, cited fol. 85. there to have the Rent as long as he is to keep the Courts; so here to have the Land as long as they are to pay the yearly Rent.

As to the Estate of Francis, It was urged, that he had but an Estate tail by this Will: That the subsequent words in a Will shall explain the former; and so upon Construction of Deeds, as appears by 35 Assisar. placito 14. & 37 Assisar. placito

placito 15. and Perkins, cap. fait, fol. 35. placito 171. Dedi, &c. totam terram meam Habendum, sibi & hæredibus suis, si hæredes de carne sua habuerit, this is an Estate tail, and here the subsequent words do explain the former; and upon this reason is 5 H. 5. fol. 6. and Coke 8 pars, fol. 154. in Sir Edward Althams Case. *Perkins fait, plac. 15.*

Here in this Case, it shall be intended to be Heirs of his Body, because a remainder is made to be dependant upon this.

19 Eliz. Dyer, fol. 357. Chicks Case: In Case of a Will, such an exposition is to be made, as that all the parts thereof may stand together.

If an Alien be made a Denizen, Land is given to him and his heirs, the remainder over; this is a good Estate tail to him, because he can have no other Heirs but lineal, not collateral.

16 Eliz. Dyer, fol. 333. Chapmans Case: In case of a Will, where a less implication shall make an Estate tail, there a Proviso to restrain alienation, and therefore an Estate tail: Here there is no Estate in Francis, in the first limitation; but afterwards, (S.) if the three Daughters overlive, &c. and then the remainder over; so that lay all together, by the meaning of this Will Francis had but an Estate tail.

Hutton Serjeant, for the Defendant urged, that Francis the Son, by this Will, had an Estate in Fee-simple, and that for this reason, because there is no remainder in them presently, but upon a mere contingency, and upon a double contingency; and until this be made certain by the happening of it, nothing is in them before this do happen.

And 19 H. 8. fol. 8. b. by Englefield, A man doth devise Land to H. in Fee, and if he dies without Heir, that then M. to have the Land; this is a void devise to M. because that one Fee-simple cannot depend upon another Fee-simple by the Law.

And so this Case was adjourned to a further time.

Afterwards, (S.) Termin. Hillar. 14 Jac. B. R. this Case was moved again. *Term. Hill. 14 Jac. B. R. &c.*

And for the first Point.

Montague Chief Justice. Francis the Son here by this Will hath an Estate-tail, and the same so to be taken of necessity by implication, out of the words of the Will; this proved by 16 Eliz. Dyer, fol. 330. Clatches Case. *16 Eliz. Dyer, fol. 330. &c.*

The whole Court agreed with him herein.

As for the second point, paying to a Corporation so much yearly for ever.

Mountague. This is a Fee-simple in them.

Dodderidge Justice. If one doth devise Land to J. S. paying to J. D. and his Heirs so much; this is in Law a Fee-simple in J. S. because the limitation of payment which ought to guide the precedent Estate is so.

The whole Court agreed with him herein.

And so clearly by the whole Court, nullo contradicente, for both the Points, (S.)

That first, This is an Estate-tail in Francis. And

That secondly, This is a Fee-simple in John and William the Nephews, and therefore Judgment was given for the Plaintiff. *Judgment for the Plaintiff, &c.*

Morrice Plaintiff against *Baker* and *Elizabeth uxor ejus* Defendants.

Entred Termin. Mich. 10 Jac. B. R. Rot. 521.

Trespass for assault, and of a servant. Bridg. 47. 1 Ro.Rep.393. 2 Ro.Abr.145.

IN an Action of Trespass, for assaulting, beating and wounding of his Servant, per quod servitium amisit, ad damnum 40 l. The Defendant, quoad vi & armis, the battery and wounding pleads Non culp. and justifies the assault, and shews, that he was possessed of a House, and there had a Light time out of mind, That the Servants of the Plaintiff did intend and endeavour to erect another house upon a certain wast piece of ground adjoyning to his house, and had erected certain timber for the house, the which house, if the same had bæn erected, would have stopped up his said ancient Light; and for this cause, that this would have bæn to his Nusans; he stood in his own house, & cum quodam baculo, did thrust away Tho. Davis and Richard Jones, his Servants by him imployed in the building; and did then throw down the timber so erected, and so doth justifie.

Upon this Plea in Bar, the Plaintiff demurs in Law.

1. It was argued by Bridgeman and Coventry for the Plaintiff, that this Plea was not good. For that the principal point of the Action, is the loss of his service, as appears by 3 H. 6. fol. 54. b. 20 H. 7. fol. 5. That an Action of Trespass lieth not, without saying, per quod servitium amisit; and the Defendant here in his justification, doth justifie the battery, but saith nothing to the loss of his service; he hath therefore by this his Plea made no answer at all to the Plaintiff, for that which is the ground and cause of the Action (S.) the loss of his service, this ought to be by the Defendant confessed and avoided, or else denied, the which is not here so done; here is nothing shewed, but that they did this by the command of the Plaintiff; he ought here to have pleaded Non culp. to all; in the Plea he saith, he thrust them away, this cannot be any loss of service. He shews that Thomas Davis and Richard Jones, the parties and servants imployed by the Plaintiff in the building, and that he impedivit novum edificium; and thrust them away, quæ est eadem transgressio, unde, &c.

3 H. 6. f. 54. b. 20 H. 7. f. 5.

2. Also the Plea is not good for another cause, for he shews that he was possessed of a house, but doth not shew of what estate he was possessed, 43 Eliz. B. R. Eedes and Marches Case in a Declaration, this is good adjudged, but otherwise it is in a Plea in Bar, as in this Case; But in an Action upon the Case for a Nusans, there it is good to say that he was possessed generally, without shewing of the Estate, because this is but a conveyance to the Action; otherwise it is here in a Plea in Bar, for that upon this Plea, no issue can be taken upon the Estate.

43 Eliz. B. R. &c.

3. It was also further urged, that the matter of this Justification is no sufficient cause of justification. For in the Plea he saith, that they did endeavour for to erect a House, and that they did erect certain Timber, and that the house, if it had bæn erected, would then have bæn to his Nusans; so that he threw it down before the same was any Nusans to him, and none can divine whether it would have bæn a Nusans to him or not before it happened. Also he cannot justifie a battery for a Nusans to his possession.

It was urged for the Defendant, that the Plea was good, and 10 R. 2. Fitz. title Labourers, placito, a good Case touching a Justification; there he answers the other Objection of Conabatur, here their endeavour was manifest, a wrong attempted,

10 R. 2. *Fitz.* tit. Labourers placito 60.

tempted, 16 H. 6. fol. 65. where one may justifie, and where not, in defence of his possession, a man may justifie, 19 H.6. fol.3. 9 E.4. fol.28. 18 E.3.fol.22. 17 Assisar placito 24.

16 H. 6. f. 65. 19 H. 6 f. 3. 9 E. 4. f. 28. 18 E. 3. &c.

That a Purchaser shall not have an Audita querela, before he be hurt.

Coke 5 pars, fol. 101. b. in Penruddocks Case in the end of it, there it is held, That a Feoffee may abate a Nusans, before he hath any prejudice by it; the reason given, that he shall prevent his prejudice, and not to stay till it happens; there the Nusans was executory, and yet might be thrown down, before the same came to be actual.

It was urged, that the Plea was good, without shewing what number of years he had in his House: If this be good in a Declaration, where more certainty is required, à fortiore, it shall be good in a Plea in Bar. As touching this, Coke 10 pars, fol. 59. in the Bishop of Sarums Case, where the difference is put betwæn an allegation, of a conveyance to the matter, and the matter it self; and so is 11 H.4. fol. 89. where a Prescription to a Lect by a que estate is good, being in point of conveyance; and so is 19 R. 2. Fitz. title Action upon the Case, placito 51. And here in this Case he shews, that he was possessed of the Lease of his House, only by way of conveyance, to his justification. It was urged, That the Declaration here is not good; the Plaintiff shews therein, that servientes & operantes were beaten, but doth not shew how they were his Servants.

Coke 10 pars, f. 59. &c.

Coke Chief Justice. He saith nothing here in this his Plea to any verberation, for he shews that he was possessed of the Lease of a House, that the Plaintiff had a piece of waste ground, juxta, &c. and that the Plaintiff Conatus fuit, for to edifie there a House, the which if he had finished, this would have stopped his Lights, and that therefore he thrust them away, and hindred them, and for prevention of this, he threw that down which was erected. The Declaration here is good, and the Plaintiff ought not to shew therein how he had retained them. The Rule which was last put is not good, being that this which is good in a Declaration, shall be good in a Plea in Bar. This Plea here amounts to the general issue. No Action is given to the Plaintiff here, if he hath not loss of his service, for this is the sole ground of the Action, given unto him for this loss of service, and if he hath no such loss, then the Servant is only to have the Action of Battery. If the Defendant had pleaded here Non culp. and then only shewed, that impedivit with a staff, the Jury would then say, that this is no battery, per quod servitium amisit, when he saith, he did but only hinder him; and so this Plea amounts unto the general issue.

As to the second matter, whether the Defendant may pull down the Nusans before the house be made, and so come to be a Nusans; I do much doubt of this; but I think he cannot do this, Nemo tenetur divinare, here it is only said Conatus fuit, to edifie this house, and rear up the timber, the Defendant hath no hurt by this, for he may afterwards leave off again; the Defendant is not to pull this down, here he would pull this down, for his intent only, whereas he may after forbear, for that melius recurrere, quam male currere, here it is said, that molliter, he laid his hands upon him. If one take my goods, in preservation of them, I cannot so do. If one comes upon his own Land and intends to come upon my Land, conatus est to come on my Land, upon this Imagination, I am to lay hands upon him, I never saw in any Book such a Justification for a Conation, because he did not do it; and I do much marvel, that any one should give such advice for such a pleading as this is, the best way for the Defendant had been to have pleaded Non culp. to all.

Haughton Justice. This Action here rests upon two points and parts. (S.) The Battery, and the loss of his service, the original is the Battery, if the Defendant answers to the battery, and doth well justifie this, this is good, without saying any thing to the loss of his service. As in an Action brought for an assault by Servants; and they do justifie their assault, this is good.

As

As to the second matter, you have come too soon, to cast this down before it was made, for if he have an intent to build a Wall, and lays the foundation, you ought not to disturb him for this his inception, you cannot pull this down.

Croke Justice. The Defendant ought to have damnum & injuriam, or his Justification not good. If he have none of these, his Justification cannot be good. It doth not here appear that he hath any damage, his Plea here amounts to the general Issue. One may cut down Boughs, if they hang over his ground; here the Plaintiff hath not builded, and therefore what he hath done, not to be pulled down.

Coke. There is no colour of any Defence to be made of this Plea. He saith also in his Plea, that he was possessed of a Lease for certain years, but shews not that this doth continue, this is not good, and this shall not be intended.

If I am upon my Land, and another upon his Land, and that he endeavours to come to me, and to take my goods, I cannot justifie the coming upon his Land to beat him for this endeavour, 14 Eliz. an Action upon the Case brought, for beating of him, and his Servants, and omits these words (S.) (per quod servitium suum amisit) Judgment and damages given generally, there it was said, that it shall be intended, that these damages were given only for the battery. But here it was said, that when the Plaintiff alledges two things, and an Action is brought for both of them, and damages given generally, these shall be said to be given for them both; and therefore it was adjudged here by the whole Court, that he should have Judgment for no part; here he might have pleaded the general Issue, and this had been his best and surest way.

14 Eliz.

But such demurrers are desperate.

Judgment for the Plaintiff, *per Curiam.*

The whole Court clear of Opinion, that the Plaintiff here needs not to shew, how he was retained his Servant, and so the Declaration here is good, and the Justification bad, and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

May Plaintiff against *Proby* and *Lumley* Sheriffs of *London* Defendants.

Entred Termin. Mich. 13 Jac. B. R. Rot. 639.

An Action upon the Case for an Escape. 2 Cr. 419. Mo. 852. Jo. 201. Eliz. Cr. 868. Noy 40. 1 Ro. Rep. 388. 1 Ro. Abr. 99. Poph. 192.

IN an Action upon the Case for an Escape brought against the Sheriff of London and Middlesex, who pleads that he had taken away the party upon a Latitat, and that in bringing of him from Islington prædict. unto the Goal, Rescous was made of him, and so returns the Rescous, as the same was, The question was, whether this was a good return, or not?

This Case being of great concernment, was argued by Council of both sides.

Coventry, for the Plaintiff urged, that this return of the Rescous is not good, and so this is no good Plea; but that this Action upon the Case well lieth against the Sheriff, for suffering of this Rescous, though the arrest was but upon a mean Process; the Action well lies for this escape, being once taken by him, and this is proved by a President of a Case shewed in Court, which was Termin. Mich. 44 Eliz. B. R. Rot. 177. between Waldoe and Lamberd, where it was held, that a Rescous shall not excuse the Sheriff in an Action upon the Case, brought by the party upon the escape. Also it is here said in the return, that in bringing of him from

Term. Mich. 44 Eliz. B. R. &c.

from Islington prædict. he was rescued from him, whereas nothing was at all said before of Islington, and so the return not good. This will be the difference (S) that a Rescous in such a Case, as is here, shall discharge the Sheriff, as to the King; but not as to the party himself. The Book of 16 E. 4. fol. 3. is against this, but Lambers Case is adjuged in point for the Plaintiff, and not upon the point of travers, as hath been urged. And if this should excuse the Sheriff, the same would be very mischievous, for then no such mean Process should ever be served; the Sheriff may take with him posse Comitatus if he will in case of a mean Process, and 16 E. 4. fol. 3. it is not the principal Case, but an opinion there put obiter in the argument of that Case, but in Waldoes Case it was so adjudged in point, contrary to the opinion in 16 E. 4. 16 E. 4. fol. 3.

George Croke for the Defendant, That this return is good; the party was here arrested by the Sheriff upon a Latitat, and rescued from him as he was bringing him to Prison; an Action upon the Case lieth not against the Sheriff for this; and herein there will be a difference between an Arrest upon a mean Process, and a Rescous made, and where it is upon an Execution; as to the parties remedy by way of Action upon the Case, where the Arrest is upon a mean Process, and a Rescous made, no Action upon the Case lieth for this by the party; for that upon every mean Process the Sheriff ought not to take with him posse Comitatus, 16 E. 4. fol. 3. this very Case is put by Catesby, and agreed, that during the time the Plea hangs in Process, the party shall not have an Action upon the Case against the Sheriff if a Rescous be returned, because the party may continue his Process against the Defendant; otherwise where a Judgment is given, and the party in Execution by his body, a Rescous there shall not excuse the party; where it is but upon a mean Process, there the prejudice is only the loss of the Process, and he may have a new Process; and with this difference agrees 3 H. 6. Fitz. title Attachment, placito 1. & 7 Eliz. Dyer, fol. 7. Eliz. Dyer, fol. 241. placito 74. where the Rule is put, that upon a Capias ad satisfaciendum, or a Capias utlagatum, after Judgment the Sheriff himself shall be charged for the escape, otherwise the party hath no remedy, he shall lose his Debt; but otherwise it is in case of a mean Process. As to the manner of the Plea (S) apud Islington prædict. this agreed to be idle (but the Plea being, that having been arrested in bringing of him from Islington, in the County of Middlesex to prison, he was rescued from him, this is good, 6 H. 7. fol. 12. to this purpose, where it is in Case of an Execution, this is then no plea for the Sheriff; for he ought here to take with him posse Comitatus; otherwise it is, upon every mean Process. 16 E. 4. f. 3. 3 H. 6. Fitz. title Attachment, placit. 1. 7 Eliz. &c. 6 H. 7. f. 12.

Coke Chief Justice. This is a very great Case, and worthy of good consideration, whether the Sheriff may return a Rescous in his discharge upon an arrest in a mean Process, the Case remembred in 44 Eliz. was so as it hath been cited, that in such a Case an Action upon the Case did lie against the Sheriff; but as to this, Qui bene distinguit bene docet, where the Arrest is at the suit of the King, and a rescous returned, potentia sequi debet justitiam, non antecedere, and the Book of 16 E. 3. Fitz. title Execution, placito 49. is so to be understood, where the party taken is rescued, the Sheriff shall be discharged for any Fine to the King, because he hath not his body; but this shall not discharge him of the Action upon the Case, as to the party himself, at whose suit he was taken. The arrest here was upon a Latitat, and this in trespass declares, but with an intent to implead him in debt; this for the Jurisdiction of this Court. A Rescous is no excuse of an ill return; as it was adjudged in 44 Eliz. As to the other matter moved, if Islington be not named before, this is idle. 44 Eliz.

Coke Justice. This Rescous here shall excuse the Sheriff à tanto, sed non à toto as to the damages; this is the first time of moving this.

The Court upon this first opening, inclined to be of opinion for the Plaintiff, that

that this return was not good; but of this the Court would further advise; and therefore by the Rule of the Court, this Case was adjourned to another time.

Afterwards, (S.) Termino Hillar. 14 Jac. B. R. this Case was moved again, and argued.

Mountague Chief Justice. This is a great Case, and of great consequence, and fit to be very well considered of.

Haughton Justice. If the Sheriff takes one upon a mean Process, after a Rescous suffers him to escape; shall the Sheriff be excused for this, or not?

Mountague. For a Non fezans, as if a Sheriff refuse to execute a Process, an Action upon the Case lieth against him for this.

Dodderidge Justice. If the Sheriff suffers a Prisoner to escape, an Action upon the Case for this lieth against him. Here it is to be considered, Whether it shall be so in Case of a Rescous by him returned upon a mean Process, the party being arrested, and rescued. No power by intendment is able to resist the Sheriff, and his power, who hath posse Comitatus at his command, whether he shall be compelled to raise this force of the County for to serve and execute every mean Process that comes unto him, this is the only matter now considerable, if he be not compelled to do this, then there may be a power stronger than he.

Montague. The Law doth always suppose the Sheriff to be still with force. The point here in this Case being, whether the Sheriff arresting of one upon a mean Process, who is rescued from him, shall for this Rescous be excused, or not? Curia, Of this, advisare vult.

Afterwards this Case was moved again.

16 E. 4. f. 3. Stat. of *West.* 2. cap. 43.

Dodderidge. The Action upon the Case here brought doth not lie, 16 E. 4. fol. 3. this is so there agreed by the Statute of Westminster 2. cap. 43. It is greatly in derogation of the King, that the Sheriff should return, that he could not have the body there, propter resistentiam. And Coke 5 pars, fol. 115. in Foliambs Case, in a Writ of Estrepement, the Sheriff may take posse Comitatus, and so in a Replevin by 8 H. 4. fol. 19. where the Sheriff returns that he could not have the Beasts; for which return he was amerced. If the Sheriff takes one in execution for debt, and after suffers him to escape, there the Debt is gone, and the Process served; and therefore if he should not have in such a Case his remedy against the Sheriff by way of Action, he should then be without all remedy, but it is not so here in this principal Case, for here it is for the indempnity of the person, this being upon a mean Process he hath not by this lost his debt, but only the person which may be taken again; and therefore the Sheriff shall not be punished for this Rescous by an Action upon the Case; and by Fitz. Nat. Br. fol. 102. the last Case in his Writ of Rescous, that a Writ of Rescous lieth by the party against the Rescussors, by which it appeareth that he is not without remedy; but this Action upon the Case here by him brought against the Sheriff doth not lie.

8 H. 4. f. 19.

Fitz. Nat. Br. fol. 102.

Haughton. I did at the first much doubt of this Case, but now for that it shall be mischievous to the Sheriff to be compelled to have with him always posse Comitatus, and the party always hath his remedy, as it hath been shewed; therefore I hold, that this Action upon the Case brought here against the Sheriff doth not lie; and the Recussor shall be doubly punished by the King, and by the party.

Croke. I did long time much doubt of this Case, but I am fully resolved, that this Action upon the Case doth not lie against the Sheriff, the Sheriff may punish the Rescussors; sub modo, this return is good; if the Sheriff returns, that he was rescued from him by a stranger, this is no good return; but if he further adds these words, Et non est Inventus in balliva mea, this is good, but not otherwise; for if he leave these words out of the return, the return then is not good; The Sheriff is compellable to make the Arrest, and if he be once in the custody of the Sheriff, there he shall be charged, but by his saying, I arrest you, he is not by this

this in his Custody, for to charge him with an Action, and here this Action doth not lie against the Sheriff.

Mountague. This is a great Case. Here the Sheriff returns, that he had arrested the party, and that in bringing of him towards the Prison, he was Rescoused from him. As touching this matter, these differences do appear in our Books.

The first difference is this. If in the arresting, the party is rescoused, be it upon an Execution, or upon a mean Process, No Action for this lyeth against the Sheriff.

The second difference; If the Prisoner be arrested, and in bringing of him towards the Goal, he is rescoused from him, No Action lieth for this against the Sheriff, (as this principal Case here is) the same being upon a mean Process; and so is 16 E. 4. fol. 3. before remembred. 16 E.4. f.3.

But if it be upon an Execution, Caveat vicecomes. But if he had arrested him, and brought him to the Goal, then it is no good return for him to say, that the Goal was broken, and so he was taken from him, as the Case in 16 E. 4. fol. 3. Bastard Falconbridges Case is, When a Prisoner is once taken, and in Execution, there is then a determination of all the mean Process; But otherwise it is, where he is taken upon a mean Process, for there he may have a new Process again. 16 E.4. f.3.

By the Statute of Westminst. 2. capite 43. touching the returns of Sheriffs. *westm.2. c.43.* Multoties etiam falsum dant responsum, mandando, quod non potuerunt (exequi) præceptum regis propter resistentiam potestatis alicujus magnatis, de quo caveat vicecomes, de cetero, quia hujusmodi responsio, multum redundat in dedecus domini regis, & coronæ suæ. 7 Eliz. Dyer fol. 241. upon an Execution, there is no return to be made; otherwise, where upon a mean Process; the reason is, because the Sheriff is not bound to have posse comitatus, upon every mean Process; If the Sheriff takes one upon a mean Process, before he commits him to the Goal, the party cannot have an Action for the rescous, otherwise it is where he is in Prison, where the Sheriff hath an Action given unto him, for rescous done, there the Sheriff is chargeable over to the party, and is subject to an Action, where he may have an Action, as where the party is in Execution, but not otherwise. Here in this Case, we do all agree, that the return here is good, and that the Action upon the Case here lieth not against the Sheriff. 7 Eliz. *Dyer* f. 241.

Dodderidge. A Rescussor shall be doubly punished, for upon the return of the Sheriff, he shall be fined to the King, and an Attachment shall issue out against him.

2. The party also shall have a Writ of Rescous against him; which is proved by 3 H. 6. Fitz. title Attachment, before remembred; and Fitz. Nat. Brev. title Rescous, the last Case. *3 H. 6. Fitz.* tit. Attachment.

And so by the Rule of the whole Court, the return here of the Sheriff was held to be good, and by consequence, the Action upon the Case here brought against the Sheriff lieth not.

And therefore by the Rule of the Court, nullo contradicente, Judgment was entred, quod querens Nil Capiat per billam. Judgment *quod querens Nil capiat per billam.*

Howson Plaintiff, against Sir *William Fountain* Defendant.

A Writ of Error. 1 Rol. R. 381. 1 Rol. Ab. 289.

IN a Writ of Error, to reverse a Judgment in the C. B. for him, the Error assigned was, for that the Defendant in C. B. appeared per Wilde, Attornatum suum, and no Christian Name of the Attorney is entred.

The Court was moved to have this amended.

Coke Chief Justice. This is not good, neither can the same be amended; we cannot know what is intended by this: And so when I was at the Bar, it was in the like Case resolved; where a Defendant did appear per Cutting Attornatum suum, without any Christian Name, and resolved, that the same was not good; And another Case there was here of the same nature, where a Defendant did appear per Higgins Attornatum suum, without any Christian Name, and held not good, but if it had been once right, with his Christian Name, and afterwards the same omitted: In such a Case we may well amend this, for we have here a good warrant in the Record to do this.

Dodderidge Justice agreed with him herein; and so in the Case in Dyer, where one did appear per Willburn Attornatum suum, and held not good, and that this is not to be amended.

A *Certiorare* granted.

Afterwards the Counsel for the Defendant, perceiving the opinion of the Court to be against him, that this was not good, nor yet amendable, moved the Court for a Certiorare, supposing the Record in C. B. to be otherwise; and accordingly a Certiorare was granted by the Court.

Rudge Plaintiff, against *Thomas* Defendant.

Covenant. 1 Rol. R. 403.

IN an Action of Covenant, the Plaintiff in his Declaration sets forth, That the Defendant was Parson of Dale, and did Covenant, that the Plaintiff should have his Tithes of certain Lands for 13 years; and that afterwards he resigned, and another Parson inducted, by which means he was ousted of his Tithes, and for this cause the Action brought.

Stat. of 13 *Eliz.* &c.

The Defendant pleads in bar the Statutes of 13 Eliz. cap. 20. and 14 Eliz. cap. 11. for Non-residency, upon which Plea, the Plaintiff demurred in Law.

It was urged for the Plaintiff, that the Plea in Bar was not good, because it is not averred, that the Defendant had been absent from his Parsonage by the space of 80 days in a year, for otherwise, the Covenant is not void by the Statutes.

For the Defendant: It was alleged, that the pleading of the Statute of 13 Eliz. is idle, but by the Statute of 14 Eliz. this Covenant is made void; for by the Statute, all Covenants shall be all one with Leases, made by such Parsons: And in this Case, if this had been a Lease, this had been clearly void by surrender of the Parson; and so in Case of a Covenant.

Dodderidge, & Haughton Justices. The Statutes of 13 and 14 Eliz. do not meddle with assurances at the Common Law, nor intended to make any Leases void, which were void at the Common Law; And therefore this Covenant here is not made void by the Statute, unless he be absent eighty days from his Parsonage.

Coke

Coke Chief Justice agreed herein with them: If a Parson doth Covenant that another shall enjoy his Land for 21 years, and he afterwards Resigns, he shall be bound by his Covenant; So if he be bound by his Obligation to make such a Lease, this is good, and shall bind him; and so it was adjudged in the C.B. in the Dean and Chapter of Norwiches Case, when I was there Chief Justice: And so it is, if Tenant for life doth Covenant that another shall enjoy his Land for 21 years, and he afterwards commits a forfeiture, he shall be bound by his Covenant.

Dodderidge & Haughton agreed with him herein: They all agreed in this Case for the Plaintiff, and that by the preamble of 14 Eliz. it is shewed; the intent of that Statute to be to make Covenants void, within the provision of 13 Eliz. by absence for 80 days.

In this Case, by the Rule of the Court, Judgment was given for the Plaintiff. Judgment for the Plaintiff, *per Curiam.*

Bacon Plaintiff, against *Waller* Defendant.

Entred Termin. Mich. 13 Jac. B. R. Rott. 62.

If a Replevin, William Waller the Avowant confesseth the Lease made to one Winchcomb, who makes another Lease to John Waller from the 25 day of May, who assigns this Lease unto William Waller the Avowant, being also seised of the Free-hold for the whole term (but one day) and avows by reason of this Lease now, as a Lease made 25 Maij, Habendum a datu, for 31 years, (and from the day of the date) upon this Avowry the other demurs in Law, and for cause sheweth that here is a departure from the Lease first alledged, and by which the Avowant claims; and if no departure, yet here is a surrender of that Lease being made to him who had the Free-hold. A Replevin & Avowry. 1 Rol. R. 387. 2 Ro. Abr. 497, 498. 520.

The first Question moved when this Lease should begin, (S.) being made the 25 of May, Habendum a datu, whether it shall begin the said 25 day of May, or not; to this purpose Claytons Case, Coke 5 pars, fol. 1. remembred, and 11 Eliz. Dyer, fol. 286. Coke 5 pars fol. 1. &c.

A Case between Powel and Nanney was likewise urged, which was Termin. Trin. 4 Jac. in Scaccario, where a Lease was made in like manner, as in this principal Case, and the difference there taken, where the day is parcel of the computation of time, and where it is parcel in point of Interest. Termin. Trin. 4 Jac. &c.

5 Eliz. Dyer fol. 218. The case of an Inrollment where the day shall be exclusive, and where not.

And a case which was Termin. Mich. 8 Jac. B. R. entred Termin. Trin. 8 Jac. B. R. Rot. 150. Lluellen & Morgans case, a Monmouthshire case, where a Lease was made, 1 Maij, Habendum a datu præsentium, and declared upon a Lease made a die datus, the Jury found the Lease to be a datu præsentium: The question was, whether this had maintained his declaration: It was adjudged that this finding of the Jury was pursuant to his Declaration, that the Declaration was good, and Lluellen accordingly recovered; and in this case by the Judgment of the Court, a Lease made, Habendum a datu, & a die datus, is all one. Mich. 8 Jac. B. R. &c.

As to the second question, whether here was any surrender of the Lease, or not; the case for this being, That Lessee for years makes a Lease to the Lessor for all the term excepting one day.

It was urged, that the Lessor hath this as a dis-joyned Lease, and not as a sur-

render, being possessed by vertue of the Lease, and seised by vertue of his Freehold.

Coke Chief Justice. I would not in this Case have demurred upon this Avowry, but would have pleaded unto it, we will peruse the Records that have been cited; the best way is to waive the Demurrer (being a desperate course of practise,) and to plead to the body of the matter, and so to put the truth of the matter in issue.

As touching the Surrender, if Lessee for 100 years grants unto his Lessor all his term, (excepting one year) this is no surrender clearly, and so likewise it is if there be a saving to himself, a month, a week, or a day; this is no surrender, and this is very clear that he shall have this, as in several; the main and principal point is, A Lease made, habendum, a datu, & a die datus, whether this be all one or not.

Judgment for the Avowant *per Curiam.*

As to this, The whole C. agreed in opinion according to the Judgment given in Lluellins case, that the same is all one, that the Avowry is good, and no departure; and that unless the Demurrer be waived, and a Plea to issue; by the Rule of the Court Judgment to be given for the Avowant.

Tisdall Plaintiff, against Sir *William Essex* Defendant.

An Action of Covenant. Hob. 34. 1 Brownl. 23. 1 Ro.Abr.847. 4 Co. 80. 1 Cr.Car. 207. Cr Jac.92.172. 1 Ro.Abr.430.

Mich. 36 & 37 *Eliz.* B.R. *&c.*

IN an Action of Covenant, the Case appeared to be this, Sir William Essex did Covenant with Tisdall the Plaintiff, quod haberet, possideret, & occuparet, such Land, from such a time for the space of 7 years without any disturbance, and the Plaintiff did also Covenant to pay unto him 200 l. a year Rent for the same, and being disturbed in his enjoying thereof, brought his Action of Covenant.

For the maintaining of which, and that this should in Judgment of Law be a good Lease, Sir James Harrintongs case was cited, which was Mich. 36 & 37 Eliz. B.R. Rot. 226. where it was resolved, That Articles of agreement to have Land for such a time, resolved to be a good Lease, (but Nota, That in that case there were words of demise, and also rent reserved.) In this case it was objected, It was not so, and that this should be no Lease; to this it was answered, That Articuli Cleri so called, yet the same amounted to an Act of Parliament. If one be seised of Land, and doth licence another to enjoy his Land, and to occupy the same for a time certain, this should be a Lease as it was urged. And if a Licence shall amount unto a Lease, so will a Covenant also.

Nota the difference.

Coke Chief Justice. The difference will be between a Covenant made by one, being owner of the Land, and where the same is made by a Stranger, who hath nothing at all in the Land; If the same be made by one who is the owner of the Land, with such a rent to be paid, this shall amount unto a Lease, otherwise it is where the same is made by one who hath nothing at all in the Land; and this will be the difference. In the 1 Case it shall amount unto a Lease, but in the second Case where he hath nothing in the Land, it shall be only as a bare Covenant and no more.

Here in this principal case it was said, that the Lord of Northampton was seised of the Land, and therefore the first words because he was not the owner of the Land, did only amount unto a Covenant, and not unto a Lease.

Coke 9 pars, f. 46. &c.

An Objection was made, that here is no special disturbance laid, as it is in the Earl of Shrewsburies Case, Coke 9 pars, fol. 46. that here is no breach of Covenant laid, and that (impedire) is not good, without some special allegation of disturbance, that the first President for this is, Coke lib. Entries fol. 9. (impedire) as it was urged, is not sufficient, but he ought to have shewed (coment.)

9 Assisar.

It is laid here, that he did enter, & conatus, to take the possession, and they did disturb him, and put him out.

Coke.

Coke. This is a sufficient disturbance, 9 Assisar. If I have but one way to my Mill an Assise lieth, if I am hindred in the using of my way, by him who is owner of the Land. In this principal case here is a good disturbance laid.

Dodderidge Justice. If this here, as it is laid be not a breach of the Covenant, I do not then know what shall be a breach.

Coke. He doth here Covenant to do this, this shall be as against all Men, as the case in 18 E.4. fol.20.b. is of a general and a special Licence.

18 E. 4. fol. 20. b.

And so without any further debate, the Court over-ruled this case, that here was a clear breach of Covenant, this being a very plain Case; and therefore by the Rule of the Court Judgment was given, and so entred for the Plaintiff.

Judgment for Plaintiff, &c.

Flemming Plaintiff, against *Yates* Defendant.

Entred Termin. Pasch. 10 Jac. B. R. Rot. 113.

IN a Writ of Error to reverse a Judgment given in the Court of C. B. In an Action upon the case there brought upon the Statute of 13 R. 2. capite 5. for suing the Court of Admiralty, for a thing done infra Corpus Comitatus. In which Action 20 l. damages, and 20 s. costs was given. 1. Error insisted upon because he doth not say that it was enacted by the Statute of 13 R. 2. but quod in statuto continetur, the Presidents being, quod in statuto in Parliamento tenent', &c.

Error.

Stat. of 13 R. 2. c. 5.

Curia, Over-ruled this to be no error at all.

The second Error, that the Declaration was not good, (Si quæ facta, facta fuerit, whereas it should be (fuit) and 5 Mar. Dyer fol. 159. cited.

5 Mar. Dyer f. 159.

Coke Chief Justice. If one sues me in the Court of Admiralty, I may well say signa facta, facta fuit, or fuerit, this is good, they are not to sue there in the Admiralty if they make it not to appear that the matter was done, super altum mare.

Dodderidge Justice agreed with him herein, and that this is a sufficient affirmance of the matter.

A third Error, it is alledged that apud Bristow, attachiare fecit, & comparere, coram, &c. locum tenent' sive president' the error because he saith that he sued before the Lieutenant of the Court; and doth not say he sued before the Lieutenant of the Admiralty, and because he did not say locum tenent' of the Admiral; but of the Court (Judicis sive presidentis) this not good as it was urged.

Coke. They may lay this as they will make their Record, the Attachment was for to appear before the Admiral or Judge, or Lieutenant of the said Court, and he saith that he was Lieutenant.

Haughton Justice, If it was locum tenent' this good.

Curia. This is their name if their Record be so, they are to be punished for their vexation.

A fourth Error, because it is shewed that he appeared before such a one, nuper Judicis. Curia over-ruled this.

A fifth Error, because in the recital of the Statute of 13 R. 2. it is in this manner, (S) inter alia enactitat'.

Curia. This is good notwithstanding Dive & Manninghams Case in the Case in the Commentaries, 1 fol. 65.

The Court over-ruled all the Errors assigned, and by the Rule of the Court Judgment was affirmed.

Judgment affirmed *per Curiam.*

The

The KING, against Sir *Matthew Cary* Junior, & *Ferdinando Cary.*

Indictment of Murder against two. 1 Rol. R. 407.

UPon an Indictment of Murder against two. By the grand Jury, Billa vera found, as to one of them, and Man-slaughter, as to the other, how to proceed.

Coke Chief Justice. This is possible so to be, and it may be good; for the one may have malice, and the other not; he may come in by chance, and so kill the other, as it is in Plowdens Commentaries, And so was the truth of this Case, being that Ferdinando Cary, and Oseband, were in the Field fighting upon a Quarrel, Sir Matthew Cary, casually riding by, and seeing them in fight, and his Kinsman one of them, rides in, draws his Sword, thrust Oseband through, and killed him. In this Case, this is clearly but Man-slaughter in him, and Murder in the other, so is the Commentaries, and Mackallyes Case, 9 pars 65.

Plow. Com. Coke 9 pars *&c.*

The whole Court agreed with him herein.

Exceptions were then moved to the Indictment, the same being quod felonicè, percussit, and doth not say, ad tunc & ibidem.

Coke. If so, then not good.

It was then further urged, that there was neither place, nor time shewed, quando percussit.

But as to this it was said, that there were two ad tuncs, and two ibidems.

This held to be good, by the whole Court, billa vera, as to Ferdinando Cary.

Dodderidge Justice. He is to answer to the Indictment, which is of Murder.

Coke. The best way is to have a new Indictment, for that this a not good, a new Indictment against Sir Matthew Cary, and this to be for Man-slaughter; for this finding of the Jury, cannot be so indorsed, upon this Indictment, the best way, to have several Indictments against them, and not one.

Dodderidge. In one Indictment, this may be specially so set down, and well enough.

Coke, And the rest of the Judges, you cannot proceed against him, by Indictment upon this endorsement, but upon a new Indictment. And so by the Rule of the Court, a new Indictment was to be drawn against Sir Matthew Cary, who by the Rule of the Court was bailed.

Sir *Matthew Cary* bailed.

Lingen Plaintiff, against *Broughton* Defendant.

Action of the Case upon a promise. 1 Ro.Rep.379. Moor 853. n. 1167. 1 Rol. Abr. 26.

IN an Action upon the Case for a promise, upon Non assumpsit pleaded, a verdict, was given for the Plaintiff. It was moved in arrest of Jdgment, that the Declaration was not good. And as touching this, the Case was, that I.S. being indebted to the Plaintiff in such a Sum, for non-payment of which, the Plaintiff purposed to sue him, for preventing of which suit, the Defendant came unto the Plaintiff, and desired him to forbear him for such a reasonable time, and if he did not then pay the Plaintiff, the Defendant promised to pay the same to him, the Plaintiff sets forth, that upon this his promise he did accordingly forbear to sue him, and

and sheweth further that I. S. did not pay him, and that the Defendant also refused to pay him, upon this the Action brought, and a Verdict against the Defendant.

It was urged for the Defendant, that the Declaration was not good, because it is not shewed therein, how I.S. became first indebted unto the Plaintiff, and this was urged upon the President in Coke lib. Entries fol. 2. Bechers Case.

2. It was urged that the Declaration was not good. The Promise being, that if he would forbear I.S. for a reasonable time, if I.S. did not then pay him, he would, and doth not shew in certain, what time this should be, that he ought to forbear him.

Croke Justice. If one be indebted to another in 10 l. a third Person saith unto him, that if he will forbear him for such a time, and if then he pays him not, he doth assume and promise to pay him; and the other doth not pay him. In an Action upon the Case for this Promise in his Declaration he shews, quod cum, such a one indebitatus fuit, unto him in such a Sum; the other assumed as before, this is good without shewing how he became indebted to him; and so it is, if one being indebted to another in such a Sum, saith to him, Forbear for such a time, and I promise to pay it. In an Action upon the Case for this promise in his Declaration, he needs not to shew how this Debt grew due to him, no more shall he do here in this principal Case.

Dodderidge Justice. Here the Verdict hath made this good, which finds that he was indebted to him in such a Sum, and finds the Assumpsit also as before, and therefore this is good, for here in his Declaration, in this Case, he shews that the other was indebted unto him in such a Sum; this he only here alledges by way of inducement to this Action, and for this cause he is not to shew how the Debt grew due; the Action being grounded upon his promise. And so by

Dodderidge, Haughton, & Croke Justices, The Declaration here is good, without shewing, (coment indebitatus fuit.)

This Case being afterwards moved again.

Coke Chief Justice said, Notwithstanding any of the exceptions taken, the Declaration is good, for here the Defendant at his request procured the forbearance of the Debt, and by this he did take special notice of the Debt, what it was, and therefore good; the Debt might grow due for divers things that the Intestate was indebted to him for, and here the forbearance is requested by the Defendant for a reasonable time, and this is good, and doth much differ from the Case, that was here adjudged touching forbearance to be per paululum tempus, which Case was Trin. 8 Jac. B. R. Sackford against Philips, held to be no good consideration, for the incertainty of the time. Here in this Case it is to forbear him, per rationabile tempus, tunc sequens, & dicit in facto, that he had forborn him for such a time, this shall not make it good, if bad before for incertainty.

Trin. 8 Jac. B. R. &c.

But the Court was clear of opinion, that the Declaration here is good; and the Court shall adjudge what shall be said to be reasonable time. Here the Plaintiff did forbear him for 8 years, here the Debt is certain, and this doth differ from the Case of forbearance, per paululum tempus, he did here forbear him for eight years, (which is a reasonable time;) And therefore by the Rule of the Court Judgment was given for the Plaintiff.

Judgment for the Plaintiff, *per Curiam.*

Johnson

Johnson Plaintiff, against *Cullamore* Defendant.

An Action upon the case for a promise. Moor 854. n. 1169. 1 Ro.Rep.396. 1 Rol.Ab.7.12.

IN an Action upon the Case upon a Promise, upon Non assumpsit pleaded, a verdict was found for the Plaintiff. It was moved in Arrest of Judgment, that the Declaration was not good, there being no good consideration therein expressed; the case being this, The Defendant being to account with the Plaintiff, pro diversis debitis, insimul computaverunt, and found upon the Account, to be in arrerages in such a Sum, & in consideratione inde the same day, he did assume and promise to pay this, at a day to come, at which time he failed to pay the same; hereupon the Action brought. It was urged that the Declaration was not good, by reason of the incertainty, not shewing, the promise to be made in consideration of forbearance, but in consideratione inde.

Dodderidge Justice. An Action upon the Case is included, in every debt upon a promise; This assumpsit here, in consideratione inde, is good, notwithstanding the Objection made against it. If he had assumed, at another day, to pay this, at a day to come, this had been good; this here is a duty, presently to be paid, or afterwards, by his promise to pay this.

The whole Court agreed with him herein, that in consideratione inde, he assumed to pay this, the same is good, without shewing any consideration of forbearance, because this was not any original Debt, but where it was an original Debt, there in consideration, that he will forbear, he promised to pay, this is good; but in this Case, here is no original Debt, but the same upon the account, is reduced unto a Debt, by the finding of him to be so much in Arrerages.

Judgment for the Plaintiff, *per Curiam.*

And so the Court was clear of opinion, that the Declaration was good; and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

Pipe Plaintiff, against *Alger* Defendant.

Error. 1 Ro.Rep.408. 1 Ro.Abr.485.

IN a Writ of Error to reverse a Judgment given in the Court of C. B. in an Assault and Battery. 1. Error in the Verdict, was this, That per sacramentum Proborum, & legalium hominum was left out.

Coke Chief Justice. This is well amendable, being in a Judicial Process.

A second Error, A Verdict for the Plaintiff, and damages given, & consideratum est, per Curiam, whereas it ought to be, Ideo consideratum est per Curiam, quod, &c.

Curia, Overruled this Error, all this being but the recital of the Court.

A third Error, because there was no continuance entred, after the Writ of enquiry of damages awarded.

Coke. After the Writ of enquiry of damages, there ought not to be any continuance entred. For that this is the award of the Court, and you may continue this, if you will, but no necessity there is, to do so; the return of the said Writ, is a day given to him. The Plea here is ended, by the first Judgment; the Writ of enquiry of damages, until it be returned, nothing to be done, and then the second Judgment is to be given.

2 R. 3. f. 3.

Dodderidge and Haughton Justices. In 2 R. 3. fol. 3. there is a question touching Continuances to be entred.

Coke. This is good both ways, and I have known this so used, by the course of the Court.

Nota,

Nota, That all the Clerks of the Court being demanded their knowledge herein, they all answered, that there was no necessity to have a continuance entred, after the Writ of Enquiry of damages was awarded.

The Court agreed, the Judgment to be well given, and accordingly by the Rule of the Court, the Judgment was affirmed. Judgment affirmed *per Curiam.*

Phillips Plaintiff against *Wickes* Defendant.

IN a Trover and Conversion of so many Hogsheads of Cyder in London. The Defendant pleads bailment of them unto him, to redeliver to another in the County of Oxon, to spend in his house, the which accordingly he had done, and takes a traverse absque hoc, that he converted the same at London aut alibi, extra Com̃ Oxon, upon this Plea the Plaintiff demurred in Law. Trover & Conversion. 1 Ro.Rep.395.

The Plaintiff declares upon a bailment in London, and a conversion in London, The Defendant pleads, that the same were bailed to him, to deliver over to another in another County.

It was urged for the Defendant, That the Declaration was not good, because there is no place shewed where the delivery was made, but that was over-ruled.

It was then urged for the Plaintiff, that the Defendants Plea was not good, amounting but to the general issue.

Dodderidge Justice. The difference in our Books is this (S) where one doth justifie in another County, and shews a special cause of Justification, as by reason of a special Warrant of a Justice of Peace, in a special place, there such a traverse may well be taken; but where the thing is meerly personal, as here in this principal Case, and altogether transitory, there otherwise it is.

The Plea here in effect is no more than Non culp. the general issue, and so not good.

The Court agreed with him herein; and therefore by the Rule of the Court, Judgment was given for the Plaintiff. Judgment for the Plaintiff, *per Curiam.*

Nota, for a Rule per Curiam. That if in any Ejectione firmæ, or in any other Action, which stirs the possession; If a Rule be given to the Defendant to answer, and he doth not, and upon this, another Rule is given peremptorily to answer, if he fails in this also, yet no Judgment shall be entred against him upon a Nihil dicit, but upon motion made in open Court; And that if any Attorney of the Court do contrary unto this Rule, he shall be for this, for the future debarred of his practie. This was then agreed by the whole Court for a Rule, to be observed at the Bar, and by the Attorneys, to this intent, that shifts shall not be used to strip men out of their Possessions. *Nota.*

Amson Plaintiff against *Walcot* Defendant.

IN an Action of Trespass laid to be done 1. May, the Defendant pleads a release to him made 1. Junij, and takes a traverse absq; hoc, that he was guilty at any time after the first of June; the Question, whether this traverse be good, or not? Trespass.

Coke Chief Justice. The day in trespass is not material, he ought here to have traversed in this manner (S) absque hoc, that he was guilty before or after 1 Junij.

A second matter was moved in this Case, touching the execution of a Process, to Arrest one, whether the same was duly executed, or not? the same being directed unto three, or to any of them to arrest one; two of them did execute the same, and arrested the party; whether this was well executed, or not? upon the Books of 38 H. 8. Dyer, fol. 62. & 1 Mar. Dyer, fol. 93. & 27 H. 8. fol. 6. b.

38 H. 8. *Dyer*, f. 62.
1 *Mar. Dyer*, f. 93.
27 H. 1. f. 6. b.
45 *Eliz.* B. R. *Hobbs* & *Kings* Case.

Coke. Two may well execute this, because this is for the service of the King, to execute the Process, and so it was adjudged 45 Eliz. in this Court, in a Case between Hobbs and King, and there is no question to be made of it, the Case there was a Trespass laid to be 9 Jac. the Defendant justifies by vertue of a Warrant, 10 Jac. and takes a traverse absque hoc, that he was culpable before the Warrant to him made, and did not say, before and after, and therefore the traverse held bad per Curiam. The Warrant there was unto three or two of them, two did execute the same, and this held to be good and well executed per Curiam.

The Court agreed with him herein, that the traverse was not well taken, that the Process was well executed; and so by the Rule of the Court Judgment was given for the Plaintiff.

Judgment for the Plaintiff.

Ratclife Plaintiff against *Clark* Defendant.

Debt.

IN an Action of Debt upon a Bond, wherein two were bound unto the Plaintiff, The Condition was, that if they, or either of them, upon request made, should pay for so many Barrels of Beer as should be delivered to them, so much for every Barrel as shall be agreed upon between them; and the payment of this mony by the condition of the Bond, to be made within five days after request, The Plaintiff in his Declaration sets forth, that he delivered so many Barrels of Beer, and had agreed with them to pay 10 s. for every Barrel; the which sum he had requested of one of the Obligors, and for breach in not payment of the mony, the Action brought; the other pleads, that there was no such Agreement made.

Coke Chief Justice. If two are bound unto one, that they or either of them shall pay so much, as before, upon request, he shews a request, and no payment; this is a good breach.

Haughton Justice. An issue is here offered, that there was no agreement, but this is here certainly shewed, and there is also a good breach shewed.

Coke. The request here makes this sufficiently certain, the request made to one, & non solvit. This is very clear, that here he hath his election to require payment of the one, or of the other, and if upon this payment is not made, this is a breach of the condition.

The Court agreed with him herein.

An Exception was then taken for the Defendant to the Declaration, because he shews, that he did request payment of the one of the Obligors, and that the other did not pay him; but this Exception was disallowed, and therefore by the Rule of the Court Judgment was given for the Plaintiff.

Judgment for the Plaintiff.

Hix & Uxor Plaintiff against *Harrison* Defendant.

Debt.

IN an Action of Debt: The Case was this (S.) A feme Executrix takes a Husband, they bring an Action of Debt as Executrix, they recover and have Judgment; but in bar of this the Utlary of the Husband is pleaded, and upon this a stay of Judgment prayed.

Coke

Coke Chief Justice. By this Utlary, clearly the Husband forfeits nothing of the Goods which the Wife had as Executrix, for that he only had them in the right of his Wife as Executrix, and so is the Book of 21 E. 4.

The Court agréed with him herein, and so by the Rule of the Court, Judgment was given for the Plaintiffs. Judgment for the Plaintiff.

The Bayliffs of *Ipswich* Plaintiffs against *Martin* and *Parker* Defendants.

IN an Action of Debt for Rent: The Case was this, One Denny and another were Lessées for years, by demise of the Plaintiff, rendring a yearly Rent; Denny assigns over his part unto Martin, one of the Defendants; the other Lessée makes his Will, and thereby makes Parker the other Defendant his Executor, and dies; Rent is behind after the Assignment, and after the death of the other Lessée, and for this Rent, an Action of Debt was brought against the Defendants, against Martin the Assignée, and Parker the Executor of the other Lessée, and this Action brought against them in the debet & detinet; whether this Action were well brought, or not? was the sole question. Debt for rent. 1 Ro.Rep.204. Cro. Jac.411. 637. 1 Ro.Abr.235.

Coke Chief Justice. Two joynt Lessées rendring Rent, the one of them grants away his Interest to another, a joynt Action of Debt lies against them both.

It was urged, that several Actions of Debt should have been brought, and not a joynt Action, the Contract being here determined: If Lessée for years assigns over his term, and dies, the Assignée, and not the Executor of the first Lessée, is to be sued for the Rent.

As appears by Walkers Case, Coke 3 pars, fol. 24. where two Cases are cited to this purpose, and upon this reason, (S.) because the privity of Contract is determined by the death of the Lessée, and therefore he cannot charge him in point of Contract. *Coke* 3 pars, f. 24. *Walkers* Case.

Coke. An Action of Debt here well lieth against them both in the debet & detinet, for here they are now as Tenants in Common, and no other Action of Debt could they have.

The Court seemed to agrée with him herein, but would not at this time overrule it: And therefore this Case was adjourned until another time.

Afterwards, (S) Mich. 14 Jac. B. R. this Case was moved again, and much debated: And it was urged, that here the Defendants have divided Possessions, and divided Interests, (S.) the one of them by an Assignment, and the other as Executor, and therefore they ought to be severally charged with several Actions of Debt; and to this purpose 11 E. 3. Fitz. tit. Debt, placito 50. was remembred. Term. Mich. 14 Jac. B. R. this Case moved again. 11 E. 3. *Fitz.* tit. Debt, placito 50.

Haughton Justice. The Action is here well brought against both the Defendants: If one having a Lease for years of twenty Acres of Land, rendring Rent, and he grants over to another the twentieth part of the Land, this shall not make the Lessor to bring his Action of Debt for the rent of this twentieth part so granted over, the Lessor shall not be forced to have several Actions.

Croke Justice. Severance of the Land, shall not make a severance of the Action of the Plaintiff, if it should, great inconveniencies would follow, by the several assignments of under-Tenants amongst themselves, and of which the Lessor might not have notice, and therefore he may at all times resort for his rent to his first Lessée; and therefore here the Action of Debt, as it is joyntly brought against both the Defendants, is well brought.

Dodderidge Justice. The Action of Debt is always grounded upon the demise, the which continues still one and the same, notwithstanding any alteration made by the Tenants, as if the Lessées do make partition, or do assign this over unto

twenty several persons, it would be very inconvenient to force the Lessor to bring twenty Actions against twenty several persons; the which the Law will not compel him to do.

Judgment for the Plaintiff.

The Court clear of Opinion, that this Action of Debt was well brought, and so by the Rule of the Court, Judgment was given for the Plaintiff.

Jakes Plaintiff against *J. S.* Defendant.

Prohibition Tythe of Mills 1 Ro.Rep.405.

IN a Prohibition, upon a Libel in the Spiritual Court, to have Tythe of Mills. Upon a suggestion of a modus to be paid for the same, and a Prohibition granted.

Coke Chief Justice. In some Cases Tythe is payable for Mills, and in some Cases not; No personal Tythe by the Statute is to be paid for Mills, but where by special usage the same hath been paid, and not otherwise.

The Court agreed with him herein; and therefore upon the same suggestion, a Prohibition was granted.

Nota, A Prohibition tythe of Mills.

Nota, That another Prohibition in like manner was moved for, upon a suggestion of a modus, to pay so much by custom for all Mills erected, or to be erected, and this appeared to be a new erected Mill: whether the Custom shall run to this or not? upon the Statute of Articuli cleri, cap. 5.

Consultation granted *per Curiam*.

Coke Chief Justice. This modus cannot go to this new Mill; for an ancient Mill your modus shall be allowed, but not for the Mill newly erected, the Custom will not extend unto it; and therefore by the Rule of the Court for this new Mill, a Consultation was granted.

Nota.

Nota, Touching the Charter of both the Universities of Oxford and Cambridge, granted unto them and their procedings, by force and vertue thereof.

8 *H.* 4.

Coke Chief Justice. In 8 H. 4. A Charter was granted to both the Universities of Oxford and Cambridge, to enable them in their procedings. They by force of their Charter, did proceed in Temporal Causes, in a civil manner, their Power being first by this Charter, afterwards by the means of the Earl of Lecester, they in 13 Eliz. obtained a confirmation from the Queen by Act of Parliament, by which their Charters were confirmed, and that they might proceed by force of their Charter, as before they had done, their proceedings before by their Charter being against the Law of the Land. Popham was very much and strongly against this, but afterwards when he did see that the Act of Parliament was passed for them; Then he wished, that they would prove honest men in their procedings.

13 Eliz. Act Confirmations

Coke Chief Justice. If a Minister of Justice hath warrant to Attach the goods of another, if he can do it and do it not, an Action upon the Case lieth against him.

I see no cause, but that the Universities may now proceed as before they have done, and that by reason of the said Act of Confirmation of their Charters.

The Court agreed with him herein.

Nota.

Nota, Touching Endictments upon penal Laws.

Coke Chief Justice said, He did much marvel that any one in an Endictment will recite the Statute in certain, because then a misrecital of the same in any part, shall make the Endictment vitious, but they may say and conclude, (and this is the best and surest way) Contra formam Statuti.

Nota.

Nota, Exceptions were moved to avoid an Utlary in Baron and Feme. 1. Because the Wife cannot be an Utlage, but waived. 2. The same was comparuit, for comparuerunt.

It

It was questioned, Whether this Utlary might be thus avoided, by of way of exceptions upon a motion, the Clerks of the Court affirmed, that by the course of the Court, in the same Term, such an Utlary might be avoided upon exceptions by a motion in Court, but this being in another Term, it could not be avoided, but by a Writ of Error, and not otherways. It was therefore moved to have him bailed upon the Writ of Error.

The Court granted this, but withall said, that he ought to appear in person the next Term, and so assign his Errors, to reverse the Utlary.

Coke Chief Justice. Order is always to be observed, for qui à jure discedit, vagus erit, & omnia, omnibus erunt incerta.

Nota, Touching a Demurrer, and what shall be said to be a good cause of Demurrer. *Nota.*

Coke Chief Justice. If an Action be brought for three things, and the Defendant answers only unto two of them, and saith nothing at all to the third, the Plaintiff may well demur upon him for this cause; for if in this case he Replies, all this shall be discontinued, and therefore without all question, in such a case the Plaintiff may very well demur; Herlackendens Case, 4 pars, fol. 62. remembred to prove this to be so.

The Court agreed with him herein.

Webbs Habeas Corpus.

UPon the return of the Habeas Corpus, it appeared that Webb was amerced at a Justice-Seat in the Forest, for putting of his Sheep there to depasture, and he being questioned for this, justified the having of them there: For this his contempt, he was there fined at 13 l. and a Noble, this being of him demanded, he refused to pay it, for which refusal, he was by them committed to Prison, and being now present in Court by Habeas Corpus, exceptions were taken to the return, that the same was not sufficient for his commitment, and the Court was moved to have him bailed, and the Book Case in 30 E. 3. fol. 10. touching the exposition of the Statute De malefactoribus in parcis was cited therein. Habeas Corpus 1 Ro Rep. 411. 30 E. 3. f. 10.

The first exception taken to the return, because it appears not by the return, that this was an offence within the Forest.

2. It doth not appear by the return, before whom the Justice-Seat was held, as it ought to be by the Law of the Forest.

Coke Chief Justice. As touching the Justice-Seat, before whomsoever this is held, the same is good; infra les doles de Forest, this is to be taken to be infra les boundes of the same. As to the Imprisonment, whether they may do this there, or not? I will of this advise.

Dodderidge Justice. You cannot have common of Pasture for Sheep, by the Forest Law.

Coke agreed with him herein, unless it be by Prescription; here a wrong was done in the Forest, by which the verte is destroyed, for Sheep do bite very low; the Statute of Charta de Foresta is an affirmance of the Common Law; and therefore you may prescribe against this. As to the bailing of him (which was prayd,) If the Imprisonment be lawful, then he is not bailable; otherwise it is, if the imprisonment be not lawful, 21 E. 3. a good Case as touching this matter, and the trial of it by Certiorare. 21 E. 3.

Dodderidge. He cannot have Sheep there by the Law of the Forest; here he hath done a wrong, and justifies the same wrong by the Law, he ought to have punishment for it.

A Justification was then offered, that this Locus, in quo, was purliew.

Bail denied *per Curiam.*

The Court would advise as touching the bailing of him, and so without any further debate, this matter was adjourned; the party remanded, the Court refusing to bail him.

Nota.

Nota, per Coke Chief Justice & Curia, for a Rule to be observed, touching Declarations, that the Plaintiff ought to declare the same Term, or the Term after that the Bail is filed, he being in Custodia Marescalli.

Nota.

Nota, Touching amendments of Declarations, the Case was this; A Declaration of the last Term pray'd to be entred this Term, before the entry of it,

Hitcham Serjeant moved the Court, to have the Declaration amended, the same (being in Trespass) the Trespass was laid to be in (Æstden) whereas in truth, the place was mistaken, for it was (Æskden) a (t) for (k.) The Defendant to this had pleaded Non culp. after this Plea pleaded, the Court was moved to have this amended.

Coke Chief Justice & Curia. This is matter material, he hath here plainly mistaken the place; we cannot amend this, being in a Declaration of another Term, to this he may plead what matter he will, we cannot amend this without the assent of the party, and if he will assent to this amendment, he may then empark until the next Term. We do not like of such amendments without the assent of parties, the Plaintiffs best way is to begin again.

Broome Secondary informed the Court, that this is a usual course to have such Amendments, before the entry of the Declarations, but not afterwards; and that this Declaration here is still in paper, and not entred, and therefore it may well be amended.

Coke & Curia. Yet we will not give way to have this amended, without the assent of the party himself who is the Defendant; and if he will assent to this amendment, he may then have an Emparlance until the next Term; this here is a material mistaking, and by this there is a good advantage given to the party, the which we cannot take away from him, after his Plea put into this Declaration; For here the Case is no other in effect, but where one lays a Trespass to be done in Dale, to this the Defendant pleads Non culp. afterwards by way of motion the Plaintiff would avoid this mistaking by way of amendment, alledging that this Trespass was done in Sale, and so would oust the Defendant of the advantage which the Law had given him; which cannot be without the assent of the party, who not here assenting, the Court refused to give way to an amendment.

Amendment denied.

Termin. Mich. 14 Jac. *Banco Regis.*

Roswell Plaintiff against *Welsh* Defendant.

Entred Termin. Hillar. 13 Jac. B. R. Rot. 854.

Trespass and Ejectment. 1 Ro.Rep.415. Bridg. 49. Cro. Jac.403. 1 Ro.Abr.502. 505. Godb. 268.

IN an Action of Trespass and Ejectment, for the trial of a Copyhold Estate, upon a Surrender, the Plaintiff declares upon a Lease made by the Heir; upon Non culp. pleaded, a special Verdict was found, upon which, The question did arise upon the custom of a Copyhold Estate, and the surrender of the same: It being found, That by the custom of the Manor, when a Copyholder would surrender his Estate, this being out of Court, ought to be done unto two Tenants of the Manor, and

and the same, by the Custom, ought to be presented within one year after the surrender.

In this case, such a Surrender was made to the use of the Defendant, unto the two Tenants who paid the Rents to the Lord inde debita, and which two Tenants died within the year, and before any Court held there for the Manor: The question was, Whether this shall be a good surrender, if the same be presented at the next Court held for the Manor? and whether the acceptance of the Rent, by the Lord, shall amount unto an admittance.

It was urged, that here the two Tenants died before the surrender was presented, and that therefore the same was to come unto the Heir who made the Lease to the Plaintiff.

It was likewise urged, that the Law hath great regard unto particular Customs, and doth much favour them, as 8 E. 2. Fitz. tit. Prescription, placit. 50. 8 E. 2. &c.

Nota, That by the custom of Kent, if a man be hanged for Felony, the King shall not have annum diem & vastum, nor the Lord any escheat of these Lands in Kent, the Custom there hinders it; and so by the special custom, an Infant may devise Gavelkind Land at the age of 15 years, as appears in 21 H. 7. fol. 17. and Coke 5 pars, fol. 84. Perymans Case, touching such particular Customs. 21 H. 7. f. 17. &c.

It was then urged for the Defendant, the Point being only, Whether the surrender here out of Court shall be good, and of force to bind the Heir, before that this be presented in Court: It was urged, that it shall bind him, so that the Lease here by him made to the Plaintiff, is not good; here by the Custom (as it was urged) a certain time is limited for the presentment of this surrender, and this is to be at the next Court, and this is a good Conveyance to bind the Copyholder and his Heir: No Court as yet held, if any thing here hath happened, so that this surrender cannot be presented; this peradventure may somewhat alter the Case; the cases put upon several customs in Kent, and other places, may well be agreed, but are not to be applied to this case in question.

Two Objections made against the Defendant, and his title by the surrender: The first, That Herring the Copyholder who made the surrender is dead, and no Presentment made of this.

This is no Objection, for one who is by wrong in possession of a Manor, may make admittances of Copyholds, being Dominus pro tempore, and this a Disseisor may do, as appeareth Coke 4 pars, fol. 24. in Clark and Pennifethers Case; this Presentment to be made of the Surrender, by the two customary Tenants before it be done, is but a Ceremony to notifie this, and therefore death happening before, it shall be no impediment for to hinder this, for the Copyholder hath given all by the surrender before, and nothing at all doth pass by this Presentment; this may be resembled to the Case of an Obligation, delivered into the hands of one as an Escrow, to be afterwards delivered, as appears by 27 H. 6. fol. 7. & 14 E. 4. fol. 2. & Coke 3 pars, fol. 35. b. in Jennings and Braggs Case, put in the end of Butler and Bakers Case, that if death happens before the second delivery, this shall make no alteration, and Coke 4 pars, fol. 29. b. in Buntings Case it is resolved in case of a Surrender by a Copyholder, that if he dies before this surrender be presented in Court, this is not material, nor shall be any ways prejudicial to the party to whose use the Surrender was made, and Coke 5 pars, fol. 84. b. in Perymans Case the Surrender is void, if it be not presented in Court. *Coke* 4 pars, fol. 24. &c. 27 H. 6. f. 7. &c. Coke 4 pars, fol. 29. &c. Coke 5 pars, f. 84. b. &c.

Obj. The second Objection made is, That the two Tenants who did take the Surrender, died within the year, and before any Court held.

In answer to this, it was urged, that this is less material than the death of the Copyholder, who did surrender before the same presented; for these two Tenants are Instruments in a lesser degree than the Lord is, to whom the surrender is made

made, they are Instruments only to testifie the surrender; and the custom here is not, that this surrender ought to be presented of necessity by them who took the surrender; but if the same be presented by any one at the next Court, this shall suffice to make the surrender good; this may be resembled to the Case in 1 H. 7. fol. 9. a. where a Judge takes a Conusance of a Fine, and dies, his Executor shall certifie this Conusance, and it shall be engrossed; and so is Buntings Case, if he dies before Presentment of the surrender, upon proof of this, it may be afterwards well presented.

It was then urged for the Plaintiff, that Herring the Copyholder who made the surrender, 28 Eliz. died, and his death is found before any Court held, his Heir enters, and makes a Lease for years to the Plaintiff, until the Presentment in Court be made of the surrender, the Title of the Heir is good, and the party to whose use the surrender was made hath no title at all, until the surrender be presented in Court; so that the point is this, a Copyholder surrenders into the hands of a Tenant, and dies; whether his Heir may enter before the Presentment of this surrender? if he may, then it is for the Plaintiff, the Defendant having no title, until he procures an admittance, and a presentment of the surrender; here the party who surrendred is dead, and also the party to whom the surrender was made is dead, before any Presentment made of the surrender; whether now after their deaths this surrender may be presented.

It was urged, that this cannot be, and that here the parties to whom the surrender was made, are but as Instruments to convey this unto the party to whose use the same was made, & nihil operatur by this, till the same be presented; for in the interim, until this Surrender be presented, he who made the Surrender hath still the sole Interest, and may take the Profits; this Interest remains in him, and shall come unto his Heir like unto a Charter of Feoffment, with a Letter of Attorney to make Livery, before this be made, in the interim all the Interest remains in the Feoffor, until Livery be executed; and so in case of a Bargain and Sale upon the Statute of 27 H. 8. cap. 16. of Inrolments; until Inrolment the Land remains in the Bargainor; and if a Stranger enters into this Land, he shall have an Assise, and an Action of Trespass for the Profits taken; for by this Bargain and Sale before Inrolment, it is but inchoatum, non perfectum, for this Indenture of Bargain and Sale gives nothing to the Bargainee, until the Deed be inrolled according to the Statute; so in this Case, the party to whose use the Surrender was made, takes nothing at all by force of this until the same be presented in Court.

Coke 4 pars, f. 23. b. &c. Coke 4 pars, fol. 23. b. Pennyfethers Case, A Copyhold Estate descends unto the Heir, he may enter before admittance, and have an Action of Trespass for that he hath this by descent; but he who is to have a Copyhold Estate by a Surrender made unto him, he cannot enter before this be presented, for he hath no Interest in it before the same be presented; as it was held 24 Eliz. in Homes and Dixons Case, and so the difference will be betwæn the Heir who comes in by course of descent, the Grant being made to his Ancestor, and another stranger who comes in by course of surrender (and hath these words) (S.) Dominus concessit & admissus est; but when the Heir of a Copyholder is to be admitted, he hath only these words (S) & admissus est, but without these words, (S.) Dominus concessit, being the words of grant of the Lord used upon every Surrender, the reason of this is, because his Ancestor had the Copyhold before.

24 Eliz. &c.

In Perrymans Case before remembred, it is there demanded what remedy, if the Copyholders will not present the surrender made out of Court; the answer there is, (S.) caveat emptor, he at his peril is to perfect all which is requisite to his assurance, so that the party to whom the Surrender is made hath no Title, until the same be presented in Court.

26 Eliz. in Gallaways Case, the question was, whether he which surrendred might have an Action upon the Case against the Lord for not holding of his Court, and admitting him to whom the surrender was made; resolved, That the party who made the surrender might have his Action against the Lord, but not the other to whom the surrender was made; and in this case it was adjudged that until admittance by force of the surrender the party had nothing, it was only inchoatum, but not perfectum.

Dodderidge Justice demanded who should have the profits of the Land, in the interim, until the surrender be presented.

Answer was made on the Defendants part, that he to whom the surrender was made should have the same.

Dodderidge. This cannot be so, the Custom here is laid to be that he is to have nothing before the surrender be presented: No possession given unto him, before this be done: No estate nor yet any possession is given unto him by this surrender made out of Court, before the same be brought in and presented in Court, the Lord cannot have this, he being only made as an Instrument for the settling of this according to the surrender; and therefore by the death of him who made the surrender before any presentment of the same, this descends unto the Heir and remains in him.

If a Man makes a Feoffment in Fee to another, and makes him livery within the view, this is no perfect livery until the other do enter into the Land according unto this; but the Feoffor may well punish a Trespass there done in the interim, for it is but inchoatum until he do enter, which doth perfect the same.

Croke Justice. No Court is as yet held, this ought to be in a convenient time, and the Law ought to judge of this.

It is here to be considered in whom the Interest of the Copyhold Estate is until a Court be held, and a presentment made of this surrender, posito, that in the interim the Lord had destroyed his Mannor before any Court held; so that no Court held, nor any effect had of this surrender; he who is to have benefit by the surrender ought to labour the Lord to have a Court held.

If it be allowed that he which first did surrender is to have this, until presentment be made in Court of the surrender, and that he may have an Action of Trespass, for Trespass done upon the Land in the interim before presentment made of it, it will over-rule this case now in question; where one comes in by way of surrender there it is said (as it hath bèen observed) dominus concessit, but it is not so where the Heir comes in by descent. Here the custom is that the surrender shall be good, ita quod the same be presented at the next Court by the Tenants, which Court is not as yet come, but he ought to expect it.

Haughton Justice. Nothing is here found of any custom which doth impeach this case, but the surrender to be presented at the next Court; But the great and sole matter in this case considerable is in whom the interest of the Land is, until the surrender be presented: If the surrender be to the use of another, and he is admitted by the Lord before any Court held, he by this is a good Copy-holder, if the Lord admit him, this is a good admittance; if it be so here, he then to whom the surrender is made hath a good title against the Heir.

It is found here that these two Tenants to whom the surrender was made, to the use of another, paid the Rents unto the Lord, inde debita; Whether this acceptance by the Lord of these Rents, shall not be in Judgment of Law, as an admittance of the party to whose use the surrender was made to the Copy-hold estate; the custom is, if the same surrender be presented at the next Court, this then is good, but in the interim the Lord agrees and accepts the Rents of him, this will go very far in the case.

Dodderidge. If he doth not say that he paid the Rents as a Copy-holder, it is not material. But if the Lord before any Court held receives the Rents of the

party to whom the surrender was made as of a Copyholder, this may amount unto a good admittance of him to be a Copyholder according to the surrender, but otherwise it is where he receives the Rents of him generally, as here in this Case there it is but as a Receiver or Bailiff; but if he as a Copyholder do pay the Rents, and the Lord in this manner doth accept them, this will amount unto an admittance. It is here found that virtute sursum redditionis, he did enter and paid the Rents, but this cannot so be, if the surrender was not presented in 4 E. 3. Two Parsons of Dale and Sale do resign causa permutationis, the Church by this is not void, for this is not absolute, but conditional; And so without any further debate at this time, this Case was adjourned, and rested upon a Curia advisare vult.

4 E. 3.

Afterwards this matter was moved again.

Croke Justice. A Copyholder may surrender out of Court, by which surrender an interest doth presently vest in the party, to whom or to whose use the surrender was made.

Haughton, It is very clear that he cannot be a Copyholder before admittance, and until admittance, the interest still remains in him who did surrender; here by the custom the surrender ought to be presented in Court, or the same shall be void, and this to be presented at the next Court after the surrender; but no Court hath as yet bæn held since the surrender made, and so no default hath bæn in this, for no presentment of the surrender could be made before a Court was held, the which time is not as yet come.

Another custom is here alledged to be the surrender out of Court, to be made into the hands of two of the Copyholders; and this surrender to be presented by them at the next Court held.

Object. It hath bæn objected that this surrender ought to be presented by these two Copyhold Tenants.

As to this the custom is not so here, but if this surrender be presented by the Homagers at the next Court, this is good, and he a good Copyholder by this; the custom is, That if the surrender be not presented at the next Court, this is to be intended, if it be by no means presented.

But if the custom had bæn special, (and so found) that this surrender ought to be presented at the next Court by these two Copyhold Tenants, unto whom the surrender was made, there it shall be otherwise, for then this ought to be pursued in the same manner, or not good; but it is not so here, and therefore the same may be well presented by the Homagers after the death of the two Tenants, at the next Court held. A Law was made in the time of King H. 5. to have continuance, until his return out of France, and he died there before his return, it was held that this Law ended by his death. Here the Estate is not in the Copyholder until his admittance to the same. The point then here is, whether any admittance be found by this Verdict, whether an admittance of the Lord before any Court held, shall make him a good Copyholder or not; It is here found that they entred, virtute sursum redditionis, but by this they are not Copyholders. It is also found that the Lord received the Rent of them inde debita, this shall bind him, as the Issue in tail shall be bound by his own acceptance, and such acceptance shall make a voidable thing good. It is found here that the Copyholder paid the Rent unto the Lord, this implies an acceptance of this, the which shall amount to make a good admittance of him, and this makes him to be a Copyholder, and the Lord is to do this, and so upon the whole matter as it is here found, the Defendant hath a good title to this Copyhold Estate by force of the surrender, and therefore Judgment ought to be given for him.

Dodderidge. The custom here may be, that the Homage shall present this surrender; here it is indefinitely found that the same shall be presented; but it is not said by whom the same shall be presented. If by the custom these two Tenants, to whom the surrender was made, are to make presentment of the surrender and no others, they are now dead, and therefore no presentment can now be made of this sur-

surrender. Also by the custom, the surrender is to be presented at the next Court held after the surrender. No Court hath been as yet held. But no hold can be taken upon any of these. But for the chief matter, the Case is this.

A Copy-hold Estate is surrendred by the Copy-holder, to the use of another, before any Court held, and presentment made of this surrender. He who made the surrender died, and they who also did take the surrender died. Whether the Copy-hold Estate be in him, to whose use the surrender was made; and certainly it is not in him; This is but an inception, and nothing by this doth operate, neither is there any thing in him to whose use the surrender was made, before this admittance to the same. But if the Lord admits him, this shall make him a good Copy-holder.

Here before the presentment, and admittance by the death of the Copy-holder, who made the surrender, the right of the Copy-hold Estate, in the interim descends unto his Heir. Here it is further found, that he to whose use the surrender was made, paid the Rents unto the Lord, inde debita. The point here is, whether this shall amount unto an admittance of him by the Lord. It shall not, Bracton well observeth that these base Estates are not to be passed from one to another, without an admittance of the Lord; this acceptance here of the Rent by the Lord in this manner, as it is here alledged, shall not amount unto an admittance of him. But if he had here received the Rent of them, as Copy-holders, it would have bæn otherwise, and there the same acceptance of the Rent should have amounted unto an admittance, but not here as it is found, being but a bare acceptance of the Rent inde debita, for this may be done as a Servant, or a Bailiff; and this is not like the Case of Tenant in tail before remembred; for there an Estate was in him, to whom the Rent was paid; here you ought to have an Estate in them, as Copy-holders, which is not so, and therefore this Verdict is in this defective; and if this acceptance as it is here alledged, shall not amount unto an admittance, he hath no Estate at all by this. *Bracton.*

Croke. The custom here is found indefinitely, the Heir is here to have the benefit of his ancient title. It is found the surrender to be good, if admitted, sed quorsum hæc, but it is not found in whom this Estate shall be, until a Court be held, a presentment of the surrender, and an admittance, and until this be done, it is but inchoatum.

Dodderidge. The entry of the admittance is in this manner, (S) & admissus est inde tenens.

Haughton. In pleading it is to be so, but if there be matter here found which doth amount unto so much, this shall be good. To say that he paid this as Bailiff, to the Heir, this cannot be, for it is expressly said, (S) that he himself paid this.

Dodderidge. The payment here of the Rent, is nothing at all to the purpose if it be not said, that he did admit him as a Tenant.

Haughton. If the Lord saith to the Copy-holder, you have surrendred to the use of such a one, to which surrender I do agree, this is good, and shall make him to be a good Copy-holder.

The Court agreed with him herein, if it had bæn so, no benefit intended here unto the Heir, by the Custom, but by the Common Law.

Dodderidge. A surrender made out of Court to a Stranger; all do die unto whom the surrender was made, he to whose use surrender was made, enters, and payes the Rent, Nihil operatur by this to make him a good Copy-holder.

Haughton. I do doubt of this case, It is not found that he paid the Rent, due after the surrender.

Croke, It is not here found what should be done with this, if no Court was held.

The Court clear of opinion against the title of the Defendant, the same being defective in alledging of the Custom, and payment of the Rent, for if he had laid the payment, and acceptance of the Rent by the Lord of him, as of his Copy-holder, this would then have amounted unto a good admittance of him as a Copy-holder.

Dodderidge & Haughton. Otherwise it is in this Case, for he may pay this Rent as Bailiff to the Heir. And therefore the Court advised the Defendant to begin again de Novo, but as the case is here found, the Plaintiff claiming by Lease from the Heir, hath a good title. And so by the Rule of the Court, Judgment was given for the Plaintiff.

Judgment for the Plaintiff.

Rich. Ackeridge Plaintiff, against *Hester Conham* Defendant.

Entred Termin. Pasch. 14 Jac. B. R. Rot. 383.

Nota.

NOta, That after a Trial, and a Verdict given for the Plaintiff; It was moved in Arrest of Judgment, That the Sheriff had made no return at all of the Venire facias, this being Album breve, without any return made of this, and so this is bad and not amendable, as appears Coke 5. pars, fol. 41. in Rowlands Case.

Judgment attested *per curiam.*

The Court allowed of this exception, and by the Rule of the Court the same was to be tryed again.

Hutchins Plaintiff, against *Periam* Defendant.

A *Scire facias.*

IN a Scire facias upon the forfeiture of a Recognizance for breach of the Peace, the case was, The Defendant was bound to keep the Peace; he breaks it; upon this the Plaintiff sues a Scire facias, upon this Recognizance out of the Office of the B.R. upon a Trial a Verdict being given against the Defendant; It was moved in Arrest of Judgment, that in this Scire facias, there was no vi & armis, this being omitted; for that in trespass he ought to lay this to be done vi & armis, and so in a Scire facias upon a Recognizance, where Battery is laid to be, this ought to be with vi & armis according to the Presidents.

Haughton Justice. This is a Recognizance, for the keeping of the Peace, and there is contra pacem in this, and so this includes vi & armis, here it is said that he did beat such a Man, and so had broken his Recognizance, but dot not say this to be vi & armis.

Judgment for the Plaintiff.

The Court clear of opinion upon the first moving of this, that this was well enough without laying this to be vi & armis.

And so by the Rule of the Court Judgment was given for the Plaintiff.

Wintall Plaintiff, against *Childe* the Vicar, Defendant.

A Prohibition.

IN a Prohibition upon a Suit in the Spiritual Court, by the Defendant the Vicar of D. for Tithes: A Prohibition prayed upon his Plea there, of a modus decimandi, to pay so much yearly to the Parson of Dale, in discharge of his Tithes, and the same Plea there disallowed.

The

The whole Court agréed, This modus, betwéen him and the Parson, will not discharge him from payment of Tithes, as to the Vicar; and therefore by the Rule of the Court, a Consultation was granted.

Judgment for the Plaintiff.

Talkerne Plaintiff, against *Wright* Defendant.

IN an Action upon the Case upon a promise, the case being, that in consideration of 40 l. given by the Plaintiff to the Defendant, he did assume, and promise to take the Son of the Plaintiff for his Apprentice, for nine years, and to teach him his Trade, and also to find him during all that time, with Meat, Drink and Apparel, the Plaintiff sets forth in his Declaration that he had paid the 40 l. to the Defendant, and that the Defendant according to his promise, had not found his Son with Meat, Drink and Apparel, during that time; and for this cause, for breach of promise the Action brought; upon Non assumpsit pleaded, a verdict was given for the Plaintiff. It was moved for the Defendant in Arrest of Judgment, that the Declaration was not good, because he hath not shewed therein that the Defendant had taken the Plaintiffs Son to be his Apprentice, and that if he never was his Apprentice, there could be then no breach of promise. It was then urged for the Plaintiff, that the Declaration was good; for where three several Considerations are laid, and the one not depending on the other (as in this Case) there he may well lay the breach upon every one of them, or any one of them; here the Action is brought for his not finding of him with Meat, Drink and Apparel; and therefore this is to be admitted, that he had first taken him for his Apprentice before any such default could be laid to be in him, this being only a subsequent default, after his taking of him as his Apprentice.

Action case, upon a promise. Cro. Jac. 406. 1 Ro. Rep. 414.

At this time the Court inclined to be of opinion for the Plaintiff, and to disallow of this exception taken to the Declaration.

Afterwards this case was moved again, upon the bringing in of the postea, and urged for the Plaintiff, that the Declaration was good, for it shall be taken by intendment, that he had taken him for his Apprentice, the agreement being in consideration of 40 l. given, the Defendant did assume, as before, and it is laid, that the 40 l. was paid, and three several things promised to be done by the Defendant, it is included that he had taken him for his Apprentice, for the Action here is not grounded, for his not taking him for his Apprentice, but only for his not finding of him with the said necessaries, of Meat, Drink and Apparel according to his promise.

Croke Justice. The Verdict here doth not aid this. If he was not his Apprentice, then there was no cause of Action. It cannot be accepit servum, if non posuit. The Declaration had been better, if he had shewed therein expresly, that he had taken him for his Apprentice.

Haughton Justice. The Declaration here is insufficient, this assumpsit stands upon three parts. (S.)

1. That the Defendant was to take the Plaintiffs Son for his Apprentice for 9 years.

2. He was to instruct him in his Trade, in this it is not limited for what time.

And 3. He was to find him him Meat, Drink and Apparel, durante termino prædicto of his Apprenticeship.

If he hath not taken him as his Apprentice, then the term is not as yet begun, for when he is his Apprentice, he is to find him in this manner, but not before he is his Apprentice; and therefore of necessity he ought to have made an express averment in his Declaration, that he had taken him for his Apprentice; For if one do promise to make to another a Lease of his House, from such a day, to such a day, for seven years, and the other doth promise to repair this. In an Action upon the Case,

Case, brought upon this promise for not repairing of the House, he ought to lay in his Declaration, that he had made the Lease to him of the House, or the Declaration not good; so here in this Case, for if he do not take him as his Apprentice, he is not to perform the other part of the promise; so that the Declaration here is altogether insufficient, and so Judgment ought to be given for the Defendant.

Dodderidge Justice. The Verdict here shall not aid matter in Law, as this Case is, here all is true, and yet the Declaration is insufficient. Upon Non assumpsit here pleaded by the Defendant; all is found against him, (S) that he did assume as before; all this is true, and yet no cause of Action for the Plaintiff, if the Plaintiffs Son was not in facto, his Apprentice; if the Plaintiff did not offer his Son to be his Apprentice, then he cannot instruct him in his Trade, nor yet tyed by his promise, to find those necessaries of Meat, Drink and Apparel; and therefore the Plaintiff ought to have alledged this in his Declaration, that he had taken him for his Apprentice, and this to enable him to have an Action for this breach. In 3 E.4. fol. 21. where an Abbess retains one for so much to serve her in the service of Husbandry. In an Action of Debt, for this, he shewed that he was retained, but doth not shew (as he ought to do) that he had served her accordingly; and for this cause the Declaration ruled to be bad: So here in this Case, the Plaintiff ought to have alledged, that he offered his Son to him for his Apprentice, he ought to alledge sufficient breach, to intitle him to have this Action, which here he hath not done.

3 E.4. fol. 21. a. b.

Croke. This doth presuppose a thing to be first done by the Plaintiff, (S) he is to put his Son to the Defendant, to be his Apprentice, for he may take issue with the Plaintiff upon this (S) that Non posuit; the Plaintiff here would have tacita Confessio, this cannot be, the Plaintiff hath here omitted the very foundation of his Action.

Judgment *quod querens Nil capiat per billam.*

The Court clear of opinon against the Plaintiff, that the Declaration was not good; and therefore by the Rule of the Court, Judgment was entred, quod querens Nil capiat per billam.

Hodge Plaintiff, against *Vavisour* Defendant.

Action upon the Case for promise. 1 Ro.Rep.413. 1 Rol.Abr. 12.

IN an Action upon the Case for a promise, the Plaintiff delivered certain Clothes to the Defendant for so much, & sic indebitatus fuit, to him in so much, the Defendant postea, in consideratione inde, did assume, and promise to pay this a year after; for not payment thereof the Action brought, upon Non assumpsit pleaded, a Verdict was given for the Plaintiff.

It was moved for the Defendant in Arrest of Judgment, that this promise should not bind him, it being said, quod postea in consideratione inde, he assumed to pay this, which promise is grounded upon a consideration that is past, and so not good to raise a promise, and here he may have Debt for his Goods.

Croke Justice. If a Man owes to another so much for certain Goods, and he demands of him when he will pay him for them, who answers at such a time, and the other agrees unto it, this is good; and the Law will here imply a tacite consideration, by the Law annexed unto it.

Haughton Justice. In consideration that the Plaintiff hath built a House for the Defendant, he did assume, and promise to pay him so much, this is executed, here the assumpsit is for Money, this is to be paid upon request; here the Defendant is clogged with a Debt continually, and therefore this is here a good consideration to raise a promise.

Dodderidge.

Dodderidge Justice. Here is a promise made for the payment at a day certain, till which time the same was forborn, and therefore this is a good consideration; here the express promise shall not take away the Action upon the Case implyed, (S) if for fear he will pay here, the Action upon the Case for the first contract still remains; for if one be indebted to another in a sum of mony, and saith unto him, If he will forbear him till Christmas he will then pay this to him; this is good. But if he arrest him before for this, what remedy shall he have? No Action upon the Case for this.

The Debt here always continues; and no discharge can be made of this, but by the payment of it.

The Court therefore over-ruled the exception as being of no force, and declared the promise to be grounded upon a good consideration; and therefore by the Rule of the Court Judgment was given for the Plaintiff. Judgment given for the Plaintiff.

Sir *John Cutts* Plaintiff, against *Bennet* Defendant.

IN an Action of Debt for Rent reserved upon a Lease for years, brought by the Plaintiff as Administrator, in the detinet, having Letters of Administration to him granted; upon Nil debet pleaded, a Verdict was found for the Plaintiff; It was moved in Arrest of Judgment that the Declaration was not good, for that he declares as Administrator without shewing forth literas administratorias, and though this be after a Verdict, this shall not help this defect. Debt for Rent.

The Court was clear of opinion that this was a great oversight in the Clark, and that no amendment can be of this: And so without further debate it was adjourned.

Afterwards this Case was moved again, and the same matter insisted upon in Arrest of Judgment as before, the not shewing forth the Letters of Administration; this omission being matter of substance, and not aided by any Statute after Verdict, 36 H. 6. fol. 31. if an Action brought by an Executor, as Administrator, he ought to shew forth the Testament, because this is the means to enable him to his Action. As in Debt upon a Bond he ought to plead hic in curia prolat. 36 H. 6. f. 31.

Dodderidge Justice. This is a very plain Case, that here he ought to have shewed the Letters of Administration; the point here is, whether this omission being after a Verdict, shall be such a material matter as shall vitiate the Declaration.

It was urged for the Defendant, that by reason of this material omission the Declaration is not good; and to this purpose a Case was remembred in 39 & 40 Eliz. between Edwards and Stapleton, in a Writ of Error, the same Error assigned for not shewing forth literas testamentarias, and the Judgment reversed for this cause, because it is matter of substance and material, and not aided by any Statute. 39 & 40 *Eliz.* &c.

The Court were of opinion that this Declaration was bad, this omission being matter of substance; and therefore the Rule of the Court was, Quod querens Nil capiat per billam. Judgment *quod querens Nil capiat per billam.*

Young

Young Plaintiff, against the Bishop of *Rochester* Defendant.

Entred Termin. Hillar. 13 Jac. B. R. Rot. 52.

A Writ of Error. 1 Rol. R. 432. 1 Ro. Abr. 784.

IN a Writ of Error to reverse a Judgment given in the C. B. in an Action of Wast, the Bishop declared upon a Lease made by himself, whereas in truth the same was made by his Predecessor, this Error assigned and insisted upon to reverse the Judgment for this variance betwéen the Original Writ and the Declaration, the one being of a Lease made by his Predecessor, and the Declaration being of a Lease made by himself; and that this is not aided by the Statute of 18 Eliz. capite 14. of Jeofailes, Coke 5. pars, fol. 37. a. b. Bishops Case; this very Case in effect, and reversed for this cause in an Action upon the Case for a promise; there by the Writ, the Obligation was alledged to be made by Thomas Warde and Christopher Bishop, and in the Court he was named George Bishop.

Statute of 18 *Eliz.* c. 14. *Coke* 5. pars, f. 37. a. b. *Bishops* Case.

Judgment was given for the Plaintiff; a Writ of Error brought, and this variance betwéen the Original Writ, and the Count assigned for Error, and insisted upon the point there, Whether this was aided by the Statute of 18 Eliz. capite 14. there resolved that this variance betwéen the Original Writ, and the Count was not remedied by 18 Eliz. nor by any other Statute; and the difference taken when there was an Original Writ, which in matter of substance varied from the Count, this not remedied by the Statute; otherwise it is where there was no Original Writ at all. And so it was urged, that in this Case for this variance the Judgment ought to be reversed.

Nota, The difference.

Against this, It was urged that this Case differs from Bishops Case; for there the variance was in the substance of the Declaration, in the name, being material, but not so here, being, whether he held by Lease of the Bishop or not.

Dodderidge Justice. Here is an Action of Wast, and the Declaration is upon one Lease, and the Original Writ is upon another Lease, the Original Writ being upon a Licence made by the Predecessor of the Bishop, and the Declaration is upon a Lease made by the Bishop himself, and so a material variance betwéen them.

The Court agréd herein that this was a material Error, and this variance not amendable, nor any ways aided by the Statute of 18. Elizabeth, that the Judgment given for this cause is erroneous, and therefore by the Rule of the Court, for this Error the Judgment was reversed.

Judgment reversed, *per Curiam.*

Lewes

Lewes Plaintiff, against *Walter* Defendant.

Entred Termin. Trin. 14 Jac. B. R. Rott. 39.

IN an Action upon the Case for scandalous words, upon Non culp. pleaded, a Verdict was found for the Plaintiff: It was moved for the Defendant in Arrest of Judgment, that the words were not actionable, being, (S) That the Defendant said, that one John Pierce did say that Mr. Lewes the Plaintiff did say, That there was no Prince in England, ubi revera, Lewes the Plaintiff did never speak these words, and averred, That Charles the Prince was then in England: The Plaintiff also in his Declaration sets forth, that he was of good Fame and a Justice of Peace.

An Action upon the case for words. 1 Ro.Rep.444. 1 Rol. Ab. 64. 69. 75. Cro. Jac. 406. 413.

It was urged that these words are not actionable, in regard, that by a favourable construction the Prince might be in another Realm, there being no certain time expressed when the words were spoken.

And it was further urged, that this was but a Report which he had from the hearsay of another.

For the Plaintiff it was urged, that this is all one, as if he himself had spoken the words.

Dodderidge Justice. If he had spoken these words in the time of Queen Eliz. this had then been true: Here it is not shewed when Pierce did say this, and this is very material; what if one should say that I. S. said, that a Stranger said, that the Plaintiff had murthered such a one, whereas in truth he did not say so.

The Court demanded to see the president which was cited of the Lady Morrisons Case.

Haughton. By the ancient Law, he which reports false news of another, ought to bring in the party who spake it, or else he himself to have the same punishment that was to be given to such a reporter of false news.

Afterwards, at another time two presidents were produced, and shewed to the Court in this Case; the one of them between the Lady Morrison and Lane, 5 Jac. in B.R. the other 41 Eliz. the Lord North and Coneys Case, a Case of hearsay, as this Case here is, and adjudged that the Action did well lie, and the same affirmed here in a Writ of Error.

5 Jac.B R. &c. 4 Eliz.&c.

The first president, that he heard another speak such words of the Lady Morrison, by reason of which words she lost her Marriage (the words said to be spoken by a Scot) the Plaintiff had Judgment here, and the same affirmed in a Writ of Error in the Exchequer Chamber.

Haughton. This Action is grounded upon the Statute of Westminst. the first, cap. 34. for contriving of false news; and 5 R. 2. cap. 5. He ought to bring in the party which he hath averred to have spoken the words, or he himself shall be adjudged to be the speaker of them.

Stat. of *West-minst.* the first c.34. & 5 R.2. c. 5.

Dodderidge. The matter here doth not rest upon the report, but upon the substance of the words, for that the Prince might be out of the Realm when the words were spoken.

Haughton. The averment here, that no such words were spoken, makes this matter strongest against him.

The Court at this time inclined to be of opinion, that the words were not actionable, because the time is not shewed when the words were spoken; but for the

 matter

matter of the report of the other, this is good and actionable, and that according to the two presidents before remembred, and adjudged in point; and so without any further debate, this Case rested upon a Curia advisare vult.

Term. Hillar. 14 Jac. B. R. this Case moved again.

Afterwards, (S) Termin. Hillar. 14 Jac. B. R. this Case was moved again, and two matters insisted upon in Arrest of Judgment.

1. Because this is but a Report that the Plaintiff did say so, and not that he did say so himself.

And 2. That no Action lieth for these words.

It was urged for the Plaintiff, that the Action well lieth for these words, they being spoken on purpose to draw him into displeasure, and to cause him to be suspected in point of his Allegiance, and that is as much as to say, that there was no King, for Rex est princeps populi, these are words of very great scandal: One said of a Peer of the Realm, (S) of the Duke of Buckingham, that he had no more Conscience than a Dog; these were held scandalous words, and an Action de scandalis magnatum lieth for these words; and if spoken of another person, of a Gentleman, an Action upon the Case lieth.

The Duke of *Buckinghams* Case.

Sir William Walgraves Case against Agard, who said to his Servant, I am a true Subject, but thou servest no true Subject, adjudged, that for these words an Action upon the Case well lieth, because it was laid, that the words were spoken malitiose, to draw his life in question, as in this Case here.

Sir *William Walgrave* against *Agard*.

Also it was there in that Case adjudged, that to say, That such a one is not the Queens Friend, are words actionable, and that Case was affirmed in a Writ of Error in the Exchequer Chamber.

It was urged for the Defendant, that if there had been laid a communication to have been of the King, and of his Issues, there it might then have been otherwise; but here the words are spoken suddenly, and it might be, that at the same time the Prince was in Scotland; and for one to say that the Prince is not in England, and that no Prince is in England, is all one.

1. Haughton. It is plain, that if he speaks of the Prince, that the Action lieth, notwithstanding this be of the hearsay of others.

But for the second matter, If scandalous words be spoken of a Man, who is not fully designed by the words themselves, but by an innuendo, in this case the Action will not lie: As if a Man hath four Sons, and one saith, that one of the Sons of I.S. (he having four Sons) did commit a Robbery (innuendo such a one of them) for these words thus spoken no Action lieth; but if it be denoted in certain, as if one doth say unto a Feme-covert, that her Husband is a Thief, an Action upon the Case well lieth, because the person defamed is certainly designed; but here in this case now in question, the slander is not certain, but by an innuendo, for it is, that he said that there is no Prince in England, (innuendo, Charles the Prince of England,) every Duke is a Prince, and so the words as they are here laid, are too general: And Walgraves Case is not like to this Case, for there it is laid that he did serve Sir William Walgrave, and so the words as they are here laid, are not actionable.

2. Dodderidge. The Action as it is brought, well lieth: It is agreed that the words themselves are actionable; the words clearly are not enforced by the innuendo, it doth not rest here upon the innuendo, but upon the denotation of the person.

If one saith the Parson of Dale hath committed such a Robbery, an Action upon the Case for these words well lieth, if he aver in his Declaration, that he was the Parson of Dale when the words were spoken.

This Case hath been here adjudged, words spoken to a Feme-covert, (S) Thy Husband hath committed such a Felony, an Action lieth for these words; for here the person of whom the words were spoken is sufficiently described; so here in this

this case, the words themselves sufficiently design the person; with us here, Dukes and Earls are Princes in their degrees, because they do wear Crowns: But when speech is of the Prince, by this is meant the most eminent, where here in England one speaks generally of the Prince.

It is to be understood the eldest Son of the King, so here is a sufficient denotation of the person of whom the words were spoken, and therefore the Action here is well maintainable, and so Judgment ought to be given for the Plaintiff.

3. Croke agreed with him herein, that the Action well lieth: But if the person was to be noted by an innuendo, the Action would not then lie, but here the person by the words themselves is well designed: If one will say to any of us, That there is no Prince, he ought for so saying to be presently imprisoned, qui bene interrogat, bene docet, these words are scandalous, being such as shall make the party speaking of them, in danger of his Head and Life, & fama, fides, & oculus, non patiuntur ludum; here is a sufficient denotation of the person, the hearsay of another is not material, the Action well lieth, and Judgment ought to be given for the Plaintiff.

Mountague Chief Justice agreed with them herein, that these words are actionable, and that they are here very well explained.

It is true, that in an Action upon the Case for words, 1. You ought to make the same Constare de persona. 2. Verba applicare ad personam; here in this Case both these are well done, when he saith, The Prince, it cannot be intended of any other than the eldest Son of the King: An innuendo shall not supply defects, that which is doubtful it will make plain, but that which is wanting cannot be supplied; here it is explanatory, we are not here to understand more Princes; words scandalous spoken of a Subject, shall be taken according to the rule of Law, in mitiori sensu, but when they are spoken of the King, or Prince, and are touching matter of Allegiance, they are there always to be taken in graviori sensu; here the words are scandalous, for which the Plaintiff had just cause of Action, the Declaration good, and so by the Rule of the Court, Judgment was given for the Plaintiff. Judgment for the Plaintiff, &c.

Milward Plaintiff, against *Maby* Defendant.

Entred Termin. Pasch. 13 Jac. B. R. Rot. 680.

IN a Writ of Error to reverse a Judgment given in the Court of C. B. in an Action of Trespass for an Assault and Battery, where the Plaintiff declared of a Battery done 1 Maij, to his damage of 40 l. the Defendant imparls till the Term following, at which time the Plaintiff declares again of a Battery done 2 Maij, in the same year, against the same Defendant, and upon this Roll it is not entred, (alias prout patet) but this is as a new Declaration, and another Attorny in this, and he declares to his damage of 100 l. upon Non culp. pleaded, Verdict and Judgment was given for the Plaintiff, for the reversing of which Judgment, a Writ of Error was brought: The Error insisted upon, was this variance between the two Declarations; and to this purpose a Case was cited in the time of Queen Eliz. between Warner and Winch, in an account for 20 l. received: In the Imparlance Roll he declared for 18 l. and in the Plea Roll for 20 l. and for this variance, being assigned for Error, the Judgment was reversed. Error.

It was urged, that in the C. B. one Declaration is there before the Imparlance, and a second Deliverance after the Imparlance; but that these two do make but one Record, the first is that upon which they proceed, and this is the chief Record, and it hath been here resolved, that if the first Declaration be good, and the second bad, the same varying from the first, that the Judgment shall be given upon the first, which is good, and the second shall be void, this being but a recital of the first; and this variance in the second, from the first, is but the default of the Clark, and shall not make the first Declaration to be vitious, but may be amended; but if the first Declaration be bad, and the second good, this shall not be amended; for that this is a material variance, and shall make all the proceedings to be erroneous. The second is to be amended, and made to agree with the first, but not e converso. And this as it was urged, hath been the usual course of the Court.

It was further urged, that if here the second Declaration which is upon the Imparlance Roll, shall be intended to be a new Declaration, then this is aided by the Statute of 18 Eliz. capite 14. of Jeofailes, because the same is then without any Original; but if the Declaration, upon the same matter doth vary from the Original, this is not aided.

Stat. of 18 *Eliz.* cap. 14.

Dodderidge Justice. If a Man brings an Action of Trespass for a Battery done the eighth day of May, and afterwards in another Term he declares of a Battery done the ninth day of May, shall these two Declarations be taken, and intended to be upon one and the same Original, when they do so much vary, and several Attornys? this cannot so be.

Haughton Justice. In Bishops Case, Coke 5 pars, fol. 37. There the variance was between the Writ and the Count, and yet the same was taken to be a Declaration upon one and the same Writ.

Coke 5 pars, fo. 37. in *Bishops* Case.

Croke Justice. The truth of the Case is, that all the proceeding is upon the first Original; and therefore this is a variance between the Original, and the second Declaration on the Imparlance Roll.

Dodderidge. In the second Declaration they use to enter, (alias prout patet) and so by this the same to have reference unto the first Declaration.

It was then affirmed unto the Court by Chibborne Serjeant, and George Croke, That in a Bill of Priviledge, and in a Scire facias they use to make this entry, but not in the other Actions.

Haughton. They in the C.B. do certifie both the Declarations, for one and the same Record, therefore it cannot be otherwise intended, but all to be upon one and the same Original.

Dodderidge. It may be that they are several Trespasses, for any thing that appears to us to the contrary; and it may be, that he having mistaken himself in the first Action, hath brought this new Action. The better opinion of the Court seemed to be, that the Judgment was well given, and not erroneous.

Milward Plaintiff, against *Wats* Defendant.

Entred Termin. Trin. 14 Jac. B. R. Rot. 1527.

A Writ of Error. 1 Ro.Rep.448. Cro. Jac. 415.

IN a Writ of Error to reverse a Judgment given in the C.B. in an Action of Trespass and Ejectment, The Plaintiff declared upon the Imparlance Roll, upon a Lease made 21 Januarij 10 Jac. habendum a vicesimo Decembris, in the same year for 4 years; and upon the Issue Roll, he declares upon a Lease made 30 Januarij

30 Januarij 10 Jac. habendum a vicesimo Decembris, in the same year for four years; and upon Non culp. pleaded, the Jury give a Verdict for the Plaintiff, upon the later Lease laid to be made 30 Januarij, and Judgment given for the Plaintiff, to reverse which Judgment, a Writ of Error brought.

The question moved, and insisted upon, was, whether these, by any intendment, may be taken to be one and the same Lease, or divers.

The Court clear of opinion, that if Error be assigned to reverse a Judgment, which proves to be no error, yet if there be other errors appearing unto the Court, in the Record, the Judgment for these Errors is to be reversed.

The Verdict was here found for the Plaintiff, upon the later Lease, of the 30 of Januarij.

The Imparlance Roll is the warrant for all; and here the Plaintiff hath declared upon another Lease differing from that in the Imparlance Roll.

Haughton. The point of the Action is that, This is of one and the same term, and between one and the same person, and here the Ejectment in both is laid at one and the same time, but the Leases do vary, here the second Lease doth vary from the first, and therefore cannot be intended to be the same Lease.

If upon the Imparlance Roll, the Plaintiff declares in Debt, and upon the Plea Roll, he declares in Trespass, and the Plaintiff hath Judgment, this is a material variance in a Writ of Error to reverse this; here the variance makes the Judgment erroneous, the Leases being laid to be upon several days.

Coke 5 pars, fol. 37. in Bishops Case before remembred, it is no Declaration without an Original, the same is not aided by the Imparlance Roll, here the Declaration is in an Ejectione firmæ, and because the variance here is in the point of the commencement of the Lease, no Judgment ought to have been given, the Declaration not being good, varying from the Original.

Dodderidge Justice. It may be, that he having at the first mistaken the Action, he begins anew in the second Declaration. It is good to be well advised of this, if one declares in one term, upon a Lease made 21 Januarij, and in another term, without an Original, declares upon a Lease made 30 Januarij, to begin from the 20th of October before. It is fit that the course of the Court in such a case be known, whether to have a new Declaration, or whether the second Declaration be but a reviving of the first. In the Court of C. B. they there use in the second Declaration for to enter, (alias prout patet) In every Term they are to begin all again; here we had a Case of the Bishop of Rochester, upon a variance. In the first Declaration, he declared of a Lease made by himself; and in the second, upon a Lease made by his Predecessor; and for this variance the Judgment was reversed.

Dodderidge & Croke of opinion that this here ought to be amended, and to agree with the first.

Haughton doubted of this; ideo Curia advisare vult, as touching the usages, and the course of the Court for this,

The whole Court agreed in this, that the second Lease connot be intended to be the same with the former. In the first Case, it is a Lease presently, in perception of the profits; in the second, it is only a Lease in point of interest, and therefore if the second Declaration shall not be intended to be upon the first Original, it is not then good, but variant from the same.

Another Error was moved, (S) they being two joynt-Tenants in the Ejectione firmæ; The Jury find him culp. of a moiety, and for the other moiety they find a special Verdict.

The Court held this to be no Error.

Dodderidge. If one declares in an Ejectione firmæ, upon a Lease made of certain Land, and he hath title but for a moiety, the Jury are not to conclude upon the moiety,

moiety, for they are not to judge upon this, but the Court; here the Jury find him guilty for a moiety, and for the other moiety they find a special Verdict; here they may conclude upon the moiety, for it may be he entred into one moiety, and not into the other; but if he declares upon the whole, they cannot find him culp. of a moiety.

The Court utterly disallowed of this last Error; And inclined to be of opinion for affirmance of the Judgment, but the same was not pronounced, nor yet moved again afterwards, but it was ended between the parties.

Elkin Plaintiff, against *Wastell* Defendant.

Entred Termin. Mich. 13 Jac. B. R. Rot. 204.

Error. 1 Rol. R. 411. 1 Ro. Abr. 216.

IN a Writ of Error to reverse a Judgment given in an Action upon the Case, for a promise, the Case was this, (S) Wastell the Plaintiff shewed, that it was agreed between him and Elkin, That whereas Wastell was seised of a House, and of certain Land, that he should surrender the same to the use of the Defendant Elkin, and that he was to give him for the same 560 l. and that if he sold the same away again, the Plaintiff was to have the moiety, for which he should sell the same, over and above the 560 l. he shewed that accordingly he surrendred to Elkin the Defendant (but doth not shew that he was admitted) and that he sold the same over to another, (who was admitted) for 80 l. more than the 560 l. The Action brought for the whole, for the 560 l. the Plaintiff was barred, because he had received this, ideo in misericordia pro falso clamore, and for the residue, he recovered and had his Judgment; for the reversing of which, a Writ of Error was brought.

Divers Errors were moved, and very much insisted upon.

Errors.

1. The first Error, because the Plaintiff shewed in his Declaration, quod seisitus fuit in dominico ut de feodo, secundum consuetudinem manerij de Ramesden, of the House, & de una virgata terræ nativæ, and doth not shew that the same was Customary Land.

The Court agréed they could not intend this to be Copy-hold Land, but that he ought to have alledged expresly, that this was held by Copy, or to have shewed some such matter.

2. A second Error, It is alledged, that it was agréed betwéen them, that the Plaintiff should surrender, and that the Defendant should give him so much Mony, and they do not alledge a promise to surrender.

As to this, It was ruled by the Court, that (agree) implies a good promise.

3. A third Error, because it is not shewed that the Defendant was admitted according to the surrender.

This Error the Court also over-ruled, because the consideration is laid to be that he should surrender, and not that the other should be admitted.

4. A fourth Error, The consideration is, that the Plaintiff should surrender to the Defendant, and that the Defendant should give him 560 l. and if he sold this again for more, that the Plaintiff should have the moity of so much as he should receive, more than the 560 l. the Error herein alledged was, because for one part of the promise the Plaintiff was in misericordia, and for the second part, the Judgment is, that the Plaintiff shall recover, and this is all but one promise, although it extends it self unto divers branches, and therefore as it was urged, the Plaintiff ought either

to

to have bæn barred for the whole, or to have recovered, and not to have been in misericordia for any part.

To this answer was made, that this was no Error, for that the Plaintiff here demanded the 560 l. upon the first part of the promise, and because there were payments made of this, and acquittances given, the Plaintiff was barred, ideo, for this in misericordia, but for the residue, for which the same was sold above the 560 l. the Plaintiff recovered, the same being but one promise, yet for two several things, and so the Judgment was well given.

Coke. It is plain, if there be but one consideration, although divers branches, yet the same is all but one promise; as to this, the presidents are fit to be seen, where upon one promise, which consists upon several branches, part performed before the Action brought, whether the Plaintiff shall be for this in misericordia pro falso clamore, the other part of the promise not being performed. I think he shall not be in misericordia in this Case.

Haughton Justice. If this had not been here laid, to be such Land as is surrenderable (S) Copy-hold Land, then there had bæn no consideration at all.

Coke agreed with him herein.

It was urged, and 3 E. 3. cited for it, that a Man may be seised of fee-simple Land, secundum consuetudinem manerij.

Coke. In consideration that you shall surrender to me, I promise to pay you so much if the surrender be made; but this is void being of Fee-simple Land, and by this the consideration fails, because it appears not, that the same was Copy-hold Land.

As to this Error, because he doth not alledge an admittance. This is no Error at all, for the party ought to sue to be admitted, the Plaintiff hath done all which in him is, and all which he ought to do, for he hath surrendred to the use of the other, and this is good, and he to give 560 l. for this Copy-hold, and if he sells the same away for more, then to give him also the moiety of the overplus, the surrender was made accordingly, afterwards he sold this for 80 l. more than the 560 l. forty pound of which was due to the Plaintiff, this not paid, but he shewed an acquittance for 560 l. adjudged this to be no bar for the 40 l. but the Plaintiff also demanded the 560 l. this shall not be a bar to him, for the other 40 l. but as to this, he ought to recover. And as for this, because the Defendant hath not paid this, he is to be in misericordia.

An Objection was then made, that here the promise was not made to pay the 40 l. but the moiety of that for which he should sell the same, over and above the 560 l. and here it is laid according to the promise to pay the moiety of 80 l.

Coke. Here is but one promise made, and if he omits one part, then Non assumpsit modo & forma, is good for this.

It was then urged, In consideration of a surrender to be made to the use of another, the party to whose use the surrender is to be made, doth assume and promise to pay him so much; he ought to shew, that this is Copy-hold Land, for this may be Fee-simple Land, and as it was urged, it hath bæn here adjudged, that Fee-simple Land may be surrendred (S) by the custom.

Coke. It is sufficient to say that he surrendred Fee-simple Land, secundum consuetudinem manerij generally, without shewing specially the custom to be so.

Afterwards, at another time this Case was moved again; and it was urged, that the assumpsit here is grounded upon the surrender of a Copy-hold Estate, to pay so much Mony, and it is not shewed that the Defendant was ever admitted unto this Copy-hold Estate, according to the surrender, and that if he was not admitted he cannot surrender this again.

As touching the misericordia for the Plaintiff, who recovered. It was urged, that

that where the Plaintiff is barred in part of his demand, there for this he ought to be in misericordia: And it was further urged, that if one promise but a release of part, it shall be good for the whole.

Haughton. Although it be but one promise, yet the same may well extend to several things.

Dodderidge. If it be but one promise, a release will extinguish all. The question here will be, whether they are distinct promises or not. I take them to be two distinct promises.

1. If he surrender, he then assumes to pay him so much, (S) 560 l.

2. If he surrenders and sells the same away to another, then he doth promise to give him the moiety of what he shall sell the same for, over and above the (560 l.) so that they are two several and distinct promises, the one from the other, and the release doth not go to the later part of the promise; but if one promise, then all is gone by the release. If one enters into a Bond, afterwards the Obligée doth release unto him all Actions; afterwards he enters into another Obligation. The Obligée after brings an Action of Debt upon both the Bonds, the Defendant pleads the release of all Actions, he shall have a Judgment upon one of the Bonds, but for the other he shall be in misericordia.

Croke Justice agréed with him herein, that they are here several and distinct promises, and that the Plaintiff shall be amerced pro falso clamore.

Haughton. If one be bound to another by his promise, to do and perform two things, the party may well by word, free, and discharge him of part, and so to make this several.

Dodderidge. If it be one entire thing, I doubt whether he may discharge part of it by his release; but here they are several and distinct; the release of the first part here, is not any release of that sum which he is to pay, being the moiety of the overplus, for which he shall sell the same over and above the 560 l. If a Man sells two Horses for 20 l. the one of them being the Horse of a Stranger, the other not, but his own, if the one be defeated he shall yet have an Action for all the 20 l. for that the contract is entire, as appears 24 H. 8. Brooks Cases, fol. 9. placito 52.

24 H. 8. *Brooks* Cases, fol. 9. placito 52.

Nota, That as touching this point, the Judges all agréed that the Judgment was well given, and ought to be affirmed.

As to the other matter before moved, (S) that here are two several surrenders alledged, and it is laid that the last Surrendræ was admitted, but not the first.

To this Haughton Justice said, That if a Copy-holder surrenders his Estate to the use of I. S. who again surrenders the same to the use of I. N. and the Lord admits I. N. this is good; For the acceptance of the surrender by I. S. is in Law an admittance of him.

And so if a Copy-holder surrenders his Estate to the use of I. D. and the Lord méeting with him, saith, Such a surrender is made to your use, to which I do agrée, or I am content therewith, and that you shall be my Tenant; these sayings shall amount unto good admittances, and shall make him to be a good Copy-holder, without any further admittance.

Dodderidge. If a Man hath a reversion, and grants this to another for so much. And if he grant this over to another for more, then to pay the moiety of the overplus which he had gained; the grant is made to him, and he grants the same over for more; If I bring my Action upon the Case upon the promise, I ought expresly to say, That to my first grant, the particular Tenant did attorn, so here he ought to shew an admittance of him upon the first surrender, to enable him thereby to surrender this over to another, the which he cannot do, if he himself was not admitted upon the first surrender made to him, or to his use, and so this ought to be shewed.

Haughton

Haughton. The pleading is good as it is, without shewing the admittance; this shall be intended, the same not being the essential part of a Copy-holder, for he may be a good Copy-holder without admittance.

Afterwards at another time, this Case was moved again.

Haughton. It is mentioned in the Record, that such a day in March the Writ of Error was received, and afterwards in June following, a procedendo was granted to them to proceed: The Writ of Error was brought after the award of the Court, but before any Judgment was entred, and therefore not well brought; and so a procedendo to the inferior Court, sed quia Nescitur quæ damna, ideo a Writ of Enquiry of damages granted, and before the return of this, the Writ of Error brought, and before any Judgement given, the matter resting upon a Curia advisare vult.

Dodderidge. The Writ of Error is here brought, after the award of the Court, and before any Judgement given, and so the Writ of Error, and the procedendo are both of them idle, and to no purpose, and it resteth now, as if no Writ of Error had been brought; and is like unto the case in a Writ of account, the Writ of Error to be, si judicium inde redditum sit; then to certifie the Record, here the Court received the Writ of Error, but it is not shewed between what persons, nor yet in what cause this is, so not good.

A matter of Discontinuance was then urged.

Upon this, the Clerks of the Court being demanded, did certifie the Court, that after the matter rested upon a Curia advisare vult, day was to be given to the Plaintiff, usque, with a cessat quousque.

Dodderidge. Here the matter is now upon a point of Discontinuance, whether it be discontinued, or not, upon the Writ of Error; there it is entred, cessat placitum quousque, without saying, usque ad proximum terminum, or to such a time certain, as the use is to be in this Court, cessat quousque, this shall amount unto a Curia advisare vult: It is here to be considered, whether there ought to be a continuance entred to a day certain, or not.

Haughton. It is no continuance, if it be not unto a day certain.

Dodderidge. It is not said, quousque proximum terminum, nor yet quousque proximam curiam; if it had been so, this had been a good continuance, but not so as it is there, and therefore by the Rule of the Court, the Judgment was affirmed, notwithstanding any of the former Errors assigned, which were all overruled by the Court, only some doubt was conceived, upon the point moved of the discontinuance, wherein only the Court was not fully satisfied, but yet agreed the Judgement to be well given. Judgment affirmed.

Abbots Plaintiff, against *Johnson* Defendant.

IN an Action of Debt upon an Obligation, the Case was this: the Plaintiff was bound in a Bond, as Surety with the Defendant, for payment of mony upon a day to come, and had a Counter-Bond from the Defendant for saving of him harmless; the Defendant paid not the mony at the day; upon this his default, the Plaintiff brought his Action upon his Counter-Bond: To this the Defendant pleads non damnificatus, the Plaintiff replies, and sheweth all this matter; and that he requested the Defendant to pay this mony, which he did not do; unde upon this, the Defendant demurs in Law. Debt.

The sole point insisted upon, was, Whether this non-payment of the mony

at the day by the Defendant, be a present forfeiture of the Counter-Bond, or not, without any other damage hapning thereby unto the Plaintiff.

It was urged for the Defendant, that this is no forfeiture of the Counter-Bond, because he is not as yet any ways damnified by reason of this default, no protest being sued out against him, 18 E. 4. fol. 27, 28. this matter there debated; where the condition of the Bond was for saving of him harmless, being bound for the other; the Defendant there pleaded, Quod non fuit damnificatus; the Plaintiff there shewed, that a plaint was affirmed against him, so that he durst not go out of his House about his business, and so by this he was damnified.

It is there urged by Choke, that this is no forfeiture, till the Sheriff hath arrested him, for though a Capias be out against him, peradventure the Sheriff will not take him, nor execute his Writ, and then no forfeiture.

It was urged therefore, that he ought in facto, to shew some particular matter of damnification.

On the other side it is there urged by Littleton, that he had notice of the Capias, and that therefore he ought to appear in person, or be utlage, and so came to London, retained an Attorney, and by this damnified.

2 E. 4. fol. 15. The Condition of the Bond there was, that the Defendant, at his own costs, should warrant and defend to the Plaintiff certain Land for twelve years, of which he had enfeoffed the Plaintiff; and this against all persons; if ousted by a stranger, the Bond forfeited by the word defend; 26 H. 8. fol. 3. b. 16 Eliz. Dyer f. 328. and 2 H. 4. f. 9. a. b. to this purpose, 4 H. 7. f. 12. Brook. tit. Coditions, placito 128, 129. 40 E. 3. fol. 20. he is to shew how he saved him harmless.

26 H. 8. f. 3. b. &c.

Cok 5 pars, fol. 24. in Broughtons Case, there is a particuler Damnification shewed, the Plaintiff himself paying the mony; but it was urged, that the non-payment of the mony at the day, is no present breach nor forfeiture.

For the Plaintiff it was urged, that this non-payment at the day, is a present forfeiture of the counter-bond: That the Demurrer here is not good; the Defendant pleads Non damnificatus, the Plaintiff sets forth a request by him made to the Defendant, to pay the mony, the which he did not pay; all this shewed by the Plaintiff, and to this the Defendant demurs in Law.

It was urged, that this non-payment at the day, is a present forfeiture of the counter-bond, and that for these reasons, (S.)

1. The Plea of Non damnificatus, implies in it a saving harmless, and he ought to have shewed how he saved him harmless.

2. The Condition by this non-payment is broken, because there is a present penalty by this given, and a loss hereby incurred on the Surety.

Like unto the Case in Littleton, in his Chapter of Conditions, where the condition is to make a Feoffment, and before this performed, he takes a Wife, or doth acknowledge a Statute, this is a present breach, because a present loss and charge; this is the reason of the Warrantia Chartæ, which may be sued before questioned, as appears by Fitz. Nat. Brev. quia timet implacitari.

Haughton Justice. A Damnification will not be by a bare fear.

Dodderidge Justice. This matter is very well debated, in 18 E. 4. fol. 27, 28. before remembred: And so without any further debate, this Case was adjourned.

Afterwards, (S.) Termin. Hillar. 14 Jac. B. R. this Case was moved again, and the Book of 18 E. 4. and Broughtons Case, Coke 5 pars, were cited.

Termin. Hilar. 14 Jac. B. R. &c.

The Court agreed herein, that the condition being to save the Plaintiff harmless, the which the Defendant here hath not done, by his failer of payment at the day, by the which he hath put the Plaintiff in danger to be Arrested, which is a damnification unto him, and so consequently a present breach of the Condition, and a forfeiture

feiture of the Counter-Bond, and that by reason of the Defendants non-payment of the mony at the day, the Plaintiff had just cause of Action upon his Counter-Bond, that the Action was well brought, the Defendants demurrer not good; and so by the Rule of the Court, Judgement was given, and so entred for the Plaintiff.

Judgment for the Plaintiff, *per Curiam.*

Porter Plaintiff against *Chapman* Defendant.

IN a Writ of Error to reverse a Judgement given in London, in an Action upon the Case upon an Assumpsit: The Error assigned was, because two several Assumpsits were laid, the one void, the other good; a Verdict for the Plaintiff, and entire damages given by the Jury.

A Writ of Error.

The Court agreed this to be a clear Error, and for this Error, by the Rule of the Court Judgement was reversed.

Judgment reversed *per Curiam.*

Beresford Plaintiff against *Gooderidge* Defendant.

IN an Action upon the Case against the Defendant, as Executor, upon a promise made by the Testator for a Marriage Portion; upon Non assumpsit pleaded, a Verdict was found for the Plaintiff.

An Action against an Executor.

It was moved in arrest of Judgement, that this Action lieth not against the Executor, for this Assumpsit of his Testator, for this matter Matrimonial the Executor shall not be charged with this at the Common Law, if it were not by Deed; and to this purpose was cited 45 E. 3. fol. 24. and that upon this difference: If one doth promise another to give him so much, if he doth marry such a one, or if he doth marry his daughter, for this he shall sue at the Common Law, and his Executors shall be liable for this after his death; otherwise it is where he assumes to give so much with his Daughter in Marriage, for this Suit shall be in the Spiritual Court, (S) in Court Christian, and not at the Common Law, and the Executor for this is not there to be charged.

1 Ro. Rep. 433. Cro. Jac. 404. 1 Ro. Abr. 14. 461. 468. 593.

45 E. 3. f. 24.

And upon this difference are these Books, (S.) Fitz. Nat. Brev. tit. Prohibition, f. 44. A. and fol. 50. 5. in Consultation 14 E. 4. fol. 6. b. 15 E. 4. f. 32. 17 E. 4. f. 4. 19 E. 4. fol. 10. Plowdens Commentaries, fol. 305. in Sharington & Pledals Case, out of 22 E. 3. Lib. Assisar. placito 70. Fitz. tit. Prohibition, placito 2. Brook tit. Debt, placito 134. & Brook tit. Jurisdiction, placito 63. 20 E. 4. fol. 3. b. 36 & 37 H. 8. Dyer, fol. 59. Latimers Case, 45 E. 3. fol. 24. placito 30. Fitz. tit. Jurisdiction, pl. 15. & tit. Executors placito 40. In Debt he counted, how that a Covenant was had between him and the Defendant, that if he did take to Wife the Daughter of the Defendant, that then he would be bound to him in 100 l. he shewed how that he had taken her to Wife; exception there taken, because this debt was demanded upon a Covenant, touching Matrimony, the which ought to be tried in Court Christian, by the Statute of Articuli Cleri; but because he demanded the Debt upon a Deed, by force of which it became in Law to be a Covenant, it was therefore ruled maintainable; otherwise if without deed.

Fitz. Nat. Br. tit. Prohition 44. A. title Consultation. So 5. 14 E. 4. f. 6. b. &c.

A President was cited in this Court, between Sanders and Estarby, in an Action upon the Case against the Executor, upon the promise of a Testator for a Marriage Portion, which was Mich. 13 Jac. B. R. entred Termin. Trin. 13 Jac. B. R. Rot.

A President cited &c.

after a Judgment here given for the Plaintiff, a Writ of Error was brought in the Exchequer Chamber, and the same matter there alledged for Error, as is now here moved in Arrest of Judgement; another Case was also cited to be in the Exchequer between Hurban Plaintiff against Elyot Defendant; where the promise by the Testator was, that in consideration that he married his Kinswoman, he promised to give him so much; it was held in the Exchequer, that the Executor was not to be charged with this promise of the Testator, to pay the 60 l. promised, and 10 l. quarterly, in maritagium.

Hurban Plaintiff against *Elyot.*

For the Plaintiff it was urged by Coventry, that the Action well lyeth against the Executor, and as to the Presidents cited of Sanders and Estarbyes Case, that was here adjudged against the Executor. A Writ of Error was brought upon this Judgement, but there was no reversal of it; Only a Certificate of the Clerks was shewed, that the opinion of the Judges in the Exchequer Chamber, was contrary to the Judgment here given; but the same Judgment was not reversed. And as to the other Case cited of Elyot, this was differing from the Case here now in question; in 37 H.6. one there said, marry such a maid, and I will give you so much; Debt lieth for this.

47 H. 6.

As to the exception taken, because in the Declaration, no Notice appears to be given of the marriage; to this it was answered, that this is not of necessity to be given; and so the difference will be between such a contract, which is made a Debt and a meer collateral promise, there if he suffer the day to pass, he shall lose it, otherwise, where it is in Case of such a contract as makes a Debt, though he suffers the day to pass, yet the Debt and duty here always remains, until the same be discharged by payment; so where a promise doth amount to make a Debt (as in this Case it doth) no notice is to be given, as it hath bëen adjudged; otherwise where it is for a collateral thing.

Haughton Justice. I do doubt, whether an Action upon the Case, lieth against the Executor, upon the Assumpsit of the Testator, for a thing or contract which makes not a Debt, upon Coke 9 pars fol. 89.90,91. Pinchons Case.

Coke 9 pars f. 89. &c.

Dodderidge Justice. Within these three years, in this Court, there was here the like Action brought, upon payment to be made at the marriage day, and overthrown for default of notice given of the marriage day. If a man be bound to pay to another so much mony at the marriage day of J.S. he ought to give notice to him of this.

The Court were clear of opinion, that here in this Case, notice ought to have bëen given of the Marriage-day, which was not done accordingly, and therefore the Court conceived this to be a good cause to arrest the Judgment. But yet they would not over-rule this, but gave directions to search for Presidents in this Case.

As touching the other matter. The Court was clëar of opinion, that this action, as it is here brought, well lyeth against the Executor, upon the Assumpsit of the Testator.

This Case was afterwards moved again. And as to the point of notice, It was urged, that no notice is requisite to be given of the marriage, though part of the mony promised, was to be paid upon the Marriage day, for that this promise makes this to be a good and a true Debt, the which still hath continuance, until it be paid.

And according to this, It was here adjudged, Trin. 44 Eliz. B.R. Rot. 238. between Hodges and Wareley, That in case where the matter demanded, is become to be a Debt, there no notice is to be given.

Trin: 44 Eliz. B.R. &c.

And Trinit. 7 Jac. B. R. Rot. 795. between Brendly and Cobbe, the same Case in effect, and Judgment there given in an Action upon the Case, upon such a Promise, without any notice given. For this was held not to be requisite, being a Debt

Trin. 7 Jac. B.R. &c.

Debt. In Hodges Case, there he assumed upon the Marriage of his Kinswoman, to pay unto him so much at the day of the Marriage, at the day he brought his Action without giving him any notice of the Marriage.

Judgment was here given for the Plaintiff.

Upon this a Writ of Error was brought in the Exchequer Chamber, and the Judgment was there affirmed.

The other President of Brendleys Case, 7 Jac. there also this point of Notice was questioned, and moved here in Arrest of Judgment, because no Notice was given.

As touching Notice to be given in such Cases, there will be a difference (as it was urged) where a collateral thing is to be done upon a Marriage-day, there notice ought to be given of it. But where the thing then to be performed is a due debt to the party who doth not demand this, yet notwithstanding this remains a good debt to him, and for refusal to pay this he may after have his Action, and in this Case no notice is requisite to be given.

Haughton. The Presidents here shewed, are the one of them upon payment to be at the day of Marriage; the second to be upon payment after Marriage, and no notice given. I am of opinion, that in this case, Judgment ought to be given for the Plaintiff, and that the want of notice given, is not material.

But in Case of a Bond for payment of mony at the day of Marriage. It is to be considered, Whether notice be there requisite, to be given of the day of Marriage.

Afterwards, at another time this Case was moved, and urged for the Defendant, that this Action lyeth not against the Executor, upon the Assumpsit of the Testator, being for a thing which was impossible for the Testator himself to perform, this being for Marriage-mony, to be paid upon promise after his death; here it is not debitum against the Testator, and therefore his Executor shall not be charged with it; to this it was answered; that in 36 & 37 Eliz. Judgment was here given in such a Case, before Slades Case now resolved. Coke 4 pars f.92. That an Action lieth against the Testator, and against him likewise upon an indebitatus assumpsit; here it is not, as it hath been urged, to pay after his death; but this is to be paid, tempore mortis.

Crook Justice. The Executor here is chargeable with this, &c.

There is a difference between a Charge, which chargeth the heir, and which chargeth the Executor. If the Testator upon a good consideration makes a promise to pay such a sum, one year after his death his Executor shall be charged with this.

The Court agreed, that the Action here well lyeth against the Defendant being an Executor for this Assumpsit of his Testator, and that no notice is here requisite to be given of the Marriage, and therefore by the Rule of the Court Judgment was given, and so entred for the Plaintiff. Judgment for the Plaintiff *per Curiam.*

Rawlinson Plaintiff against *Greeves* Defendant.

IN an Action of Trespass, The Case was this. (S.) A Copy-holder did surrender his Copy-hold estate to the use of another. The which Surrender was presented at the next Court held for the Manor, and found by the Homage, and he to whose use the Surrender was made, was there in Court accepted of by the Steward, and a Copy by him granted unto him; afterwards he to whose use this Surrender was made, surrenders the same again to the use of another, who was presented Trespass.

sented, and a Copy granted unto him, and he accepted of it as a Copy-hold Tenant, by the Lord.

The Questions insisted upon were 1. whether he should be, by this which is done in Court by the Steward, and by the Copy granted unto him, a perfect and compleat Copy-holder, without any other act to be done unto him.

And 2. When he surrenders again to the use of another, which Surrender is also presented in Court, and a Copy granted unto him, and he accepted of for a Copy-hold Tenant by the Lord, whether this be not an assent in Law by the Lord to the first Surrender, and so to make that party to whose use the first Surrender was made, and presented, to be a good Copy-holder, so by this enabled to make the second Surrender.

It was urged, That by all this which was thus done upon the first Surrender, by the presentment in Court, by the Homage, and by the Copy granted to him by the Steward, he was not yet a good and compleat Copy-holder, without some other act to be done; a further act being requisite to be done by the Lord, to give perfection unto this Surrender, and to make him a perfect Copy-holder, and this is, for the Lord to admit him; and the entry is, cepit de Domino, or Cui Dominus dat seisinam; but as it was urged, a bare surrender, and a presentment only of this shall not amount unto an admittance; for that the consent of the Lord is requisite and that of necessity, and before admittance of the Lord, he cannot be a compleat Copy-holder.

It was further urged, that this acceptance of the Steward, shall not amount to make a good admittance of him, as a Copy-holder, and that until he be admitted, the Land remains in the first Copy-holder, who surrendred the same; and for this was cited, 12 Eliz. Dyer fol. 292. and Coke 4 pars fol. 21, 22. Browns Case, and fol. 23. Pennysfathers Case, touching a possessio fratris of a Copy-hold estate, before admittance, that here there ought to be an actual admittance of the Lord of the Tenant, to whose use the Surrender was made, before which he cannot be a perfect Copy-holder; for when a Copy-holder surrenders to the use of another, before admittance of the Lord, the Copy-hold Land remains in him who surrendred, and not in the Lord, he being used but as an Instrument, for the conveying of this to another, and not to take any thing hereby unto himself.

12 Eliz. Dyer f. 292. Coke 4 pars, f. 21. &c.

Against this it was alledged, that this Surrender here is duly made, and that according to the course, and this is afterwards presented by the homage, and accepted of by the Steward, and a Copy granted unto him, by which, the Copy of him who first did surrender (S.) the force of this is quite gone.

It was further urged, that he to whose use this Surrender was made, did afterwards surrender to the use of another, which Surrender was presented, and a Copy to him granted, and he accepted of by the Lord, as a Copy-hold Tenant; this was urged to be a plain assent in Law by the Lord to the first Surrender, and to prove this was cited, 46 E. 3. Fitz. title Forfeiture placito 18. and Coke 5 pars fol. 15. a. in Newcomen & Hodges Case there remembred, where a Parson doth lease his Rectorie unto his Patron for 50 years, who assigns this over; Resolved, that in this grant is included as well a Confirmation of the first grant, as a grant of this over. And so here this admittance of him to whom the second Surrender was made by the Lord, is an assent also by him unto the first Surrender; here the entry is compertum est per Curiam, that such a thing was done, (S.) that such a Surrender to the use of another was made, and this presented by the homage, per Homagium, but no express assent of the Lord; no such entry of cepit de domino nec admissus est inde tenens, nec dat seisinam, nothing more found, but a bare presentment of the Surrender, whether the subsequent Act of the Lord upon the second Surrender shall not in Judgement of Law be an assent by him unto the first Surrender.

46 E. 3. &c. Coke 5 pars, f. 15. &c.

Haughton

Haughton Justice. If this first Surrender be presented, and a fine paid by him, if this be not entred, this will trench far in the Case. It is here found, non aliter admissus.

Dodderidge Justice. If the Lord will accept of this surrender, if this Surrender be in Court, without all question this is good. But here the same was extra Curiam, but presented in Curia, the Lord hath the same power out of Court, as he hath in Court, and here it is acceptatur per Seneschallum.

Haughton. If a Copy-holder surrenders to the use of another, and this is presented in Court, He to whose use the Surrender was made, surrenders to another, who is admitted by the Lord; afterwards the first surrenderer surrenders to another, whether any thing doth pass by this? the first Surrender here, to the use of another, was made out of Court, and this presented in Court (S.) at the next Court, whether the Copy-holder be ousted by this, or not? Whether upon this Surrender so presented in Court, with a Compertum est, without any other admittance, whether this shall be good to make this second Surrender good; or if any admittance of the first, according to the first Surrender, be here in Law, or in facto. If not, whether he which made the first Surrender, may have the Copy-hold Estate again after his Surrender.

It was urged, that he should have his Copy-hold estate again, For that this is but as a remembrance, or a preparation for an admittance, wich ought to be subsequent, and in facto.

It was further urged also, that the assessing of a Fine upon him, is no admittance. But if the Steward accepts a Fine of him, so assessed, as of a Copy-holder, this is a good admittance of him. And as touching admittances of Copy-holders, It was urged, that there will be a difference between admittances of the Steward, and of the Lord himself, which may be by an implyed Act; but of the Steward, this ought always to be by an express Act. Also an admittance by the Lord of a Copy-holder, may be done out of Court, but by the Steward, this ought to be in Court.

It was also urged, that before admittance, according to the Surrender, the Estate in the interim, remains in him who made the Surrender, but by the admitance, to be transferred over to the other, and not to be revoked, or countermanded.

To make good the first Surrender, It was urged, that here it is not only found to be with a Compertum est, but also that he accepted of him, ut tenens, and a special entry in Court made of this, an entry in the Roll, and a Roll there made of it, and that by vertue of this Surrender, the said Copy-hold Estate hath bèen quietly enjoyed ever since. 40 Eliz. and the reason that no other admittance was of him, was because he did not agree for the Fine, to the Lord, who is but as an Instrument to convey this to the other, who when he is in, and admitted, is in only by and from him who first surrendred; and now in this case, after 18 years quiet possession, the Heir of the party who first did Surrender, would avoid this Surrender so made by his Father, and that for default of this admittance of the Lord.

Haughton. Here the Steward hath delivered to him a Copy of the Court Roll, but no admittance was of him; the point here is, whether this Presentment of the Surrender, of it self hath absolutely taken away the Interest of him who made this Surrender. If the Lord hath assented unto it, then without all question, this Interest of the first Copy-holder, who thus surrendred, had bèen perpetually taken away from him; here he to whom the first Surrender was made, surrenders this to another, and the Lord admits him, according to this Surrender; Whether this admittance of him, by Judgment of Law, shall be said first to be an admittance of the second Surrender, according to the first Surrender, thereby to

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give him power, and so to enable him to make the second Surrender; of this I doubt.

Dodderidge. If this Surrender had bæn made unto the Lord himself, the Case had bæn then the stronger, but here the same was to the Steward, who made the Entry of it, the Entry ought to be (S) dat domino pro fine, & admissus est, and he ought to have seisin of the Lord. Plowdens Commentaries, the second part, Hare & Bickleys Case. Induction to a Benefice, resembled to an admission of a Copy-holder: And so without further debate at this time, this Case was adjourned to a further time.

Term. Hill. 14 Jac. B. R. this matter moved again.

Afterwards (S) Termin. Hillar. 14 Jac. B. R. this Case was moved again, and urged, for the making good the first Surrender, that the Steward may admit. That the Estate passeth from him, who made the Surrender, and nothing doth pass from the Steward, or from the Lord: That the assent of the Lord makes an admittance, which ought to be according to the Estate transferred. That the acceptance of the second Surrender, and the admittance of the party upon it by the Lord, implyes (as it was urged) an assent to the first Surrender, and that after the first Surrender, the Copy-holder cannot surrender to another, the Estate being passed from him by the first Surrender.

Dodderidge. A Copy-holder surrenders his Copy-hold Estate, before admittance a Trespas is done upon the Land; the first Copy-holder, who made the Surrender, shall punish this Trespass.

Haughton agreed with him herein, that he shall not punish the Trespass, if he still continues the possession.

Mountague Chief Justice. A Copy-holder surrenders to the use of another, and his Heirs; the Steward admits him, and this to him and to the Heirs of his body. Notwithstanding this admittance, yet the Estate shall be unto him, according to the Surrender, to him, and to his Heirs. If a Trespass be done upon the Land, after the Surrender, and before admittance, he which made the Surrender, shall not have an Action of Trespass, for this Trespass, for by the Surrender, all his interest is by him given away from him.

Dodderidge. A Surrender of a Copy-hold Estate, is compared to an Induction to a Benefice, before Induction no possession, and so before admittance no possession; pays a Fine, & fecit domino fidelitatem. No possession is altered before an admittance; as touching the assent of the Lord. If a man grants a reversion to one, who before attornment grants this over to another, the tenant attorns to the second Grantée; this is not good, otherwise where it is by fine, the assent ought to be as the Surrender is, and in the same manner, and this proves, that before this, he had no lawful Estate in him, by the first Surrender.

The Court agreed in this, that he to whom, or to whose use the first Surrender was made hath no Estate at all in him before admittance.

Dodderidge. The question is, what Interest, he which made the Surrender, had in the interim, before admittance, and whether he may transferre this over to another, or not.

Mountague. Though nothing be in the party, to whose use the Surrender was made, before his admittance, yet by the surrender, the whole Estate is out of him who made the Surrender, and by this his Surrender is passed away from him.

And so the Court doubting of this Case, and differing somewhat in opinion, they demanded sight of the Books of the Pleadings, and so this resting upon a Curia advisare vult, the same was adjorned to a further time. But the same was not moved again, but ended betwæn the parties by mediation of friends.

Ended by agreement.

Harding

Harding and others Plaintiffs, against *Goseling* Defendant.

IN a Prohibition to stay proceedings in the Spiritual Court, upon a Suit there for Tithes; the Case was, That Gosnel libelled there against them, for a modus decimandi, being not paid.

A Prohibition, 1 Rol. R. 419. 1 Ro.Abr.642. 656. 1 Ro.Abr.283, 284, 293, 301, 305, 307.

The Plaintiffs suggested another modus decimandi, which suggestion they refused to receive; upon this a Prohibition prayed.

Dodderidge Justice. The modus decimandi, is as well due to the Parson, as Tithe is at the Common Law, and if the Parson do libel in the Spiritual Court for a modus decimandi, (as he may do) and another modus is there suggested, and this refused, they may there try and determine this matter touching this modus, and no cause to grant a Prohibiton for this refusal: But if they do there refuse the suggestion for the modus upon this ground, because their Law and our Law do differ in the point of proof; as for default of two Witnesses, one being allowable in our Law, but not with them: In this Case a Prohibition is to be granted, but otherwise they may there as well try the modus decimandi, as the right of Tithes.

But if a Parson do libel there for Tithes in kind, and a modus is suggested, and there pleaded, the which they refuse to allow, upon this refusal a Prohibition is to be granted: But otherwise it is where the Libel is as in this Case for the modus, which they may well try, and therefore no cause to grant a Prohibition.

Haughton Justice. In this Case a Prohibition ought to be granted, otherwise in such Cases, upon every small difference alledged in the modus, they may try and determine the validity of every modus decimandi, which they cannot do by the Law; they are not to be suffered by our Law to try a modus decimandi there, but they ought to be prohibited; and therefore they proceeding to try this modus, which is determinable by our Law, and not by them in the Spiritual Court, a Prohibition ought to be granted.

Dodderidge. No Prohibition is in this Case to be granted, for there they may well try and determine this modus by their Law: The Libel being there originally for the modus; but if there be a difference in their proceedings, between their Law and our Law, as touching the probate of this modus, if proved by one Witness, the same is good by our Law, but not so with them without two Witnesses; if this be the ground of the refusal of the suggestion, then a Prohibition is to be granted, and therefore this is fit to be examined whether it rests upon this point, or not; and if it do so, then a Prohibition is to be granted, but not otherwise; if they only proceed there to try the modus, for which the Libel was, by proof this may well be there examined by them.

Croke Justice, at this time delivered no opinion at all in this Case.

By the rule of the Court, this matter was referred to a Clark of the Court, truly to examine the difference between them in the Spiritual Court, upon the Libel there, and to certifie the Court of this, and so this Case was adjourned to a further time.

Afterwards this Case being moved again.

Dodderidge. If there be a modus decimandi between the Parson and the Parishioners, and he libels in the Spiritual Court to have Tithe in kind, and the modus is suggested, they are in this case to be prohibited; but if he libels there for the modus, to have this paid unto him, (as he may do) and the other party doth suggest that he ought to have another kind of modus, but not that for which he li-

 belled,

belled, here the truth of this matter shall be tried there; but if the difference between them, be touching the matter of proof of this modus, and wherein their Law and ours do differ in the manner of the proof by Witnesses, in this Case they are to be prohibited; and so is 1 R. 3. and 10 H. 7.

Also if a Parson do libel there for a modus, whereas in verity there was no modus, but only a Composition of late time betwæn the Parson and the Parishoners to pay so much yearly for Tithes, and not otherwise: In this Case, because that our Law and their Law do differ in the point of prescription, with them ten years continuance, being a good prescription, but not so by our Law, in this Case they are to be prohibited.

Haughton. A modus decimandi is properly to be tryed and determined by the Common Law, and not by them in the Spiritual Court, for that their Law and our Law do differ in many things, as in point of proof of a modus, and in the point of Prescription.

Croke. A special modus being there libelled for, is there to be tryed; but if they differ there in a temporal matter, they are then there to be prohibited, this being triable by the Common Law.

Dodderidge. If they do there refuse to allow of the proof, allowable by our Law, and wherein they differ from us, they are then to be prohibited not to sue for Tithes there: And where there is a modus, if they refuse to pay this, the Parson may sue there for this modus, and this is to be tryed by them; but if in such a Case where there is a modus, if the Parson will libel to have his Tithe in kind, and the other shews there this modus, which they will not allow of, they are here to be prohibited, and this shall be tryed by our Law.

Haughton. There is a Custom laid in the suggestion, this they ought to hit right in all the particulars, or else they will fail; this was in a Case of Fishing, Tithe-Fish being libelled for, or the modus for the same; The Parson to have Tithe of the clear gain made thereby; if they allow 500 l. for the charges of the Voyage for Fishing, before any Tithe to be paid, by this they will make the Tithes of the Parson to be little or nothing.

The Court declares that they would see the suggestion, and therefore by the rule of the Court they were to make their suggestion, and to shew the same to the Court, as they would stand unto it; and in the mean time the Suit in the Spiritual Court to be stayed.

Nota, That 16 die Novembris, Termin. Mich. 14 Jac. Sir Edward Coke Chief Justice de B.R. was removed from his place, and 18 Novembris, Sir Henry Mountague the Kings Serjeant and Recorder of London, was sworn Chief Justice of the Kings Bench in his place.

Fosse Plaintiff, against *Parker* and others Defendants.

Libel for Tithes, &c.

By Libel in the Spiritual Court, for the Tithe of Neck-wool of 800 Shæp which the Defendants had cut, and converted the same to their proper use: The Defendants there answered that they used betwæn Michaelmas and All-hollandtide, to cut the Head, Neck and Ears, to preserve their Shæp from Vermine and Flies, and so by this to make the Fleece the better, and that they were to pay the tenth Fleece at shearing time, but not to pay any of these Neck-Fleeces, being as they alledged of no value; The which Plea they there refused, and gave a sentence for the Plaintiff against them: For this cause a Prohibition was prayed.

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The Court denyed to grant a Prohibition in this Case.

Haughton Justice. There may be much deceit used in this, as in the Case of Rakings: If purposely they will scatter Corn, the Parson shall have Tithe of this, unless it be minus voluntarie; so here, if they cut great Fleeces which will yield profit, the Parson is to have the Tithe of this.

Dodderidge Justice. The suggestion here alledged is, because he paid the tenth Fleece at Shearing time; for this to be discharged of payment of Tithe of the Neck-fleeces, and that in consideration of this, the Parson to have the tenth Fleece after; this is due to the Parson Jure Divino: they make too long Neck-shearings, and upon this colour they use to shear all the Shoulders also, and so by this to spoil the other Fleece: If the Parson be to have the tenth Fleece of the Back, he ought also to have the tenth Fleece of the Neck, and no reason for the contrary.

Croke Justice. If they cut this Neck-fleece, and convert this to their proper use, they ought of this to pay Tithe to the Parson.

It was then urged, that if such abuse was in the cutting of the Neck-fleeces, this ought to come on the other side to shew this to be so, as in the Case of Rakings.

The whole Court against this, and denyed at this time to grant a Prohibition, for that their answer in the Spiritual-Court, was no ways sufficient to debar the Parson of his Tithe of these Neck-fleeces.

Afterwards this was moved again, and the suggestion appearing to be, that for this, they used to wind up the other Fleeces at their own charge, so for this cause a Prohibition was granted by the Court. A Prohibition, &c.

The Wife of *Hungate* Plaintiff, against *Philips* a Constable, in *Comitat' Eborum*, Defendant.

IN an Appeal, Coventry for the Defendant demands, 1. Oyer of the Writ of Appeal, and of the return of this which was read in Court: Then he demanded Oyer of the Capias, and of the return of this which was read in Court: Then he demanded Oyer of the Capias, with Proclamations, and of the return of this. Appeal.

To this, George Croke for the Plaintiff made answer, (S) Quod vicecomes non misit breve.

Coventry. To this the non-return of the Sheriff of this, shall not take away the benefit of the Appellée by this, but at the day the party appearing gratis, the Plaintiff ought to declare against him.

Curia. As to this, vicecomes non misit breve, you cannot now demand Oyer of the Capias, with Proclamations when it is here recorded in Court, Quod vicecomes non misit breve, for it is vain for you to demand Oyer of that which is not.

Page Plaintiff, against *Davis* Defendant.

IN a Prohibition to the Spiritual Court, upon a Suit there for a Legacy, the Defendant there did suggest the Custom of London, of foraign Attachments for Debt, and shews that such a Legacy was given by, &c. and the same attached for Debt, according to the Custom of London. A Prohibition.

Prohibition denyed, *&c.*

The Court clear of opinion, that Legacies are not within this custom of London, of foreign Attachments, that this Custom doth not extend unto Legacies, for it ought to be a Debt certain, or not within this Custom; for that a Custom cannot be to attach a Legacy, which is not a certain Debt, nor yet any duty until all the Debts are paid, and for this cause a Prohibition was denyed per Curiam.

Samuel Melitine a Stranger Plaintiff, against *Hall* Defendant.

Debt. 1 Ro.Rep.423.

IN an Action of Debt upon a Bond; the Case was this, The Defendant was indebted by two several Obligations unto the Plaintiff, conditioned for the payment of 200 l. to him, at his House in Black-Fryers, in Parochia Sanctæ Annæ, in Warda de Farrington, 10 l. of which was paid; the Plaintiff in his Declaration sets forth the payment of the 10 l. unto him in part, and brought this his Action for the residue of the said 200 l. which was to be paid at his Mansion House; upon Nil debet pleaded, a Verdict was given for the Plaintiff.

It was moved for the Defendant, in arrest of Judgment, that the Declaration was not good.

First, Because it is not shewed by the Plaintiff upon which Bond this 10 l. was paid, which ought to have been specified; for which omission the Declaration is not good, and for this 3 H. 6. fol. 44. was cited.

Secondly, Because there is no place laid where the payment was to be made, being only said to be at his Mansion House; and that the Venire facias was not well awarded, being de Parochia Sanctæ Annæ, in Warda de Farrington.

Haughton Justice. 200 l. was due to the Plaintiff upon both the Bonds; he sets forth that he had received 10 l. in part thereof, it is no prejudice at all to the Defendant, of which of these sums this 10 l. shall be part; this payment was good, and the Action well brought for the residue.

Croke Justice agreed with him herein, for this is for the benefit of the Defendant, to have this his payment of the ten pound in part, to be thus acknowledged by the Plaintiff.

Dodderidge Justice. The Defendant was here indebted to the Plaintiff upon two several Obligations; several in respect of the Obligations, but he may joyn the whole in one Action; he hath alledged the payment of ten pound to him in part, and it is not material at all upon which Obligation this ten pound was paid, it is part of the Sum, and of the Debt to be paid, and no inconvenience can arise by this; the Issue was, Whether the Mony was paid, or not, the Declaration here is good without shewing upon which Bond the same ten pound was paid.

As to the Venire facias, he was bound to pay this at his Mansion House, this may be paid at any place.

Judgment for the Plaintiff *per Curiam.*

The Court over-ruled the Exceptions taken to the Declaration, and so by the rule of the Court Judgment was given for the Plaintiff.

Sir

Sir *George Reynel* Plaintiff, against *I. S.* a Prisoner in the *Marshalsie*, in his Custody, Defendant.

Motion to have a Prisoner fined.

THe Court was moved on the behalf of Sir George Reynel, Marshal of the Court, against one of his Prisoners who had very much misbehaved himself, had offered to make an escape, and had endangered the killing of one of his Servants; that he had spent in following of him 10 l. and therefore the Court was moved to have him fined for this, and that he might have recompence for this his 10 l. so disbursed and laid out.

Croke Justice. To fine him for this, we will not do it, unless that the Precedents of this Court, in such a Case will warrant this, the which we will first see, and well consider of: But you may keep him in arcta Custodia, (S) in Irons; you may also indict him for these mildemeanors, and so by this way to have him fined, but not otherwise.

Sir George Reynel being present in Court made answer, That by the Presidents of the Court he may well be fined without any Indictment.

Dodderidge Justice, & Curia. This is but your suggestion, upon which we will not proceed in such a manner without seeing the Presidents of the Court, for the allowance of this; but you may keep him in arcta Custodia: And this was all the Court would do herein without any other directions given.

Crawley Plaintiff, against *Marrow* Defendant.

Ejectione firmæ, Bridg. 64. 1 Ro.Rep.424, 443. 1 Ro.Abr.876.

IN an Action of Trespass and Ejectment, for Land in Brigstock, in Comitat' Salop, upon Non culp. pleaded, the Jury found a special Verdict; upon which the Case appeared to be this, (S) Tenant in tail acknowledged a Recognizance of 1000 l. and dies; A Scire facias was brought against the Issue in tail, who hanging this Scire facias, made a Lease for years of the Land in question to the Defendant, and pleads to the Scire facias, that he had riens per discent of Fæsimple from his Father, and that he was not the terre Tenant of the Land, all which was found against him, (S) That he was terre Tenant of the Fræ-hold, and that he had Land by descent from him in Fæ-simple, all which was put in Issue; and hanging this, he made the Lease to the Defendant: Judgment was given against the Issue in tail, that the Land should be liable unto this Recognizance, the Lease was made before Judgment to the Defendant; the Defendant being the Lessee pleads all this matter, and in the special-Verdict this is all found: The Plaintiffs title was under this Recognizance, and the Judgment given against the Issue in tail: The Defendants title under this Lease for years made unto him, by the Issue in tail.

The Points here moved and insisted upon were these, (S)

1. Whether the Issue be bound by this, or not.

2. If he be bound, then whether the Defendant, his Lessee for years be bound, and whether he may falsifie in this Case by the Statute of 21 H. 8. cap. 15. and enjoy his Lease against the Judgment given in the Scire facias, against the Issue in tail his Lessor.

Stat. of 21 H. 8. cap. 15.

It was urged by Hedley and Coventry for the Plaintiff, that although this special Verdict finds him to be Tenant in tail, yet by 37 H. 6. fol. 21. in a Scire facias

facias against the Issue in tail; if he have a release to plead, and will not plead the same, by this his Laches, he hath lost the advantage of this; the same reason here in this Case.

Obj. It may be objected as it was urged, that here the Scire facias was not for the Land it self, but for a collateral thing out of the Land, (S) to recover the 1000 l. upon the Statute acknowledged by the Tenant in tail.

Resp. The difference will be, (as it was urged) where Tenant in tail grants a Rent by Fine at the Common Law, this is void against the Issue; another difference may also be, if it were a Judgment against Tenant in tail, this shall not bind the Issue in tail; but otherwise it is, where the same is by Action tryed, as here in this Case it was.

In an Action of Debt brought against the Heir upon an Obligation, if he appears and pleads that he hath riens in Fee-simple by descent, and upon this Issue the Jury finds against him, that he hath Land in Fee-simple by descent, this Land shall now be bound by this Judgment.

If a Disseisor, as it was urged, doth acknowledge a Statute, the Disseisee enters.

In a Scire facias against the Disseisee, who pleads that he hath not any Land that was the Conusors, jour del brief purchase, if this be found against him, the Land is by this bound: This last Verdict in this Action, as it was urged, is not contrary to the first Verdict in the Scire facias, for here the Jury do find, that his Ancestor was Tenant in tail, and died seised, and it may be that he suffered a Recovery afterwards, and so died seised in Fee-simple; for he might suffer a Recovery, thereby to cut off the Intail, after the Recognizance acknowledged, the which was so acknowledged to Sir John Whitbrook, 11 Eliz.

To this it was answered for the Defendant, by Bridgeman, that the Issue in tail was not bound by this; this must be agreed, that Tenant in tail cannot charge the Land, if he do by his death, this is then discharged, and all charges on the Land by him.

26 Assisar. placito 38. &c. 26 Assisar. placito 38. Quintins Assise: If the Issue in tail doth confirm a Rent before granted by Tenant in tail, this is void; but if the Issue in tail doth enfeoff another, the Feoffee shall hold this charged, and so is 14 Assisar. placito 3. such a grant is void by his death.

Here in this Case, as it was urged, the Lessee of the Issue in tail shall not be bound, by this mispleading of the Issue in tail himself, nor yet subject to this charge. If the Tenant in a præcipe aliens pendant le brief, yet he remains Tenant, and the Alienee shall not be received, as appears by 12 Assisar. placito 41. the reason, a prejudice by this may be to the Demandant; here in this Case there can be no prejudice to the Demandant in the Scire facias, for this at the time of the descent, was discharged of this Recognizance, and became only chargeable by the Judgment against the Issue in tail; the Lessee here shall be discharged for his term, and therefore as it was urged, he shall be here received to falsifie, by the Statute of 21 H. 8. cap. 15. a termor by this Statute shall be received to falsifie upon a feigned recovery; and so here in this Case, for if a Man hanging the Writ against him, makes a Lease for years, if his Lessee shall not falsifie, then every such Lessee may be triced.

Obj. It hath been objected, that it appears by the date of the Lease, that the Issue in tail made this Lease, hanging the Writ of Scire facias brought against him, and that therefore the Defendant his Lessee shall not falsifie.

Resp. To this it may be answered, that then this shall be very mischievous unto such Lessees.

Haughton Justice. By this way any one may trice his Lessee.

Dodderidge Justice. And on the other part, any one may then avoid a lawful recovery.

And

And so this Case was adjourned to another time for further Argument herein.

Afterwards this Case was moved again, and urged for the Plaintiff, that the Defendant being Lessée of the Issue in tail, shall not be received to falsifie this recovery had against the Issue in tail his Lessor; also he came unto this Lease after the Verdict given, and so the Issue in tail himself is bound by the Judgment in the Scire facias against him, and therefore his Lessée here shall also be bound: The Recognizance acknowledged by the Issue in tail, is void by his death, but when this is prosecuted against the Issue by the Scire facias, who pleads riens per discent in Fée-simple, and this is found against him, he hath now no other remedy to aid himself but by an Attaint: It was his own Laches that he did not give the Deed of Intail in evidence to the Jury, and therefore by the Judgment against him, this Land is now extendable, and the Defendant his Lessee shall not be in any better Case than himself.

As to the Statute of 21 H. 8. cap. 15. It was urged that the Defendant here being Lessee of the Issue in tail, shall not be received by this Statute to falsifie this recovery, and that for these two Reasons.

1. This Statute extends to Recoveries had by Covin, the preamble of the Statute being fained Recoveries suffered; the purview of the Statute is, That Lessees for years shall falsifie such Recoveries for their terms only, but here is no such recovery by Covin; and this Statute doth not give such a falsifying of a recovery by the Lessee, as is had against his Lessor, upon an Action tryed, as here in this Case, and for which he hath his Attaint for his present remedy.

2. The Statute is, That a termor shall falsifie in such a manner, as a Tenant of the Free-hold shall, or may do by the course of the Common Law, &c. but here the Tenant of the Free-hold could not falsifie, no more shall his Lessee here by this Statute.

Mountague Chief Justice. If this Recovery here hath bound the Estate, how then can this Lessee be received to falsifie and plead this; 7 H. 7. the Law shall not be an Instrument of disceit; here the Issue in tail is bound, and so shall the Defendant his Lessee be.

Haughton. This very Land was not charged by the Scire facias brought against the Issue in tail, which was but only, Quare executionem habere non debeat, to which he pleads riens per discent, from the Conusor in Fee-simple; and so the Issue was, Whether this Land was Fee-simple Land, or not, and by this consequence, being so found, this very Land is now by this made to be liable to this Recognizance, and that ex consequente, but not by the Scire facias, and so this Land became to be charged by the Verdict and Judgment, with this Recognizance; and this before the Lease made, and the same became chargeable by the faux Plea of the Issue in tail: And so the difference is when the Action is brought for the Land it self in particular, and when it is (as in this Case here) only to shew cause, Quare executionem habere non debeat.

Dodderidge. Shall the Issue in tail here say after this Verdict, that he is Tenant in tail, certainly he shall not, neither shall he be remitted upon a Discontinuance after this Verdict; if the Oath of 12 Men be false, this to be so proved by 24 this to stand in full force till the same be disproved; after a point tryed in a real Action, never shall he be received to falsifie in the point tryed; and so here in this Case, clearly the Defendant being Lessee for years of the Issue in tail, shall not here falsifie for his term; the Land by the Judgment is bound, and his Estate liable to this.

Mountague, 10 H. 6. The Issue in tail shall not falsifie in a point that is tryed by Action.

The whole Court clear of opinion, because this was after Verdict, the Lessee here shall not be received to falsifie for his term.

After-

Judgment for the Plaintiff, *per Curiam.*

Afterwards at another time it was clearly argeed by the whole Court, that the Lessee for years shall here not falsifie, and so the same was pronounced by Mountague Chief Justice, and accordingly by the Rule of the Court, Judgment was given for the Plaintiff.

Smale Plaintiff, against *Boyer* Defendant.

Action on the Case upon a promise against an Executor.

IN an Action upon the Case, brought against the Defendant as Executor of, &c. upon the assumpsit of his Testator, the same being, That if he married his Daughter, he promised to give him so much with her, as he had given to any one of his Daughters.

The Plaintiff laid in his Declaration, that he had given so much to one, and so much to another of his Daughters; says the Marriage had in his life time, that he requested payment of this, which was not paid, and for this cause the Action brought against the Defendant his Executor.

The Court clear of opinion, that the Action well lieth.

The point moved and insisted upon was this, (S) That the Verdict being given for the Defendant upon an insufficient Declaration, the Plaintiff excepting against his own Declaration for insufficiency, (which proved to be so) whether in this Case the Defendant shall have costs for his vexation, by the Statute of 23 H. 8. cap. 15. or not.

Haughton Justice. The Statute of 4 Jac. cap. 3. doth not extend unto this Case, for by this Statute the Defendant shall have Costs, as the Plaintiff should have had if he had recovered, but here the Declaration being insufficient, the Plaintiff could not have his Costs; but now the question is, Whether the Defendant shall have Costs by the Statute of 23 H. 8. cap. 15. which Statute saith, That if any Verdict shall be given in an Action upon the Case against the Plaintiff, and for the Defendant, that then the Defendant shall have his costs for his vexation; and here this was in an Action upon the Case, and a Verdict given for the Defendant, so that this Statute is clearly against the Plaintiff; but here in this Case the Declaration proves insufficient, Whether now the Defendant shall have his Costs.

Grymstones Case was cited, Trin. 40 Eliz. B. R. that in such a Case it was ruled he should not have his Costs.

Other Presidents cited e contra, that he should have his Costs.

Haughton. Grymstones Case cited that he should not have his Costs, and that this Case was in an Action upon the Case.

But on the other side, and upon this Statute of 23 H. 8. the Case in 29 H. 8. Dyer, fol. 32. placito 5 & 6. was cited: In an Action upon the Case, the Jury coming to give up their Verdict, and the Plaintiff being called, became non-suit, by reason whereof the Defendant by the Statute of 23 H. 8. had Judgment to recover his Costs.

Afterwards the Record was removed by Writ of Error in B. R. by the Plaintiff, hanging which, the Defendant brought an Action of Debt in the Court of C.B. upon a new Original, and the Action held maintainable; there held, that though the Record be reversed upon the Writ of Error, yet the Plaintiff in the Action of Debt, shall have his Costs, for the wrong and vexation by him sustained by the first Suit brought against him; so in this Case the Defendant here is to have his Costs for his vexation, though the Plaintiffs Declaration be insufficient.

Dodderidge Justice. We will see your Presidents, where in such a Case as this is, Costs were given and allowed to the Defendant.

As

As for the other presidents cited, where Costs were not given, they may have passed sub silentio, and the matter not insisted upon.

The Court seemed to be of Opinion, that the Defendant ought to have his costs, upon the Statute of 23 H. 8. though the Declaration be insufficient, but the Court desired to see the Presidents cited.

Leuknor Plaintiff, against *Godman* Defendant.

Entred Termin. Trin. 14 Jac. B. R. Rot. 41.

IN an Action upon the Case for scandalous words, upon Non culp. pleaded, a verdict was found for the Plaintiff: It was moved for the Defendant in arrest of Judgment, that the Declaration was not good; and for this the case was, the Plaintiff in his Declaration sets forth, that there was a Communication between the Father of the Plaintiff and the Defendant, who said unto him, that Taylor did steal the Mare of J. S. and thy son was consenting unto it, and a partaker with him therein. Action on the Case for words.

It was urged, that these words, as they are laid in this Declaration are not actionable: The words spoken to the Plaintiff being, Thy Son was consenting to it, and partaker with him, but doth not aver, as he ought to have done in this Case, (as it was urged) that his Father had no more Sons but only this, who was the Plaintiff.

For the Plaintiff it was urged, that the words, as they are laid, are well actionable, and for to warrant this, these Cases were cited, 38 Eliz. B. R. Bedfords Case: An Action upon the Case for words, being (S.) I was robbed, and thou wert privy to it, adjudged that the Action well did lie. 38 Eliz. B. R. &c.

15 Eliz. Dyer fol. 317. Hawley against Sydnam, He is infected of the robbery and murther lately committed, and smells of the Murther; adjudged that the Action lieth for the words infected.

Another Case was urged, lately adjudged here for words, being, The Defendants in the Star-Chamber, were they that murthered Thomas Farrer; adjudged here the words to be actionable, and this Case afterwards affirmed in a Writ of Error.

The whole Court agreed this Case to be so, for here, the Defendants comprehended all the Defendants there.

As for the averment urged here to have bèen made, that the Plaintiffs Father had then no more Son than the Plaintiff, such an averment here ought not to be, for that the Law doth not presume a plurality.

Dodderidge Justice. If one saith to a Woman, Thy Husband did murther such an one, or hath stollen a Horse: It hath bèen in this Case adjudged, that the Action lieth without any such averment; the reason of this is apparent, because she can have but one Husband, and therefore here is certainty sufficient.

But it is not so here in this principal Case, for that he may have more Sons, and therefore for the maintenance of this his Action, he ought of necessity to have had such an averment, (S) That his Father, to whom the words were spoken, had no more Sons but only the Plaintiff, and without this averment, clearly the Action lyeth not.

The whole Court agreed with him herein, and that without such an averment (which in this Case is wanting) the Action upon the Case for these words will not lie: And for this omission of this averment the declaration here is not good, and therefore the rule of the Court was, Quod querens nil capiat per billam.

Judgment, &c.

Parry Plaintiff against *Parry* Defendant.

An Action of Debt.
1 Ro.Rep.395.

IN an Action of debt brought by an Executor, & profert hic in Curia literas testamentarias; the Defendant by Plea sheweth, that the party which was dead, died intestate, and that Letters of Administration were granted unto him, and takes a Travers, absque hoc, that the Plaintiff is Executor; Whether this be a good Travers or not was the question.

Term. Trin. 14 Jac. B. R. &c.

This Case was first moved, Term. Trin. 14 Jac. B. R. and then urged, that this Travers is not good; but if a Travers here is to be taken, he ought then to have traversed that he made no such Will.

Coke Chief Justice. The Travers is not good clearly, for that he may be Executor of his own wrong, and so this Travers is not good, by the Book of 7 E. 4. No Travers at all is to be taken, where he brings an Action as Executor.

The whole Court agreed with him herein, that the Travers was not good, and therefore by the rule of the Court, a day was then given him to put in a peremptory Plea, as he would stand unto it.

Afterwards, (S.) in this Term of Mich. 14 Jac. this matter was moved again upon the Travers, and urged that this Travers was not good; and to warrant this, the Books of 10 H. 6. fol. 26. 9 E. 4. fol. 33. & 4 H. 7. fol. 13. were cited.

10 H. 6. f. 26. &c.

Dodderidge Justice. In 9 E. 4. fol. 33. there is a confessing and avoiding by a refusal.

The whole Court clear of opinion, that the Travers here is not good, but very absurd; but if any Travers at all was here to be taken, it should have been absque hoc quod constituit eum executorem, but the Books do question it, whether in such a Case any Travers ought to be; but the Travers here is not good, and so by the rule of the Court Judgment was given for the Plaintiff.

Judgment for the Plaintiff.

Havergil Plaintiff against *Hare* Defendant.

Entred Termin. Hillar. 13 Jac. B. R. Rot. 868.

Ejectione firmæ.

IN an Action of Trespas and Ejectment, upon Non culp. pleaded, the Jury found a special Verdict, upon which Verdict the Case appeared to be this, (S.) One Parlour was seised of certain Land in Fee-simple, and being so seised, he granted a Rent charge of 20 l. per annum out of this Land unto one Odour, his Heirs and Assigns to be paid at two Feasts by equal portions, with a clause of distress, if behind by twenty days; and for further assurance of this, he did covenant upon request, to levy a Fine unto one Hill and Ewer and to the Heirs of one of them, which should be to the uses expressed in certain Indentures, (and no use is there expressed) but in this manner.

And

And further Covenants, that then, and from thence forth, if the said rent shall be behind in part, or in whole, and no distress upon the land, or if any distress, if a Rescous be made or any pound breach, or any Replevin sued; that then it should be lawful for the Grantée, his Heirs or Assigns into the said Land to enter, and the same to retain until he be satisfied of the rent behind. Hill dies before any request made to levy the Fine. Odour the Grantée assigns this rent over unto Woodward, his Heirs and Assigns, who sells this unto William Fisher the Lessor of the Plaintiff and to his Heirs and Assigns with all the benefits, and privileges, which he was any way to have.

Afterwards 10 l. of the rent was behind, 11 Jac. afterwards the Fine was levied Trin. Term. 12 Jac. to the said uses, and no more behind, the assignée of the rent for the rent before the fine levyed, which not paid; after the fine he came to distrain, and upon a Replevin sued, he enters into the Land for the whole rent by force of the said use, and for the trial of his title he makes a Lease for years unto the Plaintiff; and then the Jury conclude, that if the Lessor have a good title to make this Lease, then they do find for the Plaintiff, and small damages, for the damages in the Replevin; and if the Lessor have no good title, then they find for the Defendant.

This case by the Judges, was said to be a case of very great consequence, the same trenching unto all assurances to be made, which case was long and several times argued at the Bar, and afterwards by all the four Judges.

It was in this case urged for the Defendant, that no use could here arise upon this Fine, because that one of the parties, to whom the Fine was to be levyed died, before any request made to have the Fine levyed.

Notwithstanding this, It was by Henry Finch urged for the Plaintiff, that without question the use shall well arise. For if one covenants to levy a Fine before such a day, although that the Fine levied differs from the Indenture, in time, place, in the quantity of the acres, or in the person which occupied this, yet when the Fine is levyed, it shall be intended to be to the same uses in the Indenture, as appears in the Lord Cromwels Case, Coke 2 pars fol. 69. in Dowmans case, Coke 9 pars fol. 1. and in the Earl of Rutlands case, Coke 5 pars fol. 25. so here in this case, although one of the persons first specified, is not named, (S) Hill, because he was dead, yet the Fine shall be intended to be to the same uses. Coke 2 pars fol. 69. &c.

To this purpose a case was cited, Pasch. 3 Jac. 5. B.R. 5. Barnard Whetstone and Withipoles case, Swansted against Elyot; being the parties in this Court where the Covenant was, to levy a Fine, before such a day to certain uses, the Fine bears date before the Indenture. Resolved here, that this ought to be taken to be to the use in the Indenture: if the same be averred to be so, and so given in evidence. Pasch. 3 Jac. B. R. &c.

But it was also resolved in Whetstones case, that if the Jury do find this generally, then it shall not be intended to be to the same uses, (S) where the Fine is first, and then the Indenture of uses, which Fine shall be levyed to the same uses; here the Jury in this case have found expressly, that this Fine is to the uses in the Indenture; and therefore not to be questioned.

The chief matter considerable in this case is, whether Fisher the bargainée, by his entry hath gained unto himself such an estate in the Land, as will warrant the Lease for years made by him to the Plaintiff; so that he upon an ouster may maintain an Ejectione firmæ. It was strongly urged, that by this his entry, he hath gained a good and a lawful estate, so that he may well make of this a Lease for years. If no Fine were in the case, but the Indenture only purporting so much; yet he hath shewed sufficient cause before to warrant the making of this estate for years; for it is, (S) if the rent be behind, and no distress upon the Land, or if a Replevin be brought, then Fisher the bargainée, to enter into the Land, and this to hold until the rent of 20 l. be paid unto him, and here half a years rent was be-

hind, by this entry such an Estate is given unto him, as it was urged, that of this he might well make a Lease for years.

If a man doth Covenant, and grant that J. S. shall have his Land until 10 l. be levyed; or if he doth Covenant and grant that he shall have his Land, this shall amount unto a Lease of the Land, until the 5 l. be paid.

5 H. 7. f. 1. A man doth licence another to hold his Land, this shall amount unto a Lease.

27 H.8. fol. 5. One doth covenant that J. S. shall have his House, or his Cow, by this the property is presently altered from him to J. S. and there by Fitzherbert, if one doth Covenant that J. S. shall have his Lease, this shall be good to him.

1 Mar.f.96.&c. 1 Mar. Dyer 96. Seymors Case, a man doth covenant that another shall have his Land, by this he shall have it, and there a use may rise by such a Covenant.

8 E. 1. Fitz. tit. Assise, pl. 412. It is there admitted, that if one covenants that J.S. shall have his Land for so many years, this is a good Lease for so many years as are named,

5 Jac. B.R.&c. 5 Jac. B. R. between Turker and Squire, A man doth covenant to suffer J. S. to enjoy his Land for five years, this resolved to be no Lease for years, being but to suffer, which rests only in his Will; but here it is clear, that being coupled with the word Grant, this makes a good Lease for years.

37 H. 8. &c. 37 H. 8. Brooks Cases, fol. 69. placito 309. Brook tit. Leases, placito 60. That convenit & concessit, shall make a good Lease, so that by these word, as it was urged, Fisher the Assignée hath a good and a fixed Estate, and not barely at Will; the Covenant being that he shall hold the Land until the arrerages be paid, which here were 10 l. so that as it was urged, he hath here such a fixed Estate, of which he may make a Lease for years: If he had but only an Estate at Will, or a bare perception of the profits, such a one could not make a Lease; here he hath a certain Lease.

14 H. 8. f. 14. 2 Mar. &c. 2 & 3 Mar.&c. 14 H. 8. fol. 14. by Brudnel, Land given to one till 20 l. be levyed, this is a good Lease; but this was not fully determined, until 2 & 3 Ph. & Mar. 2 Mariæ Brook Leases, pl. 67. Brooks Cases fol. 101. pl. 462. by Bromley and others; a Lease made to J. S. till 10 l. be paid, and without livery, this but a Lease at Will for the incertainty.

But 3 Mariæ Brooks Cases, fol. 102. placito 468. Brook tit. Leases pl. 67. It was there held by all, If one lease Land to J. S. till he hath levyed 20 l. that this is a good Lease, notwithstanding the incertainty.

Coke 4 pars fol. 81. Sir Andrew Corbets Case touching this matter: It was then further urged, That if this Covenant will not aid him, then 2. The Fine then levyed to the use of, &c. until 10 l. levyed, this will make this good; The Case for this, being a Fine is levied to the use of J. S. till 10 l. levyed; this is all one, as it was urged with the Case of Statute-Merchant.

27 H. 8. &c. This use here is well executed, by the Statute of 27 H.8.c.10. of uses, 27 H.8.5. upon the matter, it is this very case now in question, after the Statute of uses: An Indenture of Covenant, if he do not marry the Daughter of J. S. that he shall hold the Land, until 100 l. be levyed; there held that this is such an Estate as his Executor shall have here by this Fine levyed to the use, &c.

Fisher, as it was urged, hath a good and a fixed Estate, out of which he may derive another Estate, determinable upon the payment of the rent behind.

It was urged for the Defendant, that the clause in the Indenture is, that if the rent of 20 l. be behind, but here the rent of 10 l. is behind, and therefore he cannot enter into the Land.

To this it was alledged for the Plaintiff, that if the 20 l. or any part of it, be behind, this was the true intent and meaning of the Indenture, and the naming of 20 l. is but a designation of this.

Dodderidge.

Dodderidge Justice. As to the finding of 10 l. only behind, this is not good, for he ought to have specified, if behind in all or in part, he then to have the Land; this is not here so done.

Haughton Justice differed herein from him in opinion, because if the Rent for half a year be behind, the Assise ought to be brought for the whole Rent, De redditu prædicto, here it ought to have such a construction, that if the rent be behind at any time, when this ought to be paid, that then, &c. for then the Rent of twenty pounds is behind, although not twenty pound of the rent, and so this is good as it is found.

It was then urged further for the Defendant, that the 10 l. behind, and for the which he entred into the Land, this was so behind, before that the Fine was levied and so he cannot enter into the Land for this 10 l. which was behind, before the Fine was levyed.

Dodderidge. If this be so, this is a gall in the Case.

And so this Case was adjourned for further Argument.

Afterwards (S) Termin. Pasch. 16 Jac. B. R. this Case was moved again, and debated. Term. Pasch. 16 Jac. B.R. &c.

Haughton. Before the use is here to arise, the Rent ought to be behind, and a Replevin brought; the Law respects initium actionis, where there are divers Circumstances.

And so without further debate at this time, this Case rested upon a Curia advisare vult.

Afterwards, (S.) Term. Trin. 16 Jac. B. R. this Case was then moved again, and adjourned over for the Judges to deliver their opinions herein. Term. Trin. 16 Jac. B.R. &c.

Afterwards, (S.) Term. Mich. 16 Jac. B. R. this Case was moved again. And for the Plaintiff Term. Mich. 16 Jac. B.R. &c.

Coke 2 pars fol. 92. & 93. Binghams Case was cited, where to the perfection or consummation of a thing, two accidents are requisite, and the one happens in the time of one, and the other in the time of another, in such a Case, neither the one nor the other shall take benefit of this, because that both did not fall in the time of any of them, and both are requisite to the consummation of the thing: As if Lord and Tenant is by certain Rent, and the Tenant cesse per un an. and after the Lord grants away his Seignior; and after the Tenant cesse pur auter an, in this Case none of them shall take benefit of this cesser.

Haughton Justice. Judgment in this Case ought to be given for the Defendant; divers questions have been moved in this Case, whether this which hath happened shall redound to the benefit of Fisher the Assignee; it shall not; divers Objections made against Fisher, and ruled to be none: The question, Whether Fisher here shall take benefit of the non-payment of the Rent before the Fine, two questions are considerable herein.

1. The manner of the rising of this use: This is plainly directed in the Indenture, that the same shall be to the use of Odour, his Heires and Assigns; this is so by the Indenture of 8 Jac. to be to the like uses, but not to the same uses; like unto this, where the King grants unto a new Corporation easdem libertates, which London hath, these shall be such, but not the same; the intention of this special verdict shall be to the use of Fletcher: Parlour, who here levyed the Fine, might have made new uses; here is one use limitd upon a contingency, upon a good consideration, a good interest given in the use upon a contingent, therefore the heir shall not be in Ward, here in this Case, there is no right of the use before the Fine comes.

Binghams Case hath been objected by the other side, the Case there of the Cessavit, the reason of that Case much differs from the Case here in question; Cases there put, which in shew make against me, but upon due examination they do not;

the

the Case there put of the Wardship, and of the reversion granted; there he shall have the Wardship in respect of a former right which he had, but it is no so here in this Case, where there is no former Right, but a new Right by the Fine.

2 & 3 Mariæ, Dyer fol. 130. accordingly express in point, in case of Wardship, where the commencement of the Interest to the Wardship, was by the death of the Father, before the Seigniory granted; here in this case the rent was arrear to Fisher, and by him demanded, but this was all before the Fine, he could not demand this by force of the condition, before the Fine levied, nor yet by reason of any former right that he had; here it is, if it shall happen the rent to be behind, this not to be intended, that which was behind before the Fine, so that for this Rent thus behind before the Fine levied Fisher the Assignée had no right to enter for the same, nor yet any ways intituled, thereby to be enabled to make a Lease for the Plaintiff, so that the Plaintiff here can have no good title under Fisher his Lessor, and therefore Judgment ought to be given against him, and for the Defendant.

2. Dodderidge Justice agreed with him, that Judgment ought to be given for the Defendant.

In this Case some questions have bèn moved, which have bèn by the Judges over-ruled.

1. The first question, whether upon the 10 l. rent behind, the use shall arise; this is very clear, that it shall well arise, the Covenant being, that if the 20 l. or any part of it shall be behind.

2. Another point moved, Whether these contingent benefits may be assigned over or not: This the Court also agreed, that these may well be assigned over, because they are annexed unto an Estate, and to an Interest, and so these are well assignable.

3. Another point moved, (S.) What benefit the Assignée here shall have; this the Court hath likewise resolved, that the Assignée shall have the same benefit, as his Grantor should have had.

4. Another point moved, Whether the Assignée, by his entry for the non-payment of the rent, hath such a possession, as that thereof he may make a Lease for years for trial of his title.

This the Court also resolved, that he hath such an Estate, as that he may make a Lease for years, and that he hath not only by this a bare occupation, but also, the absolute possession, and of which he may well make a Lease for years; and so is the Book of 27 H. 8. fol. 5. that by this he hath such a possession, of which he may make a Lease.

The next and great question here is, the Rent was due and behind before the Fine levyed, until the Fine was levyed, the Estate still remained in Parlour, when the Fine comes afterward to be levyed, Whether the Assignée shall now come to have the use of the Land to arise unto him, by reason of a thing which happened before the Fine was levyed, which was the 10 l. rent then behind.

As touching this, it shall not, neither can he be for this default thus hapning before he was intitled to enter into the Land, nor by this use can he be any ways interested in the Land, as to make a Lease thereof, and so the Lease not good, and Judgment ought to be given against him, as this case here is.

But for the use, to arise for a Default after the Fine levyed, this may well be.

The best Argument that can be made for such new Cases, is to be drawn out of the reason of the original Contract it self.

The first Reason may be drawn out of the Words of the Indenture, being these, (S.)

1. That

1. That a Fine shall be levied, and then after to the use &c. when uses arise out of a Fine, this to be after the Fine levied.

As for Contingencies happning after the Fine levied, they reach unto the Assignée very well, and of these he shall have benefit.

A second Reason, for that Parlour did not part with this Rent presently: The intention was, that these Conusées should stand seised of this contingent use.

A third Reason: Here it was agreed, that the Fine being levied, should have relation unto uses in a former Indenture, of things which have their continuance and being, but not of other new things which happen in the interim.

The Cases put in Binghams Case, are upon another reason, and do not match with our present Case.

Coke 2 pars, The Lord Cromwell and Andrews Case, this very Case in effect, and with such Covenants as are here in this Case; there an Advowson falls void before the Fine, afterwards the Fine is levied, the Assignée of the Mannor, with all the profits, shall not have this Presentment; there the Covenant was to levy a Fine to the uses in the Indenture; there these Points resolved. 1. That the Proviso makes a Condition. 2. That the same should be to the first uses, being all upon one contract, the Condition not destroyed. 3. Touching the breach of the Condition, the Case is there put of the Advowson, falling void before the Fine, as there it was of the Advowson; so here of this Rent behind, before the Fine, is as a Slip fallen from the Trée, which the Assignée here shall not have, and so no cause to distrain for this, nor any title to enter and make the Lease to the Plaintiff, so that the title of the Plaintiff, and of his Lessor failing, Judgment ought to be given for the Defendant. Coke 2 pars, &c.

3. Crook Justice. That in this Case Judgment ought to be given for the Plaintiff.

Four questions have bèen moved in this case. 1. Whether 10 l. were behind, or 20 l. 2. Whether Fisher the Assignée shall have benefit of the condition. 3. If he shall, then whether he hath such an Estate in the Land, of which he may make a Lease for years; these are all of them resolved for Fisher the Assignée.

The fourth and great Point, the Rent was behind, 11 Jac. before the Fine levied; the Fine was afterwards levied 12 Jac. the Distress for the Rent taken 13 Jac. after the Fine levied, Whether Fisher the Assignée shall have advantage of this failer of payment of Rent before the Fine; this he shall have.

As touching this, we are to sée and to examine what is the cause of this forfeiture here; here the Rent was granted in manner as before, and then with the Covenant, that if it be behind at any time, in all or in part, it could not be taken where was none to be had; then the remedy provided for the same, (S) in this manner. 1. If no Distress. 2. If a Distress and a Rescous. 3. If a pound breach: Or 4. If a Replevin be brought upon a Distress taken, these are causæ for him then to have the Land as a gage, quousque, The Rent here was behind, before the Fine levyed.

Obj. And therefore it hath bèen objected, that the Assignée is not to have benefit of this, that they are verba de futuro, if it shall happen.

Resp. As to this, words are to be taken to bear such a sense, (S.) If it shall happen to be behind, that is as much as to say, quandocunque acciderit, whensoever the same shall happen to be behind.

It hath bèen here again further objected, that these arrerages before the Fine levied, are as a Slip, or Fruit fallen from the Trée, the which the Assignée cannot have; this is not so.

Resp. The difference will be, betwèen the Recovery of Land and of Rent: If a Feoffment be made of Land, afterwards arrerages are demanded, and denyed, for this he shall have an Assise, the same being a Disseisin; so is Littleton in his *Littleton* chap. Rents, §. 3. &c.

his Chapter of Rents, fol. 53. placito 238. 9 Assisar. placito 13. 8 H. 6. f. 11. Brook tit. Assise placito 69. here this is no Slip, but the same is parcel of the Inheritance granted, 10 l. here behind before the Fine levied, and 10 l. after the Fine: the Distress was for the 20 l. and a Replevin brought, for this he had just cause to enter.

This hath been agreed, and that procul dubio, if rent be behind after the Fine levied, he might enter; and here in this Case, 10 l. of the rent was behind before the Fine levied, and 10 l. after the Fine; here in this Case, transit terra cum onere, into whose hands soever the Land comes; here 10 l. of the rent was behind in the time of Parlour, who dyed, and Fisher distrained his Heir for this, and a Rescous made, for this the Land is forfeited, transit cum onere the Land, the Heir subject to the forfeiture, and so the second Feoffee; a great difference there will be, where the rent still continues in one hand, parcel of the real Inheritance, and where not; this is not like to the grant of a Reversion, where death happens before Attornment, to perfect the Grant; here Fisher the Assignee had good cause to enter, and to make the Lease to the Plaintiff, having good title so to do, and so Judgment ought to be given for the Plaintiff.

Mountague Chief Justice agreed herein with him, that Judgment in this case ought to be given for the Plaintiff.

1. The intent of the parties appears here by the Indenture of Covenants: Judicis officium, ut res ita tempora rerum, by the Indenture of Covenants, 20 l. granted, the fine to be levied, uses to be expressed by the Indenture; further, that if the same were behind, to distrain; if a Rescous, a pound Breach, or a Replevin brought then to re-enter and to retain, quousque, all these to concur, or no use to rise; this use to rise by reason of the Covenant to Odour the first Grantee; we agree all for the time, (S.) The Rent was granted in 8 Jac. and the Covenants, the Assignment 9 Jac. 10 l. Rent arrear, 11 Jac. the Fine levied, 12 Jac. the Distress and Replevin, 13 Jac. lay all together, and the use well riseth unto Odour.

Reasons for this. 1. That in this Fine the Covenant comprised, which is with Odour.

2. By the Rule of Law, a general Covenant directs the special uses of a Fine, the special operation of these by the general Covenant, and according to the intent of the parties, and this is proved by 6 R. 2. Fitz. tit. Estoppel, placito 2. A Feoffment to two and their Heirs by Deed, a Fine to be levied, which is to them, and to the Heirs of one of them, this shall be to the Heirs of both of them, which Case is put, Coke 2. pars fol. 74. B. in the Lord Cromwells Case, there it is said, that the precedent Feoffment shall rule and direct the subsequent Fine, and preserve the joint Estate in them of Fee-simple against the express limitation of the Fine, and the Fine shall be ruled and directed according to the precedent agreement and Estate made by the parties.

6 R. 2. Fitz. tit. &c.

In Knights Case, Coke 5. pars fol. 55. a Lease made of divers Houses in Clarkenwell, rendring the yearly rent of 5 l. 10 s. 11 d. (S) for one House 3 l. 11 d. for another House 20 s. and for the other Houses, the residue of the Rent of 5 l. 10 s. 11 d. with condition, if it be behind in part or in all, at any of the Feasts, that then &c. this there resolved to be one entire Rent; Times different make no difference, if nothing happens in the mean time to cross it; as in Case of a bargain and sale, and before Inrolment a Fine is levied to him, afterwards the Deed is Inrolled, he now takes by the Fine; and if this should be otherwise, all Assurances might be shaken.

Coke 5 pars, fol. 55. &c.

The Law neither sees, nor regards any time, but the time of the first agreement, notwithstanding divers assurances be in differing times, and all but to perfect one assurance; and by construction of Law, they shall all be said to be made at one and the same time, otherwise you may shake all assurances.

But

But it hath been objected, how will you have this Land bound, when it is conveyed away before.

This may be answered by the Case of 16 E. 3. Brook tit. age, placito 51. put Coke 1 pars, fol. 98. b. in Shelleys Case: If R. S. hath a Seigniory by descent, and afterwards a Tenancy escheats, then a Son is born; in this Case the Son shall enter upon him; for though the Tenancy first vested in him, and was never in the Father; yet for that the Original Cause, (S) the Seigniory was in the Father, therefore the Son shall enter upon the Uncle: To the like purpose is the Case in Plowden, f. 284. in Chapman and Daltons Case, where a Covenant was made with Chapman, that he should make a Lease for years unto him, before the Lease made Chapman died, the Lease was made to his Executors, so that the term first began in the Executors; yet in regard the Covenant made to the Testator, was the cause of making the Estate to the Executors, for this cause the term was assets in the hands of the Executors, as well as if the same had been made to the Testator himself. 16 E. 3. Brook tit. &c. *Plowden*, fol. 284. &c.

As to the Case before remembred in 3 Mariæ, Dyer, f. 130. and put in Binghams Case, Coke 2 pars, f. 94. and Mich. 24 E. 3. put in Dyer, the Case of the Wardship, there remoto impedimento: Compare this with our Case here, the Fine levied, Rent behind, a Distress taken, no use as yet ariseth, but by the Replevin sued, then the use ariseth; and in the eye of Law, all this now hath relation to the first and original agreement: The use here still remains in the first Man, till the Replevin sued; this doth then awaken the use, as it is in Shelleys Case before remembred upon the Recovery. 3 Mariæ, &c.

Another ground is also taken in Chudleighs Case, Coke 1 pars, fol. 137. That the Execution of all things Executory still hath respect unto the original Act, and this appears to be so in the Countee de Rutlands Case, Coke 5 pars, fol. 25, 26. and that variance in time shall never destroy the original agreement between the parties, if no new mean agreement can be proved to be between them, but the use shall be according to the first Indentures. Coke 1 pars, f. 137. &c. Coke 5 pars, fol. 25. &c.

The Case before remembred of the Advowson cannot be denyed, for there this being fallen, was lodged and setled, nothing there to interrupt the same; but it is not so here in this Case, for when the use here ariseth, it is all now ab initio, upon the first agreement, and as if it had been all then perfected; the Law always hath respect to the original act and agreement, and will judge according to that, to this purpose is the Case in 33 Assisar. placito 7. where a Servant hath a purpose to kill his Master, for the better colouring of it, he goeth out of his Service, and then kills him; resolved there, this to be petty Treason, because he now acted this, which he intended to do before, when he was in his Service, and therefore resolved, that this Action should now have relation to his first intention, and so to be petty Treason in him.

It hath been then objected, that then and from thenceforth the use to arise, and that by this there is an exclusion of the former, the use not to arise before; this not so, vide for this, Coke 5 pars, fol. 19, 20. in Borastons Case, touching such a contingent limitation; here in this Case now in question, the contingency happening, this doth awaken the use, and then the same shall arise, so that here is a sufficient demonstration when this use shall arise to the Grantee, and to his Assignee, (S) upon the Distress taken, and a Replevin brought for the same, and all this shall now have relation unto the first original Agreement; so that Fisher the Assignee, in this Case, after the fine levied, had just cause to distrain for the Rent behind, and upon the Replevin brought by the first agreement, upon the Indenture of Covenants, the use did then arise unto him, and thereby he was well entitled to enter, and to make a Lease for years to the Plaintiff, which being ousted by the Defendant, had good cause to bring his Ejectione firmæ, having a good title under Fisher the

Assignée by vertue of his Lease, and so Judgment ought to be given for the Plaintiff, and against the Defendant.

Curia, divided two against two.

Nota, That in this Case as touching the chief point, the Judges were in this divided, (S) two against two, (S.)

Haughton & Dodderidge for the Defendant, and Croke and Mountague Chief Justice for the Plaintiff.

Nota. In an Action upon the Case upon a promise, where a certain request is to be laid, and where not.

By Mountague Chief Justice, where the request makes the Debt, there a time certain ought to be laid of the request made: But otherwise it is where there is a good Debt before, and a request only to be made for the payment of it, upon a promise, there it is sufficient to lay a request generally without any time, and this is good.

The whole Court agreed with him herein.

Payn Plaintiff, against *Selby* Defendant.

An Action upon the Case for a promise. 1 Ro.Rep.423. 1 Ro.Abr.570.

IN an Action upon the Case upon an Assumpsit, for two several promises; The one upon a promise to give one so much for a Horse, the other for Mony lent; Judgment given for the Plaintiff upon a Demurrer, and upon a Writ of Enquiry, the Jury gave entire damages; This moved in Arrest of Judgment.

It was urged for the Plaintiff, that these entire damages were well given by the Jury, and so is the common course of the Court, as it was alledged.

For the Defendant it was urged, that here the Action is brought by an Administrator, and it is alledged, that Administration was committed unto him by the Bishop of, &c. and doth not say, loci illius ordinarius; and also that the giving of entire damages is not good, this being upon a Demurrer, and a Writ of Enquiry, and not upon a Verdict; for this was cited, 22 Eliz. Dyer, fol. 370. Cliffords Case, Ejectione Custodiæ terræ, & hæredis, and entire damages given, this not good; and according to this is Moor and Bedels Case put.

22 Eliz. Dyer, &c.

Coke 10 pars, fol. 130. in Osborns Case, this being not like an Action upon the Case for several words spoken at one time, some of them actionable, some not, and entire damages given, this shall be for the words which are actionable, not for the other, as it was urged.

For the Plaintiff it was alledged, That as to the granting of the Letters of Administration, it is alledged that they were granted by the Arch-Bishop, who was the Metropolitan, and so the Administration not void, but voidable by sentence, and so is Vere & Jefferis Case, Pasch. 22 Eliz. B.R. cited, Coke 5 pars, fol. 30. in Princes Case, and that entire damages here are well given for this, 18 H. 8. fol. 1. in waste, in three several rooms, and damges entire given, and good.

Pasch. 22 Eliz. B.R. &c.

Croke Justice. Ye ought to have damages for all, ergo for part.

Dodderidge Justice. Here two things are joyned of one and the same nature, and therefore damages ought to be given joyntly: But in a Declaration for several things, there to set down several sums.

Judgment for the Plaintiff, &c.

The whole Court agreed with him herein, and that entire damages here were well given, and therefore by the rule of the Court, Judgment was given for the Plaintiff.

Davenport

Davenport the Executor of *Davenport* Plaintiff, against *Wood* Defendant.

IN an Action upon the Case for a promise, brought by an Executor, against an Executor of an Executor, upon the promise made by the Testator, for the payment of Mony lent unto him; Rich. Wood borrowed the Mony, and promised to pay the same. An Action upon the case for a promise.

It was urged that this is not the general Case of an indebitatus assumpsit, but the promise is special, and the request special, limited to the Testator, or to his Executors.

Croke Justice. It it here implyed that he was to pay this upon request, being that which the Law here requires; if no request be made, by the omission of this, he is not to lose his Debt, the loan here is prior ordine, but by the Law they are both of them simul tempore, the request made, the Mony to be paid; but if he doth not make any request, the Debt by this is not to be lost, for his Executor may well make the request.

As to the Objection made, being here the Executor of an Executor, this is not material, the Action well lieth against him, licetque etiam, ad hoc requisitus, to pay this, &c. the second licetque etiam omitted, yet the request being here made to the first Man who made the promise, and also to his Executor, this is good, quod curia concessit.

Dodderidge Justice. If he had said, Licet postea requisitus, without any day mentioned, yet this is good, and so it shall be here in this Case.

Haughton Justice. Here he declares that having lent Mony, and such a day, indebitatus for Wares, & sic indebitatus assumpsit, to pay the Mony, here it is indebitatus existit, for Mony lent, and doth not say, adtunc & ibidem, assumpsit solvere, he ought to say so, or & sic indebitatus existens assumpsit super se solvere.

But here in this princial Case, It was in consideratione inde super se assumpsit, adtunc & ibidem solvere, this is good.

The whole Court agreed with him herein.

Croke. It hath been here adjudged, if Mony be lent to one, who promiseth to pay this upon request to I. S. who dies before any request made, yet he shall have it, for the Mony shall be paid to his Executors.

An Objection was then made, because entire damages were here given.

This was held good by the Court, notwithstanding this Objection; and so in an Action of Trespass, for two Trespasses and Damages entire given, this is good.

The Clarks being demanded by the Court, they all made answer and said, That so is the usual course of the Court in such Cases upon such several promises as here there were; two promises and entire damages given, that this is good, and they are not here to sever the damages, but where part is found for the Plaintiff, and part for the Defendant.

And so by the rule of the Court in this principal Case, Judgment was given for the Plaintiff. Judgment for the Plaintiff.

Sir *John Sydnam* Plaintiff, against *May* Defendant.

Entred Termin. Mich. 13 Jac. B. R. Rot. 347.

Action upon the Case for words. Cro Jac. 407. 1 Ro.Rep.427. 2 Rol. Ab.717, 718. 1 Rol.Abr.48, 49. Hob. 180. 6 E. 6. &c.

IN an Action upon the Case for scandalous words, the Defendant denies the speaking of the words, and takes a travers, absq; hoc, that he spake the words, &c. the Jury found a special Verdict, they found the words to be these spoken by the Defendant, (S) I think in my Conscience if Sir John Sydnam might have his will, he would kill all the true Subjects of England, and the King too; and he is a maintainer of Papistry, and of rebellious Persons.

It was urged for the Plaintiff that these words are actionable, 6 E. 6. Dyer, Kemp will be a Bankrupt within these two days, actionable.

28 H. 8. Dyer, I will abide by it, that Russel was and is a false Thief, actionable; These words in this Case as it was urged, are words of scandal and aggravation: If he had said so in the affirmative, they had been Actionable, and here these words do tant amount, as if he had expressly said so.

29 Eliz. &c.

29 Eliz. between Skite and Morgan, an Action upon the Case for these words, (S) He is a maintainer of Pirats, and held actionable, and that it shall be intended in Case of Piracy.

Sir Henry Lea, & Pennystones Case, for these words, (S) Sir Henry Lea is a maintainer of Thieves, actionable.

9 Jac. B.R. Beresford & Treshams Case, Thou didst speak Treason, ruled that the Action well lay, for that Os demonstrat, quod cor ruminat. As to the entire damages given, urged that this is good, if part of the words be actionable, and part not, and the words found, the Plaintiff to have his Judgment.

For the Defendant it was urged that the words are not actionable.

Pasch. 44 Eliz. Fountain & Grymes Case, Thou are a Rebel, not actionable.

Mich. 35 & 36 &c.

Mich. 35 & 36 Eliz. Perpoints Case, My Master put me away because I would not be a Papist, not actionable.

Trinity 40 Eliz. Allen and Ætons Case, Coke 4 pars, he gave his Champion counsel to kill me; purpose, intents and thoughts, are not actionable.

Mich. 43, 44 Eliz. Royal and Virtues. Case, If my Lord had done him right, he had been hanged, not actionable, because conditional words.

1. Croke Justice. The words laid in the Declaration are these, (S) If Sir John Sydnam might have his will, he would kill all the true Subjects of England, and the King too, and he is a maintainer of Papistry, and rebellious Persons. The Defendant here takes a Travers, absque hoc, that he spake the words as they are laid in the Declaration. The Jury do find that he spake the words in the Declaration; but they do further add unto them these precedent words, which they likewise find that he did also then speak, (S) I think in my Conscience if Sir John Sydnam might have his will, &c. whether by these words so added, there shall be such a variance between the Declaration and the Verdict, so that the Plaintiff cannot have his Judgment; this is a great question in this Case. If there be no such material variance, then the Plaintiff to have his Judgment.

Thoughts are free till they be clothed with words, and then they are not free, sermo est animi index, the Tongue is the Organon of the Heart, mentiri est contra mentem ire. I think in my Conscience this is idem per idem, this is but an asseve-

asseveration, which amounts unto an affirmation. I think in my Conscience this is all one as if he had said so in facto. Here the omitting of these words in the Declaration, (S) I think in my Conscience is no material variance, being but Circumstances, and this adding of these words by the Jury, doth not detract any thing from the Declaration. And so the words as they are laid are actionable, and the Declaration good; the variance between the words laid in the Declaration and the words found by the Jury is not material, and so Judgment ought to be given for the Plaintiff.

2. Dodderidge Justice. In this Case we are to consider these particulars. (S) 1. These words as they are laid in the Declaration. 2. The words as they are found by the Jury in the special Verdict. 3. Touching the conclusion of the Verdict.

1. The words as they are laid in the Declaration, (S) If Sir John Sydnam might have his will. To extenuate these words, (If he may have his will.) The will of Man is uncertain, and none knows the will of Man. The other words, He will kill the King; matter upon a future act, As to say, such a Man being a Merchant will be a Bankrupt within two days, these words are scandalous, because they take away from him his credit, as well for the future time, as for the present; these words thus spoken draw Men from dealing with him. If one saith that I.S. will Rob I.B. within such a time; for if he saith, that he make preparation for to do it; these words are scandalous quia præbent occasionem ruinæ, although nemini ruinam. The Law doth not only maintain and preserve the life and possession of a Man, but also his good Name; here the words are, will do such a thing, being words de futuro; a thing that none knows. All moral Virtues and Vices, are in the will of Man, and from the will, they come into the intention, and so by this a thing is made good or ill. Bracton, Out of a wicked will, no good proceeds; and so the words as they are laid in the Declaration are scandalous.

2. As to the Verdict, and herein it is to be considered, whether by this Verdict the first words are qualified by the adding of more words, or whethere by this there is any diminution of the words. If any diminution be, yet if he did speak words as imported Scandal, there the Court shall judge upon them; as to the words added by the Verdict, if these words so added do diminish and extenuate the matter, this may alter the Case, but when the words so added, do diminish nothing at all, but rather aggravate the matter; as 1. thought, and then speech afterwards, and all this doth arise out of an ill thought, and that with these degrees, (S) 1. privately, secondly publickly, and thirdly with denuntiation; here the words added in this Verdict, do not diminish, but encrease the scandal, proceeding out of a wicked Conscience. None can judge of the Conscience of another until he declare this, by words uttered by him; he ought to rule his Tongue; this doth not suit with his Conscience, he ought not to speak ill of any Man, the referring of this to his Conscience doth not at all diminish, but very much aggravate the matter, the words themselves proceeding from an ill Fountain, and from an ill Root.

3. As to the conclusion of the Verdict, the Jury do refer the matter, they find him culpable of the words in the Declaration; this is true, these they do find, and other words also to be spoken by him, (but not laid in the Declaration,) this variance makes no alteration in the Case, the words spoken and found are scandalous, and actionable, for which the Plaintiff had just cause of Action; and so Judgment ought to be given for him.

3. Haughton Justice. That in this Case Judgment ought to be given for the Defendant. But in this Case I will neither excuse, nor yet justifie the Defendant. The words are scandalous, as they are laid in the Declaration, although they are in the future time, and for the Plaintiff; these words in the Declaration are sufficient for the maintenance of his Action. The incertainty of the will doth not alter nor diminish the matter; the words being in the future time. The Case cited at the

Bar

6 E. 6. Dyer fol. 72. Kemps Case.

Bar of 6 E. 6. Dyer fol. 72. Will' Kempe will be a Bankrupt withing these two days adj. actionable; this Case moves me to be of this opinion, for this is a discredit to him, and all will think so of him; and so here. If he had his will, none knows whether he would have done this or not; here it is to be presumed that he knew something, that he had a wicked will, and therefore in this I do agree with the rest for the Plaintiff, and this upon the reason given in Hext and Yeomans Case, Coke 4 pars, fol. 15. b. For my ground in Allerton, Hext seeks my life; and if I could find John Silver I do not doubt but within two days to Arrest Hext for suspicion of Felony. For the later words adjudged that the Action well did lie, because that for suspicion of Felony, he shall be imprisoned, and his Life drawn into question.

But here the matter which moves me to doubt, and to be of opinion against the Plaintiff, is upon the words in the Declaration, which are not found by this Verdict; for this being an Action upon the Case for words spoken, the Jury here have not found these words which are laid in the Declaration; the words being laid in the Declaration in the affirmative. (S) If he might have his will, absolutely these words to be proved by the Verdict, and Damages to be given in respect that he hath directly said so; and the Jury have found in this manner, (S) That he said I think in my Conscience, that if, &c. and so this is not in the affirmative, as the same is laid in the Declaration; and I am of this opinion, not because these words are as an excuse, or by way of extenuation of the former words, for they are not so, but because the Jury have not found the words affirmatively, as they are here laid in the Declaration; and for this cause only I am against the Plaintiff, for the words, as in the Declaration laid to be spoken by him affirmatively in the Verdict, they are found to be spoken in another form, (S) that he said, I think in my Conscience, that if, &c. and so the words as they are here laid in the Declaration, are not found by this Verdict; and therefore the Plaintiff here cannot have his Judgment. If an Action upon the Case be brought for words, some of which words are actionable, and some others not, Judgment shall yet be given for the Plaintiff, and Damages in such a Case given generally, shall be taken and intended to be given for those words only which are actionable, and not for the other. I hold that for the first words here, if found as they are laid in the Declaration, an Action well lieth for them, and the Plaintiff to have his Judgment, but not so as they are here found by this Verdict; and therefore as this Case is, and upon this Verdict thus found, Judgment ought to be given for the Defendant.

Croke. Because the Jury have found the words themselves which are laid to be spoken, and more by way addition, this shall not take away the Plaintiffs Action, for these additional words do nothing at all diminish or lessen the other, and so the Plaintiff to have his Judgment.

Dodderidge. If the words were such, that such a one is a Bankrupt; the Jury do find that he said, that he would be a Bankrupt; here the Plaintiff shall not have Judgment, because the Jury doth not find the words in the Declaration, one being in the present time laid; the other, the finding of the Jury, in the future time, and yet both are actionable. But when the same words without any alteration, are found by the Jury, but yet with an addition of some other words, which do not diminish (if they did diminish) then the Plaintiff not to have his Judgment; here the words added and found by the Jury, do not withdraw from, but add by way of aggravation, they add an ill thought to a corrupt tongue; these additional words do not diminish any thing from the former words laid in the Declaration, the Jury only finds further that he spake these word, as he thought in his Conscience; so that here is no Diminution from the former words; but the Jury do find all the words in the Declaration, and more. In the Case before remembred, the Plaintiff could not have his Judgment, because the Declaration was in the present time, but when the same words in the Declaration, without any alteration

ration are found, which do make no diminution, but do only add ill thoughts to ill words; therefore the Plaintiff to have his Judgment.

Haughton. If a Thief be at the Bar, to be arraigned, and a Witness comes in and saith of him, I think in my Conscience that he stole the Horse, for which he was questioned; this is no affirmation that he did so.

Dodderidge. When the life of a Man is in question, and one Witness saith, I think he did the fact, in this I do agree that this makes nothing against him. But fama, fides & oculus, are tender things, and not to be compared to the Witness of one, upon the life of a Man, the fame and credit of a Man is more tender, and words which will bear Action, will not take away the life of a Man.

We do all of us agree, that the words in the Declaration are well actionable; But we do differ only upon this which is found in this Verdict, by way of addition.

Curia. We will confer more of this amongst our selves, and if we can be all of one mind, the Plaintiff then shall have his Judgment. But the best way is to have the Defendant to agree, and to submit himself to Sir John Sydnam the Plaintiff; and so for the better effecting hereof, the Court advising the Defendant so to do; this Case was adjourned upon a Curia advisare vult, to a further time.

Afterwards this Case was moved again for the Judgment of the Court, there being no end made between the parties.

Haughton. It hath been agreed, that if the words laid in the Declaration, and the words found by the Jury are differing, that then this is not good.

Dodderidge. It hath been agreed, that the words laid in the Declaration here will well bear an Action, and 2. It hath been also agreed, that if the words found in the Verdict, had all been in the Declaration, that then it would be for the Plaintiff. It is now to be considered, whether these words found in the Verdict more than are in the Declaration, hath altered the sense of the slander; as to this I think clearly it hath not, for here by these words added in the Verdict, to be also spoken by him, he shews, that his thought was as ill as his words spoken.

Croke. Take these words any way as you will, either single or divided, and the words will well bear an Action.

Dodderidge. If the words in the Verdict, which are added, were such, (S) I am fully resolved, that if, &c. would this make any alteration? It would not clearly.

Mountague Chief Justice agreed with them herein. All is here found by the Verdict, which he did speak, & aliquid amplius than is laid by the Plaintiff in his Declaration; but this which is found more, doth aggravate, and nothing at all alter the matter, and therefore by the Rule of the Court, Judgment was given for the Plaintiff. Judgment for the Plaintiff, *per Curiam.*

Sminke Plaintiff, against *Barker* Defendant.

IN an Action of Debt, the Defendant had day given unto him to wage his Law, and at the day, Richardson Serjeant moved the Court, that the Defendant was sick of a burning Fever, and for this cause moved the Court for another day for him to come and to wage his Law, and did offer to make all this good by an Affidavit. Debt. 1 Ro.Rep.430.

The Court refused to receive this, but advised him to plead to the Country, and so he did.

Motteram

Motteram Plaintiff, against *Motteram* Defendant.

A Prohibition. 1 Rol. R. 426. 1 Ro. Abr. 341, 343. 1 Ro. Abr. 298. 300.

IN a Prohibition, upon a Suit in the Spiritual Court, the Case was this, (S) A Suit was in the Spiritual Court for Defamation, by the Wife of the party, a sentence there given, and costs, pro expensis litis, the Husband did release these costs, which they would not there allow of, upon a suggestion here that the Husband was divorced Causa Adulterij. A Prohibition was prayed.

Hillar. 7 Jac. The Case of the Church-wardens.

Against the Prohibition, a Case was cited, Hillar. 7 Jac. where a Suit was in the Ecclesiastical Court, by two Church-wardens, for not repairing of the Church; one of them did release, the which release being there pleaded and disallowed, a Prohibition was prayed, but afterwards a Consultation was granted because that this Court is not to judge of this, which properly belongs unto them.

Object. The reason objected, because the release was not there by them allowed of, and that this is matter of injustice.

Resp. In answer to this, this may be there tryed by Appeal.

Also there may be good cause for them to disallow of the release, and no injustice done by this. Also this release in this Case was made after sentence there given; and if at the Common Law, such a release should be made after Judgment given, this would not be good. If a Writ of Error be brought here, upon a Judgment given in the C.B. and for Error, shews a release made after Judgment, this is no Error to reverse the Judgment. Here the divorce was a mensa & thoro, and also from all matrimonial Duties.

For the Prohibition, It was urged, and much enforced, that this release by the Husband was good, the Suit being in the Ecclesiastical Court, for Defamation, sentence there given, the Wife divorced a mensa & thoro, which doth not dissolve vinculum maritagij, but that this notwithstanding, they may come together again when they will; and such a divorce, is no bar of Dower. And this is not like to the Case before remembred of the Church-wardens, which must be agreed to be so.

38 *Eliz. &c.*

38 Eliz. B. R. between Melham & Winnes. It was here ruled, that a Gift of the Goods of the Parish, made by the Church-wardens, is not good, without the assent of the Side-men, and the Vestery, and if by the Vestery the same is good, this being then in manner as a By-Law, here costs are given, and the Husband doth release them, if they will there give sentence, notwithstanding this release, and against the same, they ought to be prohibited; this release here (as it was urged) being a full Bar of the effect of the sentence; this matter pleaded there before the Court of Audience, and the release there shewed, and therefore they are not to execute this sentence against the release.

Trin. 44 Eliz. B. R. &c.

Dodderidge Justice. I the Case which was betwẽn Tottey and Stevens, Trin. 44 Eliz. B. R. Rot. 865. where Baron and Feme were divorced for Adultery on the part of the Wife, there was a Suit also for a Legacy, which is a good Case, and Suits with this Case here in question, if it be looked into.

Houghton Justice. In Case of a Suit for a Legacy, the Husband is for to pursue this, and therefore his release here may be good; but here in this Case, the matter in question is for Slandering of the Wife, and this is personal to the Wife, and the determination of this, is left unto them there, and if by their Law, in such a Case, the release of the Husband is not good, thereby to deprive the Wife of her costs, being depending upon the Original, (S) the Defamation; We have nothing here to do with this, for to correct their Law; and therefore they are not in this Case by us to be prohibited.

Dodderidge

Dodderidge. They there only restore the party, to her good name, in Case of Defamation, as here in this Case; and this doth very much differ from the Case of a Legacy, the point here only is, the husband and wife are divorced, causa Adulterij, the Wife she sues in the Ecclesiastical Court for Defamation, and there recovers, and costs are given, the which the Husband did release, whether this release thus made by the Husband, shall bar the Wife of her costs. And if they will not allow of this release there, whether a Prohibition shall be granted or not.

The whole Court clear of opinion, that no Prohibition in this Case is to be granted. And so by the whole Court in this Case a Prohibition was denied. Prohibition denied *per Curiam.*

Frost Plaintiff against *Eyre* Defendant.

IN an Action upon the Case for scandalous words, upon Non culp. pleaded a verdict was given for the Plaintiff. It was moved in Arrest of Judgment for the Defendant, that the words spoken, and laid in the Declaration, are not actionable. The words were these spoken by the Defendant, to the Plaintiff. (S.) Thou hast forged Writings, for which thou shouldst lose thy ears. Action on the Case for words. V. 3 Leon. 231 c. 313. Cro. El. 166. 1 Ro. Rep. 431. 1 Ro. Abr. 66.

Whether these are actionable or not, was the Question?

The Plaintiff being an Attourney at Law, and so the words do touch him in his Profession.

It was urged for the Plaintiff, that these words are scandalous, and well Actionable, and Venders Case was remembred, which was for these words. (S) Thou hast forged my Fathers hand, whereby thou hast received my Rent, adjudged, that these words were actionable; these words here in this Case are spoken, to bring him in danger of the Statutes of Perjury and of Forgery. *Venders* Case.

1. Crook Justice. For these words (S.) Thou art a Cut-throat, no Action lyeth for these words, here they are to be taken in mitiore sensu. But here in this Case, couple the first words with the Later, and ex precedentibus & consequentibus, it will be very hard against the Defendant. In this Case the words are scandalous, and the Action of the Case for these words, by the Plaintiff well maintainable.

2. Haughton Justice. It is very clear, that the former words will not bear any Action; for these words do not charge him with forgery, and then these later words being only explanatory of the former words, will not bear an Action, where the former will not. As if one saith to another, Thou hast stollen the Lead off my house, or my Tyles, for which thou shouldst be hanged, these words are not actionable. Sometimes, where the first words are actionable, and the subsequent explanatory words do qualifie the former, and so do make them not actionable; As in the Case here, where one said of another, Thou art a Traitor, for thou didst affirm that the Kings Coyn was fallen a Noble in the Pound, and ruled, that for these words, being all laid together, no Action did lie.

Dodderidge Justice. The Action here brought by the Plaintiff, for these words thus spoken of him will not lie, for that it is not certain what writings he did mean, and they may be frivolous writings, and for which he ought not to be called in in question, and therefore not actionable: And if it be so, then the later words here will not aid this, they will not aggravate: If he would Indict him, the same ought to be, quia falsa fabricavit facta, and not quia fabricavit false writings; and here an innuendo will not help this, as to say afterwards, Innuendo Obligationem, and this may here be done out of the Indicting of another: It may be a frivolous letter, and of no moment, and so it may well be understood, and therefore not actionable.

Crook. If one saith to another, Thou hast stolen, No Action lieth for these words; but if he do add these words, (S.) for which thou shouldst be hanged, an Action upon the Case then well lieth; so here, Thou hast forged Writings, no Action lieth for these words; but add these other words, (S.) for which thou shouldst lose thy ears, these words then will bear an Action; as in the other Case, (S) for which thou shouldst be hanged.

Dodderidge. The word stealing imports Felony and Larceny, and so they are scandalous, for if it be but for 6 d. he shall for this have punishment; but here the words are, Thou didst make forged Writings, not shewing what they were, and so not actionable.

Crook. I agree this to be so, if you add not these words to the former, (S) for which thou shouldst lose thy ears, without these latter words, the other are not actionable.

Haughton. For to make forged Writings, is not punishable, but the publication of them; but because it is not shewed what these Writings were, this makes the doubt.

And so this matter rested upon a Curia advisare vult, and the same adjourned to a further time.

Afterwards this Case was moved again, and debated.

Mountague Chief Justice. It is not here laid, that the Plaintiff was an Attorney, but a Sollicitor: These words, as they are laid, will well bear an Action: In generalibus, words shall be taken in mitiore sensu, but not so in particularibus, sensus verborum ex causa dicendi: For one to say of another, Thou hast made forged Writings, no Action lieth for these words; but if he conjoyns the latter part with the former, these do very much enforce the other.

Coke 4. pars, f. 12.

To this purpose is the Lord Cromwells Case, Coke 4 pars fol. 12. It is no marvel you like not me, for you like not any of the Kings Subjects.

Browns Case there put, Thou hast burnt my Barn adjoyning to my house, these words are actionable, words are to be taken in communi sensu.

Birchleys Case, Coke 4. fol. 16. in this Court, being an Attorney, Thou art a corrupt man, an Action lieth for these words, for they touched him in his Profession; so here in this case the words are actionable, and the Action brought by the Plaintiff for these words do well lie.

Crook. It is here laid that the Plaintiff was a Practitioner, a Sollicitor, and a Steward of a Manor, these latter words here will enforce the Action: If he had laid that he was an Attorney, clearly then the words would be actionable, but it is laid here, that he was Senescallus, and so the words actionable, because he is a publick person; the preceding words here are to receive construction by the words subsquent: Burnt my Barn, Innuendo, full of Corn not actionable; but if the words, Burnt my Barn full of Corn, for these words an Action well lieth; here the words are spoken to the Plaintiff being Steward of a Manor; Thou hast made forged Writings: An Attorney is a publick person: If one saith to a common person, thou art a false and a corrupt man, no Action lieth; otherwise if they be spoken to a Justice of Peace, Intentio verborum ex animo dicentis is to be collected.

If one saith to a Steward of a Manor, Thou hast made Writings which are forged, these words do extenuate: Thou hast stollen my Corn, no Action lieth for these words, for it may be growing; but if he saith, My Corn, for which thou shalt be hanged, otherwise it shall be.

Dodderidge. These words here are not actionable, neither for a Sollicitor, nor yet for a Practicer; this here is the matter, Thou hast made forged Writings, and these may be frivolus Rimes, which may be set out in anothers name: None can imagin of what nature these are, innuendo, Bonds or Covenants, this will not

not aid it, what Writings these were, whether of any importance, or not, non constat.

As to the later words then, being (S.) For which thou shouldst lose thy ears, these words will not enforce the matter, this being but his mis-conceit of the words; and so no Action here lieth, neither for the first words, nor yet for the words subsequent: For one to say, Thou hast burnt my Barn adjoyning to my House, these are words of Slander; but if he saith, Thou hast burnt my Barn, for which thou shalt be hanged, no Action lieth for these words, this being but the misconceit of the party, and do not add unto the Slander.

If one saith to another, Thou art a Thief, for thou hast stollen my Apples, no Action lieth for these words.

If one speaketh these words, I marvel you will keep company with such an one being full of the Pox, no Actinon lieth for these words, as it hath been here adjudged; here he cannot lose his Ears for forging of false Writings, and so the Action brought by the Plaintiff, is not maintainable.

Haughton. The Action here brought by the Plaintiff, lieth not for these words; when words spoken are uncertain, by an averment they shall not be made actionable, as the Pox, innuendo, the French Pox, this shall not make the words actionable, being uncertain before; but if one saith of a Justice of Peace, That he is a corrupt man, these words are actionable, notwithstanding the uncertainty in some sort. As to the words themselves here in this case, he hath made these words carry no certainty of Slander, for an honest man may make forged Writings, and yet not be guilty of any Forgery, for another may put his Seal to the same, and so he is the Forgerer; also it is here altogether uncertain, what manner of Writings these were, they may be but nugatory, and of no moment.

As to the second part of the words, these do not enforce the matter for the conclusion: If the first words do not give cause of Action, the conclusion, being but the understanding and exposition of the party himself, this shall not make these words to be actionable; that he should lose his Ears for this, this is but his false conceipt, and a false conclusion of the party, and so no Action for these.

If one saith to another, Thou hast stollen my Apples off my Trees, for which thou shalt be hanged, no Action lieth for these words, being but his misconceipt of the matter; and so in the principal Case, the words not actionable, and the Action here brought by the Plaintiff, not maintainable.

Mountague. To say of one that he is perjured and forsworn, this is but recital; but if one saith of another, that he was forsworn in B. R. in a Tryal there, these words are actionable; here in this Case, the subsequent Words are not rational, but they do enforce the Slander to be such Original Writings, for which to lose his Ears here, and also that these ought to be Written and Forged at one time.

Dodderidge. The best way to examine these words, is to see whether these words do not bring him in danger of an Indictment; as if he be indicted for this Forgery shall this Indictment be good? it shall not, and then if he be not in danger of his Ears, no Action will lie for these words.

Mountague. Here the words subsequent, do well expound the words precedent, by which it doth appear, these to be such Writings, for which he ought to lose his Ears, so that the subsequent words are not rational words, but words Original, and thou shalt lose thy Ears: As to the Case of Indictment, this is not like to the case now in question.

Haughton. One saith to another, Thou hast stolen my Wood, for which thou shalt be hanged; for stealing some Wood it is Felony, and for stealing of some Wood it is no Felony.

The Court divided, &c.

And so without any further debate, the Judges being in their opinions in this Case two against two. (S.)

Crook Justice & Mountague Chief Justice for the Plaintiff, and Haughton & Dodderidge Judges e contra for the Defendant, and so it rested upon a Curia advisare vult, and to see the Presidents in this case, which by the rule of the Court were to be searched out, and the Court to be informed of them.

Nota, That this cause was never after moved again, but said to be ended by agreement betwæn the parties.

Hammond Plaintiff against *Wemibank* Defendant.

Ejectione firmæ.
1 Ro.Rep.429.
1 Ro.Abr.506.

IN an Action of Trespas and Ejectment, upon Non culp. pleaded, a Verdict was given for the Plaintiff; upon a motion made for the Defendant in arrest of Judgment, the Case appeared to be this, (S.)

The Defendant being a Copy-holder, was summoned to appear at the Court of the Lord, to do and perform his service as a Copy-hold Tenant: he made default, upon this the Lord took advantage, by way of forfeiture; exceptions taken to the pleading of this, the matter being for a forfeiture of his Copy-hold Estate; for his refusal to do and perform his Suit and Service, by the Custom to be done by him.

It was urged, that this ought to be shewed to be a wilful and an obstinate refusal, or no forfeiture.

Also it is alledged, that the Court was held apud Manerium prædictum, and doth not shew in what house the same was held, nor yet that any notice was given unto him that it should be held; the Issue was, Whether he did voluntary refuse to come to the Court or not: And the Jury did find that he did refuse; they do also find, that notice was given to him by the Baily of the Court, but it is not said, that this was so done by the commandment of the Lord.

Also it is shewed, that the Court was held such a day, and notice given of this to the Copy-holder, and there ought to be three Courts held, before there shall be a forfeiture taken for non-attendance.

Mountague Chief Justice. The performance of Services, is incident to every Copy-holder: If Issue was taken upon his contemptuously refusing to come, this implies a notice to be given before.

Haughton Justice. If a Copy-holder wilfully withdraws his Suit and Service which he ows to the Lord, at his Court, this is a breach of the Custom, and this is a forfeiture of his Copy-hold Estate. It is here laid, Quod sectam voluntarie, & contemptuose subtraxit, & illam facere recusavit: It is here also expresly said, that the Baily did give him notice, per speciale mandatum domini.

Croke Justice. As touching the Custom to have this to be a forfeiture in some Cases it is so: A Copy-holder holds his Estate per redditus, servitia & consuetudines, the which if he does break, and not perform the same, this shall be a forfeiture of his Copy-hold Estate.

Dodderidge Justice. By 43 E. 3. If a Copyholder refuseth to pay his Rent, or to do and perform his Services to the Lord, this is a forfeiture of his Copy-hold Estate: the Lord is to hold his Court within his Manor: But if the Lord doth use to hold it in such a House, and will hold this in another place, than he hath used for to do, of this he ought to give notice to the Copy-holder.

If

If a Copy-holder be warned to appear to do his Suit and Service in another part of the Manno, in such a Case it may be he is not bound to perform it.

Mountague. Here it is laid, that he held his Court apud Manerium.

Dodderidge. He ought to lay, that he held his Court apud Manerium; and he ought to lay, that it was held in loco consueto.

Haughton. If there be any such matter, the Copy-holder ought to have alledged this matter in his excuse, which is not here done by him.

The Court clear of opinion, that here appears to be sufficient matter of forfeiture of the Copy-hold Estate, that the Declaration is good, and so by the Rule of the Court, Judgment was given for the Plaintiff. Judgment for the Plaintiff, &c.

Robinson Plaintiff against *Walter* Defendant.

IN an Action upon the Case for a Trover and Conversion brought by the Plaintiff against the Defendant, being an Inn-keeper, for an Horse. A Trover and Conversion. Popham 127. 1 Ro.Rep.449. 2 Ro. Abr. 85.

The Case upon the Defendants plea in Bar, was this, The Defendant keeping a common Inn, a stranger brings the Plaintiffs Horse into this common Inn of the Defendants, there sets him for some time, and afterwards goes his way, leaving the Plaintiffs Horse there as a pledge for his meat.

The Defendant being the Inn-keeper, being not paid for the meat of the Horse, retains the Horse for his meat; the Plaintiff afterwards, being the true owner of the Horse, and hearing that his Horse was there, demanded his Horse of the Defendant, who refused to deliver him, upon this he brings his Action: The Defendant by way of plea in Bar, sets forth all this matter of his keeping a common Inn, how that the Horse was brought thither, and there left at meat, which was unpaid, and that he retained the Horse for his meat, till he was satisfied for the same, and that if the Plaintiff would pay him for his meat, he would then deliver the Horse to him, but not otherwise; upon this Plea the Plaintiff demurred in Law.

Upon the first opening of this Case, the Court inclined to be of opinion against the Plaintiff; That the Defendants plea was good, and that he might well retain the Horse, and that against the Plaintiff, being the true owner of him, until he was satisfied by him for his meat, and notwithstanding his Horse was left there by a Stranger, unknown to the owner; and for this was remembred the Books of 39 H. 6. fol. 18. b. and 5 H. 7. fol. 15. b. the Case of the Leather converted. 39 H. 6. f. 18. b. &c.

Dodderidge Justice. This is a common Inn, and the Defendant a common Inn-keeper, and this his Retainer here, is grounded upon the general custom of the Land: He is to receive all Guests and Horses that come to his Inn: He is not bound to examine who is the true owner of the Horse brought to his Inn; he is bound, as he is an Inn-keeper, to receive them, and therefore there is very great reason for him to retain him, until he be satisfied for his meat which he hath eaten; and that the true owner of the Horse cannot have him away, until he have satisfied the Inn-keeper for his meat. 9 Co. 87. b.

The Court agreed with him herein, but the Court said, that this being a new and a good Case, they held it fit to be argued by Counsel on both sides, and so for this purpose, this Case was adjourned to a further time.

Afterwards, (S.) Termin. Trin. 15 Jac. B. R. this Case was moved again, and argued on both sides. Term. Trin. 15 Jac. B.R. &c.

Divers

Divers Authorities were cited, and reasons urged, and enforced for the Defendant, that the Plea was good. That the Defendant being a common Inn-keeper, may retain a Horse, brought into his Inn, and there left, until he be paid for his meat, and for this purpose, Coke 8. pars fol. 146, 147. the six Carpenters Case was cited, and 5 E. 4. fol. 2. b, placito 20. That an Hostler may well detain an Horse if the Master will not pay for his meat, and so of a Tailor a Garment by him made, till he be paid for it; And so is 22 E. 4. fol. 49. b. Several reasons urged for this, as (S.)

Coke 8 pars, f. 146,147. &c.

Reasons.

1. In respectu loci, this being a common Inn; where he is compellable to receive Horses coming thither, and is not to examine whose they are, and this place hath a priviledge, as to a Distress, not to be distrained by another, as a Mill-stone not to be distrained, by 14 H. 8. fol. 25. nor a Horse at the Smiths shop, by 22 E. 4. fol. 49. b. 7 H. 7. fol. 2. A Horse not to be there distrained for the prejudice of the Common-weal, nor yet in a Market or Fair; so that an Inn is there compared to a Market. A second Reason of this. (S.)

14 H. 1. f. 25. &c.

2. Why he may detain an Horse for his meat, nothing more reasonable, as it was urged, An Infant shall be bound by his Bond for his meat.

If one drives the cattel of another into the ground of J. S. he may, as it was urged, detain them, till he be satisfied for the hurt done by them.

3. Because here was no default in the Inn-keeper, who did entertain him; neither is he to demand whose Horse this was, for that every man hath a Licence in Law, to come with his Horses into an Inn, and the Innkeeper cannot put him back; and so is the six Carpenters Case before remembred; but he may detain them for their meat, Mich. 6 Jac. B. R. between Harlow and Wood, the same Case was (as is here now in question) and resolved that an Inn-keeper may retain and keep an Horse left in his Inn for his meat, though it be the Horse of a Stranger.

Mich. 6 Jac. B. R. &c.

Mountague Chief Justice. Where one is hired to serve, there he shall not wage his Law, because compellable. Communia hospitia, are compellable to receive guests and their Horses; and so he is to answer for them, which are brought thither; the custom of London is good and reasonable, how long to stay, not till he eats out more than his Head; the Inn-holder may sell him presently, and this is justifiable. Here in this case, the Inn-keeper said to the Plaintiff, prove the Horse to be yours, pay for his meat, and you shall have him; This is no denial, nor yet any conversion, he claims no property at all; he only detains the Horse, till he be satisfied for his meat, and so he may well do by the Law; he may keep him till he be paid for his meat, because he is compellable at the first to receive him.

Dodderidge Justice. One who hath no keeping for his Horse, doth devise this way to send his man with him to an Inn, and to let him stand there, and afterwards to come thither himself, and of the Inn-keeper to demand his Horse, and upon his refusal to bring his Action upon the Case; this is a fine trick for the Plaintiff to have his Horse kept, and to give the Inn-keeper nothing for the same; but instead of paying of him for his meat, to pay him with an Action, which he hath no cause so to do; as this case here is, the Inn-keeper may well justify the keeping of his Horse till he do pay him for his meat, which is all he desires to have.

Haughton Justice differed in opinion; the party being the true owner of the Horse, hath no other way to provide for himself but this. The Inn-keeper hath his proper remedy against him, who brought and left the Horse there for his meat, and for him thus to prejudice the owner of the Horse, by the wrong of another, this will be very inconvenient.

Croke Justice. If a stranger takes my Cattel, and puts them into the ground of another, he may well keep them till I pay him for their meat and hurt there done. If a mans Horse be stollen, and brought unto an Inn, or if a man lends his Horse to one for a day, and he keeps him three or four days; The Inn-keeper here was in

in no fault at all, if the Horse was stollen, and brought thither, he cannot charge the Inn-keeper with this, but he which brought him thither, and there left him: Here the Inn-keeper hath done no wrong at all, the owner is to satisfie him for his meat, because he was here compellable to receive him.

Mountague. If a stranger takes the Horse of another, and sets him up in an Inn, if the Horse was there stollen away, the party may have his remedy against the Inn-keeper.

If a mans servant carryes his Masters Horse to an Inn, and there leaves him, and is stollen away; an Action lyeth here for the Master, as well as for the servant against the Inn-keeper.

Dodderidge agreed this to be so, if he knew him to be his Servant; the owner is to pay for his meat, and it would be a very mischievous thing if it should be otherwise; for when a man hath lost his Horse, he is to look for him, and when he hath found him in the Inn, if he should not be enforced to pay for his meat, this would be a trick, to have his Horse kept for nothing, and to have him brought by his Servant to the Inn, the owner hath a benefit, (S) meat for his Horse, and for the which he ought to pay.

Curia. The pleading here is not good, therefore they did advise the party, to plead to issue, and so to go to trial, and so Judgment may then be given upon the event, but as the Case here is; Crook, Dodderidge and Mountague, clear of opinion for the Defendant against the Plaintiff.

Haughton differed from them in opinion for the Plaintiff.

And so upon the Action here brought, and upon the Demurrer to the Defendants Plea, the opinion of the Court was against the Plaintiff, that the Demurrer was not good; And so the Rule of the Court was, Quod querens Nil capiat per billam.

Nota, That the like Case, as this principal Case is, was in this Court, Term. Trin. 9 Jac. B. R. between Skipwith Plaintiff against J. S. an Inn-keeper, in a Trover, and conversion for his Horse, brought to the Inn, by a Stranger, and there detained for his meat, argued by the four Judges, and the Court therein divided; Williams and Crook Justices, That the Inn-keeper may keep the Horse till he paid for his meat. Term. Trin. 9 Jac. B.R. &c.

Yelverton & Fenner Justices, è contra, touching this matter, vide prima pars fol. 170. 1 Pars fol. 107.

Vide also, The Custom of London, for an Inn-keeper to have a Horse praised, and sold for the meat he had eaten. Term. Trin. 10 Jac. B. R. 1 pars fol. 207. Mosse Plaintiff against Townsend Defendant. Term. Trin. 10 Jac. B.R. 10 pars f. 207.

Nota by Dodderidge Justice. If one be a Patentee of the King of a Rectory, he may well sue for Tithes in the Spiritual Court. Sir Thomas Vavisour was such a Patentee. But if they will go about to trie and determine the validity of the Grant, (S) of the Kings Letters Patents, as whether Dominus Rex concessit, or non concessit, they having no power so to do: In such a case we will then prohibit them.

The whole Court agreed with him therein.

Smaleman

Smaleman Plaintiff against *Eigburrow* Defendant.

An Action of Trespass. Cro Jac. 417. 1 Ro.Rep.441. 1 Ro.Abr.592. 2 Ro.Abr.89.

IN an Action of Trespas upon a Demurrer, the Case appeared to be this, (S) The Defendant, and a feme sole, were Joynt-tenants for life of certain Land, the Wife takes a Husband, the Husband and Wife by their Indenture, do joyn in a Lease of the moiety of the Land of the Wife for 60 years to the Plaintiff, if the Wife and the Defendant her Companion shall so long live, rendring a yearly Rent for the same; the Wife dies, living the Husband; the Defendant being the Survivor, enters upon the Plaintiff, being the Lessée, to avoid the Lease, after the Coverture ended, and for this his Entry, an Action of Trespas was brought, Whether he may avoid this Lease, or not, was the only question.

Term.Trin. 14 Jac. &c.

This Case was several times argued at the Bar, Termin. Trin. 14 Jac. by Bridgman and Coventry for the Plaintiff, and Darcy and George Crook, for the Defendant.

The questions moved were two, (S.)

1. Whether this Lease thus made in point of Estate, shall determine or continue by the death of the Wife.

2. If this Lease be but voidable, Whether the surviving Joynt-tenant shall avoid this Lease or not.

For the Plaintiff it was urged, that if Baron & feme do join in a Lease for years by Indenture, of the Land of the Wife, rendring Rent, that this Lease is not void, but voidable, and that privies in Blood shall take advantage of non-age, or Coverture, but not privies in Law, nor privies in Estate, as appears Coke 8 pars fol. 24. in Whittinghams Case; a Lord by escheat shall not avoid a voidable Lease, because he is but privy in Law.

Coke 8 pars f. 42.

It was further urged for the Plaintiff, that the Survivor here shall not avoid this Lease being not void, but voidable, and that a difference will be where a Lease is determined in right, and where not, by the death of the Husband or Wife; another difference likewise will be, as it was urged, where the Husband alone makes the Lease of the Wives Land, and where the Husband and Wife do join in the Lease, in both these Cases the Lease is not void, but voidable; here in this Case the Lease is only voidable, good, in respect of the possibility to survive, and of the right of the Wife by the survivorship.

If the Husband alone do lease the Land of the Wife, and dies, this Lease is not determined in facto, but is determined in right.

Commentaries f. 65. &c.

Plowdens Commentaries fol. 65. in Browning & Beestons Case: If the Husband alone do lease the Land of the Wife, and dies, the Lease remains good, and not determined, before the Wife by her entry do avoid this, so is 9 H. 6. fol. 43.

28 H. 8. Dyer fol. 28. for as to the possession, the Lease hath continuance, and remains in full force until the Wife hath avoided this by her entry; but as to the Right, this is presently determined by the death of the Husband, (where made by him alone) but when they both joyn in the Lease of the Wives Land, there after the death of the Wife, this is a good Lease in Right, for she may make this Lease good by her acceptance of the Rent, after the death of her Husband, and so is 48 E. 3. fol. 13.

48 E. 3. f. 13. &c.

4 & 5 Mariæ Dyer fol. 159. In this Case, the Lease (as it was urged) is but a voidable Lease, to be avoided by the Wife; and when the Wife is here dead, before she hath made this her election to have this to be a good Lease or not, the surviving

surviving Tenant shall not now avoid this Lease, for that no such Election is given unto him, the same being at the first but voidable, by the Wife, and now by the death of the Wife, the same is become to be unavoidable.

It was also further urged, that in this Case the Survivor was not privy to this Lease, and therefore he shall not avoid it.

It was urged for the Defendant, that the Survivor here may well avoid this Lease; for that a Lease made by one joynt-Tenant to charge his Companion, ought to be an absolute Lease, and not voidable, as the Lease in this Case is. Also when Baron and Feme make a Lease for years of the Wives Land, by Deed, rendring Rent; prima facie, this Lease is good, because it may be made good by the Wife, by possibility, if she survive her Husband, and consents unto it, by her acceptance of the Rent, then by this agreement this is the Lease of the Wife; but if she doth not survive her Husband, but dies before, and so no agreement by her unto this Lease, then the same is not her Lease, in any respect, but it shall then be in Law, as a Lease made by her Husband alone; and so no such Lease made by the Wife, conditional, if she survive and agree, otherwise not; but as a Lease made by the Husband alone; and so no such Lease made by the Wife, conditional, if she survive and agree, otherwise not; but as a Lease made by the Husband alone. It is the Lease of the Wife, with this possibility, to be made good, and so to be her Lease, by her acceptance of the Rent, if she survive, otherwise not. And if the Lease was made by the Husband alone, the survivor might well avoid this; because it was good only in regard of the possession; and so as it was urged, this Lease here is not voidable, but absolutely void, and so well avoidable by the survivor, Coke 2 pars, fol. 77. b. Harveys Case, put in Cromwells Case, the Husband makes a Lease for years of the Wives Land; Afterwards Baron and Feme levies a Fine of the Land to another; the Conusee shall avoid this Lease after the death of the Husband, 7 E. 4. fol. 7. Baron and Feme make a Lease for years of the Wives Land, rendring Rent, the Husband alone brings Debt for the Rent, adjudged maintainable, because this is the Lease of the Husband alone, before his death; but if the Wife survives, and agrees to it, it shall be then the Lease of the Wife. It was further urged, that if this possibility to make this Lease good, be once reduced in actum, this shall make the Lease good, otherwise not; but here the Wife died in the life time of the Husband, so that this possibility which the Wife had, to have made the Lease good and unavoidable by her acceptance of the Rent, is now by her death determined, and ended, and this is now but as a Lease made by the Husband alone, of the Land of the Wife, and this is vana potentia, quæ nunquam reducitur in actum; and this possibility of election, and affirmation of the Lease, by the death of the Wife, is cut off, and falls to the ground, and so the survivor, or any Stranger shall have benefit, and take advantage hereof.

Coke 2 pars, f. 77. b. &c.

7 E. 4. f. 7.

Coke Chief Justice. A Lease for years made by one Joynt-Tenant for life, this shall be good against the Survivor. And so it is, if one joynt-Tenant for life, makes a Lease for years to begin after his death, this is good; so was Harbin & Bartons Case.

Dodderidge Justice. By 11 H. 6. If the Husband makes a Lease of the Land of the Wife, by Indenture, and the Wife dies, the Husband shall have an Action of Debt for the Rent upon the Indenture, before the Heir enters, yet the Estate is gon from the Husband.

11 H. 6.

Haughton Justice. If Tenant in tail makes a voidable Lease, for that the same is not warranted by the Statute, and dies; the Guardian in Chivalry may avoid this Lease for his time; as touching this Vide, Coke 7 pars, fol. 7, 8. the Countee of Bedfords Case.

Coke agreed with him herein, for that this is done by him in right of the Heir, But a Lord by escheate shall not avoid such a Lease, as this Case here is, for the

Coverture of the Wife. In this principal Case here, put the Husband out of the Case, and so if the Feme being Joynt-Tenant with another, makes a Lease for 21 years, to begin after her death, this is gone, because by his death the whole Estate is at an end, and gone. If Baron and Feme do make a Lease for years, of the Land of the Wife, rendring Rent, the Husband and Wife dies, and the Heir of the Wife accepts the Rent; there is a Book full in the point, that this Lease may be made good, by the acceptance of the Rent, by the Heir, and so by an inference out of this Case before put, this Lease here in question is not void by the death of the Wife. Also if Baron and Feme and a third person are joynt-tenants; the Husband and Wife here have but 1 moiety; if they make a Feoffment of the moiety, or if the Husband alone makes a feoffment of the moiety, and dies, no survivorship there shall be, because a possession stands not in jointure with a right; otherwise had it been, if they had made a Feoffment of the whole, there all is turned into a right, and there shall be a survivor; if Baron and Feme make a Lease for years of the Land of the Wife, rendring Rent, the Wife dies without Heir, the Lord by escheate shall not avoid the Lease.

And so without any further debate this Case was adjourned to a further time, for further argument thereof.

Termin. Mich. 14 Jac. B.R. &c. Afterwards (S) Termin. Mich. 14 Jac. B.R. This Case was moved again, urged, and Judgment at last given therein for the Plaintiff.

Dodderidge Justice. Baron and Feme make a Lease for years rendring Rent, as in this Case, the Wife dies, may the Husband have an Action of Debt for this Rent? (if the Estate be gone) he cannot; this will go far in the principal Case here; you cannot have the Rent any longer than the Estate continues, the Rent ends with the Estate, if it be so that the Estate be ended, the contract for the Rent will end also, this being but quid pro quo, (S) the Rent for the Land.

Croke Justice. Baron and Feme make a Lease for the life of I.S. rendring Rent, the Husband dies, Rent incurs, I. S. the cestuy que vie dies, whether an Action of Debt will lie for this Rent.

Dodderidge. It will well lie.

Haughton Justice. Two Joynt-Tenants make a Feoffment, one of them dies, the Survivor shall avoid this for Infancy, because he was party to the Feoffment, here he is to avoid this by reason of the privity. An instance may be, where a stranger shall avoid a Lease. As if Tenant in tail make a Lease for years, which is avoidable, and dies, the Gardian in Chivalry shall avoid the same, here a reversion doth only survive unto the Joynt-Tenant.

Dodderidge. Without question this Lease here is only avoidable, but not void, by 3 H. 6. But here the Wife dies, the question now is, what continuance this Lease now hath, whether the same shall still continue, or not; this Lease shall still continue, and is now become to be unavoidable: the Cases remembred of Infants, and of Feme Coverts do not come unto this Case. Two Joynt-Tenants Infants, make a Feoffment in Fee; they shall have two Writs of Dum fuit infra ætatem, but in a Writ of right, they shall joyn: If Land is given to two, and to the Heirs of their Bodies, they lose by default; they shall have several Actions; but these Cases put of Joynt-Tenants are upon another reason, than the Case now in question.

3 H. 6.

Mountague Chief Justice. Baron and Feme here do make a Lease, so the Freehold is charged with the charge made upon the Estate; the Joynt-Tenants Estate for life survives, who shall avoid this charge, the Frank-Tenant survives, but the Interest remains; the Free-hold survives with the charges; this Lease here thus made is a good Lease, and to have continuance.

A Parson makes a Lease for years to begin after his death, the which is confirmed; this is a good Lease; as to the Rent here reserved, this is not material; this Lease was avoidable only by the Wife, the which now by her death, is become impossible

possible to be avoided, Vide Coke 8 pars, fol. 42. in Whittinghams Case, as touching this matter.

Dodderidge. In the Case before remembred, the Husband cannot have an Action of Debt for the Rent, the contract being determined with the Estate.

Haughton. The Lease here is good, and shall have continuance; and the surviving joynt-Tenant shall not avoid this Lease.

At this time the Court was clear of opinion, that the Plaintiff hath a good title by force of his Lease made unto him, and that the surviving joynt-Tenant cannot avoid the same; and so at this time it rested upon a Curia ulterius advisare vult.

Afterwards at another time, this Case was moved again for the Judgment and Resolution of the Court.

Mountague Chief Justice. In this Case we are all of us agréed, that this is a clear Case, and without any question for the Plaintiff; that this his Lease made unto him, is a good, and a continuing Lease, and unavoidable by the surviving joynt-Tenant, and therefore without any further argument, the rule of the Court was, Quod judicium intretur pro querente. Judgment for the Plaintiff, *per Curiam.*

Termin. Hillar. 14 Jac. *Banco Regis.*

Doctor *Hussey* and others Plaintiffs, against *Moor* Defendant.

Entred Termin. Trin. 14 Jac. B. R. Rot. 946.

IN a Writ of Error to reverse a Judgment given in the C. B. in a Writ of Ravishment de gard, there brought by Francis Moor according to the Statute of Westminster 2. capite 35. the Error assigned and insisted upon (not being upon the matter in Law, debated and resolved in the Court of C. B. and so reported, Coke 9 pars, fol. 71. Doctor Husseys Case,) but the Error insisted upon, was this; The Writ of Ravishment de gard, which was brought, is given by the Statute of Westminst. 2. capite 35. by which Statute there ought to be Pledges found for the Plaintiff; but there are no Pledges returned by the Sheriff, nor yet any entry or order in Court, that Pledges shall be found, which ought so to be, this being an Original Writ, and for this Error the Judgment is erroneous, and so prayed to be reversed.

A Writ of Error. 1 Rol. R. 445. 1 Ro.Abr. 792. Cro. Jac. 413. Jones 77. Hob. 93. 2 Brown. 59, 91 *Coke* 9 pars, f. 71. &c. Westminst. 2. c. 35.

The whole Court agréed clearly in this, (S) that Pledges ought to be.

It was then urged for the Defendant, that this being but the misreturn of the Sheriff, shall be aided by the Statute of 18 Eliz. capite 14. which doth aid misreturns of the Sheriffs. 18 Eliz. c. 14.

This Case was several times argued at the Bar, by Coventy, and Thomas Crew for the Defendant, by George Croke for the Plaintiff.

It was urged, that the Statute doth not extend to this, for that by 18 E. 4. fol. 9. 2 H. 7. fol. 1. & 17. upon every Bill or Writ, there ought to be Pledges returned, or set down, hanging the Writ; and so is 9 E. 4. fol. 27. where the difference is taken between a Bill in B.R. there Pledges ought to be the first day, otherwise in a Writ in the C.B. the reason of Pledges, being for the surety of the Kings Fine, and where there are no Pledges, this makes the Judgment erroneous; and so is 11 H. 4. fol. 7. & 12 Eliz. Dyer, fol. 288. betwéen Chapman & Bigot. But these 18 E. 4. f. 9. &c. 9 E. 4. f. 27. 11 H. 4. f. 7. 12 Eliz. Dyer f. 288. &c.

Cases are before the Statute of 18 Eliz. Pledges are the benefit of the King, the Statute never intended to aid one who is to be punished by a penal Law; and so in Blackamores Case, Coke 8 pars, fol. 163.

Coke 8 pars, f. 163. &c.

Mountague Chief Justice. It is parcel of the Judgment, being quod plegij in misericordia, as it is in Beechers Case, Coke 1 pars, This Statute hath made it more penal.

The whole Court agreed with him herein, that this is a penal Law, and that this is a material Error.

Afterwards this Case was moved again, and urged for the Defendant, that the not having of Pledges is no Error. The reason for finding of Pledges, being first for the benefit of the Defendant, to the intent that the party Plaintiff should prosecute his Suit. 2. Because there should be a certainty for the Kings Fine, (S) the amerciament, and these are the true Reasons (as it was urged) for finding of Pledges; but here in this Case, both these are unnecessary, being found for the Plaintiff, and so the reason being removed, sublata causa, tollitur & effectus.

2 H. 6. f. 15. &c.

2 H. 6. fol. 15. No Pledges in a Returno Habendo, and no Error. 11 H. 4. fol. 7. In an Appeal, Pledges found, pendant the Brief, exception there taken for want of Pledges, there said, if the Defendant will, he may have them. 18 E. 4 fol 9. put there with a Nota, by all the Justices, that the finding of Pledges, is but matter of form, and only in the discretion of the Judges 7 R. 2. Fitz. title Pledges, placito 10. where it is said, that some Sheriffs use to have Pledges found, and some not: and there resolved, That Pledges are not to be found of necessity, 13 Eliz. Dyer, fol. 288.

12 Eliz. Dyer, f. 288. &c.

As to the Case remembred in 12 Eliz. Dyer, fol. 288. entred Termin. Pasch. 12 Eliz. B.R. Rot. 358. the Judgment there was reversed for a fault, in the end of the Count, & unde petit remedium, being in an Ejectione firmæ, and for this new conclusion in the Count, the Judgment was reversed, but not for the not finding of Pledges; and it was urged, this appears to be so upon the Roll, being examined, yet both the Errors were assigned. But admitting this to be an Error, it is then aided (as it was urged by the Statute of 18 Eliz. capite 14.)

Stat. of 18 Eliz. c. 14.

It was then further urged for the Plaintiff, that the finding of Pledges is matter of substance, and not of form, and that for want of Pledges the Judgment shall be erroneous, and overthrown; the entring of Pledges is not to be at the Suit of the Defendant, but of the Plaintiff, for his benefit, and for the benefit of the King; for he is to be in misericordia.

Coke 8 pars, fol. 61. &c. Rule for Pledges.

And as touching this matter in Beechers Case, Coke 8 pars, fol. 61. The Rule is there set down in general, That in all Actions, Original, Real or Personal, Pledges ought to be found, unless in two Cases, (S)

1. Where the dignity of the Kings Person is concerned, and therefore neither the King, nor the Quæn are to find Pledges, as appears by 18 E. 3. fol. 2. Fitz. Nat. Brev. fol. 31. F. 47. d. & Fitz. Nat. Brev. fol. 101. A. That the Quæn shall not find Pledges.

18 E. 3. f. 2. &c. F.N.B. f. 195. &c.

2. Where it is for the imbecillity of the person; as an Infant shall not find Pledges, Fitz. Nat. Brev. fol. 195. H. 14. Assizarum placito 17. But when he comes to his full age, hanging the Writ, he is then to find Pledges, or he shall be amerced; which proves the not finding of Pledges, to be Error, as it was urged. And it is to be observed for a Rule, That in all Cases where the person is to be amerced, there he ought to find Pledges as a matter of substance, and not of form. And no Law of Amendments will aid this Case, which are all put Coke 8 pars, fol. 161, 162. in Blackamores Case.

Coke 8 pars, f. 161, 162. &c.

Mountague Chief Justice. There is no question of this Case, there is no Book, that no Pledges are to be found, 2 H. 6. which hath been remembred, hath only a glance at it.

2 H. 6.

There

There are two Reasons for the finding of Pledges. The first for the party, if Judgment be given against the Plaintiff, the Subject ought not then to be prolonged without cause. 2 Reasons for the finding of Pledges.

2. For the King, because the Plaintiff hath troubled the Court without cause, therefore he is for this to be amerced, and therefore for these two Reasons, the Plaintiff ought to find Pledges. Fitz. Nat. Brev. before remembred, hath a good difference. No Pledges to be found, either in regard of the dignity of the person, as of the King, or of the imbecillity of the person, as in case of an Infant; otherwise, (these two excepted) in all Cases, Pledges are to be found. Fitz. Nat. Brev.

Also this finding of Pledges, is not matter of form (as it hath bèen urged) but matter of substance. As for the time when Pledges are to be found, They are to be found either in Court, or hanging the Writ.

As to the objection made, that there is no cause here in this Case for the finding of Pledges, in regard the matter is found for the Plaintiff, and that so the reason of finding of Pledges doth here fail, and the King is to have no amerciament. As to this in 12 Eliz. Dyer, before remembred, this is well debated. Whether this entring of Pledges be matter of form or not? The contrary is here resolved to be matter of substance, and that this is if Pledges be not found. 12 Eliz. Dyer.

Then as touching the Statutes, a Penal Law is out of the Statute; that which is within the provision, is out of the body of the Law. In Beechers Case remembred the Judgment is, ideo querens, & plegij sunt in miā; so that this is parcel of the Judgment, and therefore matter of substance.

This Case is out of the Statute of 18 Eliz. and the distinction which hath bèen taken, that this is but an additional Law; this will nothing at all help, and this is a very strange construction which hath bèen made, that because the offence was at the Common Law, therefore this is not a penal Law; the Statute of 8 H. 6. the form touching additions, this is yet a penal Law, if such a proviso had not been in the Statute of 18 Eliz. this Case had not been aided by the body of the Act. 18 Eliz. 8 H. 6.

Croke Justice. This is to be taken pro confesso, and so are all our Books, that Pledges ought to be found; and also that this finding of Pledges, is matter of necessity, not matter of form (as it hath been said) but matter of substance; and these Pledges may be found hanging the Writ. As to the Statute of 18 Eliz. the body of which Act doth not extend unto this Case, It is very clear that the proviso in the Act, doth not expressly extend unto this Case; for this is a penal Law. Stat. of 18 Eliz.

Dodderidge Justice. I will suspend my Judgment in this Case, until the Dignial, and first institution of Pledges be known, which is notable. Coke 8 pars, this is reported to be, to avoid trouble; the Pledges to be amerced, because he is not to vex and trouble the Kings Courts without cause. The original cause and reason still remains, although by multiplicity of Suits they are almost grown out of use. Originally it was thus, The Sheriff had it in his election, whether he would serve the Writ, or not, if Pledges were not found; but since it is held, that they may be found hanging the Writ; and in ancient time, if the Plaintiff sued one unjustly, the Judges would amerce the Plaintiff, and that grievously, until the Statute de moderata misericordia was made.

Afterwards at another time, all the Judges argued this Case.

1. Haughton Justice recited the Case, and stated the question, being only this, Whether this Judgment thus given in the Court of C. B. shall now be reversed for this Error moved and insisted upon (S) for the Plaintiffs not finding of Pledges. At the Common Law this is Error, but this is remedied by the Statute of 18 Eliz. capite 14. There is no difficulty in this, but that Pledges may be found hanging the Writ. And this resolves the question, for the Judges would not suffer Pledges to be entred; if the same was matter of form, the Books against this are Stat. of 18 Eliz. c. 14.

18 E. 4.

18 E. 4. f. 9. 18 E.4. fol.9. but this is no concluding Book, the same is matter of form, in respect of the substance of the matter, but not that the Judgment shall not be erroneous, if Pledges are not found, 7 R. 2. Fitz. title Pledges placito 10. this is in Oyer & Terminer, which is but a Commission, and therefore I do not find that Pledges are necessary to be found in that Action 9 E.4. & 12 Eliz. Dyer, fol.288. are direct in point, that this is Error.

7 R. 2. Fitz. &c.

9 E.4. 12 Eliz. &c.

It hath bèen objected, That a Verdict having bèen given against the Defendant, that now the finding of Pledges is not material; but this doth nothing at all move me, for the same was material at the first, and so appeared to the Court.

But for the second matter, This is aided by the Statute of 18 Eliz. First it is very clear, that this is within the body of the Act, for it is within one of the things mentioned therein, (S) Nor upon any insufficient return of the Sheriff, of the Writ, nor any other Process; these do plainly extend unto this. But the difficulty is upon the Proviso, which provides that the same shall not extend to any Action given upon any popular or Penal Law. I do agree that this Case is within the Letter of the Law; for it is an Action, and also the Statute of Westminst. 2. capite 35. is penal; but as for this present Case, I do take it to be out of this exception. (S) All Actions which the King may have, and which the Subject may have, so that they are partim popular, & partim penal. An Action upon the Statute of Perjury is given to the party grieved, this is penal, because a certain pain is inflicted by the same Statute, and given to the party grieved. But a Statute which gives recompence to the party who hath sustained damages; such Actions penal, (as I intend) are not within the Statute; by way of instance, in an Action of Wast, it is a penal Law, but the recompence given, is for a wrong done in the Land. And so in the Case of an Action upon the Statute for a forcible entry, and so in an Action upon the Statute of 2 E. 6. because these are but remedies given for the parties right. But if it be a pain, set and imposed upon one by the Statute, without any respect of recompence for damages, to this the Statute extends.

Westm. 2. c. 35.

Stat. of 2 E. 6.

This Action of Ravishment de garde, is but a recompence given for the taking away of his Ward, and therefore, &c. the Statute of 31 Eliz. capite 5. there is the like Clause, (S) That all Actions upon penal Statutes, shall be laid in their proper Counties, none will deny but that the Action for Ravishment de gard, is within the Statute, but I confess that the preamble of the said Statute doth enforce very much. 7 Eliz. Dyer, fol. 236. In a Case referred to all the Judges, that Actions upon certain penal Laws, to be sued in any of the Kings Courts of Record; these to be the Courts at Westminster, although the words are general.

31 Eliz c. 5.

7 Eliz. Dyer, fol. 239.

The Statute of Merton, capite 1. That a Feme shall recover in Dower damages where the Husband died seised; the Husband makes a Feoffment in Fée, and takes back an Estate for life, the remainder over and dies.

Stat. of Merton cap. 1.

It hath bèen ruled, that the Wife here shall not recover Damages, because though the Husband died seised, yet he did not die seised of such an Estate, of which she is Dowable, and so the same not within the intention of the Statute; so here in this principal Case, although the same be within the Letter, it is not within the meaning of the Act; and so this Error thus assigned, upon the whole matter, is no sufficient cause to reverse the Judgment given in the C.B.

Dodderidge Justice. The Judgment given in the Court of C. B. is erroneous for the Error assigned, and ought to be reversed.

At the Common Law this is Error; in the deciding of which, as touching Pledges, it is very plain, that at the Common Law, Judgment given in an Action, in which the Plaintiff is to find Pledges, if none be found by the Sheriff, nor yet hanging the Writ, this is a clear Error. 1. I will consider how this finding of Pledges stands, since the Statute of 18 Eliz. cap. 14.

As touching Pledges, and the finding of Pledges at the Common Law, I shall consider these three things, (S)

1. Quære,

1. Quare, Wherefore Pledges are to be found.
2. Ubi, Where they are to be found. And
3. Quando, When they are to be found.

1. As touching the first, being Quare, why Pledges are to be found: The reason of which is, because the Plaintiff shall not vex any of the Kings Subjects, nor yet molest and trouble the Kings Courts, with frivilous, malicious, and such like Suits, which do not grow upon any just ground. Touching the finding of Pledges.

For the rule of Law is, That every Declaration or Writ, ought to contain certainty and verity, and for default herein, Amerciaments grievous were imposed upon the Plaintiffs, until the Statute of Magna Charta, cap. 14. which doth enact, that Amerciaments shall be secundum modum delicti, salvo contenemento suo, afterwards in a Replevin, for the benefit of the Sheriff only, Pledges to be found, otherwise a Detinue shall be brought against him, and this by the Statute of Westminster the second, cap. 2. he is therefore to look unto this, so that the reason of finding of Pledges at the Common Law, was to take away multiplicity of Suits: The form of Writs being, (S) Si querens fecerit te securum de clamore suo prosequendo, for otherwise the Sheriff is not bound to summon the Defendant.

2. Ubi, Where Pledges are to be found: As to this, they were to be found in three places, (S) 1. In the Chancery, when the Original Writ was taken out. 2. To the Sheriff, upon the Writ to him delivered. 3. Or in Court, hanging the Writ: If he finds Pledges in the Chancery, then the Clause in the Writ, Si querens fecerit te securum, was omitted by all our Books; if no Pledges found before the Sheriff, this is no matter to defeat the proceedings, but he may then find them, pendente placito.

Three Objections have been made against me, (S.)

1. That his finding of Pledges is but matter of form, and to prove this, 18 E.4. fol.9. cited, there is the opinion of the Reporter to be so, but he is therein deceived.

2. Although this be more than matter of form, yet this omission shall not hinder Judgment, 3 H. 6. fol. 1. In a Replevin, the Sheriff had not found Pledges, upon the Returno habendo, but this is not to stay or hinder Judgment: This is to be agreed, for there Pledges are to be found for the benefit of the Sheriff, and this is his Laches and default, if he will not have them to be found.

3. And which is the most material: here the matter is found for the Plaintiff, and therefore the finding of Pledges here in this Case is not material; no use being now here of Pledges, because it is found for the Plaintiff, for whom Pledges were to be given.

8 H.5. fol.8.b. gives a full answer unto this, and to all the three Objections: In a Formedon, proceedings were to issue, and tryed for the Plaintiff. It was moved in Arrest of Judgment, that no Pledges were found for the Plaintiff, and for this cause Judgment was there stayed, although the Verdict was found for the Plaintiff.

12 Eliz. Dyer, fol. 288. before remembred, and in a Bill in which there is some variance and question, whether Pledges may be found, hanging the Writ, but here they were found. 12 Eliz. Dyer, fol. 288.

9 E. 4. fol. 1. & 12 Eliz. Dyer, Judgment was reversed for this cause; so that by all this it appeareth, that at the Common Law this finding of Pledges is not matter of form, but of substance, and that the omission of this shall make the Judgment to be erroneous: It is impertinent to shew what persons are to find Pledges.

The Rule of Law is, That in all Cases where the Plaintiff is to be amerced, there he is to find Pledges; otherwise it is, where he is not to be amerced. Rule of Law, &c.

As

As in the Case of Infants, of the King and Queen, all which doth at large appear, Coke 8 pars, in Beechers Case before remembred.

Coke 8 pars, &c.

2. As to the second matter to be considered, touching the Statute of 18 Eliz. cap. 14. whether this Case be within the aid of this Statute.

As to this, it is very plain that this Statute gives no aid unto this Case, the same being very clearly within the Statute, within the Proviso thereof, which doth not extend to any Writ or Declaration, for Felony, Murther, Treason, because these are Corporal punishments in the highest Degree: Nor yet to Process, Writ, Bill, Action or Information, upon any popular or penal Law: This here is not a popular Action, for it is called, popular quia quilibet de populo may pursue this: But this is penal, and so it hath been agreed to be within the letter of this Statute, and also it is within the meaning of the same; penal Laws are those which do inflict penalty, & omnis poena, aut est pecuniaria, Corporalis, or exilium, and what Law can be more penal than this Statute, which includes all these three, (S) Pecuniary, Corporal and Exile. All this you may find within this Law, for he shall pay Damages, he shall suffer Imprisonment, and he shall be Exiled, so that this Statute comprehends all penalties, except mutilation of members, or death, so that this is a penal Law, with a Witness, and so this Case is plainly within the letter, and it is also within the meaning of this: The meaning of the Makers of a Law, is to be gathered by their words: And when I have no president nor reason to move me, that the meaning of the Statute is otherwise, than the letter of this doth purport, there I ought to stick close to the letter; but it hath been thus distinguished, That all Actions which do inflict penalty, for satisfaction, and not for the offence, are within the Statute of 18 Eliz. as the Statute for waste, damages given for the hurt, as it hath been urged.

Westminst. 2. cap. 35.

But here this Statute of Westminster 2. cap. 35. is cumulative, the same gives damages, corporal punishment, and exile, to lose his Country, and if this be not a penal Law, I do not know what Law is penal: And so in this Case for the matter alledged, this Judgment given in the C.B. at the Common Law, is erroneous, for not finding of Pledges, and this is not aided by the Statute of 18 Eliz. and so for this Error the Judgment ought to be reversed.

Croke Justice agreed with him herein, that for this cause the Judgment is erroneous, and ought to be reversed; we do all of us agree, that at the Common Law this not finding of Pledges, is a good and a clear Error for to reverse a Judgment, 9 E. 4. for want of Pledges, Judgment was reversed.

The reason of the Law, as to the finding of Pledges, is very notable, being, for the avoiding of unjust vexation, that will not make the Law a scourge to others, without being punished for this himself; Pledges may be found either in Chancery, as in Appeals, there they are found: They are by the Law commanded to be found, and therefore not to be omitted; for as Lex nihil frustra facit, ita Lex nihil frustra jubet, and therefore in regard the Law hath commanded this finding of Pledges, necessarily by the course of the Common Law they ought to be found, and this to be so observed as a special Maxim of the Law.

Stat. of 18 Eliz.

As to the Statute of 18 Eliz. clearly this Case is not aided by this Law: The Body of the Law doth not extend unto this Case, for this doth aid insufficient Returns, but not no Returns, and here is no Return upon the matter.

If the Sheriff doth not put to his name, this is not aided by this Statute, so if it be album breve, not aided; these are not within the words of an insufficient Return of the Sheriff.

2. If this Law extended but to multiplication of damages, I should then be of another opinion, but here it doth extend to the Body: An Action upon the Statute of forger of faux faits, not doubted but the Statute extends to this: If the Statute had been in the Conjunctive, (S) popular & penal, yet the same ought to be

be construed in the Disjunctive, so that notwithstanding the Statute of 18 Eliz. this Case stands still as a Case at the Common Law; and this not finding of Pledges being matter of substance, and not of form, is a good Error, and for this Error the Judgment ought to be reversed.

Mountague Chief Justice. I am in this Case clearly of my former Opinion, and am now much confirmed therein, that this Judgment ought to be reversed: I have delivered my opinion before, with the reason for finding of Pledges, this being not matter of form, but of substance, and so very material.

As to the Statute of 18 Eliz. if this Case be within the Body of the Act, it is yet excepted very clearly in the Provisio; but I do hold that this Case is not aided by the Body of the Law: Insufficient Returns are by this Statute aided, and want of an Original; but it is not therein expressed, that want of a Return, but an insufficient Return is aided; here the person against whom to have Judgment, is not returned omnino, for the Judgment ought to be against the Plaintiff and his Pledges, and so this is no Return, and therefore not aided by the Body of the Act.

As touching the Provisio, If the Stat. of Westmin. 2. cap. 35. be a penal Law, then the same is within this Provisio.

This difference hath been taken by way of Objection, That Cases remedial are not within this Law, as a penal Law to punish a wrong done; this is within the Law, but not a penal Law, which gives remedy for the wrong by way of recompence.

As to this Case, here is a penal Law for a wrong done, if the Law which doth punish wrong, and goes to the person, not to the possession, this is a penal Law within this Statute, and therefore the Case of Waste, and of 2 E. 6. before remembred, are answered not within this Statute; as to the Statute of Westminst. 2. at this time no Inheritance greater than the Service of Men; a great wrong it is, to take away Wards, remedy given at the Common Law; if take and give satisfaction, this is not to have recompence, but to punish the wrong, this is a Statute to punish force, not to give remedy for a wrong for 2 years Imprisonment, notwithstanding satisfaction given.

If he takes away a Ward, and marries him, this makes him a Felon abjured, if not able to satisfie the party; this is penal, not to give recompence for a wrong personal nor real.

And so upon the whole matter, this is an apparent Error, and not aided by the Statute of 18 Eliz. and so for this Error the Judgment ought to be reversed.

Dodderidge. This is a very strict Law, for actio personalis moritur cum persona, but here the Executors may sue.

The whole Court, (Haughton except) agreed clearly, that for this Error the Judgment is erroneous, and ought to be reversed, and so by the Rule of the Court, the Judgment was reversed. Judgment reversed, &c.

Sanford Plaintiff, against *Stevens* and *Smith* Defendants.

Entred Termin. Trin. 14 Jac. B. R. Rot. 460.

IN an Action of Trespass for breaking of his Close, and for assaulting three of his Servants: And for his title shews, that this was Copy-hold Land, parcel Trespass.

of such a Mannor, of which one Church was the Lords, and that Church, 34 Eliz. did grant this Copy-hold unto Sanford and his Heirs, virtute cujus, &c.

The Defendants as to the Assault do plead Non culp. and for the Trespass in the Close, Smith the Master and his Servants do justifie in this manner (S) They confess the Close to be Copy-hold Land, but plead, that long time before, it was parcel of the Mannor of Crippelshal in Essex, and that long time before the supposed Trespass, one Pole, and Margaret his Wife, was Lord of the said Mannor, in the right of his Wife, for life, the remainder in tail to Stevens, and made a Lease for years of this Land unto Smith, by force of which Lease he was possessed, and cut the Trees, and his Servants aided him in carrying of them away, and so justifies by this his Plea in Bar, but doth not shew how Pole and his Wife came to this Estate for life, the remainder over.

To this Plea in Bar, the Plaintiff demurred in Law, because the Defendant therein hath not shewed as he ought to have done, how Pole and his Wife came to this Estate for life, the remainder over.

The whole Court upon the first opening of this Case, agreed clearly, that this Plea in Bar was not good, because it is not therein shewed, how this particular Estate pleaded to Pole and his Wife for life, the remainder in tail to Stevens, hath its commencement, they claiming under a derivative Estate for years, made by Pole and his Wife; they ought in pleading the Bar, to have set forth how this Estate thus came to Pole and his Wife, with the remainder, for which omission the Plea in Bar is not good.

The matter in Law that was in this Case moved, being a Copy-holder of Inheritance, having no custom to cut down Timber-trees, whether the Lord of the Mannor may cut them down? If the Copy-holder by the Custom, may cut down Timber-trees, (fore expendenda) this is good per Curiam.

Also by the whole Court, if a Copy-holder by the Custom may cut down Timber-trees for reparations, he shall have the Timber-tree, the Lop, Top and Bark of the same also.

Trin. 14 Jac. B.R. &c.

To this purpose the Court remembred a Case in this Court, Trin. 14 Jac. B. R. Rot. 461. between Lewis and Smith, being the same Case with this principal Case, and also for Copy-hold Land, parcel of the same Mannor: The same rule then given by the Court, as now in this Case.

The whole Court clear in this, that by the Custom the Copy-holder is to imploy the Timber for his reparation, with the Top and Bark he cannot repair, but these he is to have, and may sell them towards the defraying of his charge in reparation.

Judgment for the Plaintiff, *per Curiam.*

The whole Court clear of opinion, that the Plea in Bar here is not good, for the omission before remembred therein, and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

Bayn Plaintiff, against *Worth* Defendant.

Trespass.

IN an Action of Trespass for an Assault and Battery, laid to be at Bishops-street in Comitat. Hartford: The Defendant comes in, and by Plea shews that he was Servant to a Scholar of St. Johns College in Cambridge, that they are to have Conusance there, and not to be drawn out of the University, and shewed their Charter for Cambridge and for Oxford, and the Act of 13 Eliz. for confirmation of the Charter for Oxon, and for Cambridge: To this Plea the Plaintiff demurs in Law, because the Defendant hath taken no Travers, which he ought to have done with an absque hoc, that he was culpable in any place, extra Universitatem Cantabrigiæ, that so they might have taken Issue.

The

The whole Court clear of opinion, that the Defendant here ought to have concluded his Plea with a Travers, and that for this omission the Plea is not good and the Plaintiff had just cause of Demurrer, and so by the Rule of the Court, Judgment was given for the Plaintiff.

Meflyne Plaintiff, against *Farneden* Defendant.

IN an Action upon the Case for scandalous words laid in the Declaration, to be spoken at several times: The first time they are laid to be spoken, De præfato querent': The words laid to be these (S) That perjured Knave, præfat' scilicet querent innuendo, (communication being laid to be of him) stands perjured upon Record, at the Guild-hall London, and I will prove it.

At another time it is laid, that he spake to the Plaintiff himself in this manner, (S) Thou art a perjured Knave, and standst perjured upon Record, for denying of thy own hand, and I will prove it; upon Non culp. pleaded, this was tryed before Mountague Chief Justice, Mich. 14 Jac. at the Guild-hall a Verdict was found for the Plaintiff, and entire damages of 20 Nobles given to him.

It was moved in Arrest of Judgment for the Defendant, upon the first words, that they are not actionable, because it is not shewed in what Court this Perjury is recorded, there being two Courts, one which is a Court of Record, and the other not so, and it may be in this Court which is no Court of Record.

And also, that the later words do extenuate the former: It was likewise moved that these words being laid to be spoken at several times, the Jury here have given entire damages, which is not good.

As to the first matter moved, the Court was clear of opinion, that of necessity it ought here to be intended, to be in a Court of Record, for it is oppositum in objecto, to say that he stands perjured upon Record, if it was not in a Court of Record, and therefore this shall so be intended.

As touching the later words, the Court was clear of opinion that they are Actionable without any colour of defence.

As touching the entire damages given by the Jury, and this moved in Arrest of Judgment, where some of the words are actionable, and some of them not so.

The Court over-ruled this, that the entire damages here are were well given by the Jury, and the same shall be taken to be for the words which are actionable, and not for the other words.

Haughton Justice. If the words were spoken at several times, and some of the words are actionable, and some others not, and two several Actions brought for these words, and both of them found for the Plaintiff, and damages entire given, this is not good: But otherwise it is here in this Case, there being but one Action brought for all the words, and in the Declaration laid to be spoken at several times, and entire damages given, as in this Case, this is good, and the damages well given.

And so for this, the whole Court over-ruled this Case clearly upon the later words; And therefore by the Rule of the Court, Judgment was given for the Plaintiff.

Weal Plaintiff, against *Wells* Defendant.

Entred Termin. Trin. 14 Jac. B. R. Rot. 887.

Action upon the Case for Conspiracy.

IN an Action upon the Case for a Conspiracy, to indite him of Felony, and that falso & malitiose crimen Feloniæ, he laid to his charge, for the supposed stealing of five Stears, upon this he was tryed and acquitted.

The Defendant pleads in Bar, and shews that eighteen Novembris, at Bermingham he was possessed of five Stears which were stollen from him, that he made fresh suit after them, that they were found in the possession of the Plaintiff, that he came to him and demanded to have the sight of them, which he refused to do, and gave him very uncertain answers, by reason whereof he did suspect him, and so procured a Warrant, and had him before Sir Thomas Bennet to be examined, and for his uncertain answers upon his Examination, he did also suspect him, and committed him, binding him over to appear at the next Sessions to answer this matter, and did then also bind the Defendant to prosecute against him. At which time, he did accordingly prosecute an Indictment against him, and then gave this matter in evidence to the Jury against him, who did acquit him; and so justifies his Proceedings.

This Case was argued, &c.

The Plaintiff replies, and shews that he was a Butcher, and that he bought these Stears in Market overt, and had tolled for them; and that he had killed three of them; and takes a Travers absque hoc, that he refused to shew them to him; upon this Replication the Defendant demurrs in Law, supposing the Travers to be too short, for that he hath not answered, all which is laid against him.

This Case upon this Demurrer was argued, Termin. Mich. 14 Jac. B. R. and then it was urged for the Plaintiff; That this being in an Action upon the Case, for imposing of Crimen Feloniæ. It is good for the Defendant to shew, that a Felony was committed, and so to have a suspition of the Plaintiff. And this is good, notwithstanding he is not Guilty; but he is to shew a cause for to induce this, which cause is traversable, as appears by 7 E.4. fol.20.

7 E.4.fol.20.

If it be laid, that by the common Voice he is culpable of this; here issue is to be taken upon the cause of suspition, and not upon the suspition it self.

Here, First he alledges that he found the Cattel in his possession, this is but an inducement to the suspition. But as to this, the same is confessed, and avoided, by his being a Butcher, and by the sale made to him in Market-overt.

As to the second matter, that he refused to shew these Cattel to the Defendant, being by him demanded so to do. This is a material inducement, and therefore to be traversed.

Thirdly, That he refused to shew by what way, or means he came by these Cattel.

This is material, and this is traversed, and there is no other material matter alledged here to be traversed by the Plaintiff (as it was urged) 7 H. 4. suspition is a matter secret, and not traversable.

7 H. 4.

11 E. 4. fol. 4. b. In such an Action brought, he ought to shew some cause of suspition, the which cause is traversable. In 2 and 5 H. 7. this matter is there long argued, A Felony done, and the common Voice and Fame there questioned, whether this be a sufficient cause? 11 E. 4. f. 4. b.

It was objected, That here he should have concluded, De injuria sua propria, absq; tali causa.

In answer to this, It was urged that this could not so be, for that then the Trial ought to have bin of both Counties, and London being one, cannot joyn with the other; and therefore the Issue is to be of one of them, 2 H. 7. fol. 3. one justifies a Robbery in one place, agreed there, that by the Plea, De injuria sua propria, all the cause is in issue; where they cannot joyn, there such a Plea, De injuria sua propria absque tali causa, is not to be, as it is adjudged in Point, in 2 H. 7. as it was urged, and so is 16 H. 7. fol. 3. b. and 2 E. 4. fol. 9. 21 H. 6. fol. 5. and Coke 8 pars, fol. 66. in Crogates Case, And as to matter of Record, a Plea de injuria sua propria absque tali causa, is not to be, and so was it resolved, as it was urged. 2 H. 7. f. 3. 16 H. 7. f. 3. b. 2 E. 4. f. 9. 21 H. 6. f. 5. &c.

Pasch. 40 Eliz. between Downing and Mayward, this is to be no good Issue, and 16 H. 7. fol. 3. there agreed to be good Law to take Issue upon the one matter, or the other. Pasch. 40. &c.

And so without any further debate, this matter was by the Court adjourned to another time, to hear further argument herein.

Afterwards (S) Termin. Hillar. 14 Jac. B. R. this Case was moved again, and argued on both sides (S) by Coventry for the Plaintiff, and by George Croke for the Defendant. Termin. Hillar. 14 Jac. B. R. &c.

The sole Point being, Whether the Travers here taken, be of a matter Traverlable?

2. Whether the Travers here taken be of all that which is traverlable?

It was urged, that the Travers is well taken, and of all which here is traverlable.

It was urged, that first the cause of suspition is traverlable; propter varias, & incertas rationes.

It must be agreed, that the Cattel were in the Possession of the Plaintiff; but he being a Butcher, bought them at Barnet, in Market overt, and did Toll for them.

The cause of suspition is traverlable.

4 H. 7. fol. 2. 5 H. 7. fol. 4, 5. Common Voice and Fame is traverlable.

2 H. 7. fol. 3. & 16 H. 7. fol. 3. The Felony, or the common Voice and Fame traverlable. 4 H. 7. f. 2. &c.

11 E. 4. fol. 5. 7 E. 4. fol. 20. & 2 H. 7. fol. 9. All agree, That the Common Fame, or the cause of suspition is traverlable.

16 H. 7. fol. 3. b. Where two Counties cannot joyn, there not to plead, de injuria sua propria. Also where it is said, propter varias, & incertas responsiones. This is not traverlable, as it was urged.

It was urged for the Defendant in maintenance of his Plea in Bar, and justification of his Proceedings. That 18 Novembris, at Birmingham he was possessed of five Oxen, stollen from him by a Stranger, upon fresh pursuit, he heard they were in the possession of the Plaintiff; he demanded sight of them, but he refused to let him see them, he said that he had killed four of them, refused to shew him the Skins, which was the ground of his suspition; upon this, by Warrant he was brought before Sir Thomas Bennet, and by him examined, & propter varias, & incertas responsiones, he suspected him likewise, bound him to the Sessions, and the Defendant to prosecute; upon this he was indicted, and acquitted, and so doth justifie his Proceedings.

The

The Plaintiff replies, confesseth the Goods that they were stollen, and brought to Barnet, to the Market, where he being a Butcher, bought them, and did Toll for them; that for this he was indicted, and acquitted, and takes this Travers, (S) absq; hoc, that he refused to shew them to the Defendant; upon this Replication a Demurrer.

It was urged, that if the Replication be bad, then there is a good justification of the Accusation laid against him.

It is to be agreed, that where a cause is alledged, as the common Voice and Fame, this is to be traversed.

7 H.4. f. 32. 27 H.1. f. 2. 7 H.4. fol.32. 27 H.8. fol.2. In a Conspiracy, that by the command of a Justice of Peace, he did exhibite the Bill of Indictment, this a good excuse; so here in this case, the Justice of Peace did suspect him, bound him over, and the Defendant to prosecute.

Hill.4 Jac. B.R. Rot. &c. Hillar. 4 Jac. B. R. Rot. 886. Between Cox and Wirrall, the like Action brought, for causing him to be indicted for Ravishing of his Daughter, and that he was acquitted, the Defendant pleaded that his Daughter did complain unto him, upon which he complained to a Justice of Peace, who upon examination bound him over, and bound the Defendant to prosecute; the Court there resolved, because the Father, upon complaint by his Daughter to him, went and complained to a Justice of Peace, in compassion of his Daughter, that the Justice of Peace binding him over, and the Defendant to prosecute; this was adjudged to be a good excuse for what was done by him, and the Travers of the Felony not good; the like Case was in 44 Eliz. B.R. between Chambers and Taylour. In a special Action upon the Case brought for procuring him to be indicted for stealing of Cloth, the Cloth was stollen, and in his possession, being a Broker, he refused, as in this principal Case to let him see the Cloth; upon this he complained to the Recorder of London, who bound him over, and the party to prosecute; upon this he preferred his Bill of Indictment, and this was there held to be a good excuse. In this Case, De injuria sua propria, absq; tali causa, had bèn a good Travers.

44 Eliz. B.R. &c.

Coke 9 pars. f. 29. &c. Coke 9 pars, fol. 29. in Alexander Poulters Case. The Common Law of the Land doth allow of this, that if one hath cause of complaint, and doth accordingly complain, this is a good excuse, for what he doth in a legal way.

21 H 7. fol.18. *Kelaway.* 21 H. 7. fol. 81. In Kelaway, to the same purpose in a Conspiracy, that where there is cause of complaint, this is a good cause to excuse him in a Conspiracy; so here in this Case here was just cause; this concerns all the Justices of the Realm, as it was urged; the like Travers was taken in Chambers Case, as here in this Case, and there by Popham Chief Justice, and the rest, the Travers held not good; the Demurrer there for the same cause, and held good.

As to the Objection here against the Plea in Bar, it is not material, if the Plea in Bar be defective, the Replication hath made it good, and the Demurrer is to this.

Mountague Chief Justice. As Men must not be discouraged to prosecute Felonies; so they are not to be animated, for to ver the innocent, here the Action brought, quia sciens, that he had bought them, yet procured him to be indicted.

Dodderidge. Justice. Here is a Bar, and a Replication, De injuria sua propria absque tali causa, this could not so have been in this Case, for this had been a Travers, to all the other matters before alledged. Here is a good ground of suspition.

The Travers here being absque hoc, that he refused to shew him the Cattel this is a good Travers, and an Issue might have bèn taken upon it; but by such a Travers, as de injuria sua propria, absque tali causa; by this the Plaintiff would have been triced, because that part of the Bar is good. The Travers here, as it is taken is good, and no cause of Demurrer, propter varias, & incertus

incertus responsionis, this is a good Cause of suspition, but is not Traversable.

Haughton Justice. It is here set forth in the Plea in Bar, that he refused to shew him the Oxen, being demanded so to do: This was a manifest Cause of suspition, and well Traversable; but propter varias & incertas responsiones, this is only set down for aggravation, and like unto alia enormia.

Dodderidge. If the Bar be good, then the Defendant ought to conclude with a Travers, (S) absque hoc, that he did exhibite a malitious Indictment.

Haughton. The suspition of the Justice of Peace here is not at all material.

Dodderidge agreed with him herein; If he refused to shew him the Cattel, this was a good cause of suspition, and this was a good ground for him to bring him before a Justice of Peace to be examined; the suspition of another Man is not to be traversed.

In this Case the Court seemed to be of opinion against the Defendant, that the Travers was well taken by the Plaintiff, and the Defendant had no cause of Demurrer, and so this Case was adjourned to another time, for the Court to be further satisfied herein; but the same was never moved again; but ended between the parties, as was reported, they perceiving the opinion of the Court which way it was. Ended by agreement.

Termino

Termino Paſchæ,

15 Jac. *Banco Regis.*

John Stirt Plaintiff againſt *Patrick Drungold* Defendant.

Entred Termin. Hillar. 14 Jac. B. R. Rot. 650.

IN an Action upon the Caſe, for a Trover, and converſion, The Plaintiff declares, and ſhews that 20 Septembris 14 Jac. he was poſſeſſed of an Horſe, a ſaddle, a bridle, and a ſaddle-cloth, as of his own proper goods and Chattels, and he being ſo thereof poſſeſſed, the ſame day and year he caſually loſt them, the which the ſame day and year, came to the hands of the Defendant, and he knowing them to be the goods of the Plaintiff, refuſed to deliver them, being requeſted ſo to do, but afterwards, (S) 1 Octobris 14 Jac. did convert them to his own proper uſe, ad dampnum querentis, 30 l. unde actio.

The Defendant pleads, and ſets forth that before theſe goods came into his poſſeſſion by Trover, as in the Declaration is expreſſed, and before the converſion, (S) by the ſpace of two years laſt paſt, he did keep a commmon Inn, called the Sword and Buckler in Holborn in the Parish of St. Gyles in campis, the which was a Common Hostry. And that before the time of the converſion laid, one William Hadlane was poſſeſſed of the ſaid Horſe, and came riding upon him into his ſaid Inn, with the ſaddle, and he did then requeſt the Defendant to keep the Horſe there at meat, and ſo he did for the time and ſpace of 7 Weeks, which came unto 23 s. and that afterwards (S) 6. Novembris 14 Jac. the Plaintiff came thither and demanded his Horſe, the Defendant anſwered, that if he would pay him for his meat he had eaten, he would deliver him, which to do he refuſed, and for his ſatisfaction, he detained the Horſe, upon which Plea the Plaintiff demurred in Law.

The whole Court clear of opinion for the Defendant, and that he might well keep the Horſe until ſatisfaction was made unto him for his meat. And by the rule of the Court, Judgment was given for the Defendant, that this Plea was good, and the Plaintiff had no cauſe of Demurrer, and therefore the Judgment of the Court was, quod querens Nil capiat per billam.

But ſome queſtion was made whether he might retain the Saddle, Bridle and cloth as well as the Horſe.

Smith Plaintiff against *Bowles* Defendant.

Entred Termin. Hillar. 13 Jac. B. R. Rot. 874.

Ejectione firmæ. IN an Action of Trespas and Ejectment, upon Non culp. pleaded, the Jury found a special Verdict, upon which, the Case appeared to be this: A Prebend makes a Lease for years of Land, parcel of his Prebendary, with an Exception of the great Wood, as Oaks, Ashes and Crab-Trees, which Lease is confirmed by the Arch-Bishop, Patron, but not by the Dean and Chapter, Whether this Lease shall be good to bind the Successor, or not, which was the first question.

A second question, which was the chief and main point: In the first Lease there was an Exception of all the great Woods, as Oak, Ash, Crab-tree; the second Lease being the Lease now in question, was without the said exception, being before usually demised, with the exception, whether this Lease be good or not, upon the Statute of 13 Eliz. cap. 10.

Stat. of 13 El. &c.

It was urged, and so agreed by all, that this confirmation by the Arch-Bishop, Patron, without the Dean and Chapter, is good, and shall bind the Successor, and for this was cited, 33 H. 8. Brooks Cases, fol. 46. placito 202. Plowdens Commentaries 2 pars fol. 528. in Hare & Bickleys Case, & 19 Eliz. Dyer fol. 357. It was urged, that a Prebend is within the Statute of Leases, which was made 32 H. 8. cap. 28. and for this was remembred 3 Edw. 6. Brooks Cases, fol. 86. placito 395. Brook tit. Leases, placito 62. and the Lease of a Prebend shall bind his Successor.

Stat. of 32 H. 8. &c.

But the second and chief point is upon the exception: In the first Lease, grand Boys, as Oak, Ash and Crab-tree, are excepted, but not so in the second Lease, Whether the want of this exception shall make the Lease void, by the Statute of 13 Eliz. cap. 10. the same being before usually demised with the same Exception.

It was urged, that this omission of the Exception in this second Lease shall not make the same Lease void within the Statute.

It hath been objected, that by this exception the soil should be excepted, if so, this may be dangerous: But by this exception, the soil is not excepted, but the heads only of the Trees are excepted, and therefore this omission of this exception in the subsequent Lease, shall not overthrow the same, and for this, 33 H. 8. Brooks Cases was cited, fol. 51. placito 225. Brook tit. Reservation placito 39. That by the exception of Boys, and sub-Boys, by three against two, the soil is excepted; this being doubted in 14 H. 8. fol. 1. & 28 H. 8. Dyer fol. 19. 7 E. 6. Dyer fol. 79. Coke 5 pars fol. 11. a. in Ives Case the former doubt resolved, that by this exception the soil it self is excepted; but here, (as it was urged) there are other words: In 46 E. 3. fol. 22. excepting grand Boys, by the better opinion there, the trees, but not the soil excepted.

33 H. 8. Brook Cases, &c.

It was urged further, that in this Case there is a full explanation, that he intended great Wood to be excepted, but not the soil, Herbage nor the under-wood, so that here he did not intend to except the 40 acres of Land, but the Trees only growing thereon.

As to the chief question in this case, Whether the omission of this exception in this second Lease, shall overthrow the same, which is a new question, (as it was urged)

urged) upon the Statute of 13 Eliz. 10. The intention of which Statute, as it was, to preserve the Possessions of the Church, so the same was likewise to uphold poor Tenants Leases.

This Case, (as it was urged) is out of the preamble and mischief of the Law, it is out of the letter and body of the Law, and therefore to be adjudged out of the Statute.

The preamble of the Statute makes mention of long Leases, the causes of Dilapidations, and decay of Hospitality, and which tends to the impoverishing of the Successor, this to be but for three lives, this not unreasonable; nothing is here in this Lease omitted (but this exception) being in the former Lease; this belongs to the Tenant of common right, and reason will that he should have his Bootes, and therefore the omission of this exception shall not make this to be an unreasonable Lease, and so void by the Statute.

It was further urged for the upholding of this Lease, that this could not be any cause of Dilapidation, but a means to uphold the House; also if this exception had bèen in the Lease, yet the Successor could not have medled with the Trées, so that he is no ways impoverished by the omission of this exception, for if he cut down the Trées, a Prohibition lieth, so that this Case is clearly out of the preamble of the Statute (as it was urged:) As to the Body of the Act, the usual Rent to be reserved.

It hath bèen objected, not to demise more than in usual Leases, and for this a Case cited out of the Lord Mountjoys Case, Coke 5 pars, where an Acre of waste ground was added to the new Lease, and so not warranted: It had bèen so in this Case (as it was agreed) if the Soil, by this exception, had bèen reserved: But it is not so, here the Trees are only excepted, the Rent is reserved out of the Soil, and the Lessor doth not here suspend his Rent, by cutting of a Trée down upon the Land, for the Rent is out of the Land, 4 Eliz. Dyer fol. 212. a Lease for years made of the Grey-hound in Flèet-strèet, with divers implements, rendring Rent, the Rent there shall not be apportioned; the Rent there goeth out of the Land, and so is 35 H. 8. Dyer f. 56. a Lease made of Land, and of Shèep rendring Rent, the Rent is out of the Land; and 12 H.8. fol. 11. Co. 5 pars &c.

It was then Objected, That here something doth pass from the Successor, which was not before granted: But it was urged, that here the same Rent is reserved. If a Prebend grants Common of Estovers, and afterwards makes a Lease discharged of Estovers, this shall not overthrow the Lease, (as it was urged) Coke 5 pars fol. 37. in the Dean and Chapter of Worcesters Case; if in a later Lease there is no reservation of a Heriot, as was in the former Lease resolved, that this omission of the Heriot, shall not make this Lease void, the usual Rent being reserved: But if there be any words in the Statute to take hold of this, yet (as it was urged) this is not within the meaning of the Statute: If a Prebend do lease a Park, excepting the Dèer, this Lease ended, he makes a Lease of the Park, without excepting of the Deer, this shall not avoid the Lease, (as it was urged) out of Richard Lifords Case, Coke 11 pars fol. 46. Co. 5 pars f. 37 &c.

And so without any further debate at this time, This Case was adjourned over for further argument.

Afterwards, (S) Term. Mich. 15 Jac. B. R. This Case was moved again, and upon moving of the same, without any further argument made herein: The Judges being all of them fully agreed herein, did resolve and over-rule this as a very clear Case against the Defendant, who claimed under this Lease without the exception that the same was no good Lease warrantable by the Statute of 13 Eliz. cap. 10. but a void Lease by the same Statute: And so by the Rule of the Court, Judgment was given for the Plaintiff against this Lease. Judgment for the Plaintiff.

The KING *against* Doctor *White.*

A *Quo warranto.*

IN a Quo Warranto, for using of certain Liberties within the Manor of Bradwel in Comitat. Essex juxta mare.

Doctor White sets forth in his Plea, that King H. 8. did grant consorti suæ Katherinæ, the Manor of Bradwel, juxra mare, with certain Liberties that after her death they came unto the Crown again, which were afterwards granted by the King to Sir Walter Mildmay, with these words of tot, talia, tanta, qualia, aliquis alius unquam habuit, and from him they came to the Doctor in as large and ample manner, as the King himself, or any other had the same, by prescription, or by any other way, and shews, that Quæn Katherine had those Liberties to her granted for her life; all which Liberties he claimed to have in this manner, That the Kings Attorney General hath confessed his Plea to be true, and so prayed to have allowance of the Liberties.

The Court, upon the first moving of this, said, by this which is shewed you are to have but tot, talia, tanta, as any other had; if this be to be taken generally, this may trench very much upon the Crown Land; the Quæn had these Liberties for her life, they determined by her death.

It was urged for Doctor White, that he is by his grant to have, Tot, talia, tanta privilegia, libertates, as the King himself or any other ever had: The question moved to the Court, whether the Doctor, by this his grant, was to have those Liberties which Quæn Katherine had: It was enforced that he should have them by the Law, because by this recital they are drawn into a particular, as much as if he had shewed such to be granted unto him, as King H. 8. had granted before, Consorti suæ Katherinæ, this had bæn good; so here in this Case, this hath a reference unto the first Grant, without any recital of the particulars nominatim. And this should be so, and the reason of it appears in 20 E. 3. Fitz. tit. Avowry placit. 129. where certain Liberties were granted to the Town of Northampton, though they were repealed, yet a new Grant, with a reference to them, may be good; so here in this Case, with a reference in this manner, of tot, talia, tanta, is good, the Doctor here to have them, (as it was urged) if another had them before, though but for years.

Mich. 9 Eliz. &c. Coke 9 pars, f. 29. &c.

Mich. 9 Eliz. in Scaccario, ex parte Rememoratoris Thesaurarij, Rot. 163. Coke lib. Entries, fol. 534, 535. the very Case with this now in question, his verbis; In a Quo Warranto against the Earl of Pembroke, for claiming certain Liberties, pleads the same Plea as here, sets forth the first Grant to Quæn Katharine, as here in this Case, with a tot, talia, tanta, there adjudged for him, and at this day he enjoys the said Liberties. Coke 9 pars fol. 29. b. 30. the Case of the Abbot De strata Marcella, the Case there remembred, being the Grant of Quæn Mary, 22 Junij, 1 Mar. unto Francis Countee de Huntington, & Katharine his Wife, where the Grant is, with a tot, talia, eadem, & hujusmodi libertates, privilegia &c. quot, qualia, quanta, & quæ, &c. aut aliquis vel aliqui, &c. there resolved, that when a Charter hath a general reference to other Charters, this is as much in Law, as if all the Charters had bæn recited; and in this the difference will be as in 39 Eliz. B. R. The Lord Darcies Case, where Liberties were granted, and afterwards parcel of them repealed by Act of Parliament, and so become as no grant, and there tot, talia, quanta, shall not refer to those Liberties which were repealed, unless they were specially named, but no general reference to those which were repealed.

And

And so for Doctor White, the Kings Attourney-General having confessed his Plea to be true, allowance was prayed to be granted by the Court of these liberties by him thus claimed.

The whole Court inclined to be against the allowance of these liberties, thus, and in this manner claimed by Doctor White.

Haughton Justice. If this should be allowed of by the Court, this would make many new liberties in Essex: If by these general words of tot, talia &c. tanta, he should have all which Queen Katharine had, this may prove very hurtful to the Crown.

Dodderidge Justice agreed with him herein, tot, talia, tanta, are too general words against the King.

Mountague Chief Justice agreed with them herein, for there ought to be a certainty in reference to a thing, and to a person.

The whole Court agreed in this Case against the Doctor, that his Plea is too general, and so not good, that he should be ousted of his liberties, and Judgment to be given for the King in this Quo Warranto. Judgment for the King.

Termino

Termino Michaelis,

1 Caroli Regis, Banco Regis apud *Reading*.

Read Plaintiff against *Holmes* Defendant.

Entred Termin. Trin. 1 Caroli Regis, B. R. Rot. 550.

IN a Writ of Error to reverse a Judgment given in an Inferior Court, de Havering: In an Action of Debt, upon a Bond of 6 l. conditioned for the saving and keeping of the Plaintiff harmless; Read there pleaded to the condition, That he had saved him harmless from all Actions: The Plaintiff replyed, that one Thomas Holm who was to have been kept harmless by the Condition of the Bond, was arrested at the Suit of one Meek, and Imprisoned at Rumford, & hoc paratus est verificare per Recordum, the other pleaded, that he never obtained any such Judgment. Error.

It was urged for the Plaintiff, That this Judgment is erronious in omnibus. (S) 1. In the stile of the Court, being (Havering at the Bower) and the Court of the Manno held at Rumford, in the County of Essex, parcel of the Manno, whereas he should have said, infra Jurisdictionem Manerij, and so are the Presidents. 2. The Court is claimed part by Prescription, and part by Charter, this ought to have been by vertue of the Kings Letters Patents, where the same is a Court of Record. 3. He ought to have set forth, that he was a Tenant and an Inhabitant, for to enable himself to sue there, which he hath not so done. And 4. Which is the main and principal Error, he shews that he was arrested and imprisoned at Rumford: But by what Proces this was so done, non constat Curiæ, & hoc paratus est verificare per Recordum, there being Judgment and Execution had; this is not to be put in Issue per pais, but per Recordum verificare, as appears by 6 Eliz. Dyer f. 227. upon the Statute of Apparel, 24 H. 8. and 22 Eliz. Dyer f. 368. verificare per Recordum, this is usual. 5. The Venire facias de Rumford, no place being specified where the Action or Judgment was, for to cause the men of Rumford for to try this. 6 Eliz. Dyer f. 227. &c.

The whole Court clear of Opinion, that the whole Record is bad, and erronious throughout, the title insufficient to hold the Court, and the Plea bad, the Judgmene

Judgment reversed *per Curiam.*

ment erronious, and to be reversed; they were not to try a record per pais; the whole Record is vitious and erronious, and therefore by the Rule of the Court, Judgment was reversed.

Nota. That Banks moved an Exception to quash an Indictment; In which five several persons were indicted, the Exception was, because the Addition came after the alias dictus, and so not good, by 1 E. 4. fol. 1. b.

The whole Court clear of Opinion, that this is a good exception, because that the alias dictus is not his true name, but that which doth precede, as appears by 24 H. 8. Brooks Cases, fol. 9. placito 49. Brook tit. Brief placito 418. & 33 H. 8. Dyer fol. 51.

And so for this cause, by the Rule of the Court, the Indictment was quashed.

Potter Plaintiff against *Foster* Defendant.

Ejectione firmæ.

IN an Action of Trespas and Ejectment: The Defendant pleads in Bar, and sets forth a Lease made unto him by the Lessor of the Plaintiff; the Plaintiff replies, and doth confess, that his Lessor did make a Lease to him for years: But upon the Lease, there was a Rent reserved, with a condition to enter for non-payment of the Rent; that the Rent was behind, and that his Lessor came upon the Land, and there remained an hour before sun-setting, and there demanded his Rent and continued there demanding of this, usque ad occasum solis, and because none came to pay the Rent to him, he did then enter for non-payment of the same, according to the condition, and did Lease the same unto him.

Upon this Replication, the Defendant demurred in law; and for causes of demurer did alledge,

1. Because the Plaintiff doth not plead the Indenture for the Condition.

The Court over-ruled this, upon this difference, where to avoid a Freehold, there the same ought to be pleaded by Indenture for the Condition; but otherwise it is, where to avoid a Lease for years, being but a Chattel, as here it is in this principal Case.

2. It was urged for another cause, because here he pleads that he came upon the land, before Sun-setting, and there demanded his Rent, and so continued demanding of the same, usque ad occasum solis, and doth not say, that he continued there post occasum solis.

Judgment for the Plaintiff.

The Court over-ruled this also, and that these causes of Demurrer were idle and frivolous, only for delay, and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

Peck

Peck Plaintiff against *Method* Defendant.

Entred Termin. Trinit. 1 Caroli Regis B. R. Rot. 225.

IN a Writ of Error to reverse a Judgment given in the Court of C. B. in an Action upon the Case for a promise; In which Action, Method there declared against Peck, and shewed, that whereas the said Method, and one Marshal, by their Obligation, dated 18 Novembris, 8 Jac. were bound unto Peck in a Bond of 100 l. conditioned for the payment of 52 l. 10 s. upon the first day of March then next ensuing.

Error. 3 Cro. 386. Jones 85. Poph. 160. Winch. 112. Hutt. 73. Ben. 157. 162

The said Peck, afterwards (S.) 14 Septembris 15 Jac. In consideration that the said Method, at the request of Peck, would pay unto one Plaiford, to the use of the said Peck, 52 l. and 14 s. upon the tenth day of December 15 Jac. in satisfaction of the beforesaid Debt, in the condition of the said Obligation specified, did assume and promise with the said Method, that he the said Peck would deliver prædictum scriptum obligatorium of 100 l. unto the said Method, cum inde requisitus esset, to be cancelled.

And shews further, that although he had paid the said 52 l. 14 s. to the said Playford, to the use of the said Peck, and at his request, upon the said tenth day of December 15 Jac. in satisfaction of the said Debt, specified in the condition of the said Obligation of 100 l. yet the said Peck, according to his promise, hath not delivered to him the said Obligation of 100 l. to be cancelled, Licet ad hoc sæpius postea requisitus fuisset: But to do this, penitus recusavit, ad dampnum querentis, 100 l. unde actio.

The Defendant Peck there pleaded, Non assumpsit modo & forma prout, upon this issue was joyned, and a Verdict given for the Plaintiff, and damages to 66 l. 13 s. 4 d. and upon this, Judgment was given for him in the C. B. for 80 l. upon which Judgment, Peck hath here in this Court brought his Writ of Error.

The Error assigned, and insisted upon, was this, (S.) That where by the Assumpsit, Peck was to deliver the Obligation unto Method, upon request: It doth not appear, by the whole Record in the C. B. in the Action upon the Case there brought, that any request was made by Method unto Peck, for delivery of the said Obligation to him: No allegation being made of any request made, ita quod exitus super hujusmodi requisitionem quæ est materialis pars assumptionis prædicti jungi potest: And so for this cause the Judgment in hoc is erronious.

The Book of 40 E. 3. was objected, being in an Action of Debt upon a Bond, the Plaintiff declares, and doth not shew where this Bond was made, which makes the Declaration insufficient: But if the Defendant pleads in Bar a Release, by this, by his admittance, he hath now made the Declaration good: But as it was urged, by Hitcham the Kings Serjeant, that this is upon a Non assumpsit, and in an Action upon the Case upon a promise, the Issue of Non assumpsit doth not admit of a request duly made, as in the other Case, the release pleaded admits the Bond.

Jones Justice. In an Action upon the Case upon a promise, two things are traversable, either, quod Non assumpsit, Or, that no request was made; but if he pleads Non assumpsit, then the matter of the request, is out of doors, the same

 being

being now by him admitted, and so by this, he hath made the Declaration good.

Whitlock Justice. By the Plea of Non assumpsit, he hath now waived the matter of the request.

Dodderidge Justice. If one doth assume and promise to do a thing upon request, he doth now rest in safety, until the request be made unto him. If in such a Case the party brings his Action upon the Case, upon the said promise, and lays the request generally in this manner, (S) Licet sæpius requisitus, this request as it is laid, is formal, and not to be traversed, they go to issue upon the promise, which is found for the Plaintiff, he shall never recover any Damages, where he doth not make an express request; and doth lay this so in his pleading; for that here the request is very material, and the same also is part of the matter. And so it is, in the principal Case here, and he cannot traverse this, because it is laid in this manner, (S.) with a Licet sæpius requisitus, which is not good, and by these words and manner of pleading, with a Licet sæpius requisitus, the Travers to be taken to the request, is taken away; So that sometimes the request is but matter of form only, to be mentioned, and there it is sufficient to lay this generally. (S.) Licet sæpius requisitus, and this is good. But here it is matter of substance, and therefore this is to be laid, and certainly expressed, both for the time, and also for the place, where the request was made; So that the Defendant may, if he so will, take a Travers unto it; the which he cannot do, where the same is laid generally, Licet sæpius requisitus, and so was all the course of practice here in Pophams time.

Crew Chief Justice agreed with him herein, where the request is part of the bargain, and part of the promise, as where to pay upon request, and here in this principal Case, he is to deliver up the bond upon request made, here the request is now made a substantial part of the promise, and so the same ought to precede the delivery up of the Obligation, and the same ought to be certainly and expressly laid. It is then here to be considered, whether this matter be aided by the Statutes of Jeofails by his plea of Non assumpsit; this is not aided, but that he may well take advantage after verdict of this insufficiency in matter of Substance in the Declaration.

Jones. Where the request is requisite, there the same ought to be certainly laid; both for the time, and place where it was, otherwise, where it is not requisite, there it is sufficient, to be laid generally, with a Licet sæpius requisitus, where the request is requisite, and no time, nor yet place, of this laid in the Declaration, there the Defendant may very well demurre to the Declaration, for this insufficiency therein; but where the Action is brought upon such a promise, and the Declaration insufficient, because no time nor place is laid therein, where and when the request was made, the Defendant here, by his own Act, may waive the taking benefit of this, by his pleading of Non assumpsit and so going to issue upon it. If in facto dicit that he did request him, and leaves out the time, and place where, the Declaration is not good, and the Defendant may for this cause demurre, but if he waives this, and pleads to Issue, upon the promise, he hath now by this made the Declaration good.

The whole Court agreed in this, that where the request is material, there the same ought to be certainly laid in the Declaration, both for the time and place, because the same is material, and matter of substance, and the Declaration not good, if this be therein omitted.

But the Court did doubt in this, and herein, did at this time, differ in opinion in this particular, whether by the pleading of Non assumpsit, and so going to issue, he hath not by this waived the taking of advantage, of any other insufficiency in the Decla-

Declaration, for not laying of the request certainly in the Declaration, whether by his pleading, this is not by him admitted so to be.

Dodderidge & Crew Chief Justice. That this is no admittance of the same, nor any waver of his benefit of exceptions to the Declaration.

Jones & Whitlock of a contrary opinion, that by his pleading of Non Assumpsit he hath waved this benefit And so without any further debate at this time, it rested upon a Curia ulterius advisare vult, and so by the Rule this Case was adjourned to a further time.

Afterwards (S) Term. Hillar. 1 Car. Regis B. R. this Case was moved again. The same Error moved and insisted upon as before. Termin. Hill. 1 Car. Reg. B. R. &c.

The Court now upon the first opening of this, were of opinion, that this is an Error apparent; because as it is here laid by this general allegation of Licet sæpius requisitus, he cannot take any travers, to it; but he ought specially to have alledged the request made both for the time and place where it was made, for this ought to precede the performance of the promise, this being the essential part of the promise, otherwise it is, where the request is not so essential, there it is not traversable; and there it is sufficient to be laid, with such a general allegation, of Licet sæpius requisitus, because there not traversable, nor any Issue to be taken thereon.

The Court at this time, gave a further day, to search for the President of a former Judgment cited, and for other Presidents in the point, to make this as a leading Case for the future.

It was afterwards urged for the Defendant, that this is no Error.

Notwithstanding the Objection made, being, because the averment here is general, with a Licet sæpius requisitus, without any place or time expressed; yet this here is good, being after a Verdict, this hath made all good; as to the omitting of the place, where the Request was made; the reason inforced to make this to be an error, because there is no place for the venire facias, but this is admitted, by the Plea of Non assumpsit, like unto the Case of 18 E. 4. fol. 16, 17. where a Plea by duresse admits the Bond, and so here in this Case, as it was urged. 18 E. 4. f. 16, 17.

It was then urged for the Plaintiff, that this Judgment is erroneous, for the Error before insisted upon; and so was it accordingly adjudged, 35 Eliz. in Stewklies Case, in point of the Request to be certainly laid in the Declaration, but if in the Declaration the day of the Request is certainly laid, and the Defendant pleads Non assumpsit, this peradventure as it was alledged, may be good after a Verdict. 34 Eliz. &c.

Dodderidge. In answer to that which hath been objected, the Plea of Non assumpsit, is no admittance of a request made, and the Book remembred of 18 E. 4. doth not come unto this Case, and although the Plaintiff makes the promise, yet if no request be made, there can be no breach of promise, the promise being made to be performed upon request.

Crew Chief Justice. The request here is parcel of the bargain, and for this cause no breach can be of this promise, without a request made, and the Plaintiff in his Declaration ought precisely to lay the request made, both for the time and place, this being a real part of the promise, and therefor the same ought to be laid really to be done, for to make a good breach of the Promise.

The President which was, Termin. Pasch. 30 Eliz. in the Court of C. B. Rot. 454. Eldridges or Eastdridges Case, was a stronger Case, than this here is; there it was in the Case of an Executor, the debt due by the Testator, the Assumpsit by the Executor, who said, forbear a little, and I will pay you upon request made. In an action upon the Case brought upon this his Assumpsit, in the Declaration, the request laid generally, with a Licet sæpius requisitus; upon Non assumpsit pleaded, it was found for the Plaintiff, who had his Judgment. A writ of Error was brought, and this general allegation of the request assigned for Error, and insisted upon. In Term. Pasch. 30 Eliz. C. B. Rot. 454. &c.

this Case it was clearly held, that the request ought to appear certainly to be laid in the Declaration. And for this error the Judgment was reversed.

James Case. Another Case there was here in this Court, which was the Case of one James. In an action upon the Case brought upon a Promise for the not delivery of an Horse, which the Defendant did assume and promise to deliver to the Plaintiff at Rochester, upon request. In the Declaration the Request laid with a general allegation of Licet sæpius requisitus, upon Non assumpsit pleaded, a verdict was found for the Plaintiff, who had his Judgment, a Writ of Error brought, and the Judgment reversed for this Error, because the request was not certainly, and specially laid in the Declaration; and so in this principal Case, this is a clear Error, and according to the former Judgments in point, the Judgment ought to be reversed.

Whitlock Justice. Admit that here he had pleaded a Release, quid inde, what would have this done? It is here to be considered, whether this request be matter of substance or not; if so, that it be matter of substance, then he cannot have his Judgment, 6 Jac. B.R. between Hill and Wall; the like Case was adjudged in a Writ of Error, and held clearly that the request ought to be certainly laid, and expressed in the Declaration, or the same not good.

6 Jac. B.R.&c.

29 Eliz. lib. Entries f. 2. Dodderidge agreed herein. In 29 Eliz. there was the like Case also adjudged in point, vide the Book of Entries fol. 2.

Judgment reversed, *per Curiam.* The whole Court agreed herein, that the Judgment given in the C. B. is clearly erroneous, for this omission in the Declaration, of laying the certain time and place, of the request made; and for this cause, by the Rule of the Court, nullo contradicente, the Judgment was reversed.

Thompson Plaintiff against *Butcher* Defendant.

Action of Debt. Ben. 154. IN an Action of Debt upon a Bill of 6 l. 13 s. 4 d. the Defendant demands Oier of the Bill. In which after this clause, (S.) In cujus rei testimonium, this clause was added, in the nature of a Proviso, Provided nevertheless, that the said 6 l. 13 s. 4 d. is not to be paid, until such an one hath had a recovery, in such an Action, or suit which he hath hanging against the Plaintiff, upon a Bond of 200 l. conditioned for saving harmless, or hath made an end of the same suit; and then the conclusion was, dat' eisdem die & anno. Upon the demand of Oier, the same was all, both the Bill and the Proviso entred of Record. To this the Defendant pleads in Bar, that no end was made of the said suit, upon the bond of 200 l. nor any recovery had, but that the same still depends; and therefore according to the Proviso, the said 6 l. 13 s. 4 d. demanded by the Bill, is not to be paid, the Plaintiff having commenced his suit for this, before his time limited, by the Proviso, to have payment made of this.

The Plaintiff by Replication shews, that an end was made of the said suit, upon the Obligation of 200 l. by a composition of 20 l. given and accepted in full satisfaction, and discharge of the said suit, in plenam satisfactionem actionis prædict', and that so the 6 l. 13 s. 4 d. now demanded, is to be paid unto him. The Defendant by Rejoinder pleads, that no such end was made of the said suit, prout quer. and Issue joyned, upon this a trial had, and a Verdict for the Plaintiff.

It was moved for the Defendant in arrest of Judgment, that the Plaintiff ought not to have his Judgment, because out of this matter of fact, thus found for the Plaintiff, (S) the end of the said suit, upon the Obligation for payment of 200 l. to be by composition of 20 l. given in satisfaction, and discharge of this; out of this matter

matter of fact, found for the Plaintiff, ariseth this matter in Law, (as it was urged) which makes against the Plaintiff, so as he cannot have Judgment, and this is, the giving of 20 l. in satisfaction of the Obligation of 200 l. which in Law is not good, for that 20 l. cannot be a satisfaction for 200 l. For the Plaintiff to have his Judgment, It was urged, that the 20 l. is not given in satisfaction of 200 l. which cannot so be by law, as it must be agreed; but the 20 l. by composition was given in satisfaction, and discharge of the said suit upon the bond of 200 l. and that this is good, and the issue was only whether such an end was made by composition; and a great difference there will be, where 20 l. is pleaded to be paid in satisfaction of 200 l. (which cannot be good) for that 200 l. cannot so be satisfied, and where the same is pleaded, to be given in satisfaction of a suit, and of an Action depending for the 200 l. this is good, and may so well be, and so is the Case here; for the substance of the Plea here, is the composition, and not the payment of the mony; and the Jury have given a Verdict for the Plaintiff, and have found the said Composition to be, as the same was pleaded by the Plaintiff. Coke 5 pars fo. 43. Nichols Case. Debt brought upon a single Bill, the Defendant pleads payment, without an acquittance, upon this they went to issue, and found for the Plaintiff, there adjudged, although payment without an acquittance, is no Plea, and so an Issue joyned upon a thing not material; for if he pays without an acquitance, the single Bill still remains in force; but because an Issue was there joyned, upon an affirmative, and a negative, and found for the Plaintiff, this adjudged to be aided by the Statutes of 32 H. 8. and of 18 Eliz. and there Judgment was given for the Plaintiff, and this affirmed in a Writ of Error.

Cook 5 pars f. 43. in *Nichols* Case.

Stat. of 32 H. 8. & 18 Eliz.

1. Whitlock Justice. Here the 20 l. was given in plenam satisfactionem actionis prædictæ, and not in satisfaction of the 200 l. and notwithstanding any thing which appears in this Record, he may still have remedy for the 200 l. the Plaintiff here ought to have his Judgment, according to the Verdict given for him.

2. Jones Justice agreed herein, that Judgment ought to be given for the Plaintiff. If this Proviso here, be no condition nor yet any parcel of the Bill; then it is very clear against the Defendant; for then they are at issue upon a void thing, and there is then no difference betwæn this Case and Nichols Case, before remembred, and here aided by the Statute of Jeofailes, after a Verdict, as there it was, because the Issue did arise upon a void matter. But if the Proviso be parcel of the Bill, or if it be in the nature of a condition, there it may be the more doubtful, by 40 E. 3. f. 2. an Obligation without this clause, In cujus rei testimonium sigillum meum apposui, yet this is good; here the Proviso shews, when the 6 l. 13 s. 4 d. is to be paid, and if it be no parcel of the Bill, then the same is in the nature of a Defeasance, or Condition; if a Condition, then the Bar is good, and Issue good, and found for the Plaintiff and so good, that there ought to be a recovery, in such a suit in B.R. or an end made of this before the mony demanded to be paid, and the 20 l. here given, was to have an end of the said suit, and so it was ended.

40 E. 3. f. 2.

In Case of an obligation, it is clear, that after the day, on which it becomes due to be paid, acceptance of a lesser sum, is no satisfaction of this in Law; otherwise, where it is before the day; but here the 20 l. is not given in satisfaction of the Bond of 200 l. but the same is given in satisfaction and discharge of the suit, and so this Proviso hath relation unto a Condition, the 6 l. 13 s. 4 d. was due here to be paid to the Plaintiff; his Action well brought for the same, and having a Verdict, Judgment ought to be given for the Plaintiff.

3. Dodderidge Justice. In this Case Judgment ought to be given for the Plaintiff.

1. It is here to be considered, whether this Proviso be parcel of the Bill, or as a Condition to the same annexed, or as but a vain and idle clause inserted, upon the whole matter; if be part of the Bill then it is not idle, because this tends to the

matter

matter; appoints a day and time of payment, and hath some dependency upon this which goes before; and therefore this ought to be, either parcel of the deed, or a condition unto this annexed.

Object. An Objection hath been made, that it is not parcel, because it comes in after this Clause, In cujus rei testimonium.

Resp. This is Reason, because the said words are not always of necessity, to make the conclusion of the Deed, for a Deed is good, dated without the Clause, In cujus rei testimonium, if it be sealed, the same is good, and the said clause is not of such force, as to make the Deed void, if it be wanting; for if the words in the deed contained, are sufficient to bind him, and this is by him sealed and delivered, this is good and sufficient. So that this Proviso may be part of the deed. But if it be no part of the deed, yet the same is a Clause pertinent to the deed; if it be put in, and subscribed to the deed before the sealing of this, it is then part of the deed, if it be after the sealing, yet it may be as a Condition annexed to the Deed.

Object. It hath been objected, that he did not demand Oyer of the condition.

Resp. As to this, the same is not requisite. If all be entred of Record, this is good, although the same not demanded, this being only for Information of the Court, and of the party; so that it is not material at all, whether the same be parcel of the Bill, or a condition annexed to the deed; and so it is pertinent to the deed, for this sets down, and puts in certain the day of payment, at which time the same ought to be paid, and before which time not.

Object. It hath been further objected, that 20 l. paid, where 200 l. was due by the Obligation, and this 20 l. given and paid in satisfaction of 200 l. which by the Law cannot be.

Resp. As to this, by this, there was an end made of the said suit; if Issue had been taken here, upon the point of satisfaction, peradventure, this would not then have aided him; but the issue here tried was, whether such an end was made of the said suit, as by the Plaintiff in his pleading was alledged to be, and the Jury hath found this matter for the Plaintiff. Also if the Law be so, that 20 l. cannot be paid, in satisfaction of 200 l. yet 20 l. may well be paid to end a suit for 200 l. and this may well be so done by the Law, and this is the matter in issue here between the parties, which the Jury hath found for the Plaintiff; and so according to the verdict, Judgment ought to be given for the Plaintiff.

4. Crew Chief Justice agreed herein, as the issue here is joyned, and found, and so all to be taken together, dated as aforesaid, the issue and verdict; and by the Record it appears, that this Clause or Proviso is parcel of the bill, the 6 l. 13 s. 4 d. to be paid, either upon the recovery in the Action, or upon an end made of the said suit; this put in Issue to be tried by the Jury; the end alledged to be made, by payment of 20 l. for to end the suit, for the 200 l. It must be agreed, that after the day that the same is due, 20 l. cannot be paid in satisfaction of 200 l. but here it is not so, the 20 l. being paid, to end the suit for 200 l. and this is good; and before the day that the same was due, 20 l. may be well given, and so accepted of, and good in Law, for to satisfie 100 l. before the day that the same was due, or this may well end a suit for 100 l. the Proviso here, is part of the Bill, for this doth express the day and time of payment of the 6 l. 13 s. 4 d.

Coke 5 pars *Nichols* Case.

Coke 5 pars Nichols Case before mentioned, is a very strong Case, payment there pleaded upon a single bill, without an acquittance, this not good, but going to issue upon this, and verdict found for the Plaintiff, this is now made good, and aided by the Statutes of Jeofailes. And so the Plaintiff here ought to have his Judgment.

Judgment for the Plaintiff *per Curiam.*

The whole Court clear of opinion for the Plaintiff, and accordingly, by the Court Judgment was given for the Plaintiff.

Parret

Parret Plaintiff against *Parret* Defendant.

IN an Action upon the Case brought for scandalous words spoken by the Defendant of the Plaintiff, The words were laid to be these, (S.) Thou art a Sheep-stealer, upon Non culp. pleaded, a Trial was had at Gloucester Assizes ult. and a verdict given for the Plaintiff. Bridgeman Serjeant, moved the Court for the Defendant, in Arrest of Judgment, that the words were not actionable, being too general, and doth not lay that he said, that he had stole Sheep in facto. Words. Ben. 154.

For the Plaintiff it was urged by Trotman, that the words are actionable, and to this purpose it was here adjudged; In an Action upon the Case for these words. (S) Thou art an Horse-stealer, and it was here adjudged, that the Action did well lie for these words; being upon the matter (as it was urged) all one, with this present Case.

The whole Court agreed clearly, that in this principal Case, the words are scandalous, and well actionable; and therefore by the Rule of the Court, Judgment was given for the Plaintiff. Judgment for the Plaintiff, *per Curiam.*

Whiteman Plaintiff against *Hawkins*, & *Uxor* Defendants.

Entred Termin. Trin. 1 Caroli Regis, B. R. Rot. 1016.

IN an Aion of Trespass, Quare clausum fregit, pedibus ambulando & tres Tassas Anglice, Sheafs of Corn did take, adtunc & ibidem, existens, and upon Non culp. pleaded, a verdict found for the Plaintiff. It was moved in arrest of Judgment, that the Declaration was not good, being adtunc & ibidem existens, but in the Declaration, where he lays the taking of the three Sheafs, omits these words (S) ipsius querentis, so that it is not set forth in the Declaration, whose goods these were, which were thus taken away, and so for this omission, the Declaration is bad, and uncertain. Trespass.

Dodderidge Justice. In 3 E. 4. fol. 21. An Action of Debt brought against the Priorels for salary, and declares, that he was retained by her Predecessor, but doth not shew in his Declaration who it was that retained him, and therefore it was there held bad and uncertain, and for this cause abated, for this is not supplyed, and so is the Case in Plowdens Comentaries fol. 84. in Partridge and Stranges Case, and so here in this Case. 3 E. 4. fol. 21.

The whole Court agreed herein, that for this omission the Declaration here is not good; and therefore the Rule of the Court was, Quod querens nil capiat per billam. Judgment *quod querens nil capiat per billam.*

Gilberd

Gilbert Plaintiff against *Rodde* Defendant.

Ben. 155.

IN an Action upon the Case for scandalous words, spoken by the Defendant, of the Plaintiff, being these, (S.) Thou art a false forsworne Knave, and thou hast bæn Indicted for Perjury by 12 Men, and hast compounded for the same; upon Non culp. pleaded, a verdict was given for the Plaintiff.

It was moved for the Defendant, in Arrest of Judgment, that these words are not actionable, being too general, and an Indictment is but an Accusation, and the same to be compounded upon a just cause.

Object. Dodderidge Justice. As to the Objection made, that an Indictment is but an Accusation.

Resp. It is such an Accusation, as it is the voice of the Country, the representing the Body of the County.

Also for another reason, an Indictment is an Accusation of Record, so that lay all together, an Indictment is an Accusation, and such an Accusation which is the voice of the Country, and also the same is an Accusation of Record; the Indictment being the Kings Declaration, and so scandalous; as to the words following, they make the matter stronger, that the words are actionable, (being) and hast compounded for the same: If he had said, and hast fled the Country for the same, these words had bæn well actionable; here the words by him spoken do amount unto as much, for he said, that he had compounded for the same, which is an imployed acknowledgment that he was guilty of this Crime: and so lay all the words together, that he was indicted of Perjury, and had compounded for this, this is a very great scandal unto him, and for this cause these words are well actionable, the Indictment being an Accusation of Record.

If one saith, that such an one hath bæn arrested for Felony, and hath fled the Country for it, the words are scandalous, for upon his flying, an inquiry shall be made of his goods, and therefore actionable: And so in this principal Case, the words as they are laid, and taken altogether, are very scandalous, and well actionable, and so the Plaintiff ought to have his Judgment.

Jones Justice. The words here are well actionable: If one saith of another, that he is forsworne, these words are not actionable; but if the words go further, and saith, in such a Court, there these words are actionable.

If one saith of another, that he is Indicted, no Action lyeth for these words; but if he saith, that he was Indicted and Convicted, for these words an Action well lieth: In this principal case the words are scandalous and actionable, and therefore the Plaintiff ought to have his Judgment.

Whitlock Justice agreed herein: If these words shall be severed and laid by themselves, no Action will then lie for them; but they being all of them conjoyned and laid together, are scandalous and well actionable; here for these words, (S.) Thou art forsworn, no Action lieth; but here he procæds in his words, and thereby he interprets his meaning, and hast bæn Indicted for Perjury, and hast compounded for this, here these words laid, and taken altogether, are scandalous and well actionable, for now by these his subsequent words, he shews his meaning, that he intended that he was forsworn in a Judicial Court, and that he was Indicted for it.

This the matter of charge laid upon him by the other, and this cannot be taken away, but remains a blot and scar, and cannot be taken away but by matter of Record,

Record, (S) by Tryal indicted for this; the next matter is, and had compounded for this, this is a confession of the Fact, so that these words laid altogether are scandalous, and well actionable, and therefore the Plaintiff ought to have his Judgment.

The whole Court agreed that the words are scandalous, and well actionable, and that Judgment ought to be given for the Plaintiff: The reasons of this their Judgment being, because an Indictment is an accusation of Record: The same being the Kings Declaration, and the voice of the Country, the Jury representing the Body of the County, and so scandalous; and saying further, and hath compounded for this, this is a confession of the matter of the Indictment to be true, for fatetur facinus qui judicium fugit, so the words are scandalous and well actionable, and therefore the Rule of the Court was, Quod judicium intretur pro querente. Judgment for the Plaintiff, &c.

Blackstone Plaintiff, against *Martin* and *Uxor* Defendants.

Entred Termin. Trin. 1 Car. B. R. Rot. 773.

IN a Scire facias, in the nature of an Audita querela, the Plaintiff shews that 3 Jac. Sir William Blackston being seised of Land in the Manor of D. and of other Lands, and he being so seised, 3 Jac. he acknowledged a Statute of 400 l. that he had part of the Land subject to the Execution, and was seised of it, which was taken in Execution, there being other Lands in the hands and possession of the Defendants, subject to the said Execution, and not extended; upon this the Scire facias, here brought in the nature of an Audita querela, for to be relieved against them by way of contribution; this Writ directed to the Sheriff of Suffolk, the Plaintiff being a Feoffee of Sir William Blackstone, and prays to be restored unto his Land, and to the Profits of the same, and to all which he hath lost, by this extent thus taken out, and laid upon his Land: The parties were at Issue upon the seisin of the Plaintiff, and a Verdict found for the Plaintiff. A *Scire facias.* Latch. 3. 122. 274. Benl. 161. Jones Rep 82, 90.

Bankes and Davies moved divers Exceptions in Arrest of Judgment, and shewed that there was a former Scire facias in this Cause, and that after Verdict, Judgment was Arrested, because the Trial was mistaken, for having this Writ out of the Chancery, and being at Issue upon the seisin, and this sent down out of the Chancery to the Bishoprick of Durham, to be tryed; they failed in this, and therefore after Verdict, Judgment was arrested, because the same ought to have been first entred in this Court, the Chancellor to come with the Record, and this Court to have awarded the Trial; upon this a new Scire facias now is brought, and in this a Trial hath been at the last Assises by default; for matter now in Arrest of Judgment, it was urged, that it appears here by the Plaintiffs own shewing, that the Statute was acknowledged 3 Jac. and his Land extended, that he sued forth a Scire facias, in the nature of an Audita querela, by which it doth not appear that he was Tenant of this, and of other Land, at the time of the Execution sued; but he shews, that he was a Feoffee of Sir William Blackstone the Conusor, and so prays by this to be relieved; whereas he ought to have shewed, that he was Tenant at the time of the Execution, as appears by 22 E. 3. Fitz. tit. Execution, placito 137. No Contribution to be for the party himself, which acknowledged

the Statute, (as it was urged) not yet for his Feoffee, who shall not be in better case than his Feoffor.

And by 27 H. 6. Fitz. Execution, placito 135. the Heir is not charged as Heir, but principally as terre Tenant, and the Heir is not to have Contribution, as appears Coke 3 pars, in Sir William Harberts Case.

Coke 3 pars, &c.

To the Exceptions taken, answer was made by Trotman and Bridgeman Serjeants for the Plaintiff, because he saith that he was tenens, and it doth not appear quando tenens, for that if he was not tenens at the time of the extent, he can then have no Scire facias; this is in a Writ, & dicitur breve, quia rem breviter enarrat, like unto the Writ of Monstraverunt, & Quod permittat, in which it is not needful to shew and make expression of all Circumstances, no more here in this; but for to take this Exception, the party now comes here too late, for he hath appeared to the Scire facias, and so by this he hath confessed him to be tenens, like unto the Case, 17 Eliz. Dyer, fol. 341. where the Demandant in a Formedon is estopped, by reason of his Writ against the Tenants, he is estopped to say they are not Tenants; so here by his appearance to the Scire facias, he is estopped to say he was not tenens, by 21 H. 7. fol. 7. & Fitz. Nat. Brev. fol. 105. the Audita querela is in the nature of a complaint in the Chancery, by 16 Eliz. Dyer, fol. 332. this is well returned in the Chancery, if an Audita querela, and so if a Scire facias.

21 H. 7. f. 7. &c.

It was further urged, that upon all the parts of the Writ taken and laid together, it shall be taken and intended that he was tenens tempore brevis. This first begins, ex gravi querela, this shall so be intended, that he was Tenant at the time of the Writ, otherwise he had no cause to complain; and Writs are so called, because they are penned briefly to contain the substance of the matter, and this is sufficient, 5 E. 3. f. 150. new Print, and f. 197. old Print.

Termin. Trin. Case 23. In an Action of Trespass, for taking of his Cattel, and detaining of them, there this Rule is put, (S) When one word may have a double intendment, (S) one according to the Law, and another against the Law, that intendment shall be taken which is according to the Law, and this by a reasonable intendment.

It was further urged, that here in this Case the Execution, fuit minus juste & ad damnum of the Plaintiff, & contra legem terræ, so that by this conclusion, he shall be intended to be a Tenant at the time of the Execution sued.

1. Whitlock Justice. The Writ is, Tenentes narrant, the point is, how this shall be intended, if to be understood, that he which is only Tenant at the time of the Writ, and not pars gravata; Whether we are to intend this to be so; this we are not to do: If he be not prejudiced by this, what remedy is he to have? The reason of the Audita querela, because the burthen ought to be equally laid, (S) all to be charged together, which is not pursued here, but laid upon him alone.

This appears by the Record to be his grief, because that out of this charge some Land is omitted, and his Land taken, and this is the cause here of his grief and complaint; tenens, this is his title, because the title of the Land, and all the subsequent part of the Record, shews and sets forth his grief: The presidents are so, and so the Scire facias is but monitio: No Essoyn lieth in this, as in other Actions: in this Non tenure shall not be pleaded: No protection shall be granted in this: If brought by an Executor, he shall not in this be enforced to shew Quando, nec ubi juditium fuit, this being but only monitio, a warning.

And this is the means to have the other cause to shew if he can, why he should not have his Judgment, and the effect of the same: And so by this, he puts all the cause upon the other side to defend: He only shews by his Writ, that he is a person able to have this; he demands nothing at all by it, this being only a mone-

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faction to call in the other party for to answer, and he is not to shew in this Writ all the whole matter in such precise certainty, as it hath been objected.

As to the matter objected of discontinuance, there is no discontinuance at all in the Case; for upon view of the Record this is well aided, and so in this Case Judgment ought to be given for the Plaintiff.

2. Jones Justice agreed herein, that the Plaintiff ought to have his Judgment.

Two exceptions have been taken, which are only material.

As to the continuance, a general continuance; coram domino rege, but here it is dicto, &c. yet this is good.

As to the Issue, the Chancery might make the award not to proceed further there, but to deliver the Record in B. R.

As to the two exceptions taken; the Presidents are to have a Scire facias in the Chancery, or an Audita querela in B. R. or in C. B. as one of the Prothonotaries there, 20 years since in a Cause did inform me, and then they shewed Presidents to the Lord Chancellor to warrant this, F. N. B. and 29 E. 3. a Scire facias lieth where one Conusee is charged, and others omitted; the reason of this, because the Court which hath power to grant Execution, might have granted a Scire facias.

As to the other point, 7 R. 2. Fitz. Admeasurement de Dower, placito 4. Guardian in Chivalry, the second shall not have this, where the Guardian assigns over: It appears that he was tenens, he may come to the Land since the extent, yet it shall be good upon this reason, that a Scire facias and an Audita querela, ought not to be so certain as a Declaration, being only a Writ to be discharged; where the party saith tenens, it shall be intended of Free-hold, at the least: It is also here said ad damnum, which cannot be to his damage, if he was not tenens at the time of the extent, and so upon the whole matter, as this Case is, Judgment ought to be given for the Plaintiff. 7 R. 2. Fitz. &c.

3. Dodderidge Justice. It is here alledged that he was Tenant of the Land, and that the Execution is to his Grief, and his Prayers is to be restored to the Profits of the Land, from the time of the liberate, whether this Writ be good, or not, is the question.

The second Point, Whether he shall have a Scire facias, or an Audita querela.

A Conusor of a Statute shall have a Scire facias, 4 H. 8. Dyer, and there an old Book cited; here this is a special Scire facias, for by this he will not only have the possession, but would also be restored unto all the mean profits, at the time of the liberate; and it appears not by the Record, that he was then Tenant.

This Case cannot be taken by Intendment, for his prayer is to be restored to the Profits of the Land, from the time of the liberate; and to have this, he ought to make it appear upon the Record that he was then Tenant, otherwise he cannot have any benefit thereby, and this he hath not here so done; and it shall be a very strange intendment, for to intend one to be Tenant of the Land, for any longer time than he himself saith that he is Tenant.

Intendments by the Law shall be of probabilities, as for to intend a thing, in mitiorem partem; but it is very improbable, that he which is Tenant this day, should be intended to be Tenant, long time before that he himself saith he was Tenant, he hath something to do with the Land; he saith here, that he was Tenant at the time of the Scire facias.

As to the other point, Whether he shall have a Scire facias, or an Audita querela: This Scire facias here is special in the nature of an Audita querela. This Scire facias is good and sufficent, for now the same is returned in Chancery, and is a Record of the Chancery, and therefore he may well have a Scire facias, the Judg-

ment being there in this Case, upon the Statute of 23 H. 8. when the Record is there in the Chancery.

As to the Return, this is well there in the Chancery, for it ought to be to the same Court where he had received it.

And there is no discontinuance here in the Case, in Termin. Hillar. he prays an Imparlance, coram dicto domino rege, until Termin. Pasch. this is true, & ei conceditur, so the Entry was; this is full, though the King died before the day given; this is no discontinuance, petit licentiam interloquendi, dicto domino regi.

The sole doubt in the Case, because he saith that he was tenens at the time of the Scire facias, and by his Prayer he would be restored to the Profits, from the time of the liberate; and so at this time, for this cause Judgment ought to be given against the Plaintiff.

Crew Chief Justice. The Record is coram domino rege in Cancellaria, a Chancery Record, est querela, a complaint.

As to the Objection made, because he doth not say that he was Tenant at the time of the liberate; it is good to see the presidents in this how they are: The Plaintiff here complains that his Land was taken in execution; by this it is to be inferred, that he was in possession at the time of the liberate; this the ground of his complaint, that the Conusor had more Land not extended, and his Land only extended; also he is here pars gravata, and it is here laid to be done, contra legem terræ; if his Land was not so taken and extended, he had no cause then to complain, and this is a very strong inference out of the Record, that this was his Land: And the Defendant here admits him to be Tenant, and that he is the person who hath cause to complain; but he saith, that he hath not any such Land, it appears here by the Verdict, that the Land was omitted, he ought to have the possession, otherwise it could not be taken away from him, 16 Eliz. Dyer, it appeareth where he is to have a Scire facias, and where an Audita querela, when the Record is here, by 21 H. 7. it is here fixed; for the principal point, because he saith that he was tenens generally; as to this without any further debate, at this time it rested upon a Curia advisare vult, and so by the rule of the Court, this Case was adjourned to a further time, for the Court to be better satisfied herein; but by Crew Chief Justice, the Plaintiff ought to have his Judgment.

Termin. Hillar. 1 Car. B.R. &c.

Afterwards, (S) Termin. Hillar. 1 Car. R.B.R. this matter was moved again, and argued by the Counsel on both sides, and by all the Judges.

1. Whitlock Justice. This Writ is a Scire facias, in which the Plaintiff shews that he is seised of the Messuage and Land, at the time of the Execution; the Defendant ought to have shewed, that he was not tenens, he admits him to be tenens, and that he is the party grieved, but takes Issue, that Blackstone was not seised of the Land, tempore executionis: A Scire facias differs very much from Declarations, all things not to be so particularized in a Scire facias, and this doth accord with the Presidents; here the Defendant hath taken Issue upon the seisin at the time of the Recognizance acknowledged: The nature of the Scire facias is to turn all upon the Defendant, as appears by 34 Assisar. In this Case, forasmuch as the Defendant hath admitted the Plaintiff to be the party grieved, and a Verdict is found for the Plaintiff, and no material matter shewed in Arrest of Judgment, Judgment ought therefore to be given for the Plaintiff.

Jones Justice. In this Case the Plaintiff ought to have his Judgment.

As to the Presidents which have been shewed, they are of no great force and avail in this Case: He to whom the Conusor passeth over his Land, shall be subject to the Execution: If one be seised of two Acres of Land, acknowledgeth a Statute, afterwards he makes two several Feoffments unto two Men; the Land of one of them is extended, he makes a Feoffment over, the title of Action shall not be transferred over, or translated, so it is of Admeasurement of Dower.

As

As to the Objection made, because it doth not appear that he was Tenant at the time of the liberate, agreed, if the extent be, and before the liberate, he makes a Feoffment over, his Feoffee shall have an Audita querela, he hath no cause to complain until the liberate, and by this the wrong doth begin.

As to the presidents shewed, they come not home to this Case in question; here when he saith that he was tenens præmissorum, this is but in the nature of a Bill in Chancery, for to have a Commission, and in this, such precise certainty in every respect is not requisite to be, as in Declarations: It shall be intended that he was Tenant, until the contrary be shewed by the other party; the constant course hath been so, and this is not to be altered, and there is very much equity in this Case for the Plaintiff, and therefore he ought to have his Judgment.

3. Dodderidge Justice agreed now in opinion with them for the Plaintiff.

The matter rests only upon this word, (S) (tenens) and doth not say quando, Whether it shall be intended that he was tenens at the time of the Execution sued, and so a party grieved by the Execution; it is sufficient for him to say, that he was Tenant at the time of the first Writ purchased, then the Execution was sued out, and the same to his grief: I agree that where a lawful Execution is had against the Conusor himself, that he shall not have an Audita querela, here it appears by the Writ, that he was Tenant at the time of the first Writ, and he shall be intended still so to continue Tenant, if the contrary be not shewed, (as here it is not) and so he being the party grieved, had just cause of complaint; and having a Verdict found for him, upon the matter put in Issue, and nothing material moved in Arrest of Judgment, therefore in this Case Judgment ought to be given for the Plaintiff.

4. Crew Chief Justice. It is here said, that he was tenens Messuagij, and of the capital Messuage of Blackstones, and that Martin procured one of them to be extended minus juste & contra legem terræ; Blackstone upon this brings this gravis querela.

The Objection which hath been made is of great force, if I cannot deliver my self of this by example and president, the Objection being, because he doth not shew quando tenens, Whether at the time of the Execution, if extended in the hands of the Feoffor, his Feoffee shall not have an Audita querela. It doth not appear here when the liberate was sued out.

It is objected that he was not Tenant at the time, but lay all here together, and it doth well and sufficiently appear, Blackstone here hath brought this Action; and it doth not appear that he was Tenant at the time of the liberate, as it hath been objected: But this doth well appear to be so, for he saith that this was to his prejudice, & minus juste, and prays to have the profits of his Land to him delivered from the time of the liberate: the Defendant to this might have answered, and said, that he was not then Tenant; he hath not so done, but the contrary, for he hath admitted him to be Tenant, and that the Land was taken from him in Execution; all this is by him admitted, and this makes for the Plaintiff; and because that the Defendant himself hath admitted of this, I will not now make this a question, whether he was Tenant at the time of the liberate, or not. As to the Presidents, I have seen divers of them, and I have also examined the course and usage, and I do find the constant course to be so, as here it is in this Case; one president shewed, which was 33 Eliz. Morley against Lovet, there it was shewed how he was Tenant, and that he was Tenant at the time of the liberate, and all this there shewed in certain, 41 Eliz. Dutred against Toppe, in an Audita querela against an Assignee, shews the seisin, & adhuc seisitus existens: But in modern times, (S) in the time of King James, all the Presidents run according to the President of this Case now here in question before us: And so upon the whole matter, Judgment in this Case ought to be given for the Plaintiff. And so according to this resolution of the whole Court, by the rule of the Court Judgment was given, and so entred for the Plaintiff.

33 Eliz. &c.

Judgment for the Plaintiff.

Wrotbmeal

Wrothmeal Plaintiff, against *Gill* Defendant.

A Prohibition.

BAnks moved the Court for a Prohibition to the Ecclesiastical Court, the ground and suggestion for to have a Prohibition, he did gather and collect out of the Body of the Libel, because there the Parson libelling for Tithes, sets forth no title at all to enable him to have the Tithes, being only laid that he was the Curate of such a Church; and doth not lay that he was admitted, instituted and inducted, for that before induction, no Free-hold vests in him, to intitle him to have the Tithes, for Curatus non habet titulum, and by 32 H. 6. fol. 28. & 33 H. 6. f. 24. he can have and maintain no Action, neither a spoliation, nor trespass before his Induction; for before this he is not intituled to the Tithes, and a release by him made before this, is not good, as appears by 11 H. 4. fol. 3. Commentaries, in Hare and Bickleys Case.

11 H. 4. f. 3. &c.

Dodderidge Justice. By Institution, habet curam animarum, the words of Institution being, Instituo te habere curam animarum, curam tuam & meam, so that Curatus is a Vicar, admitted and instituted, and the Law takes notice of a Curate, as appears by the Statute of 35 Eliz. upon a motion there made by the Curate, as mention is made in the said Statute for matter of Recusancy and Abjuration; and so Curatus, this implies a Parson instituted; here by the Libel it appears that the Parishes name is Burton Cutberd, and it is mentioned that he is Curatus Ecclesiæ, rite & legitime, admissus & legitime investitus, and so good and sufficient, and by the Canon Law investitus is taken for inductus, and makes all the matter plain, and as if he had said, Curatus admissus & inductus, and this is good.

Whitlock Justice agreed herein, if he had said, rite & legitime inductus, this is good; here it is investitus, and this is all one, & Curatus investitus & inductus, implies institutus; Curatus implies this, quia ad curam animarum, and so this is good and sufficient.

Crew Chief Justice agreed with them herein, that the suggestion is good.

Dodderidge. You have not the word, persona sed Rector.

The whole Court agreed in this, that if the truth of the Case be so, that he is but stipendarius, a meer stipendary Parson, then this to be pleaded there, and if they do refuse this Plea, then this shall be a good cause to move for a Prohibition.

Banks made answer, that the truth of the Case is, that this is an Impropriation, and that there is neither Parson nor yet Vicar there, and so the suggestion is.

Dodderidge. This is not to be, for then this suggestion shall be contrary to the Libel; but plead your matter there, as the truth of the Case is, and then upon their refusal there to give an allowance of this, then you may move for a Prohibition.

Prohibition denyed.

And so without any further debate of this matter, the same rested upon this former direction given by the Court unto the Plaintiff in the Prohibition to be by him pursued: No Prohibition granted, but that they may there proceed.

Cranfield

Cranfield Plaintiff, against *Turnor* and *Collins* Defendants.

IN an Action of Trespass and Ejectment: The award upon the Roll was against both the Defendants, they both plead Non culp. The first Process, (S) the Habeas Corpora against them both, but the Venire facias against one of them only; one of them being only named in this, they proceeded to a Tryal, and a Verdict, for the Plaintiff against both the Defendants. *Ejectione firmæ.* Eccl. 156.

Crawley Serjeant moved to have this amended, after a Writ of Error brought, and this omission assignee for Error.

Curia. The award upon the Roll is well, and this is the ground for the Venire facias which is made but against one, and so the same is mistaken, and doth vary from that which is the ground of it: The Distringas is well against them both.

Dodderidge Justice. The Error of the Clerk is amendable, according to the Roll; where this is mistaken, and is to be made agreeable unto that which is the ground of all, (S) The award upon the Plea Roll, and this is plain; so here in this Case, because by the Plea-Roll it is to be inter partes prædictas: The Venire facias being only against one of them, this is to be amended, and to be made consonant and agreeable with the Plea-Roll.

Curia. The Venire facias is well amendable where it is mistaken, and to be made agreeable with the Plea-Roll, and this being after Verdict, as this Case here is, the Venire facias is to be amended, and made to accord with the award upon the Plea-Roll; this being the ground to direct all the subsequent proceedings, and this omission here is but vitium Clerici, who ought to have made the Venire facias against both the Defendants, and not against one of them alone, as here he hath done it, and therefore this is to be amended.

The whole Court agreed herein, and therefore by the Rule of the Court the same was amended, and a Supersedeas granted to stay the former Supersedeas, had upon the Writ of Error, quia improvide emanavit, and the party to proceed in his Writ of Error, and to assign his Errors without delay.

Cable Plaintiff, against *Rogers* Defendant.

IN an Action upon the Case for a Promise, for not performing the award of such to whom the Plaintiff and Defendant had submitted themselves: The submission by the Record, was laid to be in this manner, (S) That whereas divers Quarrels and Suits were between the Plaintiff and the Defendant: for and concerning Debts, Trespasses and Injuries: The submission was of all Debts, Trespasses and Injuries, the Assumpsit was mutual on either part, to perform the award which the Arbitrators should make. An Action upon the Case for a promise.

They awarded Pony, (S) twenty Mark to be paid by the Defendant to the Plaintiff in this manner, (S) the moiety thereof in hand, presently upon the award made, and the other moiety within six months next after the date of the award, and releases

releases to be made by the Plaintiff: For not payment of the Mony according to the award, an Action upon the Case was brought by the Plaintiff against the Defendant, and upon Non assumpsit pleaded, a Verdict was given for the Plaintiff.

Crawley Serjeant, moved the Court for the Defendant in Arrest of Judgment, and offered two Exceptions to the award made, (S.)

1. They have made their award for Mony to be paid by the Defendant, and releases to be made of all Actions, Debts, Duties, Trespasses and Demands, so that their award made, to have a release made of Duties and Demands, is more than is contained in the submission to them, and therefore their award not warranted by the submission, but exceeding the same, and so a void award.

2. They have awarded payment of the Mony, to be made within such a time after the date of the award, which was made the same day of the submission.

It was urged for the Plaintiff that the award was good, for the word Injury, is a word of a large extent, and comprehends all Wrongs and Injuries, be it in Debt, for the non-payment, or in Detinue, for detaining of, &c.

Dodderidge Justice. The award here is good, and well made, and that according to the submission.

As to the first Exception taken, that the award is larger than the submission to the Arbitrators, being of all Trespasses and other Injuries, and the award is here made of all Debts, Duties, Trespasses: This doth not exceed the submission, for the word Injury is a general and large word, and comprehends in it self all manner of wrongs, be it in Debt, in not paying of it, or in Detinue, in the detaining of Rent, this is an Injury: Injuria & damnum are the two grounds for the having all Actions, and without these, no Action lieth: If there be damnum absque injuria, or injuria absque damno, no Action lieth, but where there is Injury, Injuria & damnum, and so both of them do run together, there an Action well lyeth: Also this word Injury, in it self comprehends all Demands: The words of the submission, comprehends all wrong, which one Man by any way may do unto another, being an Injury, and includes in it all matters of Equity, and also of Law, and so the award and the submission do well accord.

The second matter objected against this award, that here they have awarded Mony to be paid within such a time, after the date of the award made.

As to this, sometimes by construction this goes to the making of the award, and this is not made before it be delivered up; the date of the award is to be construed, the giving up or making of the award; where it is referred to a thing not to be by writing compulsary, for the submission here doth not bind to have this award in writing, an award not made, but by their delivery of the same, and if this be referred to a thing not to be by writing, as an award which may well be made by words, as so refer to the date, as a do, das, datum, being as much as to say, given up, which is at the time of the award made or given up, although without any date; for if no date, then it is to be taken from the time of the delivery of the same, for a Deed is good without any date, by the delivery of the same, and so here it shall be taken to be at the time of the delivery, because by the submission they are not bound to make their award in writing; and so in this Case, upon the whole matter, here is a good award made, and well pursuing the submission, and for the non-performance of which the Plaintiff here had good cause of Action, and the Verdict well given for him, and so he ought to have his Judgment.

Jones Justice agreed herein: But the award here is more large than the submission; and out of this, it is true, as hath been said, that an Injury contains in it all which is contra jus: If one be bound to pay Mony to another at a time to come, this is no injury till the time do come, at which time the same is to be paid, being due, and is not paid, by the non-payment this now becomes to be an Injury; but here the award is, that the Defendant should pay Mony, and the breach is laid

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in the non-payment of this according to the award, and so is within the submission, and the award; and according to the Book of 18 E.4. the Lord Lysles Case, although the award do exceed the submission, yet if a breach be laid in a thing submitted, as here it is, this is a good award for this, although void for the residue being not submitted; as here in this Case it may be a duty to come, and no injury until detained: As to the point of the date, he agreed herein the day of the date, this is the delivery more properly, here this goes to the delivery up of the award; otherwise it should be upon the Statute of Inrolments, there the same to be within six months after the date, there the same is to be so observed, but here it is good, and shall be taken to be from the time of the giving up of the award, and so the award here is good; and for the non-performance of this by the Defendant, according to his Assumpsit, the Plaintiff had good cause of Action, and nothing being materially alledged in Arrest of Judgment, the Plaintiff ought to have his Judgment.

Whitlock Justice agreed herein in omnibus: As to the first matter, this is within the extent of the submission; they award debita, Trespasses, Injuries; debita includes all Trespasses, Injuries, Accounts and Demands; debita intends not only because it is a sum certain, but for this, that he hath cause to have this at a time to come, debita includes all: A Rent is debitum during the term, but solvendum not till the day, dies solutionis defertur, but it is debitum, for and during all the term: If a Man is bound to pay unto one 100l. at Mich. next, this is debitum presently, but dies solutionis defertur; an Injury is defined to be Quicquid est contra jus, & jus est Norma recti, so that Quicquid est contra Normam recti est injuria: As to the matter of the date he agreed herein with the rest, and so Judgment ought to be given for the Plaintiff.

Dodderidge. This is here to be referred to the time, for which this takes life and force: The breach here is assigned in the non-payment of the Mony according to the award, and this is within the submission, and so good.

The whole Court agreed herein for the Plaintiff, and therefore the Rule of the Court was, Quod judicium intretur pro querente. Judgment for the Plaintiff, &c.

Nota, That Hitcham the Kings Serjeant did move the Court in this, because three several Actions for slander were brought for Malice and Vexation, by one Plaintiff, against one and the same Defendant; he moved the Court, that he might be ordered to proceed in one of them, they being all three for the same words spoken.

The Court upon examination of the matter, and upon view of the Records and Declarations, by which it appeared, that they were all the three Actions for the same words spoken, as it was opened, but they were upon speaking of the words at several times, and therefore the Court denyed his motion: For that as the whole Court agreed, every speaking of the words is a new scandal, and the Plaintiff may well for this have his Action, for every time that the words were spoken, because that by this so often speaking of the words, the scandal to him is the greater.

Afterwards the Serjeant moved to have these Actions laid in an indifferent County, (S) in Suffolk, where the words were spoken, if any words at all were spoken.

The Court did grant his motion for this, for changing of the County, upon Oath made, that the words (if any were spoken) were spoken in the County of Suffolk, where he prayed the same to be laid; and upon Oath to be made of this, by the rule of the Court, the Tryals were to be in the County of Suffolk.

Dickes and *Uxor* Plaintiffs, against *Brown* Defendant.

Prohibition. Noy 77. Benl. 163, 170. Poph. 156.

IN a Prohibition the Case appeared to be this: (S) The Plaintiffs libelled in the Court Christian at Norwich, for a Legacy, the Defendant there pleading, shewed forth the Inventory which came to so much, and pleads fully administred; they there did examine this, and found that he had fully administred, and there a sentence given for him against the Plaintiffs, from which sentence they appeal, afterwards they desert and leave the Appeal, and came into this Court, and pray a Prohibition, and this was upon some suggestion made, and none present in Court to defend the same, upon a motion made, Termin. Pasch. 22 Jac. a Prohibition was granted. But nothing done in this during all this time, no return at all made of it; so that now by the Demise of the King, there being no Declaration in this Prohibition, and for this cause, the same was abated.

Calthorpe now moved the Court to have a Consultation, because there was no cause shewed for the granting of the former Prohibition, this being granted only upon a suggestion made, that they proceeded to try and determine whether he had fully administred, or not, of which they there had Conusance, for they have their Conusance of the principal (S) of the Legacy, they may also determine of this there whether he hath Assets, or not in his hands to pay this Legacy. But if they will there determine, or meddle with this, which belongs not unto them, they are then to be prohibited. So of Covin alledged there, to be in a matter which concerns the Legacy, or which is in discharge of this, they may there determine of this, as appears by 1 R. 3. fol. 4. In a Case of a Prohibition unto the Court Christian; because they there proceeded to try matter of Covin, Pasch. 14 Jac. B. R. between Wallis Plaintiff, against Leyde Defendant. In a Suit for a Legacy in the Spiritual Court, they were at Issue there, upon a point of Covin, as touching matter there alledged in discharge of a Legacy; upon this a Prohibition was prayed, and denyed, and a Consultation there granted, because they had Conusance of the principal, and for this cause, they have cause also there to determine of the accessory, being Covin, concerning the Legacy; it was there adjudged for the Consultation, and the Prohibition was denyed. And so he moved here,

1 R. 3. f. 4. Pasch. 14 Jac. B. R. &c. Moor 917. n. 1307.

1. Because no Declaration, nor any return made, and nothing done in the Prohibition, by reason of which, this is abated, as it was here adjudged between Trumpley and Maio, Termin. Pasch. 1 Car. R. B. R. upon which Judgment it was moved, 1. To have the said Prohibition abated; and 2. It was moved because the sole suggestion for the first Prohibition was, because they there held Plea to determine of fully administred; the which was no cause to grant a Prohibition, they having power and Conusance to hold Plea, and to determine of the principal (S) the Legacy, and therefore they shall also have power to determine the Plea of fully administred, which goeth in discharge of the Legacy; and upon all this a Consultation was prayed unto the Court Christian of Norwich, the Prohibition being abated by the demise of the King, and not aided by, nor yet within the Statute of 1 E. 6.

Termin. Pasch. 1 Car. B. R. &c.

Stat. of 1 E. 6.

The Court upon this gave a day to the other side to shew cause why in this Case a Consultation should not be granted. At which day, the Court was moved to have the former Prohibition granted, to be renewed, the same being before granted by the Rule of the Court, and now determined and abated per demise le Roy, (as it hath been confessed and admitted) a new Prohibition was therefore prayed upon the same reason and suggestion, upon which the Court granted the former.

All

All the reason offered to the Court, for to have a new Prohibition in this Court, was only this, because the same was formerly moved in Court, and the Court upon the motion made, had granted the former Prohibition, the which they would not have so done, if they had not then seen good cause for the granting of it; but the cause now appeared not. The suggestion it self, against the Prohibition, being only this, for that they there held Plea, and proceeded to determine, pleinment administer, which as it was urged, they may well do, having power to determine the principal, (S) the Suit for the Legacy. But the true cause for which the first Prohibition was granted, (as was conceived) was this, upon the suggestion misopened to the Court, and a Prohibition prayed, and then according to the usual course, a day was given to the other side, to shew cause why a Prohibition should not be granted, and no notice being given of this motion and rule, for default in shewing of cause, the Prohibition issued of course; but nothing done upon it. It was therefore now moved again for a Consultation, upon the former reasons and authorities.

Dodderidge Justice. He hath deserted his appeal, and moves for a Prohibition; this is but matter of delay, he hath also delayed this matter in the Prohibition, so that by this course, the party shall be enforced to expend more than the value of his Legacy, before recovery of it; they were at Issue there in the Court Christian, touching fully administred, they may there well try and determine this, this is there triable before them, per testes, they have there Conusance of the Legacy, and therefore of this Plea also. But if they do there refuse to allow of this in proof, which the Law doth allow of, as to the discharge of the party, in point of Assets, this shall then be a good cause to have a Prohibition, upon a true suggestion made of this. But here the suggestion is altogether insufficient, and so no cause for a Prohibition.

Curia. We do here try fully administred, or not, by a Jury; they there try this, per testes, and they have Conusance of this. But if they in their Proceedings refuse such a proof, for fully administred, in discharge of the party which is allowable at the Common Law, a Prohibition then is to be granted; but here nothing is in this suggestion, but that they there went to Issue, only upon fully administred, or not, the which of it self, is no cause to have a Prohibition. For if they do not in such a Case proceed there, infinite delay shall be, for they will then after sentence there against them, Appeal, and then will desert their Appeal, and come and move here for a Prohibition, as here it was done in this case, and this only for delay, for the preventing of which, for this time and for the future, the Court gave further time for the Plaintiff in the Prohibition, to see and to inform himself better with the suggestion for a Prohibition, which at this time he hath not so done, and to shew better cause, or a Consultation shall be granted.

But by the whole Court, they are there to proceed, in the interim, in Court Christian, without being prohibited by this Court, and so no Prohibition granted, but to proceed there. Prohibition denyed.

Beverley Plaintiff, ——— and against twenty others Defendants.

IN a Bill before the Council at York, wherein the Case was: The Plaintiff preferred his Bill against the Defendants, before the Council at York, and in this he shewed that whereas Beverley his Father, by his Deed had granted unto him a yearly Rent-charge of 12 l. per annum, and that he had delivered this Deed unto Beverley the Defendant to keep for his use, who refused to deliver this unto him, saying that he had lost it, so that by this he is deprived of all his remedy at the Common Law. Prohibition.

This Rent being granted unto him for life, being the younger Son, and by him delivered to the Defendant, being his elder Brother to keep for him, and his use, and by the conclusion of the Bill, he prays Process to have the Defendants appear, and to answer upon their Oaths, touching the said Deed, and to have delivery of this made to him, and also to have him ordered to pay the said annual Rent unto him according to the contents of the Deed.

Upon this, Davies the Kings Serjeant moved the Court for a Prohibition to stay proceedings before the Council at York, this Rent being matter of free-hold, with the determining of which, they are not there to meddle.

Curia. They are not there to determine this matter, nor yet to order any thing there as touching the Rent, this being matter of free-hold; therefore by the Rule of the Court, a Prohibition was granted, to prohibit them from proceeding there, quoad the Rent they are not there to meddle with any determination of this, but not to be prohibited, quoad the Deed; for they may there well proceed to examine any matter, touching this, and to order the delivery of this there to the Plaintiff, if they find cause for it. And so by the Rule of the Court, a Prohibition was granted only, quoad the Rent, but they to proceed there with the residue of the matters in the Bill contained.

A Prohibition granted *quoad.*

Nota. Touching *Ley Gager.* Benl. 151.

Nota, One had day given him to wage his Law, at the day he came not to wage his Law, but made default. The Court was moved for another day to be given him to come and wage his Law, in regard he could not come at the first day to him prefixed to wage his Law.

Crew Chief Justice. This day given him to come and wage his Law, is not so peremptory unto him, but that this doth rest in the discretion of the Court, to give unto him another day to come and wage his Law, upon good cause shewed in excuse for his not coming the first day to perform this; for it may be so, that he may fall sick by the way, or be otherwise hindred, that he could not by any possible means come the first day, and if it be so, the act of God, no default being in him, shall not put him to any prejudice; but another day may well be given him, to do this.

The rest of the Judges in this were all against him, for that this day given him to wage his Law, is peremptory unto him, without any further day to be given unto him to wage his Law; and therefore by the Rule of the Court, an entry was made upon the Record, quod defecit de lege, and so by this he was ousted from waging of his Law in this Case afterwards.

Smale Plaintiff, against *Mary Warne* Defendant.

Debt.

IN an Action of Debt for 80l. brought against the Defendant, as Executrix of one Southerne an Attorny of the B.R. common Bail offered to be put in, because in Case of an Executor, and this without acquainting the Plaintiff with it, but the same was not as yet received.

Cakthorpe moved the Court for the Plaintiff to have special Bail put in, grounding his motion upon a pretended priviledge, that Attornys and Clerks of the B. R. claim to have where they are Plaintiffs in Actions, (S) to have special Bail given to them, although the Suit be against an Executor, in which Case by the Law, common Bail is to be taken, and not to be enforced to find for sureties special Bail, and shewed that the Plaintiff is an Attorny, and a Clerk del B. R. and therefore claims this priviledge for him, to have the Defendant put in special Bail.

The

The reason why a Defendant being an Executor, shall give but Common Bail, is, because he being charged as Executor, his Body shall not be taken, unless it be in a Case of a Devastavit proved against him, and upon special Bail taken, the Recognizance is, ita quod, that he render his Body, which shall not be so against an Executor, but in case of a Devastavit only; otherwise no Capias lyeth for the Body of an Executor. And if an ordinary Person had been Plaintiff against an Executor, then without any question by the Law he is to give but common Bail; and how here in case of a supposed priviledge (as it was urged) for an Attorny of this Court, being Plaintiff against an Executor, the Law shall be altered, this was the great doubt and question.

The whole Court did much doubt of this, and therefore commanded the Plaintiff to search for Presidents in such Cases, that so the Court may be informed, that the use and couse hath been so, and if Presidents can be found and shewed to the Court, to satisfie the Court, this to be so, then the same Rule shall be made for to have special Bail; otherwise, without direct Presidents shewed in point, to warrant this, no such Rule to be made.

Nota, This Case, quod mirum, if it should be so, that matter of Priviledge for an Attorny should alter the Law. But no such Presidents were produced.

Termin. Hillar. 1 Car: *Regis Banco Regis.*

Boyer Plaintiff, against *Rivet* Defendant.

Entred Termin. Trin. 1 Caroli Regis B. R. Rot. 1146.

IN a Scire facias against the Defendant as Heir, upon a Judgment given in an Action of Debt against his Father, to have Execution against him, who pleads riens per discent, issue joyned upon this, and found against him for the Plaintiff, that he had two Acres of Land from his Father by descent. The question moved and insisted upon, was, whether a general or a special Judgment shall be given against him.

A *Scire facias* against the Heir. Poph. 153. Benl. 162. Jones 87.

It was urged for the Plaintiff, that a general Judgment shall be given against him, for this his false Plea, and he shall be charged as Ter-tenant. In Davies and Pepys Case, second Part of the Commentaries, fol. 44. If an Action of Debt be brought against the Heir, he ought to come in and confess what Land he hath by descent, and this shall be put in execution; the Writ demands no more, but the Land which he hath per discensum hæreditarium. It was urged that the Scire facias is here brought against him, as Heir and Ter-tenant, and for this his false Plea, the like Judgment shall be given against him as is Coke 3 pars, f. 11. in Sir Will. Herberts Case, some things are odious in the Law (as it was urged) and for which a Man shall be punished in his Land, Body and Goods.

Commentaries 2 part f. 440. &c.

Coke 3 pars, fol. 11.

As 1. For a lie, as if one do sue another without any cause, pro falso clamore, he shall be amerced, and his Goods subject to it.

2. For a Lie in pleading, a Man shall be punished, and charged by his Body, Lands and Goods; as if one do sue another, as Executor, and he pleads, Ne unques executor,

executor, if this be found against him, he shall be chargeable with the demand, the reason why the Heir shall here be charged, is because he is bound with his Father in the Bond, this is the instrumental cause to charge him, 11 E. 3. Fitz. title Debt, placito 7. An Action of Debt brought against one as Heir, who saith that he is Heir with others in Gavel-kind, and so to be all charged equally; the Heir is chargeable in respect of the Land which is the material cause, for which the Heir shall be charged with the Debt of the Father, being bound with him in the Bond, and having Land from him by descent, and for the Heir to be charged in such a case, appears by Sir William Herberts Case, Coke 3 pars. Here the Heir is to be charged, and a general Judgment to be given against him for his false Plea: Commentaries in Davies and Pepys Case. A Judgment given against the Heir upon a Nihil dicit, there nothing but the Land which he hath by descent, shall be put in execution; but here a general Judgment is to be given against him for this false Plea (as it was urged) which appears by an inference out of 33 E. 3. Fitz. title Execution placito 162. a Scire facias there against a purchasor, upon his Traverse there found against him; a general Judgment could not there be had against him, because he was a purchasor; but otherwise it should have been, if it had been against an Heir.

11 E. 2. Fitz. tit. Debt, placito 7.

Commentaries *Davies & Pepys* Case.

It was urged for the Defendant, that a special Judgment, and not a general ought here in this Case to be given against the Heir. The recovery here was against the Father upon a Bond of 200 l. a Scire facias by the Executor of him, who recovered against the Heir of him, against whom the recovery was had, who pleads riens per discent, found against him, that he had two Acres, a special Judgment is here to be given.

All the Cases before remembred, may be agreed for good Law, at the Common Law before the Statute of Westminst. 2. Land was not liable, if an Action of Debt brought against the Heir, who pleads a false Plea of riens per discent, it is now to be examined how he shall be charged, whether as a purchasor, or as Heir; he is here to be charged as a Purchasor, as Ter-Tenant, 10 Eliz. Dyer, f. 271. A Judgment is given against the Ancestor, Debt lieth not against the Heir upon this; therefore (as it is urged) he is to be charged as Ter-Tenant, and not as Heir, here he is to charged as a purchasor. As to Sir Will' Herberts Case, this was ended by composition. It appears by 27 H. 6. Fitz. title Execution placito 135. In a Scire facias against the Heir, Execution there was only of the Land, of which the Father was seiled.

10 Eliz. Dyer, f. 171.

27 H. 6. Fitz. &c.

Reasons why the Judgment here should be special, and not general. 1. Because the Heir is here charged as a Purchasor. 2. Because nothing appears here to bind him, as by 1 H. 7. fol. 2. 2 R. 3. fol. 21. 13 E. 4. fol. 4. appeareth, in all this original Record it doth not appear, that the Heir was bound with his Father. 3. Because the Judgment given against the Father, hath determined the specialty by which the Heir was bound; so that he doth not shew this upon the Scire facias, in which he is to be charged as Ter-Tenant. 4. It appears by the Record, that the Defendant is here charged as a Purchasor, for he is charged by the Scire facias, as Heir apparent, and by this it is to be intended, that his Father is living, and so he is charged as a Purchasor, and not as Heir, and therefore a special Judgment is to be given against him, and not a general Judgment to make his Land only liable, which he hath by descent, and not the Land of his own purchase.

1 H. 7. f. 2. &c.

1. Whitlock Justice. That the Judgment here ought to be special (S) of the moiety of the Land, which he hath by descent from his Father, and not a general Judgment. Admit, that if an Action of Debt be brought against the Heir; that a general Judgment should be given against him for his false Plea, yet this is no proof that a general Judgment shall be given against him, as this case here is; For upon this Judgment against the Father, the Law by this hath presently ascertained, defined, and set down, what Land shall be subject unto this Execution, for by the

the Judgment, transit in rem Judicatam. If after this, that the Law hath made this certain, whether the Plea of the Heir may alter the Law, and make this to be of larger extent. As to this, the same shall not extend the power of the Judgment; but this ought to be of the moiety of the Land, which he had at the time of the Judgment. To examine the reason of the difference of the Action of Debt against the Heir, upon the contract of his Father, and of the Scire facias, against him, to have Execution upon a Judgment given in Debt against his Father, where the Action of Debt is brought against the Heir, being bound in a Bond with his Father, there by his Plea, he makes this to be litem suam, his proper Suit; and by his faux Plea he endeavours to deceive him, 6 & 7 E. 6. Dyer, 6 Eliz. Dyer 10. 17 & 22 Eliz. Dyer, these Cases come near unto this Case in question, but they are not full in point; but reasons drawn out of these Cases, will well serve to maintain this my opinion. 6 & 7 E. 6. Dyer 6 Eliz. &c.

An Action of Debt brought against the Heir, this stands upon two Reasons, 1. Upon the Contract of the Father, because the Heir is bound with the Father in the Bond. 2. In respect of the Possession which he hath, and without both these the Heir shall not be charged. In Debt against the Heir, it shall be in the debet & detinet, against an Executor in the detinet, but it shall not attach upon the Heir, if he be not bound by the contract of his Ancestor, and also hath possession. The Heir may avoid this, if he alien away the Land, before any Action brought against him, he shall be by this discharged.

In a Scire facias against the Heir; this doth charge him as Ter-Tenant only, in the nature of a Purchasor. For the Ancestor either conveyed this Land unto others, or suffered this to descend. Also the Plaintiff here is not more prejudiced by the faux Plea of the Heir, than he is by the faux Plea of a Purchasor, being the Ter-Tenant, they are both of them in one and the same degree. The Purchasor, and the Heir, they both of them being charged as Ter-Tenants. By the former Judgment the duty is setled and recovered, and by this, transit in rem Judicatam, all the Cases before remembred by the Counsel on the other side, may be admitted, and do make nothing at all, against this which I do now hold, for there is a very great difference between a Scire facias, against the Heir upon a Judgment given against his Father, this being no demand of any duty, but to have him to come in, and to shew cause, wherefore he should not have execution against him, upon the same Judgment had against the Father. But he cannot have an Action of Debt against him, upon the same Judgment, no binding being now against him, for he is not here charged as Heir, but as Ter-Tenant; No Essoine nor Protection lieth in a Scire facias, because nothing is by this demanded. It is not material in this Scire facias, whether the Heir was bound with his Father in this Obligation, or not, whereupon Judgment was given. And so upon this difference, betwæn an Action of Debt, and a Scire facias against the Heir, and his faux ensuing Plea, not a general, but a special Judgment, as this Case is, and upon the Cases and Reasons before remembred, is to be given against the Defendant, (S) to have Execution of the moiety of the said two Acres, descended to him as Heir, and not a general Judgment.

Jones Justice. The question here in this Case is, what Execution shall be had against the Defendant. The Judgment here shall be against the Heir, as it shall be against a Purchasor, (S) for the moiety of the Land; three things here are only considerable, two of them as inducements, and the third the main matter, 1. How the Heir shall here be charged, together with the reason of it. 2. How the Heir in this Case is to demean himself in pleading, and what shall here ensue upon this his faux Plea; And 3. Being the main matter of all, how the Judgment shall be, upon this his faux Plea found against him in this Scire facias.

1. As

1. As to the first, there are two things to bind the Heir, (S) 1. His being bound with his Father in the Obligation, and the Land which he hath in his possession for to charge him, the party may pray to have a Judgment general upon his Plea, that he hath riens per discent. If one doth bind him and his Heir in a Warranty, Covenant, Debt, Annuity, the Heir shall be subject for the Land, all the Heirs to be equally charged, and if one Heir be sued severally by himself, he shall have contribution against the others, as appears in Sir William Herberts Case before remembred.

2. To see how far the Heir shall be charged for this his faux Plea, for this see Commentaries, fol. 440. in Pepys Case, where it appears how he ought to behave himself in pleading, (S) to confess the verity of this Land, which he hath by descent, but if he doth not confess it, as if Judgment do pass against him upon a Nihil dicit, non sum informatus, or confession, No general, but a special Judgment shall be given. But upon his faux Plea of riens per discent, a general Judgment shall be given; In 18 Eliz. Dyer, fol. 344. Hemminghams Case, that a special Judgment shall be given in all Cases, but where he pleads a faux Plea. In the Case of warranty, upon a voucher he pleads riens per discent, and found against him, the recovery in value shall be only of the Land which descends, otherwise it is in an Action of Debt against the Heir, who pleads a faux Plea, there the Judgment shall be to have execution of the moiety of all his Land.

18 Eliz. Dyer, 344. *Hemminghams* Case.

3. As to the third matter, This Case is not in Debt against the Heir, but in a Scire facias against the Heir, upon a Judgment given against his Father, and here he is to be charged meerly as a Purchasor, as Ter-Tenant. To consider this, 1. At the Common Law: At the Common Law no remedy there was against the Heir; there are two branches of the Statute of Westminst. 2. cap. 20. one for the Elegit, the second the Scire facias. At the Common Law, Debt against the party; No Scire facias against the Heir, where the Judgment was against the Father, these Lands which the Heir had at the time of the Action brought, are liable and those Lands which the Father had at the time of the Judgment, are liable to the Execution, and if he doth enfeoff his Son of these Lands, yet they are liable; as to the Statute, this gives the moiety of all the Lands. As to the present Case now in question, will you by this Plea extend the Execution further than the Statute hath prescribed the same to be, which is for the moiety of his Land? this cannot be, and this is the chief reason grounded upon the Statute; Also the Scire facias demands nothing, this being for him to shew cause why he should not have Execution of the Land, which he hath by descent, and here by reason of this his Plea, you would now enlarge this to Land, which he hath of his own purchase, which can not be done; the Heir here in the Scire facias is not charged as Heir, as appears by 5 E. 3. Fitz. title Age, placito 95. 6 E. 3. fol. 135. and Sir William Herberts Case, that the Heir is charged as Ter-Tenant, and not as Heir, the question here only is, whether by this faux Plea, a purchasor or an Heir shall be so charged, so that by reason of this faux Plea, the Judgment shall be enlarged, It shall not so be. As if after the Judgment, he doth alien away the Land, and a Scire facias is brought against the Purchasor, it hath been adjudged, that by this his faux Plea, he shall not be charged, but for the moiety of the Land purchased, and here the Heir is chargeable in the nature of a Purchasor; and therefore the same reason well holds for him; and so upon the whole matter, the Judgment here to be given against the Defendant, ought to be special and not general, (S) to have execution of the moiety of the Land, to him descended

West. 2. c. 20.

5 E. 3. Fitz. tit. Age, placit. 95. 6 E. 135. &c.

3. Dodderidge Justice. It is to be considered here in this Case, how the Defendant being the Heir, is to be charged with this duty. As to this, All our Books do agree in this, that he is to be charged as Ter-Tenant; For the true deciding of this matter, these particulars are to be considered. (S.)

1. The Action of Debt against the Heir, and upon what ground this is.

2. In Case of a Recognisance against the Heir, how he shall be charged.

3. In

3. In Case of a Scire facias against the Heir, how he is to be charged.

4. How the Heir shall be charged upon a Warranty. In a Warrantia Chartæ, here the Heir is not to be further charged, but for the Land which descends unto him.

1. In an Action of Debt against the Heir, there he chargeth him as Debtor, not as terre Tenant, for he is bound in the Bond, and from 18 E. 2. until 7 H. 4. the Law did run for currant, that the Heir was not chargeable in Debt, if the Executor had Assets; the reason of the Law was, which was altered in 7 H. 4. they did then conceive the Heir should be charged, although the Executor had Assets, if the party would sue him; the reason of the Law was, because this was his own Debt, and he is charged as Debtor, which is his own Debt; observe the Writ which is against him in the debet & detinet, but against the Executor, who represents the person of the Testator, it is only in the detinet, the Heir he is Debtor by reason of his own Contract.

The President cited in the Commentaries in Pepys Case, that an Action of Debt lieth against the Executor of the Heir, which cannot be, if he doth not charge the Heir, as with his proper Debt; then observe the manner how the Heir defends himself in pleading, that he hath no Assets descendable, jour del brief purchase: If he had aliened the same after, his own Land shall be liable by his faux Plea, he being bound in the Obligation, this makes him a Debtor, but if he be not bound, then to be charged as a Purchasor and terre Tenant; the Heir may sell his Land which to him descends, if this be aliened away before the Writ brought against him, he is not then chargeable. Commentaries *Pepys* Case.

2. In case of a Recognizance there are no words to charge the Heir, being only vult & concedit, quod executio fiat, de terris & tenementis; he is not there charged as a Debtor, but as a terre Tenant, as appears by 33 E. 3. 27 H. 6. and Sir William Herberts Case; That the Heir in case of a Recognizance acknowledged, comes in as terre Tenant, but yet not meerly as terre Tenant, but rather because he comes in as privy in Blood; and as to the Judgment, the terre Tenant may say that the Heir hath Land by descent; the Heir comes in as privy to the first Judgment, and if he hath Land by descent, he is to be charged before the terre Tenants, and the Heir shall not have Contribution; but against the other Heirs; the Heir is privy to the Judgment, but the Land only which descends is subject unto this. 33 E. 3. 27 H. 6. &c.

3. As to the Scire facias, this is to be brought against the Heir, to shew cause why execution should not be had against him upon the Judgment, and this comes to the Case here now in question: In which it is considerable how the Heir comes in, he comes in, in the same manner, as in the Case of a Statute upon the Recognizance, 33 E. 3. Fitz. tit. Execution, placito 162. is an express Case in the point: In case of a Judgment, the Heir pleads a faux Plea, and there adjudged, that the Judgment shall be given against him only for the Land which he hath by descent. 33 E. 3. Fitz. &c.

4. In the Case of Warranty, this runs in another manner: If he vouches one as Heir within age, he shall not charge him further: If he enter into the Garranty with a Protestation, that he hath riens per descent, if this be found against him that he hath Land by descent, he shall have a recovery of this only in value, and of no other, and so throughout, this is a plain and a clear Case, That no Judgment shall here be given against the Defendant, but for a moiety of this Land which he hath by descent.

5. Crew Chief Justice agreed herein, that the Plaintiff is to have Judgment and to have Execution only of the moiety of the Land, which the Defendant hath by descent from his Father; and so is Sir William Herberts Case in effect, which is in the nature of a Reading upon this Learning: A Man binds him and his Heirs,

the Heir is bound in privity, as Heir; here the Judgment was given against the Father, in an Action of Debt upon an Obligation, in which the Son was bound with him.

It is now to be considered what Land is liable by this Judgment, clearly the Land of the Father, which he had tempore judicij, and not the Land of the Son, for all other Land is quit, as to be charged with this Judgment; the Plaintiff is to have for his Execution the moiety of this Land which descends; the Statute doth not give more, but only of the moiety: Execution to be in Debt against the Son, here he is bound in privity, because the Father hath bound him, the Body is liable, per capias, the Debt is transferred by the Judgment, no Debt afterwards against the Father; upon the Scire facias here the Son comes in meerly as terre Tenant, and in no other manner.

Commentaries, in Pepys Case before remembred, there the Judgment given upon his faux Plea; clearly no Land is here liable to this Judgment, but the Land which descends unto him from his Father.

In Case of the Recognizance the Son is not bound, the words being, (S) Concedit quod currat super, &c. and the Son is not bound: This faux Plea here shall make no alteration, the Land of the Father, and which he hath by descent, shall be only liable to the Execution upon the said Judgment, as appears by 5 R.2. Fitz. tit. Annuity, 40 E.3. Fitz. Warranty, & 33 E.3. Fitz. tit. Execution, placito 162. before remembred: The difference will be between a personal and a real charge; this charge here is real, and the same shall not be prejudiced by this his faux Plea.

5 R.2. Fitz. tit. Annuity, &c.

And so in this principal Case, no general, but a special Judgment is to be given, (S) To have Execution of the moiety of the Land, which descended to the Defendant from his Father.

And so the Court all agreeing in this, according to this their resolution, they caused a Rule to be entred, that the Plaintiff have a special Judgment, (S) to have execution only of the moiety of the said two Acres, which the Jury have found to descend unto the Defendant the Son, by descent from his Father, and no more; and no general Judgment in this Case to be, by reason of his faux Plea of riens per discent by him pleaded, and found against him, thereby to make the Land of his own purchase, to be subject to the execution upon the said Judgment.

A special Judgment for, &c.

Costs denyed, *per Curiam.*

Nota, That in this Case, it was moved for the Plaintiff to have his full Costs: But to grant this, the Court denyed, because that no Costs are due by the Law in the Scire facias.

Dominus Rex, against *Bell.*

Indictment.

Upon an Indictment for Perjury, assigned in an Affidavit made before Sir Robert Rich, Exception moved for the quashing of it.

1. It is not laid that Sir Robert Rich was a Master of the Chancery.
2. That this is no Perjury within the Statute of 5 Eliz. cap. 9.
3. Because he concludes this to be contra formam statuti of 5 Eliz. for Perjury, in this Affidavit, which is not within the Statute.

Indictment quashed.

Curia allowed of these Exceptions, and for these Exceptions, by the Rule of the Court, the Indictment was quashed, and the party of this discharged.

Hungerford

Hungerford Plaintiff, against *Haviland* Defendant.

Entred Termin. Hillar. 22 Jac. B. R. Rot. 194.

IN an Action upon the Case for a Promise; the Case upon the pleading was this, Thomas Smith was seised of Land, and held this of the Plaintiff, as of his Manor of Winston, by Rent, and by a Customary relief of one years value: Smith alienedthis Land unto Haviland, who 1 Maij, 10 Jac. devised this to the Defendant Haviland, the Devisor died, the Defendant entred and was seised: The Plaintiff lays a Colloquium between him and the Defendant, as touching the arrearages of the Rent, and the relief, the Plaintiff said unto the Defendant, that if he would not pay him, he would put him in suit for it; upon this the Defendant did assume and promise unto the Plaintiff, that if he would forbear the putting of him in Suit until the next Court, and then if the Plaintiff should make it appear to the Brothers of the Defendant that these Tenements were so chargeable, with the 5 s. yearly Rent, and with the relief, that then he would pay this unto him; the Plaintiff avers, that upon this he did forbear the Suit, and that at the next Court he made it to appear to the Brothers of the Defendant, per præsentationem homagij Curiæ illius, and also by the Records of the Court, that the Rent and Relief were due unto him by the Defendant, and that notwithstanding all this, the Defendant hath not paid this unto him according to his promise: unde actio, The Defendant comes in and confesseth the Action.

Promise. 1 Ro.Rep. 370. Latch. 37. 94. 129. Benl. 180. Jones 132.

As to the Exceptions taken in Arrest of Judgment.

The first and chief Exception insisted upon, was, That he cannot have remedy for the Relief, if the Law do not give him remedy for it; and so this resembled unto Godfreys Case, Coke 11 pars, as to prescribe in the thing, so he ought to prescribe in the means to come unto it.

Coke 11 pars, &c.

As to this, it is here laid, that by Law he may distrain for it, this being Relevium cum acciderit, secundum consuetudinem Manerij, so that (as it was urged) this is parcel of the Tenure, and then he may well for this distrain; and this appears 14 H. 4. fol. 2. full in point, in the Case of Recordare longum, by Hankford; but admitting he had no remedy for this Relief, yet he may distrain for the Rent, and this is sufficient to ground the promise for the whole, and this is a good consideration.

A second Exception insisted upon, that this is laid too generally.

As to this, it is sufficiently laid that he had made this to appear to his Brothers, and it is certainly laid, for it is in this manner, That he made it to appear by Presentment of the Homage of the Court, upon Oath, and so by them presented; and by the Rolls of the Manor, and here the promise is the point and ground of the Action.

It was further urged in Arrest of Judgment, that the relief here is meerly due by Custom, and so no remedy for this but by Custom.

It was urged, that two things are here to be done before payment.

1. To surceale the Suit.
2. To make this appear to the Defendants Brothers that the same was due: He

makes it appear that it was due by Smith long time before, and by Haviland, but not due by the Defendant, and then no cause of Action.

1. Whitlock Justice. Two Exceptions only insisted upon: The point is, Whether this relief, as it is laid in the Record, be of such a nature, as that remedy may be had for it.

It is here laid, that the Land is held per redditum, & per relevium cum acciderit, which is part of the Tenure, and for his remedy, he may very well distrain for this.

When this Case came first in question, I put the Case of 14 H.4. of relief for a Knights Fee leviable by distress, because due by Tenure.

The Statute of Magna Charta doth not introducere novam legem, it doth but explanare veterem, cum acciderit, by this the same is well explained, when this ought to be paid; here it is due by Tenure, and here is a sufficient consideration to raise an Assumpsit, because he may have remedy by distress; but admit that he hath remedy for the Rent, and none for the Relief, yet the consideration is good, and it is not to be construed and examined by weight and measure.

If the consideration depends upon two parts, and remedy is for the one, but not for the other; if one part of the consideration stands, this is a good ground to make the promise good.

2. As touching the means how he hath made this to appear that the same was due; the Record as to this, is, that he was to make this to appear that the Land, est onerabilis.

As to this, there is no better means and evidence to make this to appear, but by these two ways, (S) by the presentment of the Homage upon Oath, no better nor stronger evidence can be: For that all the Rights of the Lord are examinable and triable by the Homage, this is evident, and a direct means for the Rent.

As for the Relief, he saith that he hath made this to appear, per Rotulos Curiæ, this being the proper evidence to prove this: For if the same be due by Custom, or by Tenure, the same ought to be made appear by the Rolls of the Court.

If speech be made of proof generally, this ought to be proof by Jury; If of matter of Record, this is to be proved by the Record; but if proof be to be made of a particular benefit which the Lord of the Manor is to have, then no better proof can be made of this, than by the Rolls of the Court, for no proof can be more directly and particularly, than by setting down of all the Rolls in certain: If the proof had not been good in Law, the Defendant ought then to have demurred in Law to it; but here the Defendant hath not so done, but he hath confessed the same, so that this is now admitted by him.

And so the Judgment here ought to remain in force, and the Plaintiff ought to have his Writ of enquiry of Damages.

2. Jones Justice. As to the first Exception, that here is no remedy for this Relief.

As to this, the point grows by reason of the Tenure, or by reason of the Custom; if by Tenure, he may then distrain; if by Custom, then to be considered what remedy for this, as to have the Custom to maintain the relief, so also to have the Custom to maintain his remedy for this Heriot Custom, not to distrain but by Custom.

If Relief be due by Custom he hath no remedy for this but by Custom; here there is a Tenure laid besides the Custom, it is laid, that he held of him per relevium, to be paid secundum consuetudinem Manerij, but that it is due by Tenure, and then he hath good remedy for this, and so here he hath good remedy for this, and that the consideration is good in substance.

As to the last point, that he was to make this to appear, this as it is here laid,

laid, is good in substance, and the Defendant hath made all good by his Confession.

3. Dodderidge Justice. By the Book in temps, E. 1. tit. Relief, and 40 E. 3. it is agreed, that Relief is no part of Service, and therefore till our later time agreed that Debt lyeth for it, this may be incident to the Tenure, but yet no part of the Tenure.

The Statute of Magna Charta, is in part Introductivum novi juris, for the Barons relief before this Statute was at the Kings pleasure, as appears by Glanvile tit. Relief; but the Statute of Magna Charta hath now made this certain. Stat. of *Magna Charta.*

If by this Declaration it appears, that the Relief is due by Custom, then no remedy can there be for this but by Custom: No apter case may be resembled to this, but the case of the Heriot, for Heriot Service he may seise or distrain, but for Heriot Custom, seise, as it is resolved in Plowdens Commentaries, in Woodlands Case, second point: If due by Custom, there is then a failer of part of the consideration; for then the point will be, whether the other part of the consideration will uphold the promise, or not; that the same will not, but all the considerations alledged, ought to be performed, or no Action upon the Case lieth upon the Assumpsit, 16 Eliz. Dyer, A consideration to raise an Assumpsit, ought to be a mutual recompence.

6 H. 7. fol. 11. A notable Case in Trespass adjudged upon a Concord there pleaded, that the Defendant should do two things, it is no Concord unless that both the things are done, he ought to perform all.

As to the other matter, whether he shall take advantage of this Declaration after his own confession; as to this, he may take advantage of the Declaration, for although he hath confessed this matter, yet he may well shew unto us, that we, as Judges, should give an erroneous Judgment; this he may shew unto us by way of prevention, & ut amicus Curiæ, in Arrest of Judgment.

As to the Exception taken for the making of this to appear that the Rent was due, how this ought to be done, by the presentment of the homage, and the relief, by the Rolls of the Court, and so it is expressed in the Declaration to be: As to this manner of appearance, in his imagination he thought he could make it appear, but this is no full proof, but he ought to shew that the same was paid, for the Steward may put in what he will, but he ought to make it appear that the same was paid, and then we are to judge upon it: And so without any absolute or final opinion in this Case given, he desired time to be further advised herein.

4. Crew Chief Justice. Two Reliefs here laid to be due by reason of two several alienations; as to the Case 14 H. 4. the Case de recordare longum, if Relief grows due by Custom, there it is clear that he ought also to have a Custom to enable him to have means to recover this; generally Reliefs are to be paid upon the death of Tenants, here he claims to have this upon every alienation; here this is due by Custom, not by Tenure; here two things are to be made to appear, and this two ways, one way for the Rent by the homage, and for the Relief that is due by the Rolls; if he hath made here the Rent and the Relief sufficiently to appear to be due, is the question; if the promise be in such a manner, that if he shall make it to appear that the Rent and Relief were due, he ought in pursuit of this to make this appear by Action, and by proof in this.

As to the confession here, he shall not be admitted to say after this, that the same is not due; as touching this, vide 7 R. 2. Fitz. tit. Bar, placito 241. what manner of proof ought to be where before the Suit, and where in the Action: Also he ought to make both to appear, that the Rent and also the Relief was due, and if he only makes part to appear, he is not to have his Action; as if a Man doth promise to another so much, if he delivers unto him so many Quarters of Corn, if he delivers

livers but part, he shall not have his Action upon the Case for the promise, before he hath delivered all.

And so without any further debate at this time, this principal Case rested upon a Curia advisare vult, and so the same was adjourned to a further time.

Trin. 2 Car. B.R. &c.

Afterwards, (S) Termin. Trin. 2 Caroli Regis B. R. this Case was moved again, and argued at the Bar, and after by all the four Judges, who agreed all in opinion for the Plaintiff, and accordingly by the Rule of the Court Judgment was then given, and so entred for the Plaintiff.

Turnor Plaintiff, against *Denning* Defendant.

Entred Termin. Trin. 1 Caroli Regis B. R. Rot. 107.

Trespass.

IN an Action of Trespass, for Trespass done with his Cattel in two Closes of the Plaintiffs, the one called the Court-Close, the other called the Moor-Close, and lays the Trespass with a continuance.

The Defendant in Bar, shews that the Court-Close is next adjoyning to the Moor-Close, and that the Moor-Close is next adjoyning unto a Meadow-Close, and that he, and all the Occupiers of the said Meadow-Close, have used fugare & refugare averia sua, from the Meadow-Close to the Moor-Close, and from thence to the Court-Close, and lays an Estate in himself, at will, in the Meadow-Close; and that he according to the usage at the same time, did chase and re-chase his Cattle.

Upon this Plea in Bar, the Plaintiff demurred in Law, because the Custom by him alledged, is only a Custom to do wrong to another, which the Law adjudges to be a bad Custom.

Judgment for the Plaintiff, &c.

Coke 4 pars, in Gatewards Case, Tenant at Will may prescribe in case of profit, but not in case of easement.

The whole Court clear of opinion, that the Bar here was not good, and that the Plaintiff had good cause to demur unto it, because the Custom by the Defendant alledged, is only to do a wrong, and so not good, and so for this cause the Bar is insufficient, and therefore by the Rule of the Court, Judgment was given for the Plaintiff.

Alfrey Plaintiff, against *Blackamore* Defendant.

An Action upon the Case for a promise. Latch. 97. Benl. 159.

IN an Action upon the Case for a Promise, for payment of a Marriage Portion, upon Non assumpsit pleaded, a Verdict was found for the Plaintiff.

It was moved in Arrest of Judgment, that the Declaration was not good, because that no notice is therein expressed to be given by the Plaintiff to the Defendant, of the day of the Marriage, before which time the Defendant was not bound to pay this, according to Barrows Case, 18 Eliz. Dyer, fol. 354.

Against this it was urged, that no notice here is to be given; the Pony here by the

the promise, is to be paid ad diem Maritagij, vel infra decem dies post Maritagium; but if notice ought to be given of this, it is sufficient for him to give this in the Declaration, and if notice be requisite, this is then implied in the request made, and here the promise was made by the Father; where the promise was made by a Stranger, there notice is to be given, but needs not to lay this in the Declaration; but where the promise was made by the Father, as here in this Case the same was, no notice is requisite to be given; and this is the difference, for the Law presumes, that he had notice of this, and so this is not to be alledged in the Declaration, if it be no part of the promise; the notice here is no part of the promise, (as it was urged) and the request only implies a notice, this being a notice in it self.

Jones Justice. If one doth promise that I. S. shall pay a Sum of Mony to a third person, upon the Marriage-day of I. D. he ought to pay this at his peril.

Coke 6 pars, in Boothies Case, there it appears no difference to be where the payment is to be to the party, and where to a Stranger upon request; a request here is to be laid, but no notice, and here is a request laid, the which implies an absolute notice; here the party hath election to pay this at the day of Marriage, or ten days after; here the same not paid at the day, then the tenth day after was his day of payment; here the request is laid, and that he hath not paid this, and this implies a sufficient notice: As if one be bound to make a Conveyance, such as the Counsel of the other shall advise, and shews in his Action brought for breach, that the Counsel did advise such Conveyance, and that he required him to execute this, and shews not that he gave him notice of the particulars of this. Coke 6 pars, *Boothies* Case.

In Frances Case, Coke 8 pars, fol. 89. It appears that a request implies all other Circumstances. Coke 8 pars, 89. *Frances* Case.

In this Case the Declaration is good, and Judgment ought to be given for the Plaintiff.

Whitlock Justice. The sole point here considerable is, Whether the notice be any part of the promise; as to this nothing can be the substantial part of the Assumpsit, but that which is contained in the Declaration, request is to be made to him, to have him by this to take notice that the Marriage is past, so that the request and notice is all one, and no cause there is to express any notice to be given to him, the request being a sufficient notice of it self, and clearly no notice ought to be here laid in the Declaration.

The whole Court agreed herein, that the Declaeation is good, without any notice therein alledged to be given, which needs not to be, and therefore by the rule of the Court, Judgment was given for the Plaintiff. Judgment for the Plaintiff.

Nota, That Hitcham Serjeant le Roy, being present in Court when this last matter was debated, informed the Court, that he had the same day moved the Judges of the C. B. in the like Case, and there it was adjudged by them all clearly in the like Case, and the same question made, that no notice was to be given; but if notice was requisite, then they held also clearly, that the request being made, implyed a notice, and was a sufficient notice in it self, *Nota.*

Shury

Shury Plaintiff, against *Brown* Defendant.

Entred Termin. Hillar. 20 Jac. B. R. Rot. 177.

Debt for Rent. Latch. 99. Benl. 159.

IN an Action of Debt for Rent reserved upon a Lease for years, brought by the Plaintiff as an Assignée of an Assignée: The Case and point rested upon the words of Reservation, the Lease for years was made rendring Rent in this manner, (S) Reddendo inde annuatim, durante termino prædicto, a certain Rent to him and to his Assignées, and dies, Whether his Heir and his Assignée shall have this Rent or not, was the sole point insisted upon for matter in Law.

For the Plaintiff it was urged, that this Rent by the words of the Reservation, shall continue during the whole term, and by the words subsequent, it is sufficiently denoted who shall have the Rent.

27 H. 8. f. 19. By 27 H 8. fol. 19. Rent reserved during the term, generally this shall go with the Reversion.

10 E. 4. f. 18. 10 E. 4. fol. 18. by Littleton, A Lease made for years without mentioning of Heirs, because the Heir is to have the Reversion, he shall also have the Rent; so is the Book of 31 H. 8. Dyer, fol. 45. the Lessor and his Heirs shall have the Rent generally, & 6 E. 2. Fitz. tit. Voucher, placito 258. that the Rent reserved shall go to him who hath the Estate, and with this agrees Plowdens Commentaries, fol. 171. in Hill and Granges Case, and Coke 5 pars, fol. 111. Malloryes Case; the reservation in the principal Case, is yearly during the term, to him, and to his Assignees, and this is a sufficient denotation of the person, who is to have this Rent.

31 H. 8. Dyer, f. 45. &c.

For the Defendant it was urged, that the Plaintiff here brings an Action of Debt for Rent, as an Assignée; that the Rent here doth not continue, because it doth not appear that John Shury was living, and this is not averred, Pasch. 11 E. 3. Fitz. tit. Assise placito 86. Assise for a Rent, touching the several words of reservation.

Pasch. 11 E. 3. &c.

1. Whitlock Justice. The Rent here is to have continuance, being reserved, during the term, and the Heir shall have this, and the reason of this is, because a Lease for years is a contract, and in this, because there is quid pro quo, the Law favours this recompence, (S) the Rent for the Land; and therefore the same is to have continuance during the term; and this is natural equity, & de jure communi, and the Law favours this recompence, this being jus commutativum, which the Law favours. If one makes a Feoffment in fée, and doth not express a use, and consideration, the Law then saith, that this shall be to the use of the Feoffor; here the Law gives a recompence for that which is passed from him; If one makes a Lease, and no reservation of any Rent in it, the Law reserves Fealty for him, and that he shall give his attendance, in 31 H. 8. Dyer, there is a general reservation, and so this left to the construction of Law, Coke 5 pars, in Malloryes Case. A reservation to an Abbot and his Successors, this is good there to both. Commentaries, fol. 171. in Hill and Granges Case. Rent reserved payable at Mich. and Lady-day, and this Lease made in January, he will have the first Lady-days Rent, by construction of Law. In this principal Case here, the contract of the parties is plain, that the Rent is to have continuance during the term, and the Law will uphold this 4 H. 6. fol. 26. to prove that the Rent shall go to the Heir, where it is not reserved to him, by express

31 H. 8. Dyer. Coke 5 pars, &c. Comment. f. 171. &c.

4 H. 6. f. 26.

press words, and this by reason and construction of Law, and so it shall be here in this Case. And so upon the whole matter, the Rent here continues to the Heir, or to the Assignæ of the whole Land, during the term; and that Judgment ought to be given for the Plaintiff.

2. Jones Justice agreed herein for the Plaintiff, that the reservation here shall be to him and his Heirs, and he having aliened the reversion, the Alienæ shall have the Rent, 11 E. 3. Fitz. tit. Assise for Rent, placito 86. that the Rent shall go to the Heir, but this is not there resolved in Browning and Bestons Case, in the Commentaries; there the reservation was not during the term, as here in this Case it is, 10 E.4. fol.18. and 27 H. 8. fol.19. An opinion there is upon the point of reservation, in what manner the Rent shall go; and there, fol. 29. some other opinion there is as touching this, and so in 31 H. 8. Dyer. But this Case here, very much differeth from the Case where the reservation is to the Lessor himself particularly; for here in this Case, there is an express reservation of the party himself, durante termino prædicto annuatim, to the Lessor, and to his Assigns; but if the same had been reserved, annuatim, to the Lessor during his life, then the same Rent should have had no longer continuance. I ground my opinion this way, upon Hill and Granges Case in the Commentaries. If Rent be reserved, annuatim durante termino prædicto, the first payment to begin two years after, this controls the words of reservation. But it is not so here in this Case. If we shall not make such a Construction in this Case, we should then go against two Judgments; the one Coke 8 pars, in Whitlocks Case, and the other, Coke 5 pars, in Malloryes Case; here the Rent is reserved annuatim durante termino prædicto; and the limitation of the payment comes afterwards, (S) to the Lessor, and to his Assigns. In Malloryes Case, there it is rendring Rent to him, or to his Successors; this Rent shall not go to the Successors; but there the reservation was, durante termino prædicto, the first words carry the Estate, for the reservation, and the other words (or Successors) are void, and so the first words to carry, and to settle the reservation, the other words only for limitation of the payment, for there are no words of reservation, but of limitation of payment; and so in this Case the Plaintiff hath good cause of Action, and so Judgment ought to be given for him.

11 E. 3. Fitz. Assise placito 86. &c.

31 H. 8. Dyer.

Hill and *Granges* Case. Com.

Coke 8 pars, *Whitlocks* case, &c.

3. Dodderidge Justice, I will not now deliver any binding opinion in this Case. Conceits are but like unto sparkles of Fire. I have viewed all the Books.

As to the general Reason. 1. To the words of demise, they are the words of the Lessor, and so the words of Reservation, are the words of the Lessor, and as he doth demise this, so it shall stand, and as he doth reserve the Rent, so the same also shall be by construction of Law; but if he leaves this to the construction, and to the reservation of Law, then this to go with the Estate, and during this Estate, the same shall have continuance. If he himself do make his reservation too short, he ought to be with this contented, because this is his own Act so to do, & volenti non fit injuria.

In a Reservation there are these three things considerable. (S.)

1. The quantity of the Rent reserved.
2. The person who is to have this, to whom it is reserved; and
3. The limitation of the time when this Rent is to be paid; and all this rests in the limitation, and appointment of the Lessor himself, who doth reserve this.

1. For the quantity of the Rent, this is to be according to that which he himself hath reserved to be paid, as appears by 11 E. 3. & 50 E. 3. where 20 l. was reserved for the last year, and good.

11 E. 3. & 50 E. 3.

2. As touching the person who is to have this Rent. If this be generally left to the construction of Law, then the Law will speak for him, and will make this Rent to be incident unto the reversion, but if the party speaks for himself and reserves this Rent unto himself, then this Rent shall go no further, nor have any longer

 continuance

continuance than according to his own reservation; and shall then have this only during his time.

If two Joint-Tenants do make a Lease for years, rending Rent to one of them, this is good, and the other shall not have it, neither shall it go with the reversion. Two Joynt-Tenants in fee, or for life, the one of them makes a Lease for years, rending Rent, the other shall not have this Rent, because not privy to the Lease. In this Case here now in question, If Judgment shall be given against the Rent, that the same is not to have continuance; such a Judgment here given, will not any ways hurt the Judgments given in Malloryes, nor in Whitlocks Case. In Malloryes Case, there is no election, the word (or) there taken for (and) there it appears that the Rent was to have continuance, which could not so be, if (or) had not been taken for (and) but the construction there, was not made upon any words of reservation. A Lease for years made, rending 20 s. Rent annuatim durante termino prædicto, this shall go to the Heir, there being no restraint; for there it is all one, as if the Rent had been generally reserved; but if he had said, rending Rent to himself, durante termino prædicto, the Rent there by any construction shall not be extended to have any larger continuance, but only to the Lessor himself, who hath so reserved this Rent.

In this Case now in question, if it had been demanded of him, who was to have this Rent? he would have answered that this should be to him, and to his Assigns; and not to his Heir, but he himself to have this, if he should live so long; if not, then his Assignee to have this, if assigned over by him, during the term; & posito, that he assigns this over to one, who assigns it to another, the Assignée of the Assignée shall have this Rent, but not the Heir, where no assignment was made, and so upon the whole matter, the Rent here doth not continue, and Judgment ought to be given against the Plaintiff.

4. Crew Chief Justice. There are conceipts transcendent, being rational, and which are grounded upon the reasons of Law, and such are not to be rejected, but very much to be respected.

As to the reservation here, this being annually durante termino prædicto, this is the contract made by the Lessor, to him, and to his Assignees, these are the words; so that by the intention of the parties, the Lessée is to pay his Rent to the Lessor, if he shall live, and to his Assignée, if he dies. As to Malloryes Case, being in Case of a reservation, during the term, the Law gives a favourable construction for the continuance of the Rent, and such construction is to be made in this, and in the like Cases as shall be according to the meaning and intention of the parties, here in this principal Case, the Assignée of the Assignee brings this Action. If a Lease be made rending Rent annually during the term, to the Lessor, this shall not go unto his Heir, for it shall be intended to be to him, if he shall live so long, but if he dies, during the term, because by his express reservation, he hath fixed the payment upon the Lessor only, this shall go only unto him. But here in this principal Case, the reservation is, rending Rent annually, durante termo prædicto, to the Lessor, and to his Assignées; so that by this he explains himself, who should have this Rent (S) he, and his Assignées, and this differs from Butchers Case, cited Hillar. 33 Eliz. C.B. Rot. 1116. for there the Heir brought the Action of Debt, and he was excluded by the words of the reservation. And so upon the whole matter, Judgment ought to be given for the Plaintiff.

Butchers Case, Hill. 33 Eliz. C.B.Rot.1116. Judgment for the Plaintiff,

Afterwards Bridgeman Serjeant moved the Court in this Case, to have Judgment for the Plaintiff.

Crew Chief Justice, Jones & Whitlock Justices, Dodderidge absent, were all clear of opinion for the Plaintiff, and accordingly the Rule of the Court was, that if cause (by a time prefixed) was not shewed to the contrary, Judgment to be then entred for the Plaintiff, and no cause being shewed, Judgment was given for the Plaintiff, and execution taken out.

Calfe

Calfe Plaintiff against *Bingley*, & *Davies*, the Mainpernors of *Hall.*

Entred Termin. Hillar. 22 Jac. B. R. Rot. 951.

IN a Scire facias against the Bail, the Case appeared to be this. A Judgment was given against Richard Hall, the Principal in B. R. upon this Judgment a Writ of Error brought in the Exchequer Chamber, according to the Statute of 27 Eliz. c. 8. and hanging this Writ of Error, by the procurement of the Bail of Hall, Hall the principal appeared, and rendred himself in discharge of his Bail, hanging this Writ of Error, a Scire facias was brought against the Bail, who pleaded in discharge of this, that after the Writ of Error brought, and hanging this, the Principal reddidit se in exoneratione balliorum, and also that before the Scire facias brought, and before the Writ was determined, and hanging this, the Principal dyed; unto this Plea of the Defendants, the Plaintiff demurred in Law.

A *Scire facias* Stat. of 27 El. cap. 8. Jones 138. Latch 148. Poph. 185. Ben. 184. Noy 82.

The Question was, whether this be a good Plea, in discharge of the Bail, and whether after all this, the Plaintiff may resort again unto the Bail by a Scire facias.

It was urged for the Plaintiff, that this Plea was not good, being double, the same having two matters issuable in it, as 1. the render of the body of the Principal, and the second, the death of the Principal, before the Writ of Error determined.

Jones Justice. In a Writ of Error, the tenor of the Record is sent away, but the Record it self remains here, vide the Statute of 27 Eliz. which gives the Writ of Error in the Exchequer-Chamber; upon a Judgment given here, by the Writ of Error, the virtue and efficacy of the Record is suspended, and in Judgment of Law is no Record, until the Judgment be reversed, or affirmed, as appears 6 Eliz. Dyer fol. 227,228.

6 Eliz. Dyer, f. 227, 228.

Curia, Whitlock & Jones Justices being only present, and clear of opinion, that the Bail is by this discharged, and that he cannot after all this, resort unto the Bail. As to the render of the principal, hanging the Writ of Error, reddidit se prisonæ, this he may well do, and this is to be entred of Record, and there ought also to be a committitur by the Court, and this is triable by the Record, but he cannot be in execution, as long as the Judgment remains undetermined, by the Writ of Error; during this time, the party cannot pray him in Execution, neither can the Court grant him to be in execution, because that all the proceedings are suspended, hanging the Writ of Error, but he remains in Custodia Marischalli, to be taken in execution, after the Writ of Error determined, if Judgment be affirmed: and if the party will not then pray him to be in execution, the Court will then discharge him.

Nota, that all the Clerks and Attourneys, for the course of the Court said, and informed, that hanging the Writ of Error, the Principal may render his body in execution in discharge of the Bail, because the Record of the Bail is a distinct Record of it self, and that a Scire facias might be brought against the Bail, pendant the Writ of Error, quod non est lex, the opinion of the Judges for point in Law being against them.

Whitlock Justice. The point here is, whether hanging this Writ of Error, the Principal may render himself prisoner, in discharge of his Bail, or not, whether he may waive the benefit which the Law hath given unto him by the Writ of Error.

It hath bæn objected, that the Principal may render himself in execution, in exoneratione of his Bail. As to this he cannot be in execution, pendant the Writ of Error.

Jones Justice agreed with him herein, For that the Writ of Error, is a suspension of the Judgment, and the party cannot be in execution so long as the Judgment by the Writ of Error remains undecided; the same being by this suspended; also if the party do not pray him in execution, the Court will then discharge him.

Whitlock Justice agreed herein, the sole point here considerable is, how, for there may be a render by the Principal of himself, after the Writ of Error brought, and hanging the same.

Jones Justice. When I was in the C. B. this was then there in question, whether by a Scire Facias the party might resort to the Bail, after a Writ of Error brought, and there this point was then left as a question not resolved. But I am of opinion, that he cannot in such a manner resort unto the Bail, by a Scire Facias, after the Writ of Error brought, for by this Writ of Error, upon the Judgment here giveu, there is a stay of execution, until the Judgment be affirmed or disaffirmed.

When I was in Ireland, a Judgment was there given before me, and a Writ of Error brought here upon this Judgment, and the tenor of the Record sent hither, and afterwards the Judgment was affirmed, I then did doubt whether I might proceed there to give Judgment, because the tenor of the Record was here in B. R. I put this questiou here to the Judges, to have their Resolution herein, they did all here resolve, and sent me their resolutions in this, that I might well there proceed to give Judgment, which was so done accordingly.

In this principal Case, Curia, (S.) Jones & Whitlock being only present, after the Writ of Error brought, and hanging this, the principal rendring of himself, cannot be prayed in execution, neither can the Court grant him to be in execution, because that all the procedings in this matter, are now suspended by the Writ of Error brought, and hanging the same. And so without any further debate at this time (the Court not being full) the same was adjourned to a further time, to be moved again in full Court.

Term. Trin. 2 Car. R. B R. this matter moved again.

Afterwards, (S) Termin. Trinit. 2 Car. Regis B.R. this matter was moved again, and much debated.

Jones Justice. The Bail may bring in the principal, at any time before the Judgment affirmed, but he shall not be prayed to be in execution, until the Judgment be affirmed or disaffirmed; but he shall remain in Prison in custody, until this be done.

Crew Chief Justice. Hanging the Writ of Error, the Bail may bring in the body of the Principal, at any time, when he will, but he shall not be prayed in execution, before Judgment be affirmed or disaffirmed.

Hobbs Case.

Jones Justice. It was held in Hobs Case, that though a Capias be against the Bail yet he may bring in the body of the Principal, at any time, before the Judgment be affirmed. The Bail is not chargeable before a Scire Facias brought against him. There ought to be 1. A Capias against the Bail, before he is to charge him, and if the Principal dies before the Scire Facias, the Bail by this is discharged, and this by the Act of God.

The Court was clear of opinion in this, that the Bail was not to be charged, but by a Scire Facias first had against him, and if before the Scire Facias, the Principal dies, the Bail shall be discharged, as here in this principal Case.

The

The Court was also clear of opinion, that the Bail may bring in the Body of the Principal at any time. But to charge the Bail, there ought to be shewed, That the Capias was returned, and filed against the Bail.

The Court was clear of opinion in this Case against the Plaintiff, that he cannot have a Scire Facias against the Bail, after a Writ of Error brought, and hanging the same; and therefore the Rule of the Court was, that if the Plaintiff shewed not better cause the next Term, Judgment then to be entred against him.

Afterwards, (S.) Term. Mich. 2 Car. R. B. R. this Case was moved again, and argued at the Bar, and after by all the Judges, and at last adjudged against the Plaintiff. Termin. Mich: Car. B.R. &c.

Crew Chief Justice. It remains doubtful, whether by the rendring of himself, he shall be in execution, or not, reddidit se in exoneratione manucaptorum suorum, the Principal here dyed, breve de errore tunc pendente indiscusso, he dyed before the Return of the first Scire Facias, there being no Capias at all.

Dodderidge Justice. If you will have execution, you ought then to shew all things to enable you to have execution, to shew whether there was any Capias, or not, here there was none.

Crew. The condition is double, to render himself, or to pay, &c. No Capias here, but a Scire Facias against the Bail, before the return of it, the Principal renders himself, and hanging the Writ of Error dies, the Bail by this discharged.

Jones Justice. The Bar here is not double, here the Principal may render himself, before Judgment, and this is good, but yet not to be in execution, until after Judgment, and a prayer to have him to be in execution, but in the interim, the Marshal may have him in his Custody, but he cannot be in execution, hanging the Writ of Error undetermined.

As to the Plea here of the Defendants, the same is good, and not double, as it was objected.

As touching the Principals rendring of himself, and the time when he may so do. In these Cases, the same came to be questioned between Styles and Seager in the C. B. when I was there, & 43 Eliz. B. R. between Hobbs & Doncster, there questioned, whether upon a Judgment given, the Principal, to render himself presently, or not until a Capias. *Styles & Sedgars* Case, C.B. &c.

There Resolved, That he is not to render his body until a Capias brought, and returned against him, and that if the Principal dies before this be done, the Bail is discharged, and this so agreed there by all.

And so was the Case also in the C. B. where agreed, that if the Principal dyed before any Capias had, and returned, there resolved, the Bail by this is discharged, so that none can fall upon the Bail, until a Capias, and if the Principal dies before the Bail is discharged; and if there was any Capias, this ought to come on the Plaintiffs part, to shew this to be so, and that the death of the Principal was after the return of the Capias, and this to be shewed by him, by way of Replication, but this he hath not done.

Dodderidge Justice. The Plea here is not good, but he proceeds, and shews the death of the Principal, before the return of the Scire Facias.

Crew. The act of God here hath discharged the Bail.

Dodderidge. A Capias is first to be awarded, and no Scire Facias to be against the Bail, before a Capias had, and returned against the Principal. A Capias is first to be taken against the Principal, and upon a Return made of Non est inventus, then a Scire Facias, to be against the Bail, but not before, for you cannot charge the Bail, before a Capias had against the Principal, and the Bail may bring in the body of the Principal, but no such matter here appears, which should have been shewed by the Plaintiff, to have enabled him, to have had execution against the Bail, No Capias being at all here shewed to be had. Also if you have here a Judgment, and

upon

upon this you will have Fieri Facias, or an Elegit, by this you have made your election, and you shall never now charge the Bail.

Whitlock Justice. The Bail here are to be discharged.

The wole Court in this Case agreed clearly against the Plaintiff, and that first there ought to be a Capias against the Principal, and upon a Non est inventus returned, then a Scire facias to be against the Bail, but not before, and so upon the whole matter, the Rule of the Court was, quod querens Nil capiat per Billam.

Judgment *quod querens nil capiat per billam.*

Harrison Plaintiff against *Rock* Defendant.

Entred Termin. Trinit. 1 Caroli Regis B. R. Rot. ----

Action upon the Case for stopping a way. Latch. 110. Ben. 160.

IN an Action upon the Case for stopping of a way, ad dampnum 40 l. which way the Plaintiff claimed by Prescription: A special Issue joyned upon the place where the disturbance was laid to be, a Verdict was given for the Plaintiff.

It was moved for the Defendant in arrest of Judgment, that the Declaration was not good, and divers exceptions taken.

First Exception, because it is shewed that one Wilson was seised of the House in Sturbridge, and that he, and all those who, &c. time out of mind have used to have a way, without shewing that this was Antiquum Messuagium.

Second Exception, because it is not shewed in certain, where this way is, nor how this way goeth.

Third Exception, because it is not laid in what Town this way is.

Fourth Exception, because it is not shewed what manner of way this was, whether appendant, or &c.

This Case was argued at large, and in part resolved the last Term, but because it was then upon the first Argument, &c.

Dodderidge Justice somewhat differing in opinion from the rest of the Judges, for this cause no Judgment was then given, but the cause was adjourned until this Term, to be opened and argued again.

Bridgman Serjeant and Wild, moved for Rock in arrest of Judgment, Littleton & Trotman for the Plaintiff to have Judgment.

Whitlock & Jones Justices maintain their former opinion the last Term, that the Declaration is good and sufficient, notwithstanding the Exceptions taken to it, and that Judgment ought to be given for the Plaintiff.

Dodderidge Justice. The Declaration here might have been better, but as the same now is, it is good and sufficient, and the matter now rests upon the Verdict.

As to the first Exception taken, because he doth not say that it was Antiquum Messuagium, as it is in 6 E. 6. Dyer fol. 70. in Ishams Case, where he ought to say, that it was Antiquum parcum, or not good, as it is there resolved; there it is said, if the Park be ancient, then it follows an ancient Parker there to be.

If one prescribes, that Land is devisable in a Borough, he ought to say that it was an ancient Borough, by 7 E.4.fol.6. 15 E.4.fol.14. 7 H.6. fol. 32. touching the return of the Sheriff, in a Nativo habendo, to say, Quod Civitas London est antiquissima Civitas, 22 H.6. Fitz. Prescription, pl. 57. 21 E. 4. fol. 54. & Coke 4 pars, in Lutterels Case: If one prescribes for Estovers, he ought to alledge, that it was an ancient House, and that time out of mind used to have them.

7 E.4 fol.6.&c.

But

But as this principal Case here is, he needs not to alledge that the Messuage fuit antiquum Messuagium: There is a way which may be appendant and incident: If the way be claimed, as belonging to the said House, there it is appendant, and he ought to plead, that the House est antiquum Messuagium, or not good; but the same is not so here, being only that he hath had a way, so that this way is not claimed as incident to the House, but the House is only terminus a quo, and so upon this difference, all the Books may be well reconciled, and so are all the Presidents.

But where this way is claimed as belonging to the House, there the same is incident and appendant unto it, and there he ought always to say that the House was antiquum Messuagium; but here he claims the way only from the House to the Close and Meadow, so that the Messuage is here named only, ut terminus a quo, and not as belonging, or as incident to it; and upon this difference, upon view of the Books and upon the pleading of this Case, I am of opinion, that in this Case as it is here pleaded, the Plaintiff ought not to plead that this House was antiquum Messuagium, because that the way, by the pleading, is not laid to be belonging, nor yet incident to the House.

As to the second matter, he sheweth this particular way how it leadeth, but gives no name unto it, as by 39 H. 6. fo. 6. he ought to have named the way in pleading of it; But here, we are in case of a private way: The Declaration, as to this, might have been better, but as it is, it is good and sufficient; for here he makes no use, nor yet lays any prescription in the by-way, but he doth use this, and names this only to bring him to his private way, the which is said to lead to such a Bridge; a private way is an ease to the party who hath it, and a charge and burthen to the other, and therefore when he comes to his private way, in pleading he ought to make and lay this certain; here it is laid to be prope such a croft, this is not good; but here the Jury have found this way for the Plaintiff and so this verdict hath aided all other imperfections, and so upon the whole matter, the Declaration is here made good by the verdict, and so Judgment ought to be given for the Plaintiff.

Crew Chief Justice agreed herein, that the Declaration is good, and that the verdict here hath aided and made good all the imperfections in the Declaration, if any be; there will be a difference between a Custom of a place, and a prescription. In case of Custom you ought to say in pleading, antiqua Civitas & antiquum Messuagium, but in case of a prescription, which is personal, otherwise it is; the difference before put is very probable, where the way is laid to be belonging to a Messuage, and where not; but the Messuage is named only, ut terminus a quo, the way to be; here the inference is vey forcible, and of great relation, for he cannot have a way time out of mind, from the said Messuage, if the Messuage was not antiquum Messuagium, as by 6 E. 6. Dyer fol. 70.

As to the Presidents, I have viewed some of them in the Book of Entries, in tit. Trespas, and there he is not to say, antiquum Messuagium: This Declaration here is good and certain, but it might have been better; but the verdict here hath made all good.

The whole Court agreed, that the Declaration here is good, and sufficiently certain, notwithstanding the Exceptions taken against it, all which the Court overruled, that the Plaintiff had just cause of Action, to have satisfaction for the wrong done him, and having a verdict, he ought to have his Judgment, and accordingly by the rule of the Court, Judgment was given, and so entred for the Plaintiff. Judgment for the Plaintiff.

Mountford

Mountford Plaintiff, against *Sidley* Defendant.

Entred Termin. Hillar. 22 Jac. B. R. Rot. 312.

Trespass. IN an Action of Trespas, for the taking of three Loads of Oats, the Defendant in Bar avows the taking, for damage feasant, being upon his Land, he having a Lease of this Land made unto him, by one Beckington, the place called Herles Close, within the Parish of Tawen. The Plaintiff replies, and agrees the Lease to be so made to the Defendant, but saith, that he was Parson of the Parish of Tawen, and that the Oats were there set forth for him, for Tithes, and that he took them.

The Defendant Rejoyns, and takes by Protestation, that they were not set forth for Tithes, and for Plea saith that Sidley did not demise to Hawks for one year (who as the Plaintiff supposes) did sow the Land, and set forth the Oats for Tithes, and doth travers the Lease made by Sidley to Hawks for one year; upon this Travers the Plaintiff demurs in Law.

Whitlock Justice. That the Travers here is not good, and upon consideration had of the whole matter, Judgment ought to be given for the Plaintiff; the Defendant here hath admitted, that the Plaintiff was Parson, and hath also admitted, that the Corn was set out for Tithes, and the Defendant took them. The Case is no other than this, That Corn is set forth for Tithes, and the owner of the Land takes this as for damage feasant without making this to appear in pleading, (as he ought to have shewed) that the Parson had suffered the Corn to remain overlong upon his Land to his damage. The Parson might have an Action of Trespas for the taking away, if once they were set out for Tithes, and after taken away. The Defendant here disclaims in any title, or property unto the Corn, he claims nothing in it, but he admits the Plaintiff to have the sole property; where he distrains for damage feasant, he ought here specially to shew that the same remained there so long, so that by this, there was a damage to him, and lawful it is in such a Case to distrain Corn in shocks, but not so for Rent, and so the difference is taken.

10 H.7. 21 H.7. 22 E. 4. f. 50. 10 H.7. 21 H.7. and 22 E.4.fol.50. As to the Travers here taken, this is not a material Travers, and so for this cause not good, the same being (absque hoc) that Sidley had demised unto Hawks for one year, this is no way at all material. If he had said, absque hoc, quod possessionatus fuit, and sowed. He needs not to take notice of his title, in an Action upon the Statue of 2 Ed.6. for not setting out of Tithes; he is not to lay, and set forth a title in the Defendant, but only, that he was possessed, without shewing any title, and this is sufficient; here the Defendant by his Travers, admits the Plaintiff to be Parson, so the Travers is not good, and Judgment ought to be given for the Plaintiff.

2. Jones Justice, It doth not appear here, whether the Plaintiff hath brought his Action, as Parson, or otherwise, and therefore the Defendant may well plead in Bar, the Parson ought to make his title; the Parson, where Tithes are set out, hath a liberty for a time convenient to come and carry them away, and this conveniency of time, is tryable by a Jury: and this is a Licence which the Law gives unto him, and if he exceeds this, he shall be subject to an Action; and then by the Judgment of Law, he shall be taken for a Trespassor, ab initio, otherwise it shall be of a Licence in fait, given by the Parson himself; if he exceeds this, no Action of

Trespass

Trespass lyeth for this, but an Action upon the Case, and this difference is taken.

Coke 8 pars fol. 146. in the six Carpenters Case. If an Action is brought for taking away of Tithes, the Defendant ought to plead specially, (S.) either that they were not set out for Tithes, or else being set out, they were suffered to remain there over-long, here the Parson makes his Title in his Replication. As to the Travers by the Defendant, of the demise to him, who set out the Tithes, this is a bad and an impertinent Travers. If one, who hath some colour of Title, sowes the Land, and sets out the Tithes, though this be by a Disseisor, this is good for the Parson; otherwise it is, where one without any colour sets out Tythes, this is no setting out in Law; here the Travers being of a particular inducement to the Title, is not good, and so the Travers here is bad, and Judgment ought to be given for the Plaintiff.

Dodderidge Justice. The Travers here is bad, both for the matter and the manner of it. As touching a Travers, this thing is to be traversed, which goes to the point of the action, any other Travers is not good, because not material, to the Title of the Plaintiff here, be the demise to Hawks, for one year, or for half a year, it is not material; and for this cause the Travers is not good: the Defendant here might have said that he was not Parson, or that it was not within the Parish. Or 3. that it was not severed from the nine parts; If any of these so be, the same would have well served his turn, and a material Travers might have bèen upon any of these. But here he hath traversed a thing merly immaterial. As to the manner of the Travers, the same is here also void, for the manner of it, for he hath here traversed a Conveyance only, and no other thing else, and this is not good. He doth here travers only the Conveyance to the Title, which enables him to have the Tithes, and therefore this Travers is not good. Also, this Travers is not good, because he hath here taken a captious Travers, the same being absque hoc, that he demised to Hawks for one year, so that upon the whole matter, the Travers here is bad every way, both for the matter and the manner of it; and therefore Judgment ought to be given for the Plaintiff.

4. Crew Chief Justice. The Defendant hath here allowed a good Title in the Plaintiff unto the Oats. If it appears by the Declaration, that he was Parson, then by the Ear, he ought of necessity to have shewed the cause of his taking for damage feasant, but here, as this Case is, he needs not to do it, because the Plaintiff doth not bring this Action, as Parson. But in his Replication, makes his Title, as Parson. The Travers here of the Defendant is not good. If the Corn had continued there over-long, his remedy had bèen, by his Action upon the Case, but here no Title appears but only for the Plaintiff, so the Travers is bad, and Judgment ought to be given for the Plaintiff.

And so accordingly, by the Rule of the Court, Judgment was given, and so entred for the Plaintiff. Judgment for the Plaintiff *per Curiam.*

Termino Paſchæ,

2 Car. *Banco Regis.*

Shury Plaintiff againſt *Piggot* Defendant.

Entred Termin. Hillar. 1 Car. B. R. Rot. 124.

IN an Action upon the Caſe, for ſtopping of a Water-Courſe, which had uſed to have its current from ſuch a place, through ſuch a place, and ſo to come into the Plaintiffs yard, and there to fill and ſupply a Pond with water, for the neceſſary watering of his Cattel, that the Defendant hath erected a ſtone-wall, and ſo hath ſtopped this, that the Plaintiff wanted his water, and was by this dampnified.

An Action upon the Caſe Poph. 166. Jones Rep. 148 Latch. 153. Noy 84. Ben. 188.

The Defendant pleaded in bar, a unity of poſſeſſion in the Land of the Houſe, and place to which, and of the Land through which, and of other Land, of which, &c.

The only queſtion moved, and inſiſted upon was, Whether this unity of poſſeſſion will extinguiſh this Water-Courſe or not.

This Caſe was argued at the Bar, and much debated, and for further argument, the ſame was adjourned to another time.

Afterwards, (S.) Termin. Mich. 2 Car. R. B. R. this Caſe was moved again, and urged, that by this unity of poſſeſſion, the Water-Courſe is not extinguiſhed; and for this purpoſe, Coke 4 pars Terringhams Caſe, 14 H. 4. fol. 7. profite apprender extinct by unity. 21 E. 3. fol. 2. a way extinct by unity. 35 H. 6. fol. 55, 56. a Warren not extinct by unity, he may hawk in his own Land. 16 Eliz. Dyer fol. 326. 13 Eliz. Dyer fol. 295. 11 H. 7. fol. 25. the Caſe of the Gutter not extinct by unity, as it was urged. Termin. Hillar. 36 Eliz. B. R. Rot. 1332. a Caſe between Herneden and Crowch, was urged, that ſervice of incloſure extinct by unity, and 39 Eliz. Harringtons Caſe was urged, in which it was adjudged, that ſervice of encloſure ſhall be extinct by unity of poſſeſſion, and not to be afterwards revived.

Term. Mich. 2 Car. R. B. R. this Caſe moved again. Coke 4 pars. *Tirringhams* Caſe. 14 H. 4. f. 7. &c

Hillar. 4 Jac. B. R. Jourden againſt Atwood, the Caſe of a Way adjudged, to be extinct by unity, as it was urged, and not to be revived. 24 E. 3. fol. 25. Common extinct by unity.

Jourden & Atwoods Caſe. 24 E. 3. fol. 25.

11 H. 4. fol. 5. A way extinct by unity.

Dodderidge Justice. If I have a Mill, and a Water-Course unto it, he sells the Land, he shall not stop the Water, being matter of necessity, and not like unto the Case of the way; therefore not to be extinct by unity, because of necessity, and the same hath a continual running.

The Reason of the Case of enclosure urged is, because the prescription there was interrupted, and therefore all gone, and extinct, and so it was adjudged, 3 Jac.

3 Jac.

The whole Court at this time seem'd to be clear of opinion, that the Water-course here, was not extinct, by the unity of possession, there being a great difference between this Case, and the Case of the way.

Whitlock Justice. The Course of a Spring, is a natural Course, and current, and to stop this, may be a Nusans to the Common-Wealth, and a private wrong.

Term. Mich. 2 Car. R. B. R. this Case argued by the Judges.

Afterwards this Case was argued at large by all the four Judges, Term. Mich. 2 Car. R. B. R. who all agreed in opinion, that Judgment ought to be given for the Plaintiff, and that the Water-Course in this Case, is not extinct, by the unity of possession.

1. Whitlock Justice. There is a difference between a Way, a Common, and a Water-Course. Bracton lib. 4. f. 221, 222. calls them servitutes prædiales, these which begin by private right, by prescription, by assent, as a way common, being a particular benefit, to take part of the profits of the Land; this is extinct by unity, because the greater benefit shall drown the less; a Water-course doth not begin by prescription, nor yet by assent, but the same doth begin ex jure naturæ, having taken this course naturally, and cannot be averted.

2. Jones Justice. This Water-Course is not extinct by the unity of possession, the same being a thing which ariseth out of the Land, and no interest at all, by this claimed in the Land, but quod currere solebat this way, and so to have continuance of this.

3. Dodderidge Justice agreed herein, That this Water-Course is not extinct by the unity of possession.

1. Because the nature of this is to be current.

2. Because it is also a thing of necessity, for the watring of Cattel, and a thing which of necessity is to have continuance, the same not to be extinct by a unity of possession, as common appendant to arable Land, for Cattel of the Plow, and because appendant unto ancient arable Land, (S.) Hyde & Gaigne, to be only for Cattel, (S.) Chivals & Beofes, for to plow the Land, and for Kine, and Sheep, for to compester the Land.

As to the Case of Ways, if they are private Ways, they are extinct by unity of possession, but not so, if they be Ways of necessity; as to the Church, or to the Market, and so was Pophams Opinion in his time, upon this difference, where a Way shall be extinct, and where not, by a unity of possession.

The Case of the Water-Course is upon the like Reason.

11 H.7. fol.25.

11 H. 7. fol. 25. A notable case there of the Gutter, the reason there given, because matter of necessity, where one had a Gutter running within the Tenement of another; doth purchase the Tenement, the Gutter remains, not extinct; this being as necessary as it was before.

2. Another Reason may be drawn from the nature of Water, the which will naturally descend, and will make a Way, for its passage, if stopped; it is not possible to have such to be extinct by a unity of possession.

Coke 4 pars. *Luttrels* Case.

Coke 4 pars Luttrels Case of the Mill, and the Case of the Dy-house, no Mill nor Dy-house can subsist without Water.

Crew

Crew Chief Justice agreed herein, that this Water-course is not extinct by the unity of possession; this Case differs from the Case of way, and common appendant.

Coke 4 pars fol. 38. in Tirringhams Case. 3. Resolved, that a common appendant is extinct by a unity of possession; and so it is, of every profit, which one hath out of land, and so is 24 E. 3. fol. 25. Coke 4 pars fol. 38. &c.

The whole Court agreed in the principal Case, that the Water-course was not extinct by the unity of possession; and accordingly by the Rule of the Court, (the Defendants Plea in Bar being not good) Judgment was given for the Plaintiff. Judgment for the Plaintiff.

FINIS.

An

An Alphabetical TABLE Containing the ſeveral Heads and Points in Law, That are Controverted and Adjudged in this Third PART.

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