THE

REPORTS

OF

Sir Henry Yelverton,

Knight and Baronet,

Late one of the JUSTICES of the COURT of *COMMON PLEAS*,

Of divers Special CASES in the Court of King's Bench, as well in the latter End of the Reign of Q. ELIZABETH, as in the firſt Ten Years of K. JAMES.

With Two TABLES; One of the Names of the CASES, the other of the PRINCIPAL MATTERS.

Publiſh'd Originally in *French* by Sir *WILLIAM WYLDE*, Knight and Baronet, the King's Serjeant and Recorder of the City of *London*.

Now carefully Tranſlated, with the Addition of many Thouſand REFERENCES.

The Third Edition, Corrected.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of *Edward Sayer*, Eſq;) for William Feales at *Rowe's Head* againſt *St. Clements* Church in the Strand; John Bindley at the *King's Arms* in *New Bond-ſtreet*; John Worrall at the *Dove* in *Bell-yard* near *Lincolns-Inn*; Charles Corbett at *Addiſon's Head*; and Richard Wellington at the *Dolphin* and *Crown*, both without *Temple-Bar*. MDCCXXXV.

TO THE

READER.

TO the Reſtitution of the *Laws* (which this Age hath moſt happily attained) we conſecrate theſe Monumental *Remains* of Sir *H. Yelverton*: A Perſon of ſo complete Judgment and renowned Abilities in this moſt Honourable Science, advantaged by the Times wherein he both Practiſed and Judged, which were learned, and ennobled by many eminent Sages of the *Law*, his Contemporaries; that we ſhall not need to direct your Acceptance of theſe his Judicious *Collections*, which his own Exquiſite Pen hath commended to the World. The *Caſes* are Select, ſuch as his curious Choice out of the Plenty of his great Obſervation preferr'd;

and in moſt of which himſelf was Counſel, the Weight whereof may well paſs for Number. It is not therefore doubted but that they will find Entertainment without a Beſpeaking Dreſs, being ſo excellent in their native Beauty. We ſhall thus then leave theſe Sir *Henry Yelverton*'s Reports to follow his Fame.

Farewel.

A TABLE OF THE Names of the Caſes.

ABraham *verſus* Wilcocks. *Page* 30
Acton & Lewys. 34
Aden & Ayer. 44
Alban *verſus* Brownfall. 163
Alexander *verſus* Lane. 137
Alexander & Raynay. 76
Allein *verſus* Randall. 49
Alſop & Shelley. 77
Alſope *verſus* Sytwell. 17
Andrew *verſus* H. *de* Lewknor. 116
Andrews & Cromwell. 36
Andrews & King. 57
Appleton *verſus* Doily. 135
Armiger Brown *v.* Wentworth. 92
Arnold *verſus* George. 16
Arundel *verſus* Arundel. 33
Arundel *verſus* Tregono. 116
Aſh *verſus* Doughly. 121
Aſhton *verſus* Burges & Dixon. 128
Ask & Gomerſhall. 133
Atkins & Brechley. 10
Atkinſon & Brooks *verſus* Lee. 172
Atwood & Blanchflower. 107
Auſtyn & Green. 86
Auſtyn & Higgs. *Page* 152
Ayer *verſus* Aden. 44
Aylet *verſus* Choppin. 183
Aylin & Goodman. 148

BAgſhaw *verſus* Gaward. 96
Baily *verſus* Moone. 69
Baily *verſus* Tailor. 24
Baker & Girling. 227
Baker & Grendil. 7
Baker & Bp. of P. *verſus* Catesby. 100
Balgay & Brinſley. 113
Banks & Bradley. 204
Barham *verſus* Netherſale. 21
Barker & Witham. 147
Barnard & Newhall. 225
Barnehurſt *verſus* Sir Charles Yelverton. 83
Barnes *verſus* Worlich. 30, 59
Barnes *verſus* Conſtantine. 46
Barnes & Hutton. 79
Barret *verſus* Fletcher. 152
Bartholmew & Dighton. 2
Barton & Gore *verſus* Starkey. 172

The Table of the Names of the Caſes.

Barwick *verſus* Foſter. *Page* 167
Baſpole & Long. 1
Bates & Nevil. 64
Beale & Braſier. 222
Beaumont & Sir Jo. Harpur. 57
Bedel *verſus* Lull. 151
Bedle *verſus* Morris. 162
Belcher *verſus* Hudſon. 156
Bell *verſus* Fox & Gamble. 161
Bereblock & Rede. 29
Berisford *verſus* Preſſe. 197
Bettiſworth *verſus* Campion. 133
Birket *verſus* Manning. 65
Blach & Everard. 52
Blanchflower *verſus* Atwood. 107
Blithman & Martyn. 197
Bogan & Kenicot. 198
Bois & Darby. 123
Boldroe & Porter. 20
Bolter & Buſtard. 7
Bonham & Repps. 131
Boothe & Edmonds. 131
Boſden *verſus* Sir Jo. Thinne. 40
Bradley *verſus* Banks. 204
Bradley & Purcell. 36
Braines & Wats. 13
Brand *verſus* Liſley. 164
Braſier *verſus* Beale. 222
Brecheley & Atkins. 10
Brenley *verſus* Todde. 168
Bridges *verſus* Einon. 214
Briggs *verſus* Thomſon. 60
Briggs & Riches. 4
Brinſley *verſus* Balgay. 113
Briſcoe & Hollis Sir John. 64
Briſtoe *verſus* Knipe. 206
Brode *verſus* Owen. 22
Bromley *verſus* Littleton. 112
Bromwich *verſus* Stone & *al'*. 161
Broome *verſus* Wooton. 67
Brothwith & Hawkins. 94
Brownſall *verſus* Alban. 163
Broxolme *verſus* Herold. 177
Bullein & Godfrey. 186
Burges & Dixon *verſus* Aſhton. 128
Burton & Sadock. 202
Bury *verſus* Wright. *Page* 126
Buſtard & Bolter. 7
Butcher & Higgins. 89
Butler *verſus* Painter. 21
Butler & Salter. 9

Campion & Bettiſworth. 133
Carpenter *verſus* Collins. 73
Carter & Ventres. 130
Cavendiſh Lord *verſus* Sir George Savil. 213
Challenor *verſus* Thomas. 143
Chambers *verſus* Maſon. 42, 47
Champernoon *Sir* Ri. *verſus* Hill. 63
Chanell *verſus* Robotham. 68
Chanudflowers *verſus* Preiſtly. 30
Charnell *verſus* Holland. 49
Cheſeman & Middleton. 65
Chetwynd *Sir* Wa. *verſus* Medſon. 220
Child & Durrant. 217
Chomley *verſus* Apſley. 210
Choppin & Aylet. 183
Clarke *verſus* Sir John Sydenham. 85
Clifford & Wever. 42
Cobb *verſus* Hunt. 119
Cogan & Wilboar. 93
Collins & Carpenter. 73
Collyer & Tompſon. 112
Collyns & Oliver. 126
Commyn & St. John. 117
Conſtable & Sutcliffe. 223
Conſtantine & Barnes. 46
Cook & Dalby. 171
Cope *Sir* Ant. *verſus* Temple. 146
Core *verſus* Morton. 22
Corne *verſus* Parſtow. 15
Cottells & Pikard. 56
Cottington & Saunders. 165
Coveney *verſus* Wooden. 220
Cox *verſus* Semor. 104
Cox *verſus* Worrall. 105
Cox *verſus* Jennings. 16
Criſpe *verſus* Viroll. 12
Croft *verſus* Walbank. 128

A TABLE *of the Names of the Caſes.*

Crompton & Smith. *Page* 5
Cromwell Lord. 15
Cromwell Lord & Andrews. 3, 6
Cruſh *verſus* Cruſh. 80
Cuſh & Stweton. 36
Cutcliffe & Sanford. 124

DAlby *verſus* Cook. 171
Dale & Parry. 95
Darby *verſus* Bois. 123
Darby & Wallop. 209
Davis & Gerry. 105
Davis & Ratcliffe. 178
Davis *verſus* Purdie. 182
Dawſon. 4
Deane & Hinde. 12
Denbaugh & Woodley. 186
Dennis & Drury. 106
Deuſe *verſus* Deuce. 228
Dewclas & Kendall *verſus* Kendall, Beſſon & Hands. 187
Dighton & Bartholomew. 2
Diſmo *verſus* Sherley. 108
Dixon & Harris. 72
Dodſon *verſus* Kayes. 193
Doily & Appleton. 135
Dorrington *verſus* Eaſt. 87
Doughly & Aſh. 121
Doughty *verſus* Fawn. 226
Draper *verſus* Fulkes. 165
Draper & Raſtell. 80
Dromant *verſus* Weſtopher. 136
Drury *verſus* Dennis. 106
Durrant *verſus* Child. 217

EAſt & Dorrington. 87
Edmunds *verſus* Booth. 131
Egles & Vale. 70
Einon & Bridges. 214
Ellis *verſus* Warnes. 47
Everard *verſus* Blach. 52
Ewer *verſus* Moyle. 140

FAirechild *verſus* Gaire. 60
Faldo *verſus* Ridge. 74
Farmor *verſus* Hunt. 201
Faſſet & Newlyn. 154
Fawcet & Roy. *Page* 99
Fawcet & Ferneley. 120
Fawn & Doughty. 226
Feild *verſus* Hunt. 103
Fenton. 27
Fernley *verſus* Fawcet. 120
Fiſh *verſus* Richardſon. 55
Fitzwilliams. 32
Fletcher & Barret. 152
Flud *verſus* Rumcey. 160
Ford & Roy. 99
Foſter & Sir George Moore. 62
Foſter & Barwick. 167
Fox & Gambler *verſus* Bell. 161
Freiſton *verſus* Shellito. 165
Freſhwater *verſus* Rois. 51
Frith & Godley. 159
Fryar & Croucher. 2
Fulkes & Draper. 165
Fulſtow & Harriſon. 108
Fulwood & Lucas. 208

GAir & Fairechild. 60
Game & Feme *verſus* Harvie. 50
Gaſcoigne & Greene. 36
Gaward & Bagſhaw. 96
George & Arnold. 16
Gerry *verſus* Davis. 105
Gibſon *verſus* Holcroft. 31
Gill *verſus* Glaſſe. 227
Girling *verſus* Baker. 227
Girling & Sallows. 203
Godbold & Talbot. 137, 147
Goddard *verſus* Thorlton. 170
Godfrey *verſus* Bullein. 186
Godley *verſus* Frith. 159
Gold *verſus* Robins. 145
Gomerſhall *verſus* Aske. 133
Gomerſhal *verſus* Medgate. 194
Goodman *verſus* Ayling. 148
Goodwyn *verſus* Goodwyn. 39
Goodwyn Sir Fr. *verſus* Welſh & Ouer. 151
Goodyer *verſus* Junce. 179
Goege & Troughton. 166
Goring *verſus* Goring. 10

A TABLE *of the Names of the Caſes.*

Goſper & Shire *verſus* King. *Page* 58
Gough & Yates. 33
Gray *verſus* Metcalfe. 21
Green *verſus* Gaſcoigne. 36
Green *verſus* Auſtin. 86
Green *verſus* Eden. 138
Grendit *verſus* Baker. 7
Greſham Sir Tho. *verſus* Grinſley. 88
Greſham & Semaine. 28
Greſil *verſus* Sir Chr. Hodſon. 143
Greſil & Hoddeſden. 104
Guile & Peckas. 128
Gurnons *verſus* Hodges. 11
Guy & Heynes. 107
Guy & Jeffrey. 78

HAithwaite & Jennings. 106
Harburne & Wood. 52
Hardiman & Feme *verſus* Paler & Bartlet. 71
Hargrave *verſus* Rogers. 52
Harpur St. Jo. *verſus* Beaumont. 57
Harpur & Readhead. 114
Harrington *verſus* Launſdon. 97
Harris *verſus* Dixon. 72
Harriſon *verſus* Fulſtow. 108
Harriſon & Rice. 221
Harvey & Game. 50
Harvey *verſus* Young. 20
Hatley & Jennings. 19
Hawes *verſus* Loader. 196
Hawkeſhead & Wood. 13
Hawkins & Moore. 180
Hawkins & Slocomb. 222
Hawks *verſus* Brothwith. 94
Heake *verſus* Moulton. 90
Heape & Stile. 72
Heines *verſus* Guy. 107
Herne & Lilburne. 211
Heyford *verſus* Reve. 39
Higgins *verſus* Butcher. 89
Higgs & Auſtyn. 152
Hill & Champernoone. 63
Hind *verſus* Deane. 12
Hobbs & King. *Page* 25
Hodges & Gurnons. 11
Hodſden *verſus* Greſil. 104
Holcroft & Gibſon. 31
Holland & Charnell. 49
Hollis Sir Jo. *verſus* Briſcoe. 64
Holſworth *verſus* Sir Stephen Procter. 110
Honyman & Tocock. 6
Horne *verſus* Widlake. 141
Hoſteler. 66
Howſe *verſus* Webſter. 103
Hudſon & Belſher. 156
Hughes *verſus* Kenie. 215
Hughes *verſus* Philips. 38
Humfry & Lathbury, *&c.* 115
Hund. *de* Leuknor & Andrews. 116
Hunt & Cobb. 119
Hunt & Farmer. 201
Hunt & Feild. 103
Hunter & Maſſam. 189
Hutton *verſus* Barnes. 79
Huys *verſus* Wright. 35

JAckſon & Odingſall. 224
Jeffrey *verſus* Guy. 78
Jemx & Harriſon. 97
Jennings & Cox. 6
Jennings *verſus* Haithwaite. 106
Jennings *verſus* Hartley. 19
Johnſon *verſus* Turner. 5
Johnſon *verſus* Procter. 175
Jones & Smith. 184
Junce & Goodier. 179

KAye & Dodſon. 193
Keme & Hughes. 215
Kendall & *alii verſus* Dewclas & *alios*. 187
Kenicot *verſus* Bogan. 198
Ket *verſus* Life. 125
King *verſus* Hobbs. 25
King *verſus* Andrews. 57
King *verſus* Goſper & Shire. 58
King & Shire. 32
Kinrick *verſus* Pargiter. 129

A TABLE *of the Names of the Caſes.*

Knipe & Briſtoe. *Page* 206
Kniveton *verſus* Roiley. 182
Knott & Tompſon. 144

LAcon & Lee. 69
Lane *verſus* Alexander. 122
Lane & Alexander. 137
Lane & Weſt. 137
Lapworth *verſus* Waſte. 77
Lathbury & *feme verſus* Humphrey. 115
Laundſdon & Harrington. 97
Lea *verſus* Minne. 84
Lee *verſus* Atkinſon & Brooke. 172
Lee *verſus* Lacon. 69
Lewys *verſus* Acton. 34
Life & Ket. 125
Lilburne *verſus* Herne. 211
Liſley & Brand. 164
Littleton & Bromley. 112
Loader & Hawes. 196
Loggins *verſus* Titherton. 225
Long & Baſpole. 1
Lovelace. 26
Lucas *verſus* Fulwood. 208
Lull & Bedel. 151

MAN & Winkworth. 114
Manning & Birket. 65
Markham *verſus* Molineux. 120
Markham *verſus* Turner. 155
Markham & Tailer. 157
Martham *verſus* Jemx. 97
Martyn *verſus* Blithman. 197
Maſon & Chambers. 42, 47
Maſſam *verſus* Hunter. 189
Matthewe & Roy. 90
Mayer & Weblin. 153
Medgate & Gomerſall. 194
Meeſon & Sir Wa. Chetwynd. 220
Metcalfe & Gray. 21
Middleton *verſus* Cheſeman. 65
Miller Sir Robert. 120
Milton & Tuthill. *Page* 158
Minne & Lea. 84
Moile & Ewer. 140
Molineux & Markham. 120
Molineux *verſus* Molineux. 169
Molineux *verſus* Rigges. 55
Moone & Baily. 69
Moone & Pratt. 82
Moore Sir George *verſus* Foſter. 62
Moore *verſus* Hawkins. 180
Mordant Lord *verſus* Walden. 110
Moreton & Core. 27
Moreton & Orde. 211
Morgan *verſus* Sock. 219
Morley & Slade. 20
Morris & Bedel. 162
Morriſon & Tuerloote. 198
Moulton & Heake. 90
Mouſe *verſus* —— 46
Muſgrave *verſus* Wharton. 218

NEdham & Poole. 149
Nele *verſus* Sheffeild. 192
Netherſale & Barrham. 21
Nevil Dr. *verſus* Bates. 64
Newhal *verſus* Barnard. 225
Newlyn *verſus* Faſſet. 154
Newſam & Pudſey. 44
Newſam & *Feme verſus* Smith. 189
Newſam & *Feme verſus* Tampian. 210
Nile *verſus* Swanſon. 142
Norton & Rippon. 1
Nowell Sir And. 81

ODingſal *verſus* Jackſon. 224
Okeley *verſus* Salter, &c. 176
Oliver *verſus* Collins. 126
Orde *verſus* Moreton. 211
Owen *verſus* Williams. 108
Owen & Brode. 22

Paine

A TABLE of the Names of the Caſes.

PAine. Page 111
Paler & Bartlet *verſus* Hardiman & *Feme*. 71
Palmer *verſus* Welder. 59
Palmer & Butler. 21
Pargiter & Kinrick. 129
Parkhurſt *verſus* Palmer. 104
Parry *verſus* Dale. 95
Paſlow & Corne. 15
Paſtons *verſus* Luſher. 155
Perient & Poulter. 195
Perſival *verſus* Spenſer. 45
Philips *verſus* Hughes. 38
Pickard *verſus* Cottels. 56
Pickas *verſus* Guile. 128
Pie & Roſſe. 207
Pierſon *verſus* Pounteys. 135
Pigot *verſus* Pigot. 54
Pincomb *verſus* Rudge. 139
Pirley & Woolby. 213
Poole *verſus* Nedham. 149
Porter & Boldroe. 20
Pounteys & Peirſon. 135
Prat *verſus* Moone. 82
Preiſtley *verſus* White. 173
Prieſtley & Chanudflower. 30
Preſſe & Berisford. 197
Pridham *verſus* Tucker. 153
Procter Sir St. & Holdſworth. 110
Procter & Johnſon. 175
Pudſey *verſus* Newſam. 44
Purdy & Davis. 182
Purſell *verſus* Bradley. 36

RAndall *verſus* Wale. 88
Randell & Allein. 49
Raſtall *verſus* Draper. 80
Ratcliffe Sir Jo. *verſus* Davis. 178
Raynay *verſus* Alexander. 76
Read *verſus* Berelock. 29
Redhead *verſus* Harpur. 114
Relfe & Staverton. 160
Repps *verſus* Bonham. 131
Reve & Heyford. 39
Rice *verſus* Harriſon. Page 221
Rich & Wilſon. 1
Richardſon & Fiſh. 55
Riches *verſus* Briggs. 4
Ridge & Faldo. 74
Rigges & Molineux. 55
Riggsby & Trulock. 185
Rippon *verſus* Norton. 1
Robins & Gold. 137
Robotham & Chanell. 68
Rock *verſus* Rock. 175
Rogers & Hargrave. 52
Roily & Kniveton. 182
Rolls *verſus* Yate. 177
Roſs *verſus* Pie. 207
Roy *verſus* Matthew. 90
Roy *verſus* Fawcet. 99
Roy *verſus* Ford. 99
Roy *verſus* Staverton. 190
Roys & Freſhwater. 51
Rudge & Pinchcombe. 139
Rumcey & Flud. 160
Rutland Com. & Spencer. 208

SAdock *verſus* Burton. 202
Saint George. 53
Saint John *verſus* Commyn. 117
Sallowes *verſus* Girling. 203
Salter *verſus* Butler. 9
Salter & Okeley. 176
Sanders *verſus* Cottington. 164
Sandford *verſus* Cutcliff. 124
Sands Lord *verſus* Scullard & Darby. 109
Savage. 28
Savil Sir George & Candiſh Lord. 213
Scadding. 134
Scotsford & Shelsbury. 22
Scullard, &c. *verſus* Sands Lord. 109
Semaine *verſus* Greſham. 28
Semor & Cox. 104
Shade *verſus* Morley. 20
Shaw & Horwood. 23
Sheffeild & Neale. 192

A TABLE *of the Names of the Caſes.*

Shelbury *verſus* Scotsford. *Page* 22
Shelley *verſus* Alſop. 77
Shellito & Freiſton. 165
Sherley & Diſmo. 108
Shire *verſus* King. 32
Sitwell & Alſop. 17
Skurro & Soprani. 18
Slocomb *verſus* Hawkins. 222
Small & Tanner. 95
Smith & Crompton. 5
Smith *verſus* Jones. 184
Smith *verſus* Newſam. 189
Smith *verſus* Smith. 130
Smith *verſus* Turner. 104
Sock & Morgan. 219
Soprani & Bernardi *verſus* Skurro. 18
Sparke & Sparke. 9
Spencer & Perſival. 45
Spencer & Woodward *verſus* C. *Rutland.* 208
Starkey *verſus* Barton & Gore. 172
Staverton *verſus* Relfe. 160
Staverton & Rex. 190
Stile *verſus* Heape. 72
Stone, &c. *verſus* Bromwich. 161
Street & Wheeler. 121
Strickland *verſus* Thorpe. 126
Stweton *verſus* Cuſhe. 36
Sutcliffe *verſus* Conſtable. 229
Swanſon & Nile. 142
Sydenham Sir John & Clark. 85

Tailor *verſus* Markham. 157
Talbot *verſus* Godbolt. 137, 147
Tampian *verſus* Newſam & Feme. 210
Tanner *verſus* Small. 95, 104
Tatem & Poulter *verſus* Perient. 195
Taylor & Baily. 24
Temple & Sir Anthony Cope. 136
Thinne Sir John & Boſden. 40
Thomas & Challoner. 143
Thorlton & Goddard. 170
Thorold & Broxholme. 177
Thorpe & Strickland. *Page* 126
Titherton & Loggins. 225
Tocock *verſus* Honyman. 6
Todd & Brenley. 168
Tompſon & Briggs. 60
Tompſon *verſus* Collier. 112
Tomſon *verſus* Knot. 144
Tregono & Arundel. 116
Troughton *verſus* Googe. 166
Trulock *verſus* Riggsby. 185
Tucker & Pridham. 153
Tuerloote *verſus* Morriſon. 198
Turner & Johnſon. 5
Turner & Smith. 104
Turner & Markham. 155
Turner & Skinner. 157
Tuthill *verſus* Milton. 158

Vale *verſus* Egles. 70
Ventres *verſus* Carter. 130
Viroll & Criſpe. 12

Walbank & Croft. 128
Walden & Mordant *Lord.* 110
Wale & Rendall. 88
Walop *verſus* Darby. 209
Ward *verſus* Walthew. 101
Warnes & Ellis. 47
Waſt & Lapworth. 77
Weblin *verſus* Mayer. 153
Webſter & Houſe. 163
Weddel & Wilſon. 144
Welder & Palmer. 59
Welſh & Over *verſus* Sir Francis Goodwyn. 151
Wentworth & Brown. 92
Weſt *verſus* Lane. 137
Weſtofer & Dromant. 136
Wever *verſus* Clifford. 42
Wharton. 23
Wharton & Muſgrave. 218
White & Preiſtley. 173
Whorwood *verſus* Shaw. 23
Widlake & Horne. 141
Wie & Morgan. 15

A TABLE *of the Names of the Caſes.*

Wilcox & Abraham. *Page* 30
Wilcox & Lovelace. 26
Wildbore *verſus* Cogan. 93
Williams & Owen. 108
Wilſhire *verſus* —— 146
Wilſon & Rich. 1
Wilſon *verſus* Weddell. 144
Winkworth *verſus* Man. 114
Winter Sir Ed. 66
Witham *verſus* Barker. 147
Wolby *verſus* Pirley. 213
Wood *verſus* Haukſhead. 13
Wood *verſus* Harburne. 52
Wooden & Coveney. 220
Woodley *verſus* Denbaugh. *Pag.* 186
Woolfreſton. 51
Wooton & Broome. 67
Worlich & Barnes. 30, 59
Worrall & Cox. 105
Wright & Huys. 35
Wright & Bury. 126

YAte & Rolls. 177
Yates *verſus* Gough. 33
Yelverton Sir Charles *verſus* Barnhurſt. 85
Young & Harvey. 20

In

In the Court of KING's BENCH.

Termino Paſchæ anno quadrageſimo quarto ELIZABETHÆ *Reginæ.*

Baſpole & Long.

THE Cuſtom within a Copyhold Manor is, that upon a Surrender made to one and his Heirs, if three Proclamations paſs, and he doth not come to be admitted, the Lord ſhall have it as forfeited: A Surrender is made to the Uſe of *A.* for Life, the Remainder to *B.* in Fee: *A.* ſuffers three Proclamations to paſs, and doth not come to be admitted; yet this doth not forfeit the Eſtate in Remainder, neither ſhall the Lord have it upon this Default of the Tenant for Life, for here the Eſtate of *A* and *B.* are divided Eſtates, and the Cuſtom ſhall be intended of an intire Fee-ſimple given to one Perſon; and the Cuſtom, being to bar an Eſtate, ſhall be taken ſtrictly. *Adjud. Quære*, if ſuch Surrender is made to *A.* and *B.* and their Heirs, and *A.* comes within the Time of the Proclamations, and *B.* doth not, if now *A.* ſhall have the whole, or that a Moiety ſhall be forfeited? Cro. El. 875. Noy 42. Vide Lutw. 769. 3 Mod. 221. 1 Show. 31, 83. Salk. 386.

Wilſon *verſus* Riche.

BAron and Feme join in a Leaſe by Indenture to *B.* yielding Rent; and it is for Years, and they make a Letter of Attorney to ſeal and deliver the Leaſe upon the Land, which is done accordingly: *B.* brings an Ejectment, and declares upon a Demiſe made by the Baron and Feme; and upon Evidence to the Jury, it was ruled by *Popham* Chief Juſtice, *Fenner* and *Yelverton*, that the Leaſe did not maintain the Declaration; for a Feme Covert cannot make a Letter of Attorney to deliver a Leaſe of her Land, altho' a Rent is reſerv'd upon it, but her Warrant of Attorney is merely void: So this Leaſe is only the Leaſe of the Husband, which is not maintain'd by the Declaration. *Yelverton* was of Counſel with the Defendant. 1 Brownl. 134. Cro. Car. 165. *contra per tot' Cur'.*

Rippon *verſus* Norton.

THE Son of *J. S.* aſſaults *J. D.* and his Son, *J. D.* goes to a Juſtice of the Peace to complain, as well on his own Behalf as on the Behalf of his Son: *J. S.* comes to *J. D.* and deſires him to ceaſe and forbear his Complaint, and he would undertake, that his Son ſhould keep the Peace both againſt him and his Son. The Son of *J. S.* afterwards breaks the Peace upon the Son of *J. D.* and the Son of *J. D.* brings *Aſſumpſit* againſt *J. S.* and declares on the Matter aforeſaid; and 'twas adjudg'd by *Gaudy*, *Fenner* and *Yelverton*, that the Action well lay, and the Conſideration precedent was ſufficient for the Plaintiff to maintain Cro. El. 881. Cro. El. 849. con. 881. acc.

maintain his Action againſt *J. S.* for altho' the Plaintiff himſelf did not complain to the Juſtice of the Peace, but *J. D.* his Father, yet becauſe *J. D.* had Cauſe to complain, both for himſelf and for his Son, and by Reaſon of the Complaint made in Behalf of the Son the Plaintiff, the Son of *J. S.* might be in Queſtion before the Juſtice of the Peace, for that Reaſon the Conſideration is good; for upon the Defendant's Promiſe, the Complaint, by which his Son might be brought in Queſtion, was ſtayed.

Dighton *verſus* Bartholomew.

Cro El. 831. *Dighton* brought *Nativo hab.* againſt *Bartholomew* in the County, and it was remov'd by *Pone* into the Common Pleas, at the Day of the Return whereof *Dighton* did not appear, and Judgment was given that *Bartholomew*, &c. ſhould be infranchiſed for ever. In a Writ of Error brought on this Judgment in *B. R.* it was adjudged that it ſhould be reverſt; for the Judgment ſhould be only that the Plaintiff ſhould be *in Miſericordia*, and not that the Defendant ſhould be infranchiſed; for the Non-appearance of the Plaintiff in the *Nat. hab.* at the Day of the Return of the *Pone* is but a Nonſuit before Appearance; for the Action and the *Pone* may be brought by ſome Stranger, as well as by the Plaintiff; and although the *Pone* ſays *(ad Petitionem petent')* yet that is but Recital and Suppoſal, which doth not conclude the Plaintiff in this Writ of Right. Alſo the *Pone* iſſues out of the Chancery, which is another Court than that in which Judgment is given; and the *Pone* is not any Declaration, but at the Day of the Return of the *Pone*, if the Plaintiff and Defendant appear, the Plaintiff ought to count on the Writ of *Nat. hab.* alledging Seiſin in Fee, Eſplees, and producing ſome of the Defendant's Blood, who acknowledged himſelf to be Villein; as appears by * 19 *H.* 6. 13 *E.* 1. (*a*) *Vill. Vide* 12 *E.* 3. *Vill.* 44. (*b*) 12 *E.* 2. *Vill.* 19 *E.* 2. (*c*) *Ibid.* 6 *E.* 2. (*d*) *Ibid. Telverton* was of Counſel with the Plaintiff.

* 19 H. 6. 32.
(*a*) Fitz. 38.
(*b*) Fitz. 28.
(*c*) Fitz. 32.
(*d*) Fitz. 26.

Croucher *verſus* Fryar.

Mo. 618. Cro. El. 704, 784. A Parſon ſued a Copyholder in the Spiritual Court for Tithes ariſing upon the Copyhold Land; he brought a Prohibition and ſuggeſted that the Biſhop of *Wincheſter*, Lord of the Manor, whereof his Copyhold is Parcel, and his Predeceſſors, &c. from Time whereof, &c. for themſelves their Tenants and Farmers have been diſcharg'd of Tithes ariſing upon the ſaid Manor; and ſhewed that he had been a Copyholder of the ſaid Manor from Time whereof, &c. and preſcribed in his Lord, now Biſhop of *Wincheſter:* And altho' here is a Preſcription upon a Preſcription, one in the Copyholder to make his Eſtate good, the other in the Biſhop to make his Diſcharge good; yet adjudg'd by *Gawdy*, *Fenner* and *Telverton*, that the Prohibition lies. *Telverton* of Counſel with the Plaintiff alledg'd the Matter *ſupra*, which was allow'd. *Nota* the Reaſon; for a Preſcription in the Lord ought of Neceſſity in common Intendment to precede the Preſcription in the Eſtate of the Copyholder, and the Diſcharge of the

Noy 132.

Tithes in the Lord (which may well be in this Caſe, becauſe he is a Spiritual Perſon) ſhall trench to the Benefit of the Tenant, who is the Copyholder, for by this Means it is preſumed that the Lord has the greater Fines and Rents. *Nota*, *Popham* was againſt this Judgment, becauſe the Plaintiff, who is the Copyholder, will have *in ſuo genere* an Eſtate of Inheritance diſtinct from the Eſtate of the Lord, who is the Biſhop.

The Lord Cromwell *&* Andrews.

IF an Aſſiſe between *A.* and *B.* is ſummon'd before Juſtices of Aſſiſe, and they are removed, and the Chief Juſtice of the Common Pleas, and another Juſtice are Juſtices of Aſſiſe in the ſame County, and the Aſſiſe is taken before them, and adjourn'd for Difficulty into the Common Pleas, where Judgment is given for the Plaintiff; and he againſt whom the Aſſiſe paſſes brings a Writ of Error in the King's Bench; which Writ is directed to the ſame Chief Juſtice of the Common Pleas before whom the Aſſiſe paſt, and recites the Aſſiſe ſummon'd before the Juſtices of Aſſiſe by Name, as (*revera fuit*) before *Gawdy* and *Walmeſly*, *& poſtmodum capta* before the Chief Juſtice of the Common Pleas, *&c.* and does not recite how the Aſſiſe came into the Common Pleas, *&c.* by Adjournment, or for other Cauſe; this Writ of Error is not good; for as by the Removal of the former Juſtices of Aſſiſe, before whom the Aſſiſe was taken, the Writ of Error by a *Poſtmodum* ought to recite the Aſſiſe taken before other Juſtices of Aſſiſe, (and yet there is only a Change of the Juſtices, and not of the Court) *a fortiori* there ought to be in the Writ of Error another *poſtmodum* when it is adjourn'd into the Common Pleas; for now both the Judges and the Court are changed. And a Difference was taken between the Caſe of an Aſſiſe and of a *Quare Impedit*, for the Aſſiſe ought to be originally commenced before the Juſtices of Aſſiſe, and ſo by Preſumption and Intendment Judgment alſo given before them, and not in the Common Pleas, unleſs upon Adjournment: And therefore, if Judgment is given in the Common Pleas, it ought to be ſpecified certainly how the Record of Aſſiſe came into the Common Pleas. But in Error to remove the Record of a *Quare Impedit*, the Writ is not of ſuch preciſe Form, becauſe the Action originally commences before the Juſtices of the Common Pleas, and by Intendment Judgment given there, altho' by the Statute to avoid a Lapſe Judgment may be given before the Juſtices of Aſſiſe. And *Fitz. N. B.* recites ſuch Form of a Writ of Error, which recites the Adjournment, *&c.* Adjudg'd *per tot' Cur'*; yet all the Curſitors were of a contrary Opinion. And alſo in the Caſe *ſupra* it was adjudged, that if an Aſſiſe is brought againſt four, and Judgment is given againſt them, upon which they four bring a Writ of Error, and upon the *Scire fac.* by the Plaintiff (who recover'd in the Aſſiſe) *quare Executionem habere non debet*, one only appears, and the others make Default, and he who appears

Cro. El. 891. Noy 44.

Vide 22 H. 6. 13. b. Darby.

aſſigns

aſſigns Errors *per ſe*, and the Defendant in the Writ of Error pleads *in nullo eſt Erratum*, this Aſſignment of Errors by the one only is ill; for all ought to aſſign the Errors together; and therefore the Writ of Error (as *Popham* ſaid) is diſcontinued; for altho' a Writ of Error is but a Commiſſion to examine the Errors, and may be lodged in Court ſeven Years without being diſcontinued, yet after the Parties have once proceeded upon it (as in this Caſe) it may be diſcontinued as well as any other Action. And in this Caſe, when one of the Plaintiffs in the Writ of Error appears, and the others make Default, he who appear'd ought to have pray'd Proceſs *ad Sequend' Simul*, and thereupon Judgment of Severance ought to have enſued; for before Appearance there can be no Judgment of Severance without Proceſs; but it is otherwiſe after Appearance; *per* 38 *E.* 3. 3. *b.*

Riches & Brigges.

Cro. El. 883, 884.

IN an Action on the Caſe the Plaintiff declared, that in Conſideration he had deliver'd to the Defendant twenty Quarters of Wheat, the Defendant promiſed upon Requeſt to deliver the ſame Wheat again to the Plaintiff. And adjudged a good Conſideration; for by *Popham & tot' Cur'* the very Poſſeſſion of the Wheat might be a Credit and good Countenance to the Defendant to be eſteemed a rich Farmer in the Country, as in Caſe of the Delivery of 1000*l.* in Money to deliver again upon Requeſt; for by having ſo much Money in his Poſſeſſion he may happen to be preferr'd in Marriage. *Quære*, for it ſeems an hard Judgment; for the Defendant has not any Manner of Profit to receive but only a bare Poſſeſſion. *Nota*, the Truth of the Caſe was (which doth not alter the Reaſon *ſupra*) that the Plaintiff had deliver'd to the Defendant the ſaid twenty Quarters of Wheat to deliver over to *J. S.* to whom the Plaintiff was indebted in ſo many Quarters, and the Defendant promiſed to deliver the ſame Quarters of Wheat to *J. S.* And becauſe they were not deliver'd, the Plaintiff brought his Action, *ut ſupra*; and adjudged *ut ſupra*. But *Nota*, the Judgment was reverſt in the Exchequer, *Mich.* 44 & 45 *Eliz.* as *Hitcham* told *Telverton.*

Poſtea 50.

Poſtea 128.

Trin. 44 Eliz. B. R.

Dawſon.

Cro. El. 888.

AN Action on the Caſe for theſe Words: *Thou art an arrant Knave, for thou haſt bought ſtolen Swine, and a ſtolen Cow, knowing them to be ſtolen.* And adjudg'd againſt the Plaintiff, for the Receipt or Sale of Goods ſtolen is not Felony, nor makes any Acceſſory, unleſs it is joinedwith a Receipt or Abetment of the Felon himſelf. And in ſome Caſe it is lawful to receive ſtolen Goods, as if the Lord of a

Manor or his Bailiff, who has *bona waviata*, meets with a ſuſpicious Perſon who has ſtolen Goods, and ſtops the Goods, and the Party confeſſes them to be ſtolen, and flies, in that Caſe, it is a Receipt of Goods ſtolen, knowing them to be ſtolen; and yet it is not any Slander, if any one ſhould ſay to him, *You have taken ſtolen Goods, knowing them to be ſtolen.* By *Gawdy*, *Fenner* and *Yelverton*, *Popham abſente.*

Crumpton *verſus* Smith.

DEBT, the Plaint is of 6 *l.* 14 *s.* 2 *d.* and declares that the Money became due by Reaſon of two ſeveral Contracts, *ſcil.* So much by the one, and ſo much by the other; and it appears by Computation of thoſe two Sums, that they are more by 3 *d.* than is contain'd in the Plaint. The Defendant pleads, as to 6 *l.* 14 *s.* 2 *d.* *nil debet*, &c. and it is found for the Plaintiff, and Judgment in an inferior Court, that the Plaintiff ſhould recover *prout narravit*; and thereupon Error is brought, and the Matter *Supra* aſſign'd for Error; for 3 *d.* more is given by the Judgment to be recover'd, than was found by the Jury to be due; and altho' the Defendant pleads only to the Sum contain'd in the Plaint, yet the Sum ſpecified in the Declaration is that whereof the Iſſue and Trial ſhould be; and it ſeem'd clearly by *Fenner* and *Yelverton* to be Error. And there ſeems to be a Difference, where the Plaint (for the Purpoſe) is of 10 *l.* and he declares, *viz.* for 10 *l.* for an Horſe, and 5 *l.* for another Contract, and the Defendant pleads *nil debet* to 10 *l.* and nothing to the other, and it is ſo found; yet that is good; for the 5 *l.* in the Declaration is but Surpluſage, becauſe the Plaint was anſwer'd *in toto* with the principal Contract laid in the Declaration, *ſcil.* the Horſe; but in the principal Caſe the Money mention'd in the Declaration being upon ſeveral Contracts, and none of the Contracts *tantum*, & *per ſe* amounting to the Sum ſpecified in the Plaint, every Part of the Declaration is made material; and ſo being found ſhort by the Verdict, the Judgment thereupon ſeems to be erroneous: *Quod* Gawdy *non multum impugnavit.* Cro. Jac. 499.

Johnſon *verſus* Turner.

TRespaſs for breaking his Houſe, and taking and carrying away his Goods. The Defendant juſtified the whole. The Plaintiff *quoad fractionem Domus* and taking of the Goods, *nec non materia in ea contenta*, demurr'd upon the Defendant's Bar: The Defendant join'd in Demurrer *in hac forma*, *quia placitum prædictum quoad fractionem Domus*, and taking of the Goods, *ſufficiens*, &c. demanded Judgment, &c. and thereupon Judgment given in the Common Pleas for the Plaintiff, and a Writ to inquire of Damages; upon which Damages were aſſeſs'd for the Breaking of the Houſe, and for the Taking and alſo for the Carrying away of the Goods. And thereupon a Writ of Error was brought, and the Judgment reverſt; becauſe in the Offer of the Demurrer *ex parte Querentis*, nothing 1 Brownl. 192.

is ſaid in Special, but *quoad* the Breaking of the Houſe, and the Taking of the Goods: And although the Words ſubſequent, *ſcil. necnon materia in ea contenta*, go to the whole Matter in the Bar, *viz.* to the Carrying away alſo; yet when the Defendant joins in Demurrer with the Plaintiff, he joins but ſpecially, *viz. quoad* the Breaking of the Houſe, and Taking of the Goods, and ſays nothing of the Carrying away; ſo as to the Carrying away nothing is put to the Judgment of the Court, yet the Writ of Inquiry of Damages is for the whole, and the Judgment alſo; and the Carrying away being Part of the Matter, and for which greater Damages are adjudged, and that not being put to the Judgment of the Court by the Demurrer, for that Reaſon the Judgment is erroneous; (*a*) for as to the Carrying away (which is Part of the Matter) there is a Diſcontinuance. This Caſe concern'd Mr. *Darcy* of the Privy Chamber for his Patent of Cards. *Telverton* was of Counſel with the Defendant in the Writ of Error.

(*a*) Vide 1 Rol. Rep. 135, 176, 406. 1 Sand. 28. 2 Sand. 127. Lutw. 1492. 1 Lev. 16. Poſtea 225. & Quære.

Tocock *verſus* Honyman.

IF a Man recovers in Debt on Bond, and has a *Fieri facias* to the Sheriff to levy the Debt, and the Defendant brings a Writ of Error upon the Judgment, and has a *Superſedeas* thereupon to the Sheriff; ſo much of the Defendant's Goods as the Sheriff has taken into his Hands, by Virtue of the *Fieri facias* before the *Superſedeas* came to him, ſhall remain to ſatisfy him who recover'd, and a *Venditioni exponas* ſhall iſſue thereupon; but after the *Superſedeas* comes to the Sheriff, he cannot proceed further upon the *Fieri facias*. *Per totam Curiam.*

The Lord Cromwell & Andrews.

IN a Writ of Error upon a Judgment given in Aſſiſe before the Juſtices of the Common Pleas, upon an Adjournment by the Juſtices of Aſſiſe, altho' the Writ of Error don't mention how the Record came into the Common Pleas, *viz.* for Difficulty or otherwiſe, whereby the Writ abates by Judgment, yet it was adjudged that the Record, removed out of the Common Pleas by Virtue of this ill Writ, remain'd in the King's Bench: And the Party ſhall have a new Writ of Error *coram nobis reſident*, for the Writ of Error recites the Record of Aſſiſe truly, both in the Names of the Parties, and of the Land; otherwiſe if there was any Miſtake in the Matters aforeſaid. And upon a *Scire facias* ſued by the Defendant in the Writ of Error, *quare Executionem habere non debet*, this *Scire facias* is merely collateral to the Record remov'd, and yet by Matter *ex poſt facto* may become a Record; as if the Plaintiff, upon the *Scire facias* return'd, appears and pleads a Releaſe, or other Matter, as he well may, then it is a Record annext to the firſt Record remov'd. But if upon the Return of the *Scire facias* the Plaintiff appears and aſſigns

his Errors, or otherwiſe by Rule of Court has Day 'till another Term to aſſign his Errors, *viz.* by Rule enter'd with the Clerk of the Papers, and upon this Record aſſigns his Errors inſufficiently, now all the other Proceedings are upon the Record which is remov'd, and now the firſt *Scire facias quare executionem habere non debet*, is but a Piece of Paper filed to the Record remov'd, and no Proceedings thereupon; wherefore upon Errors aſſigned inſufficiently, he who recover'd in the Common Pleas ſhall have Execution without another *Scire facias Quare, &c.* although 'tis after the Year; for after the Writ of *Scire facias Quare, &c.* once ſued out, the Party ſhall never have another. But if he, who ſued the Writ of Error, doth either not appear upon the Return of it, or appears and aſſigns his Errors inſufficiently, whereby a Default in him appears to the Court, he who firſt recovered ſhall have Execution without another *Scire facias*. Adjud. *Nota*, in this Caſe a Precedent *M.* 4 *H.* 5. *Rot.* — was ſhewn, which agreed with this Judgment, both for the Abatement of the Writ of Error, and alſo that notwithſtanding that, the Record is well removed. Cro. El. 892

Grendit & Baker.

THE Lord *Paulet* Tenant for Life of an Advowſon, the Remainder in Fee to *A.* Tenant for Life preſented *D.* who was admitted, inſtituted and inducted; but for Default of Reading the Articles according to the Statute of 13 *Eliz.* the Benefice was void, but *D.* continued in the Church, and was by Reputation Parſon for his Life; the Lord *Paulet* died, the Queen after the Death of *D.* reciting her Title to be by Lapſe, preſented *C.* who was inſtituted and inducted; he in Remainder preſented *S.* who was admitted, inſtituted and inducted, and brought an Action of Treſpaſs againſt *C.* the Queen's Incumbent. And it was adjudged (upon a Special Verdict finding the Matter aforeſaid, and alſo that *D.* continued in during his Life, and died, and that no Notice was given the Patron of the Voidance of the Church for not reading the Articles) for the Plaintiff, and that the Queen's Preſentation was merely void, as if ſhe had preſented to a Church full; for as to the Patron it is full 'till he has ſurceaſed his Time after Notice given; and it is all one, as if the Patron had drawn a Preſentation in Writing and put his Seal to it, and let it lie in his Study, and the Party, who ſhould be preſented, takes it without the Privity or Licence of the Patron, and carries it to the Biſhop, and is thereupon inſtituted and inducted, it is merely void and no Preſentation at all: And the Court held in this Caſe, that the Preſentation by him in Remainder was good, altho' 'twas objected that it belong'd to the Executors of the Tenant for Life, becauſe, as to the Tenant for Life himſelf, the Church was full 'till Notice. 6 Co. 29. a. 1 And. 62.

Mich.

Mich. 44 & 45 Eliz. in B. R.

Buſtard *verſus* Bolter.

4 Co. 121. Cro. El. 902, 917. Mo. 665.

THE Caſe briefly is: *Buſtard* exchanged the fourth Part of the Manor of *Barton* in the County of *Oxford* with *Savage* and *Daſton* for the Moiety of the Manor of *Ilbury* in Fee; both being in Poſſeſſion and in Demeſne; *Juſtice* (the Wife of one *Jaſper Dormer*) evicted the Moiety of the Manor of *Ilbury* by Reaſon of her Jointure, for Life: Wherefore *Buſtard* enter'd upon *Sheldon*, Leſſee of *Savage* and *Daſton*, in the fourth Part of the Manor of *Barton*, which he gave in Exchange, and brought Treſpaſs againſt *Bolter*, *Sheldon*'s Servant, and adjudged maintainable: For the Exchange being of Land in Poſſeſſion and in Demeſne at the Time of the Exchange, this Eviction of the Eſtate for Life, which takes away the whole Recompence for the Time, defeats the Exchange for ever, as well as in the Caſe in 4 *H.* 7. where twenty Acres are exchanged, and one is recover'd by elder Title, the whole Exchange is defeated; for although the whole Eſtate exchanged is not defeated, but continues as to the Reverſion, yet becauſe the Exchange was Poſſeſſion for Poſſeſſion, Demeſne for Demeſne, and this Recompence of the Poſſeſſion, which was the Motive of the Exchange, being evicted, the whole is evicted; as if an Eſtate Tail is evicted, it leaves the Reverſion, but it leaves but a dry Recompence, and therefore (*per Yelverton* Juſtice) defeats the Exchange in the whole. The ſame Law (*per Popham*) if *J. S.* makes a Leaſe for 1000 Years of Land to commence at a Day to come, and afterwards conceals this Leaſe, and exchanges the Land as in Poſſeſſion, for other Land in Poſſeſſion, and afterwards the Leſſee enters, this defeats the whole Exchange; for in Exchange Warranties are implied, which warrant Poſſeſſion for Poſſeſſion; yet there's no Doubt but that a Reverſion may be exchanged with a Poſſeſſion, but that is apparent at the Time of the Exchange. And *Nota*, *Yelverton* vouch'd *Hugh Spenſor*'s Caſe 42 *Aſſ.* 22. where it ſeems that an Eviction of an Eſtate for Life after Partition, defeats the Partition: *Quod Cur' conceſſ.* otherwiſe *Yelverton* conceived, where Rent only is evicted out of Land exchanged, or Land divided by Parcels, as 10 *E.* 3. 6. is. *Yelverton* was of Counſel with the Plaintiff.

1 Inſt. 384. a.

1 Inſt. 173. b. 174. a.

Sparke *verſus* Sparke.

A Man made a Leaſe for Life, and afterwards demiſed to *A.* for Ninety-nine Years, if he ſhould ſo long live, to commence after the Death of the Tenant for Life, and if *A.* died during the Term of Ninety-nine Years, or that the Term otherwiſe determin'd, and after the Death of the Leſſee for Life, then the Leſſor granted for himſelf and his Heirs, that the Land ſhould remain to the Executors of *A.* for Twenty Years; the Leſſee for Life died, *A.* demiſed for Twenty Years yielding Rent, and died inteſtate: *B.* took Adminiſtration, and brought Debt for the Rent; and adjudged that it did not lie; for *Gawdy* and *Telverton* conceived that this Contingent Leaſe of the Twenty Years never veſted in *A.* but that if *A.* had made Executors, that they ſhould take by Way of Purchaſe (Executors being a Name of Purchaſe, as (*a*) *Cranmer*'s Caſe 14 *El. Dy.*) But if it had been limited to the Executors for Payment of the Debts of *A.* or the like, it ſeem'd then by the Intent apparent, it ſhould be an Intereſt in *A.* and in the Executors to the Uſe of *A.* *Popham* and *Fenner* agreed for the Matter in Law as to the Action of Debt: But yet they conceived that the Executors of *A.* ſhould never take; for the Eſtate ended before the Intereſt commenced or aroſe to the Executors. (But *Quære* that; for if *A.* made Executors, in the Inſtant of his Death the Remainder took Effect in the Executors (as 7 *H.* 4. is) ſo that it could not take Effect as a Remainder, for that ought to depend upon a former Eſtate; but by them two, if it took Effect at all, it ought to be by Virtue of the Leſſor's Grant, and that cannot be, becauſe the Executors are not Parties to the Deed; and therefore, if a Man leaſes for Life, and by the ſame Deed grants that after his Death, *J. S.* ſhall have for Twenty Years, it is of no Avail to *J. S.* becauſe he is not a Party, as in the Books 19 *E.* 2. *Covenant* 25. 19 *E.* 3. *Covenant* 24. 22 *Aſſ.* 37. 49 *E.* 3. 11 *H.* 4. 34. *M. Dy.* 151. *Nota*; the chief Reaſon was, becauſe the Term for Twenty Years is but a Poſſibility. *Telverton* was of Counſel with the Plaintiff.

Cro. El. 84. Mo. 666. Executor. Poſſibility. Executor, a Name of Purchaſe. Intent.

(*a*) Dy. 309. a. b. 1 And. 19. 3 Leon. 20. Mo. 100. 2 Leon. 5.

Poſtea 85. con.

Nov 14.

Salter *verſus* Butler.

IN an Action on the Caſe on *Trover* of Cattle, the Defendant juſtified by Reaſon of a Rent granted to *A.* his Executors and Aſſigns for the Life of *B.* out of *Black Acre*, and ſhewed that *A.* was dead, and that he as Adminiſtrator of *A.* diſtrain'd for the Rent in *B. Acre* arrear after the Death of *A.* and averr'd the Life of *B.* and adjudged that the Juſtification was ill, both for the Matter and the Manner; for by the Death of *A.* the Rent is determin'd, and can't come to the Executor or Adminiſtrator; for 'twas not a Thing teſtamentary, but a Freehold; and ſo not like where 'tis granted to *A.* and his Heirs for another's Life; yet by *Popham*, and agreed *per Cur'*, if a Rent is granted to *A.* for the Life of another, the Remainder to *B.* altho' *A.* dies, whereby the Rent

Cro. El. 901. Noy 46. Mo. 664. Trover. Rent. Executors. Occupancy general, ſpecial. Remainder. Converſion. Diſtreſs.

determines in Intereſt as to the Perception of it, yet foraſmuch as the Tertenant during that Time holds the Land diſcharged of it, that is ſufficient to ſupport the Remainder: Alſo it ſeem'd to the Court, if the Rent had continued, then the Taking of a lawful Diſtreſs for the Rent was no Converſion at all; otherwiſe if the Diſtreſs was not lawfully taken.

Brecheley *verſus* Atkins.

4 Co. 18. b. Mo. 666. Action for Words.

Yelv. 34.

ACtion on the Caſe, becauſe the Defendant ſpoke of the Plaintiff theſe Words; *Thou art an old perjured Knave; that is to be proved by a Stake that parts the Land of* J. S. *and* J. D. and (by *Gawdy* and *Popham*) the Action doth not lie; for although the firſt Words (*perjured Knave*) are of themſelves ſufficient to bear the Action, yet they are ſo qualified by the ſubſequent Words, which do not ſound in any apparent Slander; for it is as much as to ſay, *Thou art a perjured Knave, but none in the World can prove it*; which will not bear an Action: So 'tis in this Caſe, the Proof of the Perjury being referr'd to (a Stake) which is a Thing inſenſible, and impoſſible to produce any Proof, qualifies the precedent Words. *Fenner* and *Yelverton contra*; and that the former Words are ſufficient to maintain the Action; and the ſubſequent Words are as void and idle; becauſe there can be no Proof in a Stake; as if he had ſaid, *Thou art perjured, though I cannot prove it*; *or thou art perjured, and that I will prove by* J. S. where there's no ſuch *J. S. in rerum Natura*, or *J. S.* is dead; yet the Action lies on the former Words. *Quære.*

Goring *verſus* Goring.

Aſſumpſit.

Conſideration to take 150 *l.* for 205 *l.*

H. *Goring* was indebted to *Smith* in 205 *l.* upon Simple Contract: *Smith* made *J. Goring* his Executor and died; *J. Goring* the Executor agreed, and was contented to take of *H. Goring* for the 205 *l.* 150 *l.* and alſo agreed to take the 150 *l.* by 20 *l. per Annum*, in Conſideration whereof *H. Goring* undertook, and promiſed to pay the ſaid *J. Goring* the ſaid 150 *l.* by 20 *l. per Annum*, and for Nonperformance of the Promiſe *J. Goring* brought *Aſſumpſit* againſt *H. Goring*; and upon *Non Aſſumpſit* pleaded, 'twas found againſt *H. Goring*. And *Hide* moved in Arreſt of Judgment, that the Conſideration to take 150 *l.* for 205 *l.* is not ſufficient, becauſe for any Thing that appears, *H. Goring* remains ſtill charged with the 205 *l.* and ſubject to the Plaintiff's Action for the 205 *l.* and therefore he ought to have ſhewn that he had diſcharg'd the Defendant of the 205 *l.* But *non allocat'*; for the 205 *l.* being due to the Plaintiff as Executor of *Smith*, the Action

for it ought to be in the *Detinet*; but now, by this Agreement to take 150 *l.* of the Defendant, and the Defendant's Promiſe to pay it, 'tis made the Plaintiff's proper Debt, and the Action for it maintainable in his own Name, without being named Executor, and altho' (by *Yelverton* Juſtice) 150 *l.* is not any Satisfaction of 205 *l.* becauſe they are both of one Nature, and its otherwiſe of Things collateral to the Debt, as an Horſe, a Cup, *&c.* yet in Reſpect that the Nature of the Action is changed, it proves the Nature of the Debt to be changed; and therefore a good Conſideration: For if the Executor is indebted to *J. S.* in 100 *l.* and *J. S.* comes to demand the Money, in this Caſe, as the Debt now is, the Executor is chargeable only in Reſpect of the Aſſets, and not otherwiſe; but if he promiſes to pay it at a Day to come, 'tis now made his own Debt, and to be ſatisfied by his own Goods. And (*per Curiam*) the Conſideration alledged is ſufficient for another Reaſon; for although the Plaintiff has not ſhewn that he has diſcharged the Defendant of the 205 *l.* yet if the Defendant ſhould be afterwards charged with it, he might have *Aſſumpſit* againſt the Plaintiff; for the Plaintiff agreeing to take 150 *l.* for 205 *l.* is a Promiſe on his Part, and ſo one Promiſe againſt another.

Gurnons *verſus* Hodges.

THE Plaintiff ſhewed, that whereas one *J. S.* was poſſeſſed of a Meſſuage by Virtue of a Decree in Chancery; in Conſideration the Plaintiff *conaretur procurare J. S.* to permit the Defendant to have the Poſſeſſion and Profit of the ſaid Meſſuage, the Defendant promiſed to give the Plaintiff 20 *l.* *Si ipſe procurare potuiſſet & procuraret* the ſaid *J. S.* to permit the Defendant *ut ſupra.* The Plaintiff *layeth in facto*, that he *did procure* the ſaid *J. S. ut ſupra*, and that the Defendant *did enjoy* the Meſſuage, *&c.* The Defendant pleaded *Non Aſſumpſit*, and it was found for the Plaintiff, and it was alledged in Arreſt of Judgment that there was no Place put where the Procurement was, and that was a Matter iſſuable *per ſe:* But *non allocatur*, becauſe the Iſſue is taken upon the *Aſſumpſit*, which is another Matter; but if the Iſſue had been upon the Procurement, then it would be otherwiſe; and Judgment was given for the Plaintiff: Another Exception was taken, becauſe it appear'd that the Conſideration was only upon a *conaretur procurare*, which is no effectual Conſideration; for an Endeavour to do ſuch an Act, without doing it in Fact, is no Benefit to the Defendant; *ſed non allocatur*; for (by *Popham*) his Labour and Pains may deſerve the Money due upon the *Aſſumpſit*; and alſo in this Caſe it appears that a Procurement in Fact is annexed and knit to the Conſideration, ſo may and ought both the Sentences, *viz.* of the Endeavour to procure, and of the Procurement in Fact, to be joined together. *Yelverton* was of Counſel with the Defendant.

Cro. El. 906. Aſſumpſit. Place. Iſſue. Conſideration.

Hob. 106.

Hinde

Hinde *verſus* Deane.

Noy 47. Cro. El. 797. Co. Entr. 234. 2 And. 170. Error. Stat. Stap. Recogn. Aud' Querela. Execution.

Machin enter'd into a Recogniſance of 2000 *l.* to *Hinde*, and afterwards enter'd into a Statute of 1000 *l.* to *Deane*, *Deane* extended his Statute upon the Manor of *D.* which was *Machin*'s, he having alſo ſeveral other Lands; afterwards *Hinde* ſued Execution of the Recognizance, and had the Moiety of the Manor of *D.* firſt deliver'd to *Deane* in Execution, but omitted ſeveral other Lands out of his Extent, which were *Machin*'s at the Time of the Recognizance: Wherefore *Deane* brought *Audita Querela* againſt *Hinde* in the Common Pleas, and had Judgment, and upon Error brought by *Hinde* in the King's Bench, it was affirmed; for *Deane* being in by Judgment, and upon Title by the Extent on the Statute, ought to have his Land liable to the Extent upon the Recognizance but *pro rata*; and therefore *Hinde* ought to have included all the other Lands of *Machin* in his Extent, as well as the Land of *Deane*: But if *Deane* had not had his Land by Title, but by Diſſeiſin, or by other tortious Means, then he ought not to be relieved upon *Audita Querela*. *Vide* 13 *H.* 7. 19 *E.* 2. *Execution.* 2 *R.* 3. *& Nota* in this Caſe by *Yelverton* Juſtice ſtrenuouſly, *Hinde* ought to have ſued *Scire facias* againſt *Deane* before he remov'd his Poſſeſſion, becauſe he was in by Title; but *Quære* that, for the Books are contrary.

Fitz. Execution, 17, 250.

4 Co. 66. b.

Criſpe *verſus* Viroll.

Cro. El. 910. Appeal.

AN Appeal by *Criſpe* againſt *Viroll*, late of *Sandwich* in the County of *Kent*, for the Murder of the Plaintiff's Brother committed in *Sandwich* by the Defendant, who gave the Plaintiff's Brother a mortal Wound there, of which he inſtantly died: And this Appeal is brought by Original in *B. R.* to the Sheriff of *Kent*, who upon *Cepi Corpus* brings in the Defendant, who pleads that *Sandwich*, within which the Murder is ſuppoſed, is Parcel of the Cinque-Ports, *ubi breve Domine Regine non currit, qui quidem Portus de* Sandwich *non eſt in Com' Cantiæ*, and demands Judgment of the Writ, and pleads over to the Felony; and adjudged an ill Plea; for altho' the Cinque Ports have ſeveral great Liberties, yet the Reaſon of the Grant of thoſe Liberties, was for the Eaſe and Benefit of the Inhabitants, and not for their Prejudice; and therefore in 50 *E.* 3 — by *Belknap*, if a Stranger comes into the Cinque Ports, and commits a tranſitory Treſpaſs, and afterwards goes out of their Juriſdiction, he to whom the Treſpaſs is done may have an Action at the Common Law; for it is more for his Benefit to have the Suit at the Common Law, than within the Cinque Ports; for they have no Power to (*a*) ſummon any Man that is out of their Juriſdiction, *viz.* in the County of *Kent*, or elſewhere, into the Limits of their Juriſdiction. Another Reaſon here

Cinque Ports.

Fitz. Juriſd. 14.

(*a*) The Original is call' Comb. 468.

was, becauſe the Defendant having committed the Murder in the Cinque Ports, and flying out of the Cinque Ports, if the Pleading here ſhould be good, it would be in Failure of Juſtice, for they of the Cinque Ports cannot try him, becauſe he is not there: But by *Popham*, if the Defendant had ſhewn that at the Time of the Murder ſuppoſed, and ever ſince he had been, and was an Inhabitant, and lived within the Cinque Ports, whereby he had by his Plea given Juriſdiction to the Court there, and they as Judges might have ſeen that the Defendant, if he was guilty, might have receiv'd a ſatisfactory Judgment, *viz.* Death for Death, then the Plea had been good: But the Defendant has not ſhewn any ſuch Thing, whereby it appears that that Court has ſuch Juriſdiction. A third Reaſon was added by *Gaudy*, *Fenner* and *Telverton* Juſtices, becauſe this Court of King's Bench is the higheſt Court of Juſtice, *and of greateſt Soveraignty*; and although the Kings have heretofore granted Conuſance of Appeals to the Barons of the Cinque Ports, yet that does not give away the Queen's Intereſt concerning her ſelf; and in this Appeal the Queen has an Intereſt by a Means, for if the Plaintiff is nonſuited after Declaration, or releaſes (as 29 *H.* 6. *Corone*— is) yet the Defendant ſhall be arraigned at the Suit of the Queen: Alſo *per totam Curiam* the Defendant's Plea is double and repugnant; one is that *Sandwich* is Parcel of the Cinque Ports *ubi breve Dominæ Reginæ non currit*, which is a Matter in Law put in Judgment of the Court; the other that it is not *in Com' Cantiæ*, which is a Matter in Fact triable by the Country: Alſo by the Appeal brought, *Sandwich* is expreſly ſuppoſed to be within the County of *Kent*, which by the firſt Plea is not denied, *viz.* by Saying that it is Parcel of the Cinque Ports, *&c.* yet by the other Part it is utterly denied to be within the County; ſo repugnant; and alſo *revera* all the Cinque Ports are Parcel of the County, although they are by their Charter exempted *from being drawn in Plea*, within the County generally: And in the Caſe of * *Watts* and *Braynes* upon a Murder committed by *Braynes* within the Cinque Ports, *Watts* enter'd his Appeal againſt him by Bill being *in Cuſtodia Mareſcalli*, and adjudg'd good, being within the Juriſdiction of this Court, and *Braynes* was hang'd upon it.

Kings Bench.

Double Plea.

* Cro. El. 694, 778.

Wood *verſus* Haukſhead.

ACtion on the Caſe againſt *Haukſhead* for taking of Toll for Paſſage over the Weſt End of the Bridge of *W.* and ſhews for Title the Letters Patent of *H.* 6. *An.* 20 to the College of *All-Souls* in *Oxford* for them their Tenants and Farmers to be quit of Toll, and conveys to himſelf as Farmer to the College, yet had the Defendant ſuch a Time taken Toll of him againſt the Form of the Patent, *&c.* The Defendant

Toll

Stat. 28 H. 6, & 4 H. 7.

Cro. Car. 257.

Departure.

pleads in Bar the Statute of 28 *H.* 6. of Reſumption of all Liberties and Franchiſes *formerly granted by* H. 6. The Plaintiff by Way of Replication pleads the Statute 4 *H.* 7. whereby all Letters Patent granted by *H.* 6. to this College are made good, the Statute 28 *H.* 6. of Reſumption notwithſtanding; and thereupon the Defendant demurs: And the only Queſtion is, whether this Replication is a Departure from the Matter contained in the Declaration; and adjudged that it is not; for there is no new Matter contained in the Replication otherwiſe than was in the Declaration; for the Plaintiff's Title ſtill reſts upon the Letters Patent, and he relies on them, and a Departure is always where the Matter touching the Point in Action is different in the Replication from what it was in the Declaration: As in Debt for Rent on a Leaſe for Years, or in an Avowry for a Rent-Charge granted by *A.* if after a Bar pleaded, the Plaintiff will reply and enforce his Action or his Avowry by a *Ceſtuy que uſe*, it is a Departure, becauſe at firſt by the Declaration it is intended a Leaſe and a Rent by Courſe of the Common Law; and now by the Replication the Title appears to be only by an Authority given by the Statute of 1 *R.* 3. The ſame Law, if a Man intitles himſelf by the Feoffment of one *A.* and the other ſhews that *A.* was an Infant at the Time of the Feoffment, if the Plaintiff will now induce a Cuſtom to make the Feoffment good, it is a Departure; for both the Uſe in the firſt Caſe, and the Cuſtom in the Second are Matters of Title, and *in eſſe* before, and at the Time of the Plea pleaded, *quod vide* 4 *H.* 7—& 37 *H.* 6.——But in this Caſe the Title ſhewn in the Declaration and Replication are all one, *viz.* the Letters Patent, as (by *Popham*) in the Caſe of *Sellenger*, 3 *H.* 7. if a Man intitles himſelf to Land by the Feoffment of *J. S.* and the Defendant pleads that before the Feoffment *J. S.* was attainted; now if the Plaintiff ſhews an Act of Parliament before the Feoffment, whereby the Attainder of *J. S.* is made void, it is no Departure; for the Matter of Title is not changed, but remains all as it was at firſt, *viz.* by the Feoffment. But *Gaudy* Juſtice *contra*; and he took a Difference between Actions in which the Plaintiffs are bound to a preciſe Form, and where not; as in Formedon, if the Demandant entitles himſelf by a Gift, and the Tenant pleads no Gift, the Demandant may enforce the Count, and maintain it by a Recovery in Value, and ſo a Gift, as 3 *H.* 7. 5. is, and that is no Departure, becauſe the Plaintiff in Formedon is bound to a preciſe Manner and Form of Count: But in an Action on the Caſe, as here, it is otherwiſe; for as his Caſe is, ſo ought the Plaintiff to declare: And therefore (by him) the Plaintiff in this Caſe ought to have declar'd on the Letters Patent, and to have ſhewn the Statute of Reſumption, and the Statute of 4 *H.* 7. of Revivor, and all this in his Declaration: For now he enforces the Matter of his Declaration by a

Departure.

1 Inſt. 304. a Plow. Com. 105. b.

1 Lev. 81.

Form.

Letters Patent.

Statute, which is another and a new Thing, *Quod Curia negavit.* And in this Caſe alſo it was agreed *per Curiam*, although the Grant of *H.* 6. to be diſcharg'd of Toll, *&c. fuit tantum pro ſeipſo*, and not for him, his Heirs and Succeſſors, yet it is good againſt the Succeſſor, as well as in Caſe of the Grant of the Intereſt, which in Sir *Thomas Wray*'s Caſe in the Commentaries——is agreed to be good. *Telverton* was of Counſel with the Plaintiff. 6 Co. 27. a.

The Lord Cromwell's *Caſe.*

THE *Lord Cromwell* was indicted upon the Statute of 8 *H.* 6. of Forcible Entry into an Houſe, and certain Land of one *Andrewes*, and expelling and diſſeiſing of *Andrewes*: But in the Concluſion of the Indictment it was *Si Domus prædicta non fuit in Poſſeſſione Dominæ Reginæ nec pro Domina Regina*, then the Jury found, *Billa vera. Et per totam Curiam*, this is no Indictment at all; for it is as a Condition precedent to the Verdict, and as if they had found, upon ſuch Matter of Indictment, that if *J. S.* was at *Pauls* ſuch a Day, then *Billa vera*; or (as *Popham* ſaid) as if they had found, if the Freehold is in *Andrewes*, then *Billa vera*; which is the ſame Thing as if they had found nothing. Indictment on 8 H. 6. Conditional Indictment.

Corne *verſus* Paſtow.

Paſtow brought Treſpaſs againſt *Corne*, and before Iſſue tried, the Sheriff was challeng'd, and the *Venire facias* iſſued to the Coroners, *&c.* at the *Niſi Prius* for Want of Jurors, a *Tales* was pray'd for the Plaintiff, and as it appear'd by the *Poſtea* return'd, the *Tales* were return'd by the Sheriff, and that *per Mandat' Juſtic'* as the uſual Form is; and Judgment was given in the King's Bench for the Plaintiff, the Verdict being for him. But upon Error brought, it was reverſt in the Exchequer upon the aforeſaid Matter aſſign'd for Error; for when the Proceſs is once awarded to the Coroners, they ſhall ſerve all the other mean Proceſs, and they ought to have return'd the *Tales*, and not the Sheriff: And it is not aided by the Statute of Jeofails; for it is the Award of the Court to command the Sheriff to return the *Tales*: The ſame Law if the Sheriff of the County of *York* returns the Panel upon a Trial in *Middleſex*, it is Error, and not aided by the Statute of Jeofails; yet it is but a *Miſconveying* of Proceſs. And *Trin.* 36 *Eliz.* the ſame Caſe was between * *Ilie* and *Morgan*; for the *Venire facias* was awarded to the Coroners, and the Jury was impanell'd by the Sheriff, and this Matter aſſign'd for Error, and reverſt. *Telverton* was of Counſel with the Plaintiff in Error. Cro. El. 894. Error. Venire fac' Coroner. Tales. Statute of Jeofails. Miſconveying of Proceſs. Poſt. 214. * Mo 356. Cro. El. 574. 1 Brownl. 134.

Arnold

Arnold *verſus* George.

Copyholder. Admittance. Quære. Particeps Criminis. What Thing a Copyholder may do without Admittance. Vide Cro. El. 349. Poph. 127. Yelv. 145.

ON a Motion made to the Court, it was agreed by all the four Juſtices, that if a Copyholder ſurrenders to a Stranger, and the Steward will not admit him, and the Stranger enters and occupies the Land; if the Lord makes a Leaſe to a Stranger to try the Title, he to whom the Surrender is made (altho' he is not admitted) may well plead Not guilty: And it ſhall be found for him againſt the Lord. *Quære Rationem*; for if it is in Reſpect of the Poſſeſſion, the Lord's Title ſeems to be elder, for the Lord's Title is good and lawful to the Freehold, and by Reaſon of the Freehold to the Profits of the Freehold, unleſs the Stranger can make Title to the Profits, which ſeems hard in this Caſe without Admittance. *Quære*, if the Reaſon is not becauſe the Lord is *Particeps Criminis*, *quia* it ſhall be intended he would not ſuffer the Steward to admit the Stranger, who is Defendant. *Nota* alſo in this Caſe, the Surrender was but of the Copyhold to him & *tribus Aſſignatis ſuis*; ſo that by his Death the Eſtate in the Copyhold was determin'd; and he to whom the Surrender was intended had nothing in Intereſt, nor otherwiſe by Courſe of Law before Admittance. *Telverton* was of Counſel with the Defendant.

Coxe *verſus* Jennings.

Aſſumpſit. Oxford. Cuſtom. Oxford, and Privileges in it.

THE Plaintiff in his Declaration ſhewed the Cuſtom in the *Univerſity* of *Oxford* to have from Time whereof, &c. a Court which held Pleas in any perſonal Action, &c. (except Mayhem, Appeals and Suits of Freehold) and further declar'd, by Cuſtom there, if any Scholar or privileg'd Perſon ſued any *Extraneum*, that this *Extraneus* ought to put in Bail, which Bail ought to pay the Condempnation, *Si*, &c. he further ſhewed that the Defendant was ſued there in the Court of *Oxford in Placito tranſgr' ſuper Caſum nuncupata in* * *Curia illa* [*Cauſa Injuriæ*] and that this Plaintiff was Bail there for him, and that the Defendant undertook and promiſed to ſave the Plaintiff harmleſs from the Bail; and further declar'd that the ſaid Suit *in tantum perſequebatur*, that the Defendant there was condemned, and the Plaintiff obliged to pay the Condempnation, and ſo upon Breach of the Promiſe, becauſe he is not ſaved harmleſs, he brings this Action: And by *Popham* and *Telverton* the Action well lies; for he need not recite in his Declaration all the Proceedings of the Suit in the Court of *Oxford*; but it is ſufficient to ſay, ſuch Plaint was enter'd and proſecuted till, &c. for that is but a Conveyance to the Action, and merely collateral to the Point in Queſtion which is the Promiſe: *Vide* ſuch Matter as to the Recital of the Record 34 *H.* 6. 4. *b.* But by *Popham*, if it had appear'd by the Declaration that the Suit and Plaint in *Oxford* had been enter'd only *in Cauſa*

* The Words [Curia illa] are omitted in both Edit. of the Original.

Cro. Jac. 11. Cro. Eliz. 877.

Injuriæ, which is a Suit merely according to the Civil Law, whereof the Judges cannot take Conuſance without ſhewing of it, then it had not been good: But it is explain'd by the Declaration to be in Treſpaſs upon the Caſe *nuncupata in Curia illa* [*Cauſa Injuriæ.*] So it is ſuch Action whereof the Common Law takes Notice, and then it is ſufficient to ſhew that a Plaint was enter'd, & *in tanto proſecut'* till the Defendant was condemn'd: *Fenner contra*, and that the Plaintiff ought not only to ſhew that a Plaint was enter'd, but alſo that the Plaintiff there declar'd upon it, &c. *quod Popham* utterly *negavit: Sed* becauſe *Gaudy* was abſent, and the Parties poor (*Ne diutius pendeat*) it was put *in Arbitrium Magiſtri* Kemp. Civil Law.

Alſope *verſus* Sytwell.

THE Plaintiff declar'd that in Conſideration he would marry the Defendant's Niece, the Defendant undertook and promiſed to give the Plaintiff as much in Marriage with his ſaid Niece, as before *Agreaſſet dare in Maritagio* with the ſaid Niece to one *Jarvis Ayer*, and alledg'd *in facto* that the Defendant had agreed to give *Jarvis Ayer* 1000 l. *ſi ipſe maritare vellet* the ſaid Niece; and alledg'd *in facto* that the Plaintiff, relying upon this Promiſe, had married the ſaid Niece, yet, &c. to his Damage 1000 *l.* and upon *Non Aſſumpſit* pleaded, it was found for the Plaintiff to the Damage of 1000 *l.* And it was moved in Arreſt of Judgment, that the Declaration was not good, but incertain; becauſe it was not alledg'd with whom the Defendant agreed to give 1000 *l.* to *Jarvis Ayer*, if he had married the ſaid Niece. And (*per Fenner* and *Yelverton*) it is a good Exception; becauſe for any Thing that appears in the Declaration, it is but the Defendant's Report to give *Ayer* 1000 *l.* *Si*, &c. and no Agreement; for that ought to be perfect, and that Perfection reſts between two Perſons at leaſt, and there is no Perſon named with whom the Defendant agreed to give *Jarvis* 1000 *l.* *Si*, &c. and that is material, and a Point traverſable: But *Gaudy* and *Popham* clearly to the contrary; for the Agreement is but a Thing collateral, and only an Inducement to the Promiſe, which is the principal Cauſe of the Action; and Inducements need not be alledged ſo certain in a Declaration as thoſe Things ought to be which are the Foundation of the Action: And therefore it is ſufficient to alledge Inducements generally, without Certainty of Name, Place, or Perſon; for in this Caſe in Queſtion, if the Defendant would plead that he did not agree to give *Jarvis Ayer* 1000 *l.* in Marriage, &c. then might the Plaintiff ſoon enough for Time by Way of Replication make the Agreement certain in the Perſon with whom it was made, and in ſuch other Circumſtances, but the Declaration is good without ſuch Certainty at the firſt. As if *J. S.* in Conſideration of 1000 *l.* agrees to pay all the Debts of *J. D.* in Aſſumpſit. What ſhall be a good Conſideration. Agreement. Count. Inducement. Replication.

that Caſe it is ſufficient for *J. S.* to declare that he agreed to pay all the Debts of *J. D.* in Conſideration whereof the Defendant promiſed to give him 1000*l.* and it is good, without alledging with what Perſon the Agreement was, or what Debts in certain he had paid; yet the Payment of the Debts is a Matter traverſable; for if the Defendant alledges any Debt in Special not paid, the Plaintiff may by Way of Replication make it certain. *Yelverton* was of Counſel with the Plaintiff.

Soprani & Barnardi *verſus* Skurro.

Aſſumpſit.

Soprani and *Barnardi* brought *Aſſumpſit verſus Skurro*, and declar'd that it was agreed between the Plaintiffs and one *Zanches*, that *Zanches* ſhould demiſe to one *Welſh* a Meſſuage in the *Dukes Place* for the Term of ſeven Years, and that it was alſo agreed that *Welſh* during the ſaid Term ſhould repair the Houſe with Tile and Glaſs only; and it was agreed that theſe and other Covenants ſhould be put into an Indenture between the ſaid *Welſh* and *Zanches*, and that the Plaintiffs ſhould be bound in 100*l.* for the Performance of the Covenants on the Part of *Welſh*; and they further ſhewed that an Indenture was drawn, and becauſe there were more Covenants put into the Indenture to be performed on the Part of the ſaid *Welſh*, than were at firſt agreed, *viz.* that *Welſh* ſhould be bound to all Manner of Repairs, *Welſh* refuſed to ſeal the Indenture, and the Plaintiffs refuſed to ſeal the Bond of 100*l.* for Performance, *&c.* they further ſhewed that in the ſaid Houſe there was a great Wall, Parcel of it, ruinous and *likely* to fall within the ſaid Term; and that *Skurro* the Defendant in Conſideration *Welſh* would ſeal the Indenture, and the Plaintiffs the Bond of 100*l.* undertook and promiſed the Plaintiffs that he would maintain the ſaid Wall *Durante prædicto Termino & Annorum*: They ſhewed that *in Conſideratione inde Welſh* ſealed the Indenture as his Deed to *Zanches*, and that the Plaintiffs alſo ſealed the Bond of 100*l.* to the ſaid *Zanches*: And ſaid *in Facto* that the Wall of the ſaid Houſe fell for Want of Repairs within the ſaid Term; and ſhewed in certain when, both after the Sealing and Delivery of the ſaid Indenture by *Welſh*, and of the ſaid Bond by the Plaintiffs (*viz. in hiis Verbis, durante prædicto Termino & Annorum per Indentur' præd' dimiſſ'*) whereby they had forfeited their Bond, to their Damage 200*l.* and upon *Non Aſſumpſit* pleaded, it was found for the Plaintiffs. And it was moved in Arreſt of Judgment, that the Declaration was inſufficient; for the Action is founded on a Breach of Promiſe in the Defendant for not repairing a Wall Parcel of the Houſe agreed to be demiſed to *Welſh* by *Zanches*; but it is not expreſly alledg'd that *Zanches* did demiſe the ſaid Houſe; and if there is no Demiſe, then there is no Poſſibility for the Defendant to repair it during the Term; for *Non conſtat* that there is any Term; and a good Exception *per totam Curiam*; becauſe, for any Thing that appears in the Declaration, the Indenture ſealed was only

Where a Thing implied ſhall not make a Count good.

on the Part of the Leſſee, and not on the Part of *Zanches* the Leſſor; and if the Leſſee ſeals his Part, and not the Leſſor, *Nihil operat.* neither in Reſpect of the Intereſt, nor in Reſpect of the Covenants; for the Covenants depend upon the Leaſe, and the Plaintiff's Bond upon the Covenants; and if there is no Leaſe, there is no Covenant, and by Conſequence no Breach of the Covenant, whereby the Plaintiffs can in any Sort be damnified; for if the Leaſe had been made, and afterwards ſurrender'd, all the Covenants and the Bonds for Performance of them had been void alſo: And adjudg'd *Quod Querentes nil capiant per Billam.* *Telverton* of Counſel with the Defendant. Poſt. 25.

Jennings *verſus* Hatley.

THE Plaintiff declar'd that ſuch a Day and Year he recover'd againſt one *Baſſet* in the Common Pleas in an Action of Debt on a Bond of 50*l.* and upon that Recovery he *took forth* a Special *Cap' Utlagat'* for the Body, Goods and Land of *Baſſet*; and ſhewed the Tenor of that Writ ſpecially, and that the Defendant perceiving the Plaintiff intended to ſerve the ſaid Writ on the Goods of the ſaid *Baſſet*, deſired the Plaintiff to ſtay the Execution of the ſaid Writ till ſuch a Day; and if *Baſſet* did not that Day pay the Plaintiff the 50*l.* in Conſideration of ſuch Stay of Execution of the ſaid Writ, and for 2*s.* 4*d.* to be given the Defendant by the Plaintiff for Renewal of the ſaid Writ of *Capias*, the Defendant promiſed, if *Baſſet* by the Day limited did not pay the 50*l.* that he would pay it the Plaintiff: And alledg'd *in facto* the Stay of the Execution at the Defendant's Requeſt, and the Giving of the 2*s.* 4*d.* for the Renewal of the ſaid Writ, and that *Baſſet* did not pay the 50*l.* at the Day, &c. to his Damage 100 *Marks*, and upon *Non Aſſumpſit* pleaded it was found for the Plaintiff; and it was alledg'd in Arreſt of Judgment, that the Conſideration is not good, but void and againſt Law; for the *Capias Utlagat'* is the Queen's Suit; and therefore a Promiſe made in Conſideration to ſtay the Queen's Suit is not good: For if Goods are ſtolen from *J. S.* and a Stranger promiſes that in Conſideration *J. S.* will not proſecute any Indictment againſt him who ſtole them, that he will give him ſo much Money, this is a void Promiſe; for it is in Hindrance of the Queen's Juſtice and Benefit: But by *Gawdy*, *Fenner* and *Telverton* the Conſideration is good; for this *Capias Utlagat'* iſſued upon the original Suit of the Party, ſo the Benefit which the Queen is to have is by Means of the Party, and he is at the Charge *of Suing it forth, and hath the Carriage of the Writ*; and if the Party is taken he ſhall be in Execution at the Suit of him who recover'd; and if the Queen by Virtue of the *Capias Utlagat'* has any Goods, ſhe is to ſatisfy the Party at whoſe Suit the Outlawry came; but *Nota*, *Popham* ſaid, that is *de Gratia* and not *de Jure*; but *Popham contra* in the Caſe *ſupra*; for it is merely the Queen's Suit, which the Party neither can, nor ought to delay: For the Queen's Attorney may take ſuch Goods, although he that recover'd will not ſue for them: But Judgment was enter'd for the Plaintiff according to the Opinion

Cro. El. 909. Aſſumpſit.

What ſhall be a good Conſideration.

Cap. Utlagat.

Execution of Goods.

3 H. 6. Dec. 17.

Opinion of the three Juſtices. And in this Caſe it was ſaid to be adjudg'd between *Garnons* and *Layton*, that if a Man is taken on a *Capias Utlagat'* after Judgment, he is in Execution for the Party; and if he eſcapes, altho' he was taken at the Queen's Suit, yet the Party has ſuch an Intereſt in the Body, that he ſhall have Eſcape againſt the Sheriff. *Quod nota*; *Yelverton* was of Counſel with the Plaintiff.

Mo. 566, 567. 5 Co. 89. b. Salk. 319. 5 Mod. 200. Comb. 373.

Slade *verſus* Morley.

AN Action on the Caſe on an *Indebitatus Aſſumpſit* lies well; for every Debt implies a Promiſe, and is a good Conſideration *in facto* to found an Action upon. But for a Debt by Simple Contract due by the Teſtator * no *Aſſumpſit* lies againſt the Executors; and this was openly deliver'd by *Popham* Chief Juſtice 9 *Nov.* 44 *Eliz.* to be the Reſolution of all the Juſtices of *England*, and this to be a Precedent for all ſubſequent Caſes.

4 Co. 92. b. Mo. 433, 667. * Mo 691. ſed vide 9 Co. 87. a. b. 2 Brownl. 137. 10 Co. 77. a.

Harvey *verſus* Young.

Action on the Caſe for Deceit.

J. S. had a Term for Years, and there being a Diſcourſe between him and *J. D.* about buying that Term, *J. S.* ſaid and affirmed to *J. D.* that the Term was worth 150*l.* to be ſold, upon which *J. D.* gave *J. S.* 150*l.* for the Term: And afterwards *J. D.* offer'd and endeavour'd to ſell the Term again, and could not obtain, nor get for the Term 100*l.* whereupon he brought an Action on the Caſe in Nature of a *Diſceit* againſt *J. S.* and declar'd *ut ſupra*, and that *J. S. aſſeruit* to him, that the Term was worth ſo much, to which Aſſertion *J. D. Fidem adhibens*, *did buy the Term* for ſo much Money, but could not ſell it again for ſo much Money as was given at firſt in Fraud and Diſceit of the Plaintiff to his Damages, *&c.* and upon Not guilty pleaded, it was found for the Plaintiff, and alledged in Arreſt of Judgment, that the Matter precedent did not prove any Fraud; for it was but the Defendant's bare Aſſertion that the Term was worth ſo much, and it was the Plaintiff's Folly to give Credit to ſuch Aſſertion. But if the Defendant had warranted the Term to be of ſuch Value to be ſold, and the Plaintiff had thereupon given and diſburſed his Money, there it is otherwiſe; for the Warranty given by the Defendant is a Matter to induce Confidence and Truſt in the Plaintiff. Between *Harvey* and *Young*. *Mich.* 39 *Eliz.* as *Towes* of the *Inner Temple* ſaid at the Bar, and that he was of Counſel with the Defendant. *Quod Nota.*

What Thing ſhall be adjudg'd a Fraud. 1 Sid. 146.

Boldroe *verſus* Porter.

Action for Words.

ANna *Boldroe* brought her Action againſt *Porter*, that whereas ſhe was *bonæ Famæ*, *&c.* the Defendant ſuch a Day and Year ſpoke theſe

Words of the Plaintiff: *Thy Father ſaid thou haſt murdered thy Husband* (*innuendo* ſuch a Man by Name *jam defunct*) and alledged *ubi revera* her Father ſpoke no ſuch Words; whereby the Plaintiff had loſt her good Name, and was in Danger of loſing her Goods and Life, to her Damage, *&c.* And upon Not guilty pleaded it was found for the Plaintiff, and alledg'd in Arreſt of Judgment, that thoſe Words, altho' they import in themſelves a Slander, yet it is not expreſly alledg'd in the Declaration that the Plaintiff's Husband was dead at the Time of the Words *ſpoken*. And if a Man ſays of *J. S.* that he has murder'd *J. D.* and *J. D.* was then alive, although he dies afterwards, the Words will not bear an Action. But *per Yelverton* Juſtice, if the Words are, *Thou haſt poiſon'd* J. S. although *J. S.* is alive, yet the Words will bear an Action, and found in Slander; for a Man may be poiſon'd, and yet not kill'd, for the Poiſon may *break forth otherwiſe*; as in Biles, Vomiting, *&c.* And the Exception *ſupra* was allow'd, and Judgment enter'd *Nil capiat per Billam*. The ſame Caſe was adjudg'd between *Butler* and *Painter*; where *Butler* brought an Action on the Caſe againſt *Painter* for Words *ſpoke* againſt *Butler* as Juſtice of Peace; and it was not expreſly alledg'd that *Butler* was a Juſtice of Peace at the Time of the Words *ſpoken*, and ſo adjudged according to *Trin. 2 Ja. B. R.* between *Grey* Plaintiff againſt *Medcalfe*, in an Action for calling him Bankrupt, whereas he was, and had been *per multos Annos jam ult' elapſos* a Merchant; and becauſe it did not appear expreſly that he was a Merchant at the Time of the Words *ſpoken*, but *tantum augmentative*, it was adjudged againſt the Plaintiff.

Expreſs Allegation of the Death.

Vide Cro. El. 297. Palm. 69. Juſtice of Peace.

Cro Car. 282. Merchant.

Barham *verſus* Netherſall.

THE Plaintiff declar'd that whereas, *&c.* the Defendant ſuch a Day *ſpoke* theſe Words: *T. Barham* (*innuendo* the Plaintiff) *hath burnt my Barn* (innuendo *my Barn* at ſuch a Place *full of Corn*) *and that with his own Hand*; and upon *Non Culp'* pleaded, it was found for the Plaintiff, and alledg'd in Arreſt of Judgment, that the Action did not lie; for theſe Words, the Paintiff *hath burnt my Barn*, are no Slander; for ſuch Burning of an Houſe is but a Treſpaſs, and all one as if he had ſaid, the Plaintiff hath *cut down my Trees*, and ſuch like; for to ſay a Man has committed a Treſpaſs, is no Slander: And then the *Innuendo* (*my Barn full of Corn*) will not help the Matter; for it is the Nature of an *Innuendo* to explain doubtful Words, where there is Matter ſufficient in the Declaration to maintain the Action. But if the Words before the *Innuendo* do not ſound in Slander, no Words produced by the *Innuendo* will make the Action maintainable; for it is not the Nature of an *Innuendo to beget* an Action. And all this was

4 Co. 20. a. Co. Entr. 25. Words.

Innuendo. 4 Co. 17. b. Owen 57. Cro. El. 428. Mo. 396. Salk. 513. Comb. 459.

allowed by *Gaudy* and *Yelverton* Juſtices (being alone in the King's Bench) and Judgment *Quod nil capiat per Billam.*

Brode *verſus* Owen.

1 Brownl. 82, 83. Debt on Statute 5 El. of Perjury. Chancery.

LAW was Plaintiff againſt *Brode* in Chancery; and upon the Bill and Anſwer ſuch Matter appear'd to the *Lord Keeper*, that by an Order there he made one *Laborer* be as Party to the Bill againſt *Brode*; and afterwards a Commiſſion *went forth in Chancery* between *Laborer* and *Brode* to *examine Witneſſes:* Upon which Commiſſion *Owen* the now Defendant was examin'd *ex parte Laborer*, and depoſed directly for *Laborer* againſt *Brode*; wherefore an Order and Decree was made and conceived in Chancery againſt *Brode*; and upon this Matter *Brode* brought an Action of Debt againſt *Owen* upon the Statute of 5 *Eliz.* as a Party grieved by the Oath and Depoſition of *Owen.* And *Owen* the Defendant demurr'd in Law: And by *Gaudy* and *Yelverton* Juſtices the Action does not lie; for the Words of the Statute are, where a Man is grieved and damnified by a Depoſition in a Suit *between Party and Party*; and in this Caſe it appears, that *Laborer* was not Party to the Suit, but came in *a Latere*, *by an Order*, and no Bill *depending either againſt him*, *or brought by him*; ſo out of the Statute; for it being penal is to be taken ſtrictly. *Quære*, if upon an *Aid Prier* he in Reverſion joins, and he is grieved and prejudiced by an Oath and Depoſition, if he can maintain an Action upon this Statute? For clearly by the Common Law he may have Attaint.

Oath. Attaint.

Shelbury *verſus* Scotsford.

Aſſumpſit.

THE Plaintiff declar'd that whereas he was poſſeſſed of an Horſe, and lent it the Defendant to ride to *Y.* and afterwards to deliver it back ſuch a Day, the Defendant promiſed in Conſideration thereof to redeliver the Horſe on the Day mention'd in the Declaration. The Defendant by Way of Bar confeſſed the former Matter, but laid the true Property of the Horſe to be in *J. S.* before the Plaintiff had any Thing in it, and that when the Defendant had rode to *Y.* and was ready to have deliver'd back the Horſe to the Plaintiff, the ſaid *J. S. Vi & Armis & contra voluntatem* of the Defendant retook the Horſe, which Matter, *&c.* the Plaintiff by Way of Replication ſaid, that the Defendant ſuffer'd the ſaid *J. S.* by Fraud and Covin to deceive him, to take the Horſe, and thereupon Iſſue joined; and it was found for the Defendant; and it was moved in Arreſt of Judgment, that notwithſtanding the Verdict had found the Iſſue with the Defendant, yet Judgment ought to be given againſt him on his own Confeſſion by his Plea in Bar: But by *Fenner* and *Yelverton contra*;

for the Matter alledged by the Defendant does in Law diſcharge the Promiſe by Reaſon of the former Property of the Horſe in *J. S.* and then it is as an Eviction of the Horſe out of the Defendant's Poſſeſſion, which diſcharges the Promiſe, as well as an Eviction of the Leſſee for Years diſcharges all Rents, Bonds and Covenants in any Sort depending upon the Intereſt. *Ante* 19.

Aſſumpſit diſcharg'd by Matter in Law. 1 Jon. 195. Eviction.

Wharton's *Caſe*.

NOTA, upon the Arraignment *Wharton*, *Young* and *Purſoy* being indicted of Murder for the Death of one *Halakinden*, it happen'd that at the firſt Day when the Priſoners were to be tried, Eleven of the Jury appear'd and were ſworn; but one was challeng'd by the Priſoners, and ſo for that Time the Trial was ſtay'd. Upon a *Tales* taken for the Queen at another Day when the Jury appear'd, one of the Jurors who had appear'd before, and was ſworn the firſt Day, was now challeng'd for a Cauſe that was *in eſſe* the firſt Day, but then not known to the Queen, but which came ſince to the Knowledge of the Queen's Counſel: And upon a Doubt conceived by the Court of King's Bench, *Yelverton* Juſtice went into the Common Pleas to know their Opinion; and the Opinion was, that the Queen could not have the Challenge now, no more than ſhe could have had it the firſt Day after the Juror had been ſworn, although the ſame Cauſe continues yet, *viz.* that the Juror the firſt Day, and yet is within the Diſtreſs of one Mr. *Cromer* Maſter to *Wharton*, who ſtood indicted; another Matter of Doubt was, whether thoſe who were firſt ſworn ſhould be ſworn again, or that the Panel ſhould be peruſed, and the Jurors ſworn as they ſtand in Order in the Panel? And it was agreed they ſhould be ſworn as they ſtand in the Panel without having Reſpect to thoſe who were ſworn at firſt; and upon this Indictment all the Parties above were found Not guilty of the Murder. Wherefore *Popham*, *Gaudy* and *Fenner fuerunt valde irati*, and all the Jurors committed and fined, and bound to their good Behaviour, *&c.*

Nov. 40. Indictment. Challenge for the Queen, Tales. Sworn again. Jury puniſhed.

Whorewood *verſus* Shaw.

IN Debt by *Shaw* Executor of *A.* againſt *Whorewood* Adminiſtrator of *Field*, upon a Bill of Debt made by *Field* to *A.* whereby *Field* acknowledg'd to have receiv'd of one *Prettie* Forty Pounds to be *equally divided* between *A.* and *B.* and to their Uſe: And upon Judgment given in the Common Pleas *Whorewood* brought Error, and the Judgment was affirmed: The Matters moved

Mo. 667. Cro. El. 729. Ow. 122. 1 Brownl. 82.

moved were two, 1. Becauſe the 40*l.* was given to be equally divided between *A.* and *B. Ergo* they are Tenants in Common thereof, and *Shaw* ought to have join'd *B.* with him in the Suit, becauſe Tenants in Common ought to join in perſonal Actions. But it was over-rul'd, becauſe in this Caſe they are ſeveral Debts, *viz.* 20*l.* to one, and 20*l.* to the other; as in the Caſe of 10*l.* reſerv'd upon a Leaſe, *viz.* 5*l.* at *Michaelmas*, and 5*l.* at *Lady-day*; yet it is one Rent to be divided in Payment. And this Caſe is not to be compar'd to Caſes of Intereſt, as 20 *Eliz.* where Land or a Leaſe is given to two equally to be divided; for there they are Tenants in Common: The ſecond Matter was, if Debt or Accompt lay? And adjudged, although no Contract is between the Parties, yet when Money or Goods are deliver'd upon Conſideration to the Uſe of *A. A.* may have Debt for them: So is the Opinion of *Montague* 28 *H.* 8. *Dyer* 20, 21. in *Core* and *Woody*'s Caſe. And alſo a Precedent of ſuch Action of Debt in the Book of Entries.

Reſervation. Debt by him to whoſe Uſe Money is deliver'd. Accompt. Debt.

3 Co. 39. b.

1 Ven. 318.

Baily *verſus* Taylor.

Cro. El. 899. Debt.

THE Condition of the Bond was, That whereas *Edward Taylor, had bargained, &c.* to the Plaintiff a Cloſe of Paſture call'd *Owſerby, and whereas the ſaid* Edward Taylor *hath already by Indenture of Mortgage mortgaged to* Jerome Smith *divers Lands in* Gomerby, *whereby the Cloſe of Paſture abovenamed is either mortgaged, or ſuppoſed to be mortgaged, upon Condition for Payment of a certain Sum at a Day yet to come; if therefore the ſaid Cloſe of Paſture, at the Day mentioned in the ſaid Indenture of Mortgage, be redeemed and ſet free, and diſcharged from all Tithes,* &c. *which may grow by Reaſon of the ſaid Mortgage, that then,* &c. The Defendant pleaded in Bar, that the Cloſe mentioned in the Condition was not mortgaged to *Jerome Smith, & ſic dicit quod Clauſum præd', &c. fuit redemt' liberat' & exonerat', &c.* The Plaintiff replied that the Cloſe was mortgaged to the ſaid *Jerome Smith*; and thereupon Iſſue was joined, and found for the Plaintiff: And it was mov'd in Arreſt of Judgment, that the Replication was not good, for the Plaintiff ought to have replied that it was mortgag'd to the ſaid *Smith*, and not redeem'd; and not to have ſaid only, that it was mortgaged; for although it was mortgaged, yet the Condition by the Mortgage alone is not broke; for it may be, *Non obſtante* the Mortgage, that before the Day limited it was redeem'd: Like the Caſe of Debt upon Bond to ſtand to the Award of *J. S.* if the Defendant pleads *Nullum fecit Arbitrium*, the Plaintiff, by Way of Replication ought to ſhew the Award in Certain, and aſſign a Breach, and yet the

Defendant ſhall have no Anſwer to the Breach. But on the other Side it was ſaid, that this Caſe in Queſtion is not like the Caſe of an Award; for there the Defendant's Plea is ſo general that he does not offer any Iſſue, and therefore the Plaintiff by his Replication ought to ſhew the Whole in certain, and lay a Breach; for otherwiſe no Cauſe of Action appears to the Court; and there alſo the Offer of the Iſſue comes from the Plaintiff: But in this Caſe of the Mortgage, the Defendant by his Plea offers an Iſſue, *viz.* that the Cloſe was not mortgaged, which is a particular Point to which the Plaintiff ought to anſwer; and ſo he does when he replies, *&c.* that the Cloſe was mortgaged; and then are the Parties at a certain Iſſue, and ſo he need not alledge that it was not redeemed; for no Redemption ſhall be intended, becauſe the Defendant pleads it was not mortgaged. Like the Caſe, where an Award is made, that if *J. S.* pays to *J. D.* ten Pounds, then *J. D.* ſhall aſſure to *J. S.* the Manor of *D.* and they are bound to perform this Award: In Debt brought upon this Bond againſt *J. D.* if he pleads that *J. S.* has not paid him the ten Pounds, it is a good Replication for *J. S.* to ſay that he has paid him the ten Pounds, without ſaying further, that *J. D.* has not aſſured the Manor of *D.* for when the Plaintiff has given a direct Anſwer to the ſpecial Matter alledg'd in the Bar, he need not make any further Addition: The ſame Law if *J. S.* is bound to marry the Daughter of *J. D.* on *Eaſter Day next*; in Debt on this Bond if *J. S.* pleads in Bar, that the Daughter of *J. D.* dy'd before *Eaſter*, it is a good Plea; and it is likewiſe a good Replication to ſay, that the Daughter was alive on *Eaſter Day*, without ſaying further, that he did not marry her; (*a*) becauſe a ſpecial Plea in Bar is always anſwer'd with a ſpecial Replication in that Point which is alledg'd; and (by *Popham Chief Juſtice*) it is a good Replication in this Caſe, becauſe the Mortgage is ſuppoſed to be made between a Stranger and the Defendant, to which the Plaintiff is not privy; and therefore he ſhall never ſpeak of any Redemption, for by Preſumption he cannot have any Notice of Acts done between the Defendant and *Jerome Smith* a Stranger; and accordingly Judgment was given for the Plaintiff by *Popham*, *Fenner* and *Yelverton*. But *Gaudy contra*. *Yelverton* of Counſel with the Plaintiff.

A Thing mortgaged ſhall not be intended to be redeem'd, unleſs expreſly alledged.

Replication.

(*a*) Yel. 78. Cro. El. 320. Salk. 138. 1 Show. 148. 2 Show. 359. 1 Sand. 103.

King *verſus* Hobbs.

THE Sheriff made a Warrant to four Men *& cuilibet eorum, quod ipſi caperent* J. S. two of them take him, and *J. S.* promiſes *J. D.* at whoſe Suit and Requeſt he was taken, that if he would diſcharge him from the Arreſt, he would pay him 10 *l. quando requiſitus, &c. J. D.* diſcharg'd him from the Arreſt, and brought *Aſſumpſit* for the 10 *l.* and it was found for the Plaintiff. And *Lowe* mov'd in Arreſt of Judgment, that the Conſideration is not good, becauſe the Arreſt was not lawful, the Arreſt being made by two; whereas by

Cro. El. 913. Noy 47. Aſſumpſit in Conſideration of a Diſcharge from an Arreſt. Warrant.

the Authority given by the Sheriff it ought to be by four, or one only; and then a Promiſe to pay Money to be diſcharg'd from an illegal Arreſt, is no good Conſideration; for falſe Impriſonment lies on a tortious Arreſt: *Quod fuit conceſſum per Cur'*, if the Arreſt was illegal. But *per Gaudy* and *Yelverton* the Arreſt is (*a*) well made; for Warrants in this Kind are not to be compar'd to other Caſes of Authority to make or take Livery; for if a Letter of Attorney is made to three *conjunctim & diviſim*, two cannot make Livery by 38 *Hen.* 8. *Dyer* 62. *a.* and 27 *H* 8. 6. *b.* The ſame Law in the Caſe of a Bond, where three are bound *& quilibet eorum*, the Bond cannot be ſued againſt two: But a Warrant to make Execution, or ſuch like, ought not to be conſtrued ſo ſtrictly; for the Sheriff's Intent was to have the Party arreſted, whether by all or any of them *ipſi non refert*; then the Arreſt being lawful, the Conſideration is good. *Fenner* contrary; for an Authority to reſtrain Liberty ſhall be taken ſtrictly; and in this Caſe, when the Arreſt is made by two only, it cannot be determined the Arreſt of which of them it is; as (by him) it was lately adjudg'd in Chancery on a *Commiſſion to ſix, four or two; and it was executed by three, and awarded to be void and without Warrant. *Nota*; in this Caſe the *Venue* was miſtaken, *viz. Weſport* for *Weſtport*, with (*t*); and therefore the Judgment was ſtay'd.

False Imprisonment. Authority.

(*a*) 1 Inſt. 181. b. Palm. 52, 53. 2 Ro. Rep. 137. Hutt. 127. 3 Bulſt. 209, 210. 1 Ro. Rep. 406.

Letter of Attorney. Obligation. Intent.

* 2 Inſt. 380.

Venue miſtaken.

Wilcocks *verſus* Lovelace.

Cro. Jac. 8. Replevin. Error.

Replevin; the Defendant avow'd by Reaſon the Plaintiff held certain Land in *D.* of him, by Fealty and certain Rent, as of his Manor of *D.* and for ſuch Service arrear he avow'd the Taking; and Iſſue was join'd between the Plaintiff and the Defendant upon the Tenure, and the *Venire facias* was awarded to *D.* and it was found againſt the Avowant; and upon Judgment given in the Common Pleas, the Avowant brought a *Writ of Error* in the King's Bench, and aſſign'd for Error, that the *Venire facias* ought to have been as well from the Manor of *D.* as from the Vill of *D.* for Notice upon the Trial (the Iſſue being upon the Tenure) ariſes as properly out of the Manor of *D.* as out of *D.* where the Land lies; and this was allowed for Error. *Nota*; the Place where the Land lay was call'd *Kingſdowne*, and the Manor of which the Tenure was, was call'd the Manor of *Kingſdowne*. And (by *Fenner Juſtice*) the Difference is, where the Tenant holds his Land as of a Manor, and where he holds as of a Seigniory in groſs; for where the Avowant has but a Seigniory in groſs, there the *Venue* ſhall be only where the Land lies; but where of a Manor which is local, and which by Intendment has Freeholders, there

Venire facias. Venue

the Trial ſhall be as well from the Manor, as from the Place where the Land lies. And a Difference was likewiſe taken and agreed, where it appears by the Record, that the Land lies in *D.* and is held of the Manor of *D.* in *D.* and where of the Manor of *D.* only; for in the firſt Caſe the *Venue* from *D.* only is ſufficient, becauſe both the Land and the Manor appear to be in *D.* but in the other Caſe the *Venue* ought to come from both; *quia non conſtat*, that the Manor and Land lie in one Vill, and the Manor of *D.* may be in *S.* or *V.* as well as in *D.* and for this Reaſon the Judgment was revers'd. And Precedents were ſhewn accordingly. Vide 16 & 17 Car. 2. c. 8.

Core *verſus* Morton.

THE Plaintiff declar'd, that whereas he was a good and *loyal Subject*, and of a good Reputation, *&c.* the Defendant ſpoke theſe Words of him, *Thou art a falſe and forſworn Knave, and that I will prove, for thou forſwore thy ſelf againſt* Peter Rumball *in the Hundred Court*: And upon *Non culp'* pleaded, it was found for the Plaintiff; but adjudged *Quod nil capiat per billam*; for the Words, as they are laid, will not bear an Action; for *forſworn, by it ſelf*, does not import Slander; otherwiſe of the Word *perjured*. And foraſmuch as the Plaintiff in this Action did not ſhew that there was any Action depending in the Hundred Court between *Peter Rumball* and ſome other, in which the Plaintiff was produced for a Witneſs, which might have induced the Word *forſworn* to have been equivalent to the Word *perjured*; for this Reaſon it was adjudged againſt the Plaintiff; for perhaps in Diſcourſe between *Rumball* and the Plaintiff in the Hundred Court, voluntarily between themſelves, the Plaintiff might *ſwear* ſomething falſly; and the Defendant might thereupon ſay, that he was *forſworn*; which does not ſound in any Slander. Cro. El. 905. Forſworn. Perjured. 4 Co. 15. b. Mo. 365.

THE Jurors preſented that *Fenton, Pecke, &c.* 20 *Aug.* 44 *Eliz. Vi & armis & manu forti unum Meſſuag' in* Fenton *in Com'* Stafford', *exiſtens ſolum & liberum Tenementum cujuſdam* Ja. Skrimſhire, *illicite & contra formam Statuti, &c. ingreſſum fecerunt, ac præfatum* Skrimſhire *a poſſeſſione ſua, &c. tunc & ibid' expulerunt & diſſ. &c.* And two Exceptions were taken to this Indictment; 1. Becauſe 'tis found that *Fenton, &c. unum meſſuagium ingreſſum fecerunt*, where it ſhould be (*in*) *unum meſſuagium*; for as it is in the Indictment, it is not good *Latin*. Otherwiſe if it Indictment on the Stat. 3 H. 6.

was

was *unum meſſuagium ingreſſi fuerunt*; *ſed non allocatur*, for either is ſufficient; and alſo it is not falſe *Latin*, altho' it is not ſo elegant and good *Latin*, as if this Prepoſition (*in*) was in the Indictment. 2. Exception was, becauſe the Indictment is (*exiſtens*) and does not ſay * *adtunc exiſtens*; ſo that *non conſtat whoſe Freehold* it was at the Time of the Entry. *Sed* † *non allocatur*; for when it is found that ſuch a Day they enter'd into a Meſſuage (*exiſtens*) *ſolum & liberum tenementum*, *&c.* this Word (*exiſtens*) muſt neceſſarily refer to the Time and Day of the Entry: So has it been taken before, upon an Indictment for the Murder of one *Savage*, where the Indictment was, that *J. S.* ſuch a Day and Year *in ipſum* Savage *inſultum fecit & percuſſit*, *dans eidem unam plagam mortalem*; and adjudged good without ſaying (*adtunc*) *dans*: Otherwiſe if the Indictment had been *percuſſit & dedit*, for then without the Adverb (*adtunc*) it would not be good; for the firſt Stroke, and the mortal Stroke, might well be at ſeveral Times; but where the Participle (*dans*) is join'd to the Word *percuſſit*, there it cannot be taken but that all was at one Time. *Yelverton* of Counſel in Maintenance of the Indictment to be good.

* Palm. 426. 2 Ro. Rep. 65. Noy 131. Cro. El. 754. Latch 109. Hetley 73. † 1 Bulſt. 177. Salk. 59. 4 Mod. 292. Comb. 294. Indictment of Death.

Semayne *verſus* Greſham.

Greſham and one *Beresford* were Jointenants of an Houſe in *London*, in which Houſe *Beresford* had ſeveral Goods; and being indebted to *Semayne*, and Judgment given againſt him for the Debt, dy'd poſſeſſed of the ſaid Goods, in the ſaid Houſe: *Greſham* continued poſſeſſed in the Houſe by Survivor; *Semayne* took Execution for the Goods of *Beresford*; the Sheriff of *London*, taking with him a Jury to praiſe the Goods of the ſaid *Beresford*, came to the ſaid Houſe to ſerve the Execution; which *Greſham* perceiving, before the Sheriff had enter'd the Houſe, ſhut the Door of the ſaid Houſe, and would not ſuffer the Sheriff nor the Jury to enter to view and praiſe the Goods; whereupon *Semayne* brought an Action on the Caſe againſt *Greſham* for diſturbing the ſaid Execution, and declar'd upon all the preceding Matter. And (by *Fenner* and *Yelverton*) the Action does not lie; for *Greſham* has done nothing but what he may lawfully juſtify, *viz.* ſhut his own Doors. And altho' the Execution had been for the Debt of *Greſham*, yet before the Sheriff's Entry into the Houſe it had been lawful for him to ſhut the Door; for, unleſs it is upon a *Capias Utlagatum*, which is the Queen's Suit, for the Contempt

Cro. El. 908. 5 Co. 91. Mo. 668. Co. Entr. 12. Caſe. Jointenants. Execution. Where the Sheriff may break the Door to do Execution. 1 Brownl. 50. 2 Show. 87. Ante 19.

of the Party, it is not lawful for the Sheriff to enter the Houſe unleſs it is open; as * 18 *Ed.* 4. — is: *Conceſſum* by all the Juſtices, contrary to the Book 18 *E.* 2. † *Execution.* And alſo in this Caſe (*per Fenner*) if the Sheriff himſelf might have enter'd, yet it is not lawful to bring a Jury into the Houſe to praiſe the Goods; for it was very inconvenient to have ſo large a Company in an Houſe, and might be prejudicial to the Party, by the Loſs of the Goods, &c. *Popham contra*, becauſe by this Means Juſtice is hinder'd; for Execution is the Effect of the whole Suit; and if Execution cannot be made, but is prevented by this Means, then it will be in vain to ſue; and therefore he conceiv'd the Book in 18 *E.* 2. *Execution*, is better Law than 18 *E.* 4. and he was of Opinion that upon an Execution betwee Party and Party, the Sheriff might enter and break the Door; to which *Fenner Juſtice* anſwer'd, that if the Sheriff might by Law in ſuch Caſe break the Houſe, then alſo clearly the Action does not lie; for then, altho' *Greſham* ſhut the Door of the Houſe, it was the Sheriff's Fault that he did not break it: *Quod Yelverton* granted afterwards. *Trin.* 2 *Jac.* Judgment was given againſt the Plaintiff *per totam Curiam.*

2 Ro. Rep. 137.
* Bro. Execution 102.
† Fitz. Execution 152.

Rede *verſus* Berelocke.

JUdgment is given againſt *Berelocke* in Debt of 100 *l.* in the Common Pleas; and after the Judgment he enters into a Statute to *J. S.* and dies Inteſtate; his Widow takes Adminiſtration, and removes the Record of the Debt recover'd againſt her Husband into the King's Bench by *Error*, and pending that Suit pays the Debt upon the Statute to *J. S.* and afterwards the firſt Judgment is affirmed. And in a *Scire facias* againſt the Adminiſtratrix to have Execution, ſhe pleaded Payment of the Statute, beyond which ſhe had not Aſſets. And thereupon the Juſtices of the King's Bench being divided, *viz.* *Popham* and *Gaudy* againſt *Fenner* and *Yelverton*, it was refer'd to the Opinion of the other Juſtices; and by the greater Part of the Juſtices joining with *Fenner* and *Yelverton*, it was adjudg'd a good Plea, and that the Payment of the Statute was no *Devaſtavit*; for at the Time of the Execution of the Statute ſhe could not plead the Judgment in the Common Pleas, becauſe it was doubtful whether it would be affirmed or not; then the Payment and Diſcharge of the Statute was no Fault in the Adminiſtratrix, for ſhe could not have *Audita Querela*, nor any other Remedy to be freed from the Payment of the Statute at the Time of the Execution ſued.

Cro. Eliz. 734, 822.
Co. Entr. 152. b.
2 Brownl. 39, 81.
4 Co. 59, 60.
2 And. 157.
Scire facias.
Statute-ſtaple.
Adminiſtrator.
Aſſets.
Judgment.
Devaſtavit.
Audita Querela.

Hill. 45 Eliz. B. R.

Abraham *verſus* Wilcox.

Replevin. The King. A Grant to him by Deed deliver'd of Record, but not record-ed.

TEnant in Tail of the King's Gift by Deed *deliberat' de recordo & ibidem remanens* conveys his Land to the King in Fee: And adjudged good, altho' the Deed be not enrolled; for the King does not take by the Enrolment, but by the Deed; ſo that the Deed is the Principal, and the Enrolment but a Proof that the Deed is of Record; and altho' it is uſually ſaid in the Books that the King cannot take unleſs by Deed inrolled, that is to be underſtood, unleſs the Deed made to the King is recorded; yet it is not ſufficient to make a Deed of Land to the King, and throw it into the Exchequer, or other Court of Record; or after ſuch Deed is made, to leave it in Court; but the Party ought to deliver it of Record in Court, and to be endorſed by the Officer, *Quod venit* J. S. *tali die*, and delivers into Court ſuch a Deed to the Uſe of the King, and then that countervails Enrolment. *Vide* for this the Books 37 *H.* 6. 10. and 12 *H.* 7.——*Vaviſor* in *Crooke's* Reports; and in this Caſe *per tot' Curiam, nullo contradicente.*

Chanudflower *verſus* Preſtley.

Cro. El. 914. Noy 50. Covenant. Breach aſſign'd.

Cro. Jac. 315. 1 Sand. 177. 1 Lev. 301. 1 Sid. 466. 1 Mod. 290.

A Man covenanted upon Payment of 10 *l.* by *J. S.* that *J. S.* ſhould have ſo many Tuns of Copperas, and enjoy it without lawful Diſturbance by any Perſon: *J. S.* brought Covenant, and ſhewed the Payment of the 10 *l.* but that he was interrupted and diſturb'd in the Enjoyment of the ſaid Copperas: And it was mov'd by *Crooke*, that the Breach is not well aſſign'd; becauſe it is not ſhewn by whom he was diſturb'd, nor that he was *legitimo modo* diſturb'd, according to the very Words of the Covenant; for though the Plaintiff in Covenant need not ſhew in ſpecial the Title by which he is diſturb'd, becauſe by Preſumption he cannot know it; yet in aſſigning the Breach he ought to purſue the Words of the Covenant: *Et allocatur per Curiam.*

Barnes *verſus* Worlich.

Noy 41. Mo. 644. Cro. Jac. 25. (*a*) Cro. Car. 283. 3 Bulſt 17.

J. S. lent 100 *l.* for a Year, and took 5 *l.* Intereſt at the End of ſix Months: *Popham* and *Gaudy* Juſtices were of Opinion, that this is (*a*) not Uſury; for it is not *ultra* 10 *l.* for the 100 *l.* for altho' *J. S.* took 5 *l.* Intereſt at the End of ſix Months, yet that is not *ultra* the Rate,

for it will be as if the 100 *l.* had been lent but for ſix Months: Like as if a Man lends 100 *l.* for a Year, and takes the Profits of a Manor to the Value of 10 *l. per Ann.* altho' the Profits are received every Day of the Year; yet that is not Uſury. But *Fenner* and *Yelverton* Juſtices *contra*; for this Caſe in Queſtion is not to be compar'd to a Mortgage; for the Statute, which allows the Mortgage, muſt neceſſarily allow the Profits to be taken as they naturally ariſe: But here, when 100 *l.* is lent for a Year, the Statute intends that the Profit and Increaſe of the 100 *l.* ought not to be receiv'd 'till the End of the Year; for if the 5 *l.* Intereſt is received at the End of the ſix Months, then he to whom the 100 *l.* is lent, has but the Uſe and Profit of 95 *l.* for the whole Year; and the Statute is to be taken ſtrictly againſt the Offender, and largely in Puniſhment of the Uſury; and therefore if 100 *l.* is lent for a Year, and he who lends it within two Days after takes back 10 *l.* it is Uſury: And in this Caſe when *J. S.* takes 5 *l.* Intereſt at the End of ſix Months, now it is to be preſumed, he will lend this 5 *l.* and take Intereſt for it within the Year, as he well may, which is more than the Statute allows; for the utmoſt Gain of 100 *l.* in Money for Intereſt ought to be by no Means but 10 *l.* by the Year. And Judgment was given, by the Opinion of all the Juſtices of *England*, againſt the Plaintiff. *Yelverton* of Counſel with the Defendant.

Audita Querela. What ſhall be Uſury. Stat. 13 El.

Gibſon *verſus* Holcraft.

IN a Prohibition, the Suggeſtion to ſtay the Suit in the Spiritual Court for Tithes was, that the Abbot of *Vale Royal* in *Cheſhire* was ſeiſed of the ſaid Parſonage of *W.* and of the Grange of *Darnal*, whereof Tithes were demanded by the preſent Parſon of *W.* and that the ſaid Abbot and his Predeceſſors from Time whereof, *&c.* were ſeiſed of the ſaid Parſonage of *W.* and of the ſaid Grange of *D.* in their Demeſne as, *&c.* in Right of their Abbey; and *ratione inde* ſhewed the Unity of Poſſeſſion in Diſcharge of the Tithes, upon the Statute of 31 *H.* 8. To which the Defendant pleaded that the ſaid Abbey was founded 5 *E.* 1. (which is within Time of Memory) and ſhewed and confeſſed the Unity of the Parſonage, and of the Grange after the Time of the Foundation. And upon the Motion of *Cooke* the Attorney General (*per totam Curiam*) the * Plea in Bar is good; and it is not neceſſary to traverſe the Preſcription, for the Shewing of the Foundation of the ſaid Abbey to be after the Time of Memory, is a ſufficient Confeſſing and Avoiding: But if the Defendant againſt the Suggeſtion of the perpetual Unity, would ſhew that the Demeſnes before the Statute, and in the Time of the Abbot, were in the Hands of the Farmers,

Prohibition. Stat. 31 H. 8. Tithes and Unity. Preſcription. Traverſe. Confeſs and avoid.

* Hob. 311.

Vide Mo. 528. 2 Co. 48. a. 11 Co. 14. b.

Farmers, &c. there he ought to traverſe the Preſcription; for although the Poſſeſſion was chargeable in other Hands, yet as to the Fee-ſimple which remain'd in the Abbot, it is a Diſcharge in Right.

Fitz-William's *Caſe.*

Cro. El. 915. Indictment on 8 H. 6. Certiorari. Reſtitution. Superſedeas. Re-reſtitution. Contempt in Juſtice of Peace. Br. Certiorari 19. Br. Recordare 8.

William Fitz-William was indicted upon the Statute of 8 *Hen.* 6. and that Indictment being in Force, he was indicted again upon the Statute upon the ſame Day, and upon the ſame Entry. The firſt Indictment was remov'd by *Certiorari* into the King's Bench; and upon the ſecond Indictment the Juſtices of the Peace in the County of *Eſſex*, where the Indictment was taken, awarded Reſtitution; and before it was executed, a *Certiorari* was deliver'd to Sir *Thomas Mildmay*, one of the Juſtices of Peace, who refuſed to open it before he had ſpoke with his Companions, and did not grant any *Superſedeas*, whereby Reſtitution is made; and afterwards the Indictment is remov'd into the King's Bench, and Re-reſtitution pray'd for *William Fitz-William*; and it was granted *per totam Curiam* upon great Deliberation; for the *Certiorari* coming to the Hands of one of the Juſtices, is in it ſelf a Prohibition to them all, (for the very Words are, *Coram nobis volumus terminari, & non alibi*) and thereby the Hands of the Juſtices are tied up; and it was a Miſdemeanor in Sir *Thomas Mildmay*, that he did not obey the Writ; for it is, *Cuilibet eorum*; and he was ſeverely reprimanded by the Court. *Vide* 1 *R.* 3. 4. *Certiorari* to remove an Indictment, which Indictment bore Date after the *Certiorari*; and 6 *Hen.* 7. 16. *per Keble*, if after the *Certiorari* deliver'd the Party does not ſue for the Removal, but lets it lie, yet the Juſtices cannot proceed in Execution: But *Hub. contra* there. But *Bro.* in abridging the Caſe, agrees with *Keble*. And 7 *Eliz. Dyer* 245. in ſuch *Certiorari*, altho' the Day of the Return is paſt, yet it is a *Superſedeas* by Reaſon of the Words (*Coram nobis & non alibi*). *Vide* 34 *Aſſ.* 8. *Telverton* of Counſel with *William Fitz-William.*

Shire *verſus* King, *an Attorney.*

Cro. El. 914. Error. Action for Words.

A Man ſpoke of an Attorney theſe Words, *Thou art a paltry Fellow, thy Credit is fallen, thou dealeſt on both Sides, and doſt deceive many that truſt thee.* And affirm'd upon Error, that the Words give Cauſe of Action; for altho' an Attorney may *deal on both Sides* as an Arbitrator, yet all the Words being *coupled together*, ought to have Reference to his Calling, and cannot be taken but *in malam partem*. *Telverton* of Counſel with the Plaintiff.

Paſch. 1 Jac. B. R.

Yaites *verſus* Gough.

GOugh was indebted to *Cowper* in 20*l.* who dy'd Inteſtate; and *Frances* his Widow took Adminiſtration, and recover'd by Judgment againſt *Gough*; but before Execution dy'd Inteſtate; whereupon *Yaites* took Adminiſtration of the Goods of *Cowper*, and brought a *Scire facias* againſt *Gough* upon the Judgment. And by *Popham*, *Fenner* and *Yelverton* it does not lie; for the one Adminiſtrator is not privy to the other; and this *Scire facias* being grounded upon a Record, he, who will have an Action upon this Record, ought to make himſelf privy to him who was before Party to the Record, which cannot be in this Caſe; for each Adminiſtrator claims by Commiſſion, and *quaſi* by a collateral Authority one to the other; and therefore the Opinion of *Fitz-Herbert* 26 *Hen.* 8. 7. is not Law. And *Benlowes* Serjeant cites a Caſe 28 *Hen.* 8. adjudg'd contrary to the Opinion of *Fitz-Herbert*. But (by *Popham*) if an Executor brings Treſpaſs for Goods taken out of his own Poſſeſſion, which were the Teſtator's, and recovers and makes his Executor, and dies, altho' the Record is general; ſo that *non conſtat* whether the Goods, for which the Treſpaſs was brought, were the Teſtator's or not; yet if the Executor ſues Execution, he ſhall have them to the Uſe of the firſt Teſtator; for ſo were they adjudg'd in his Teſtator to be Aſſets, *viz.* the Damages for the Taking of the Goods: But if an Adminiſtrator brings ſuch general Action for Goods which *revera* were the Inteſtate's, and recovers and dies, his Adminiſtrator ſhall have Execution of the Judgment, *quia non conſtat* by the Record to whom the Goods belong'd: But when he recovers, then the Adminiſtrator of the firſt Inteſtate ſhall compel him in a Court of Equity to pay him as much Money to the Uſe of the firſt Inteſtate, as he had recover'd before. *Quod nota.*

Mo. 680. Cro. Jac. 4. Scire facias. Execution. Privy. Adminiſtrator. Yelv. 83. 2 Sand. 148. 1 Mod. 62. Cro. Car. 208, 227. March 9. 30 Car. 2. c. 6. Bendl. 18. 1 And. 23. Mo. 4. Treſpaſs. Aſſets. Chancery.

Witty Diverſity.

Arundell *verſus* Arundell.

THE Cogniſance of a Fine was taken by *Roger Manwood*, Eſq; one of the Juſtices of the Common Pleas, who was afterwards made a Knight and Chief Baron of the Exchequer; afterwards the Party ſued forth the Fine, as is uſual, and took a *Dedimus poteſtatem* (which muſt of Neceſſity in Date over-reach the Cogniſance) to Sir *Roger Manwood*, Knt, who return'd it, *reſpons' infranominat' Rog' Manwood*; and afterwards the Fine is made perfect, and receiv'd by the Juſtices of the Common Pleas. And now it is alledg'd for Error in Fact, that *Roger Manwood*, who took the Cogniſance of the Fine, was not a Knight according to the Authority given him by the *Dedimus*, &c. And adjudg'd that it ſhould not be aſſign'd for Error; for it is contrary to the

Cro. Jac. 11. Cro. El. 677. Error on a Fine. Knight. Error aſſign'd contrary to the Record.

Record, and contrary to that which the Court has accepted; and by the ſame Reaſon he might ſay that there was no ſuch *Roger Manwood in rerum natura*; which cannot be, becauſe the Record is otherwiſe, which is an Eſtoppel; and moreover it is incertain how this Error aſſign'd in this Manner ſhall be try'd, whether by the Country, or by the Heralds, who make a Regiſter of the Knights. It would likewiſe be miſchievous to ſuffer ſuch Aſſignment of Errors; for this Averment may be taken to all Fines acknowledged by *Dedimus Poteſtatem*, altho' they were paſt 100 Years ago. And (by *Popham*) there are but two Sorts of Cogniſance of Fines, *viz.* by Commiſſion, *i. e. Dedimus Poteſtatem*, or in the Court of Common Pleas; if a *Dedimus Poteſtatem* is awarded to two, and one of them takes the Conuſance of a Fine, and this Fine is afterwards *drawn up* in the Common Pleas; yet the Party may well have Error upon this Fine, *viz.* that the Conuſance was without Warrant; for this is not contrary to the Record, for the *Dedimus Poteſtatem* is Parcel of the Record, and the Aſſignment of Errors agrees with it: But if ſuch erroneous Cogniſance on *Dedimus Poteſtatem* is taken, and the Fine is afterwards drawn up as a Fine acknowledg'd in Court, now no Miſtake in the *Dedimus Poteſtatem* ſhall avoid it; for it ſhall be adjudged as a Fine acknowledg'd in Court only. And if *J. S.* has a Warrant of Attorney for *J. D.* and it is taken by a Judge in the Common Pleas, and the Record is accepted in Court, it ſhall not afterwards be aver'd that there is no ſuch *J. S.* becauſe contrary to that which the Court has recorded; yet if the Judge had been inform'd of it at firſt, he would and ought to have ſtay'd it. And in the Caſe of a Sheriff, altho' a Man cannot aver contrary to that which he returns, yet he may ſay, that he who has indorſed his Name *on the back Side* of the Writ, *&c.* was not Sheriff; becauſe by the Common Law, until the Statute of *E.* 2. no Sheriff nor Officer uſed to put their Names to their Returns; and therefore this Averment, that he who made the Return is no true Officer, is not taken away by the Statute, but remains as a Thing at the Common Law.

Eſtoppel. Trial. Heralds. Miſchief. Averment. Ded. poteſt. Authority to two, one takes.

Return of the Sheriff. Stat. E. 2.

Lewis *verſus* Acton.

Action for Words.

THou are a perjured Knave, and that will be proved by a Stake that ſtandeth between the Ground of J. S. *and* J. D. and adjudged not maintainable; for altho' the firſt Words by themſelves will bear an Action, yet they are qualified by the ſubſequent Words; and this Word [*and*] is as much as this Word [*for*]; and ſo it appears, that this Perjury wherewith the Plaintiff is charged, is refer'd to the Proof of a Thing inſenſible, *viz.* a Stake: As if the Defendant had ſaid, *Thou art a Thief, and that will be proved by the Apples thou ſtoleſt off my Trees*; this is no Slander, for the ſubſequent Words explain the former Intent; and *ſtealing Apples from the Tree* is not Felony.

4 Co. 18, 19. Mo. 666. Yelv. 10.

Felony.

Huys

Huys *verſus* Wright.

THE Plaintiff declar'd, that whereas ſeveral Suits, *&c.* were between the Plaintiff and Defendant, they ſubmitted them to the Award of *J. S.* and promiſed each other to perform it; and ſhewed further, that in *Eaſter* Term, ſuch a Year, *in & ſuper* 20 *Maii J. S.* awarded that the Defendant ſhould *impoſterum* ſurceaſe ſuch a Suit, and alſo releaſe to the Plaintiff all Demands; and alledg'd *in facto* that after the ſaid 20 *Maii* in the ſame *Eaſter* Term, the Defendant did not ſurceaſe the Suit, but proſecuted it, and had Judgment; and alſo that he did not releaſe, *&c.* And upon *Non Aſſumpſit* pleaded it was found for the Plaintiff. And *Tanfield* Serjeant mov'd in Arreſt of Judgment, that the Declaration was not good; for it appears by the Plaintiff's own Shewing, that the Defendant had Judgment in *Eaſter* Term, and every Judgment has Relation to the firſt Day of the Term; then the 20 *Maii* being in the Middle of *Eaſter* Term, and the Award being that the Defendant after that ſhould ſurceaſe his Suit; *J. S.* has awarded a Thing which could not be performed; for the Suit was ceaſed before by the Judgment, which relates *ad Initium Termini*, and ſo could not be ſtay'd by the Defendant; then this Matter before being aſſign'd for one Breach, upon which to have greater Damages, and the Award being in that Point impoſſible to be performed, the Plaintiff ought not to have his Judgment: But it was *reſolv'd per totam Curiam*, that the Plaintiff ſhould have Judgment for two Reaſons: 1. Becauſe if the Exception ſhould be taken as before, *viz.* that by the Judgment relating to the Beginning of the Term, the Award to ſurceaſe the Suit is void; then it is as if ſuch Thing had never been awarded, and then the Aſſignment of the Breach of the Award in that Point is alſo void; and ſo no Damages given as to that Point, but only for the other Breach aſſign'd for not making the Releaſe. 2. (By *Popham*) altho' in Judgment of the Law every Judgment relates to the firſt Day of the Term; yet in this Caſe, the Plaintiff having expreſly alledg'd in his Declaration, that after 20 *Maii* the Defendant proſecuted the Suit to Judgment, altho' it appears to be all in one Term; yet the Defendant ought to have taken Advantage of it by a ſpecial Demurrer thereupon, becauſe it is ſpecially laid down in Time one to be after the other; and he having in this Caſe taken Iſſue upon the Point of the Action, *viz. Non aſſumpſit*; the other Matter alledg'd in the Declaration is only collateral, and but Inducement; and the Court cannot now judicially take Notice of it, without reſorting to another Record, *viz.* the Record of the Judgment; which they ought not to do, becauſe the Plaintiff has preciſely alledg'd it to be after the 20 *Maii* in Time.

Aſſumpſit.

Relation.

Where the Term ſhall not be adjudged one Day.

Damages.

1 Sid. 373. Demurrer.

Cro. Car. 53. Notice.

Grene

Grene *verſus* Gaſcoigne.

Cro. Jac. 484. 1 Brownl. 83. Debt. Outlawry. Reſpond. Ouſter on Failure in the Record. Co. Lit. 128. b. 2 Ro. Rep. 38.

IN Debt on a Bond of 100 *l.* the Defendant pleaded, in Bar to the Action, Outlawry in the Plaintiff, and ſhew'd it in certain; the Plaintiff reply'd *Nul tiel Record*, upon which the Defendant had a Day until the next Term to bring in the Record; and in the mean Time the Plaintiff reverſed the Outlawry, whereby it is now become in Law *Nul tiel Record*: According to 4 *H.* 7. 12. *Telverton* mov'd the Court for the Defendant, that although this is in Law a Failure of Record, yet the Defendant ought not to be condemn'd, but a *Reſpondeat Ouſter* ſhall be awarded: According to 6 *Eliz. Dyer* 228. *a.* who puts the Caſe, that the Failure of the Record is not peremptory; and ſo *adjudged per Curiam*; for in Fact there is no Default in the Defendant, his Plea being true at the Time of pleading it. *Quod nota.*

Purcell *verſus* Bradley.

Cro. Jac. 46. 1 Brownl. 192. Treſpaſs. Two Intendments. Equam not ſaying Suam. Mo. Caſ. 14. Salk. 640. 2 Lev. 156. Comb. 464. 2 Show. 395.

THE Plaintiff declar'd, *quare* ſuch a Day the Defendant upon him *Inſultum fecit, necnon unam Equam pretii* 6 *l. a perſona ipſius* (the Plaintiff) *adtunc & ibidem cepit*: And *Telverton* moved for the Defendant in Arreſt of Judgment, that the Declaration is not good; for the Plaintiff does not alledge any Property in the Mare, but he ought to have ſaid *Equam ſuam* or *Equam ipſius Querentis*; for now, as it is laid in the Declaration, it may have two Intendments: 1. That the Mare was the Defendant's, and then the Taking was lawful; or that it was the Plaintiff's, and then tortious; and being indifferent in Conſtruction, it ſhall be taken ſtrong againſt the Plaintiff; for it is not a Defect in Form which is aided by the Statute 34 *E.* 3. but it is defective in Matter; and then the Jury having aſſeſſed intire Damages for both the Treſpaſſes, and for one Treſpaſs ſuppoſed no Cauſe of Action is given; the Verdict is not good. *Quod fuit conceſſum per Fenner* and *Telverton* Juſtices, being only in Court.

Stweton *verſus* Cuſhe.

Cro. Jac. 9. Mo. 680. Owen 114. 1 Brownl. 135. A Condition to repair.

J. S. demiſed an Houſe for eighty Years, in which there is a Condition, that the Leſſee, his Executors and Aſſigns, ſhall maintain it in Repairs; and if upon *lawful Warning* given by the Leſſor, his Heirs and Aſſigns, that the ſaid Houſe is in Decay, it is not repair'd, *&c.* within ſix Months, then it ſhall be lawful for the Leſſor, his Heirs and Aſſigns to enter; the Leſſee for eighty Years makes a Leaſe of the Houſe to *A.* for thirty Years, and *A.* demiſes it

to *Wilmore* for fifteen Years; the Aſſignee of the Reverſion comes to the Houſe, and ſeeing it in Decay gives Warning to *Wilmore*, then poſſeſſed of the ſaid Houſe, to repair it; which he did not do within the ſix Months: Whereupon the Aſſignee enter'd for the Condition; and upon *Non Culp'* pleaded, the Matter aforeſaid is found by a Special Verdict. And it was adjudg'd againſt Sir *William Wade* the Aſſignee of the Reverſion; for the Warning to repair the Houſe being given to *Wilmore*, who was but an Under-Leſſee, was not good; for he was not Aſſignee of the Term, for he had but a ſmall Intereſt under the Grand Leaſe, upon whom no Avowry could be made for the Rent, nor any Action of Waſte brought againſt him; for immediate Privity is wanting. And in this Caſe a Difference is to be taken between Rent and a Condition for Repairs; for this Condition is merely collateral to the Land, and merely perſonal; ſo that Warning is not of Neceſſity to be given at the Houſe, but Notice of the Want of Repairs ought to be given to the Perſon of the Leſſee, who has the grand Intereſt. And a Difference is to be taken between a certain Time in which a Thing is to be done, and an incertain Time: As in Caſe of Rent reſerv'd payable at a certain Day, the Demand ought to be upon the Land only, becauſe the Land is the Debtor; and yet (by *Popham*) in ſuch Caſe, if the Leſſor comes to demand the Rent, and there meets with *J. S.* a Stranger, and ſays to *J. S. pay me my Rent*, this is no good Demand; for he has miſtaken the Perſon, for *J. S.* is not chargeable with it; but in ſuch Caſe a general Demand of the Rent, without Reference of it to any Perſon, who is not chargeable, had been good. And (by him) if a Man demiſes, rendering Rent by the Year *quandocunque* the Leſſor ſhall demand it; in that Caſe, if the Leſſor comes to demand it before the End of the Year, his Demand upon the Land is not good, unleſs the Leſſee is alſo there; for the Time being incertain when the Leſſor will demand it, he ought to give Notice to the Leſſee of the Time: And if he comes to the Leſſee, and demands it, that is likewiſe inſufficient; for although Notice ought to be given to the Leſſee in Perſon, yet the Land is the Debtor; and therefore the Law ties the Leſſor to the Land, as to the Place in which it ſhall be paid: But if the Leſſor ſtays till the End of the Year, then the Leſſee ought at his Peril to wait on the Land to pay it; for the End of the Year is the Time of the Payment preſcrib'd by the Law. *Quod fuit conceſſum*, *Serj. Tanfield* and *Stephens* of Counſel with the Defendant, for whom the Judgment paſt.

Who ſhall be called Aſſignee. Condition collateral. Notice. Time. Where Demand ſhall be to the Perſon, and where on the Land.

Hughes *verſus* Phillips.

Cro. El. 754. Cro. Jac. 13. Audita Querela. Stat. Staple.

Hughes of *Grayes-Inn* brought *Audita Querela* againſt *Rice Phillips*, to whom he had acknowledg'd a Recogniſance of 300*l.* upon a Defeaſance, that if *Hughes* paid to *Jo. Buſh* 300*l.* in ſix Years, *viz.* by 50*l. per Ann'*, at ſuch a Place, that then the Recogniſance ſhould be void; and pleaded that he was ready every Day at the Place in which, *&c.* to have paid the 50*l.* to *Buſh*, but *Buſh* was not there *ad exigendum & recipiendum. Phillips* ſaid, that he ought not to be thereby barr'd; *quia proteſtando* that *Hughes* was not ready to have paid, *&c.* to *Buſh*, *pro placito idem Jo. Buſh dicit*, that he was ready at the Place in which, *&c.* to have received the 50*l.* according to the Indenture, *abſque hoc*, that *Hughes* was there ready to have paid it; and upon this Plea *Hughes* demurr'd, and ſhewed for Cauſe, that whereas he had offer'd a ſufficient Iſſue triable by the Country, *viz.* that he was ready to have paid the 50*l.* if *Buſh* had been there ready to have receiv'd it, *Phillips* does not ſay that *Buſh* was there ready to receive, *& de hoc ponit ſe ſuper Patriam*; but traverſes, that *Hughes non obtulit* to pay; and upon this Demurrer was joined. And it was adjudg'd for the Plaintiff in the Common Pleas. And alſo upon *Error* brought by *Phillips* in the King's Bench, the firſt Judgment was affirmed by all the Juſtices; for altho' it was objected, that the Plea in Bar by *Phillips* being ill (*quia Phillips* ſays *pro placito*, that *Jo. Buſh dicit*, which is as if *Phillips had told a Tale out of* Buſh's *Mouth*) the Judgment in the Common Pleas ought to have been upon *Nihil dicit*, and not upon the Bar; yet it was anſwer'd, that the Bar being enter'd as a Plea by *Phillips*, and the Demurrer drawn up upon it between the Parties, the Judgment is upon an ill Bar; and in Pleading it is not all one, *Nihil dicere*, *ac inſufficienter dicere*; for then upon every inſufficient Bar Judgment would be upon *Nihil dicit*, which is not ſo. Then it was objected, that, becauſe it is but an apparent Miſtake in the Record, it ſhould be amended; to which it was anſwer'd, that, as the Caſe is, the Court has not Power to amend it; for this Fault in the Bar is ſhewed ſpecially for Cauſe of Demurrer by *Hughes*, and then Judgment paſſing upon the Special Cauſe ſhewn in the Demurrer, ouſts all Amendments. Then it was objected, that the Declaration by *Hughes* is not good, becauſe he ſays that *Buſh* was not at the Place *ad exigendum & recipiendum*, and the Money is to be paid without Demand: To which it was anſwer'd, that this Word *Exigendum* is void, and the other Word *Recipiendum* ſufficient. Then it was objected, that *Hughes* ought to have ſaid that *Buſh*, *nec ullus alius* was there for him to receive it: To which it was anſwer'd that *Hughes* ought not

1 Inſt. 126. a. 1 Sand. 103. 2 Sand. 190. 1 Mod. 289.

Where Judgment ſhall not be on Nihil dicit.

Amendment. Demurrer.

Stranger.

to plead ſo, as this Caſe is, becauſe *Buſh* is a mere Stranger to the Recogniſance, and it is no Duty in *Buſh*, but is as a Penalty inflicted upon *Hughes*, that he ſhall pay it to *Buſh*. And ſo being a collateral Duty payable only to *Buſh* a Stranger, *Buſh* ought to be there in Perſon, or by Attorney to receive it, and *Hughes* is not oblig'd in this Caſe to exceed the Words of the Condition of the Defeaſance. *Per totam Curiam in omnibus. Yelverton* of Counſel with the Plaintiff.

Term. Mich. 1 JAC. apud Winton. B. R.

Goodwyn *verſus* Goodwyn.

A Man by his Will bequeathed 20 *l.* to his Daughter; the Executor enter'd into a Bond of 40 *l.* to the Daughter for Payment thereof according to the Will; the Daughter married, her Husband ſued the Executor in the Spiritual Court as for a Legacy; the Executor pleaded Payment according to the Bond; and becauſe the Spiritual Judge would not allow this Plea, the Executor brought a Prohibition, and ſhewed for Surmiſe the Matter aforeſaid, *&c.* And *Tanfield* Serjeant mov'd for a Conſultation, becauſe the Suit was for a Legacy, which is Spiritual; and altho' the Executor pleads Payment, which is not allow'd there; yet he ought not to have a Prohibition, becauſe Payment is a good Plea in the Court there; and if the Judge will not allow it, the other may apppeal to the ſuperior Judge; and if this is ſuffer'd in the Caſe of a Legacy, then the Spiritual Court will try nothing. But (by *Gaudy*, *Fenner* and *Yelverton* Juſtices) the Surmiſe is good: For the Executor by his entering into Bond to the Daughter for Payment of the Legacy has extinguiſhed the Legacy, and has made the 20 *l.* bequeathed a Debt merely at the Common Law, and not ſuable there.

Prohibition. Legacy extinct.

Extinguiſhment.

Heyford *verſus* Reve.

Reve diſtrain'd ſix Kyne of one *Heyford*, and impounded them at *Baſingſtoke*, for a Quit-Rent due to the Bailiffs of *Baſingſtoke*; wherefore *Reve*, in Conſideration of the Money paid for the Redemption of the Cattle, promiſed upon Requeſt to ſhew *Heyford*, or any Perſon he ſhould name, a ſufficient Record to charge his Land with ſuch Quit-Rent to the Bailiffs; upon this *Heyford* brought *Aſſumpſit* againſt *Reve*, and ſhewed the Matter aforeſaid, and that he ſuch a Day appointed *B.* to view the Record, and requeſted him to ſhew it to *B.* and

Aſſumpſit.

Sufficient Record Iſſue. Jurors

and ſaid *in facto*, that *Reve* did not ſhew *B.* any ſufficient Record to charge his Land, *&c. Reve* pleaded *Non Aſſumpſit*, and it was found againſt him. And *Yelverton* moved in Arreſt of Judgment, that the Breach of the Promiſe is not well laid; for the Matter and Subſtance of the Promiſe is always iſſuable; and in this Caſe (as the Plaintiff has laid the Breach) the Sufficiency of the Record will be referr'd to the Jury, which belongs only to the Judges of the Law; as if the Defendant had pleaded, that he ſhewed *tale Recordum*, which is ſufficient: But the Plaintiff ought to have ſaid that the Defendant did not ſhew any Record; and to that the Defendant might have pleaded, that he ſhewed ſuch a Record, which was ſufficient: And then the Jury ſhould not try the Sufficiency of the Record, but only find the Record which was ſhewn: *Sed (per Gaudy, Fenner* and *Yelverton) non allocatur:* For although the Plaintiff might have laid the Breach generally, as before, *viz.* that the Defendant did not ſhew any Record; yet, as it is laid, it is good enough; for it is ſufficient, and more proper for the Plaintiff to lay the Breach as the Promiſe was made: And in this Caſe the Defendant might have pleaded, that he ſhew'd *Tale record'*, and recited it, and then concluded that it is ſufficient, and upon that Bar the Plaintiff might have demurr'd in Law. *Quod Nota.* By the Aſſignment of the Breach in Special as it is, the Parties would never come to Iſſue upon the Matter of the Promiſe, but only come and put themſelves in the Judgment of the Law.

Vide ante 30.

Boſden *verſus* Sir John Thinne.

Cro. Jac. 18. Aſſumpſit. Conſideration. Requeſt. Relation.

THE Plaintiff declar'd, *Quod cum ad Specialem inſtantiam* of the Defendant, he had procur'd Credit for one *Flud* for two Pipes of Wine amounting to 51 *l.* and *Flud ſuper Credentiam & per Medium* of the Plaintiff, at the Requeſt of the Defendant *emiſſet* of one *Roberts* two Pipes of Wine for 51 *l.* and *ſuperinde* the Plaintiff with *Flud* enter'd into Bond of 100 *l.* to *Roberts* for Payment of the ſaid 51 *l.* at a Day to come, which was not paid at the Day; and thereupon *Roberts* ſued the Plaintiff upon the Bond, and recover'd, and had a *Capias* againſt him, whereby he *fuit coactus* to pay *Roberts* 67 *l. de ſolutione of which* 67 *l. cauſa præallegata* he notified to the Defendant, who *in Conſideratione præmiſſorum* promiſed to pay the Plaintiff the 67 *l.* at *Michaelmas*; and ſhewed the Failure of Payment of the 67 *l.* at the Day, *&c.* And upon *Non Aſſumpſit* pleaded, it was found againſt the Defendant. And *Yelverton* moved in Arreſt of Judgment, that the Action, upon the Matter ſhewn, does not lie, becauſe the Conſideration was paſt, and executed before the Promiſe, and the Defendant had no Profit by it, but all the Benefit was to *Flud* a

Stranger; like the Caſe 10 *Eliz. Dy.* 272. where *J. S.* was Bail for the Servant upon an Arreſt, and ſignified all to the Maſter after the Bail enter'd into, who promiſed to ſave him harmleſs; and although the Bail was condemn'd, yet no *Aſſumpſit* lay againſt the Maſter, becauſe the Conſideration was paſt before the Promiſe: And it ſeems that upon the firſt Requeſt only to give Credit to *Flud* for two Pipes of Wine, no *Aſſumpſit* lies; for a bare Requeſt don't imply any Promiſe: As if I ſay to a Merchant, *I pray truſt* J. S. *with* 100 *l.* and he does ſo, this is of his own Head, and he ſhall not charge me, unleſs I ſay, *I will ſee you paid*, or the like. And it ſeems likewiſe, that the Promiſe ſhall not have Relation to the firſt Requeſt of *giving Credit* to *Flud*; becauſe the Intreaty for the Credit was but for two Pipes of Wine amounting to 51 *l.* and the Promiſe is for 67 *l.* and ſo they differ in the Sums; as if I requeſt *J. S. to enter into Bond for* J. D. *for* 10 l. *and I will ſee him paid*; now if *J. S.* enters into Bond of 20 *l.* for the Payment of 10 *l.* for *J. D.* which 20 *l.* is recover'd againſt him, he ſhall not charge me on my Promiſe but with 10 *l.* But *non allocatur per Fenner*, *Gawdy* and *Popham*; for altho' upon the firſt Requeſt only *Aſſumpſit* don't lie, yet the Promiſe coming after ſhall have Reference to the firſt Requeſt; and although the Requeſt was but for two Pipes of Wine amounting to 51 *l.* that *Flud* might have Credit for that; yet when *Roberts*, who ſold the Wine, would not take (as appears) Security but by Bond of 100 *l.* for Payment of 51 *l.* and all this Matter is ſignified afterwards to the Defendant, who agrees to it, and promiſes to pay the 67 *l.* this ſhall charge him; becauſe it has its Eſſence and Commencement from the firſt Requeſt made by the Defendant. As *(per Gawdy)* if I requeſt one to marry my Coſin, who does ſo, and afterwards tells me of it, and thereupon I promiſe him 100 *l.* this is a good Promiſe to charge me, although the Marriage was paſt, which is the Conſideration; becauſe now the Promiſe ſhall have Reference to the Requeſt, which was before the Marriage. *Vide* this Caſe, *Dy.* 272. *b.* The ſame Law (by him) if I entreat one to be Bail for my Servant, and he thereupon becomes Bail, and is condemn'd, and afterwards tells me of it, and I promiſe him to ſave him harmleſs, it is good, and he ſhall recover his Damage *in toto:* Wherefore Judgment was given for the Plaintiff. But *Yelverton* Juſtice was *contra* clearly

Requeſt.

Cro. El. 42.
2 Leon. 224.
Godb. 31

Weaver *verſus* Clifford.

Cro. Jac 3. 1 Brownl. 83. 2 Bulſtr. 62. 1 Rol. Abr. 897.

Debt on Eſcape. Recognizance. Capias. Scire facias. Chancery. Cap. don't lie on Recognizance. 23 H. 7. 100. Eſcape. Precedents.

IF upon two *Nihils* return'd againſt the Recogniſor in Chancery, a *Capias* is awarded againſt him out of the Chancery, by Virtue whereof he is taken by the Sheriff, and ſuffer'd to eſcape; yet no Action of Debt lies againſt the Sheriff upon this Eſcape; for a *Capias* don't lie on a Recognizance, but a *Scire facias* only: And therefore when the Party is taken by the *Capias*, he is not a Priſoner by Courſe of Law; for the Law has not ordain'd any ſuch Means to arreſt him, and being in Cuſtody without Warrant, it is not an Eſcape; for that is only upon a lawful Commitment: And ſo is the Statute *W.* 2. to be conſtrued, which gives the Action againſt the Gaoler, *viz.* where the Party is in Execution by Courſe of the Law, and that he is not in this Caſe, becauſe the Law don't give a *Capias* on a Recognizance; and although the Chancery has ſuch Courſe to award a *Capias* on a Recognizance, and has ſeveral Precedents of it, yet this is the Uſe of that Court only, which does not cloſe the Mouths of the Judges of the Common Law, but that they ought to adjudge according to the Law. *Per Telverton, Gawdy, Popham*, Juſtices: *Fenner hæſitavit*; becauſe he conceived the Award of the *Capias* only erroneous, and not void: And in this Caſe *Tanfield Serjeant*, and the *Attorney General* ſhew'd a preciſe Judgment in the Caſe, 21 *Eliz.* in the Exchequer, *Clement Paſton*'s Caſe, who was charged for an Eſcape, where he being Sheriff had taken one on a *Capias* on a Recognizance, and ſuffer'd him to eſcape; and yet there the Recogniſor was in Priſon for Felony before the *Capias* on the Recogniſance was awarded, and came to the Sheriff's Hands; and yet adjudged an Eſcape to the Party, although he was alſo the Queen's Priſoner for the Felony: Yet the three Juſtices held their Opinion ſtrenuouſly as before. *Quod Nota.*

Mo. 274. Cro. El. 164.

Term. Hill. 1 Jac. B. R.

Chambers *verſus* Maſon.

Cro. Jac. 34. Trover. Poſt. 47.

IN an Action of Trover for certain Tithes ſever'd from the nine Parts, upon *non Culp'* pleaded; the Jury found, that the Prior of *Wombridge in Comitatu Salop'*. was ſeiſed of the Rectory of *Loppington*,

&c. and by Indenture 12 *H.* 8. demiſed the Tithe Corn and Hay, to *Milward* for Eighty-one Years, yielding 4*l. per Ann.* payable at *Wombridge*; and by the ſame Indenture granted to the Leſſee and his Aſſigns *dare & reddere* yearly 3*s.* 4*d.* for Portage: The Priory is diſſolved, and by mean Diſcents comes to Queen *Eliz.* who 26 *Junii Anno* 37. demiſes the Rectory with the Appurtenances, *& omnes Domus, terras glebales, &c. cum pertinen' ad Rectoriam præd' Spectan' & cum eadem Rectoria uſualiter dimiſſa, locata, vel occupata antehac pro annuali reddit'* 3*l.* 16*s.* 8*d.* to *Johnſon. Habend'* from *Michaelmas* next, *Si nulla Dimiſſio tunc de Rectoria fuerit in eſſe*; and yielding 3*l.* 16*s.* 8*d. per Ann', &c. Et ſi aliqua Dimiſſio, &c.* then *habendum* from the End of ſuch Demiſe, yeilding, *ut ſupra.* The Jury further found, that *Johnſon* aſſign'd his Intereſt to the Plaintiff, that 3*l.* 16*s.* 8*d.* were only paid to *H.* 8. Queen *Mary*, and *Eliz.* yearly *pro Rectoria prædicta*; that *Milward*'s Leaſe by the Prior ended 43 *Eliz.* that the Corn taken by the Defendant is Part of the Tithe of the Rectory ſever'd from the nine Parts, *&c. Et ſi, &c.* So the whole Matter reſts upon the Plaintiff's Title: And in this Caſe *Yelverton* mov'd for the Defendant in Argument againſt *Serjeant Coventry.* 1. That the Rent reſerv'd by the Prior is 4*l.* and although 3*s.* 4*d.* is to be paid to the Leſſee for Portage, yet that is no Part of the principal Rent to be retain'd by Way of Defalcation; for the Words are, *quod Prior, &c. concedunt dare & reddere*, ſo the whole 4*l.* ought to be paid, and by Way of Covenant the Leſſee is to receive 3*s.* 4*d.* by the Hands of the Abbot for Portage, *quod Curia conceſſit.* 2. *Yelverton* mov'd, that the Leaſe by the Queen is bad; for there being no Conſideration expreſt, for which the Queen ſhould make ſuch Leaſe, it ſhall be intended that ſhe meant to part with no other Poſſeſſion than the Abbot had demiſed before, and to have the ſame Recompence which the Abbot had; and in this Caſe it appears, 1. That the Queen has demiſed the Rectory, whereas the Prior demiſed but Part of the Fruit of the Rectory, *viz.* the Tithe Corn and Hay. 2. She was induced to demiſe the whole Rectory with the Appurtenances for 3*l.* 16*s.* 8*d.* thinking that had been the uſual Rent formerly reſerv'd by the Prior, whereas the Prior's Rent was 4*l.* So in both theſe Points ſhe was deceiv'd; for the Recital of the Rent in the Queen's Caſe is material, where no other Conſideration is mentioned in the Patent. 3. It is incertain at what Time the Queen's Leaſe ſhould commence, for ſhe intended that the whole Leaſe ſhould have the ſame Commencement; and in this Caſe as to the Rectory the

Recital in the Leaſe.

Reſervation. Covenant.

Rent miſtaken.

The King's Grant. Conſideration in a Patent.

the Leaſe by the Queen might commence immediately, for of that *nulla Dimiſſio eſt*; but as to the Tithe Corn and Hay it could not commence till the Abbot's Leaſe ended, which is found by the Jury to be ended *Anno* 43. So by Matter apparent in the Verdict, one and the ſame Leaſe, which was intended to be intire, would have ſeveral Commencements, which ſhall not be. *Quod fuit conceſſum per Curiam*; *Fenner* being abſent.

Ayer *verſus* Aden.

Mo. 757. Cro. Jac. 73. Trover. Execution.

AYER being Defendant in Debt at the Suit of *J. S.* a *Fieri facias* iſſued to the Sheriff to levy the Debt for *J. S.* the Sheriff by Virtue thereof ſeiſed the Goods, but did not return the Writ: The Sheriff is afterwards diſcharg'd, and a new Sheriff made: The antient Sheriff after his Diſcharge ſells the Goods to *Aden* the Defendant, againſt whom *Ayer* brought an Action on the Caſe on Trover, *&c.* and the aforeſaid Matter was found by Verdict. And *adjudged pro Querente*; (*a*) for the Sale by the old Sheriff after his Diſcharge is void, for his Authority ceaſed with his Office; and in ſuch Caſes where the Sheriff has ſeiſed the Goods by Writ of Execution, and is afterwards diſcharg'd, he ought to *turn over* the Goods to the new Sheriff, as he does his Priſoners; (*b*) and by the Seiſing of the Goods the Owner's Property is not alter'd; for the Seiſure is not any Execution, but only the Beginning of it; and the Sheriff after ſuch Seiſure ought to return the Writ executed *in tanto*, and cannot by the Law deliver them *in Pais* to the Plaintiff; for as the Writ of Execution is warranted by the Roll, ſo likewiſe ought the Diſcharge and Executing of it to appear of Record; and the Sheriff after the Seiſure, although he had continued in his Office, could not have ſold the Goods without a Writ of *Venditioni exponas*, and that is not grantable till it appears by the Sheriffs Return, that *remanent pro Defectu Emptorum.* Adjudg'd by *Popham*, *Fenner* and *Yelverton*, *Gawdy* being abſent.

(*a*) 34 H. 6. 36. a. contra.

Property in Goods.

(*b*) 1 Lev. 282. 1 Mod. 30. 1 Ven. 52. 1 Sid. 438. 2 Sand. 47. contra. Vide Lutw. 589.

Pudſey *verſus* Newſam.

Mo. 682. 1 Brownl. 84. Debt.

DEBT of 500 *l.* with Condition, if the Defendant before *Michaelmas do make, acknowledge and ſuffer*, &c. *all and every ſuch reaſonable Act and Things, whatſoever they be, for the good and lawful Aſſuring and Sure-making of the Manor of* D. *to* J. S. *and his Heirs*, that then, *&c.* the Defendant pleaded, that before *Michaelmas* the Plaintiff *rationabiliter non requiſivit* the Defendant *ad faciendum, &c. aliqua rationabilia Actum & Acta, quæ forent pro bona & legitima*

Assurantia of the Manor of *D. &c.* The Plaintiff replied, that such a Day before *Michaelmas* he requested the Defendant, *quod ipse conveniret & assuraret Maneria de D.* to J. S. *&c. secundum tenorem Conditionis*; and upon that they were at Issue, and it was found for the Plaintiff, and alledg'd in Arrest of Judgment, that no sufficient Breach was assign'd; for the Plaintiff ought to have required an Assurance in certain, *viz.* a Feoffment, or Fine, or, *&c.* and not to have requested that the Defendant *conveniret*; for the Condition being Special, *all and every Act and Acts*, the Request ought to have put the Assurance to a Certainty, what ought to be made. But *non allocatur*; but the Issue adjudg'd good, and the Condition broke; for by the Condition the Defendant is to do *all and every Act whatsoever* for the Assurance of the Manor of *D.* So that if the Plaintiff requested a Fine, a Feoffment, a Recovery, a Bargain and Sale, the Defendant ought to do all; but it was held, that he is not to execute any * Bond, or Recognisance for the Enjoying of the Manor, for that is but a collateral Security, and is no Assurance: Then when the Plaintiff requested the Defendant to convey the Manor in General, the Defendant ought at his Peril to do it by some Kind of Assurance; and if upon that Request the Defendant had made a Feoffment of the Manor, yet if the Plaintiff had after that requested a Fine, the Defendant ought also to have acknowledged a Fine, and so upon every several Request, he ought to make several Assurances; and therefore in making the Request in General he has well pursued the Words of the Condition, and upon that the Defendant ought at his Peril to make some Assurance. *Per totam Curiam.*

Request to make Assurance.

Assurances. Bond. Recognisance.

* Vide Cro. El. 370, 371.

Ante 30.

Persival *versus* Spencer.

IN an Action on the Case on a Promise, the Plaintiff declar'd for 10 *l.* Damage, and upon Issue tried, the Jury gave 13 *l.* which is more Damage than the Plaintiff declar'd, and Judgment was given accordingly, *viz.* that the Plaintiff should recover 13 *l.* by the Jury assess'd; and this Judgment was reverst for this Reason in the King's Bench; † for the Plaintiff is in Law taken to have the best Knowledge of his own Damage, and he shall never recover more than what he declares for; but if after such Verdict the Plaintiff had ‡ releas'd all the Damages, but those for which he declar'd, and then had Judgment, that had been good: This Record was removed out of the Court of *Northampton.*

Action on the Case. Damages.

† Cw. 45. 1 Bulst. 49. Cro. Jac. 297. Post 70.

‡ 2 Show. 56, 57. 2 Sand. 350. 10 Co. 115. b.

Mouſe *verſus* ——

Error. Court. Prerogative.

Cro. Jac. 184.

IF an Inferior Court holds Plea, and it do not appear in the Stile of the Court how they hold it, *viz.* by Charter or by Preſcription, the Proceedings in that Court are erroneous, and all that enſues thereupon; for all Juriſdiction to hold Plea reſts in the Crown, and therefore the King's Court ought to be informed, how that Power is derived from the Crown. *Adjudg'd* upon a Record removed out of the Court of *Graveſend.*

Trin. 2 Jac. B. R.

Barnes *verſus* Conſtantine.

Cro. Jac. 32. Action on the Caſe for Conſpiracy. Barretor. Oyer of the Indictment certified.

AN Action on the Caſe in the Nature of a Conſpiracy: He declar'd that whereas, *&c.* he was indicted before ſuch Juſtices *ad diverſa Felonias, &c. necnon ad Pacem conſervandam aſſignat'* as a common Barretor, and thereupon pleaded *non Culp'*, and was lawfully acquitted, *&c.* The Defendant demanded Oyer of the Indictment, which was certified to be taken before ſuch Juſtices *ad Pacem conſervandam, &c. aſſignat'*, and upon that demurred, becauſe the Indictment certified varied from the Indictment ſhewn in the Declaration; for upon the Matter it is an Acquittal before Juſtices, who have other Power than ſuch as is ſignified by the Declaration; for thoſe are *ad diverſa Felonias, &c. necnon ad Pacem*, and the Indictment certified is before Juſtices *ad Pacem tantum.* And yet *adjudg'd* that the Action lay; for they are not merely Juſtices of another Nature or Power than thoſe which are mentioned in the Declaration; for both are Juſtices of Peace, and ſuch as have Power to receive ſuch Manner of Indictment: But if the Declaration had mentioned Juſtices of Aſſiſe, and the Certificate had been of a Thing taken before Juſtices of Gaol-Delivery, it had been merely different; for they are diſtinct in Power. Moreover this Action is but for Damages for a Slander, which well lies, although the Indictment is erroneous; or, as it has been adjudged (as *Yelverton* Juſtice ſaid) if a Bill is offer'd, and *Ignoramus* found. *Nota* that. *Per Popham, Gawdy, Fenner* and *Yelverton.* But *Williams contra.*

Poſtea 117. Style 372, 378.

Salk. 14. 5 Mod. 406.

Ellis

Ellis *verſus* Warnes.

Mo. 752. Cro. Jac. 33. 1 Brownl. 85. Debt. Uſury.

IN Debt for 120 *l.* the Caſe upon the Pleading was, that *Warnes* was indebted to *Alder* in 100 *l.* on an uſurious Contract, and *Alder* was indebted over to *Ellis* the Plaintiff in 100 *l.* juſt Debt; for which Debt *Warnes* and *Alder* were bound to the Plaintiff. In Debt on this Bond *Warnes* pleaded the Uſury between him and *Alder* to avoid the Bond; *Ellis* the Plaintiff replied, that *Alder* before the Bond was indebted to him in 100 *l.* juſt and true Debt; for the Payment of which *Warnes* and *Alder* were bound to him in the Bond in Suit, and that he was not *Sciens* in any Sort of the Uſury between *Warnes* and *Alder*; and upon that *Warnes* demurr'd: And it was *adjudg'd per Gawdy, Yelverton* and *Williams* for the Plaintiff; for this is not Uſury in the Plaintiff, but only between *Warnes* and *Alder*, by which the Plaintiff, not being privy, ſhall not be prejudiced; for although the Statute of Uſury is to be taken ſtrictly to ſuppreſs Uſury, yet it ought to be between thoſe Perſons who uſe Corruption, and not to puniſh the Innocent, as the Plaintiff is; for there can be no Shift in him, having a due Debt Precedent; but if there had been no Debt due to the Plaintiff before, then clearly it had been Uſury in the Plaintiff, for there was no lawful Cauſe to make the Bond to him, but only to countenance the Corruption between *Warnes* and *Alder*; and alſo (by *Yelverton* Juſtice) if this Plea by the Defendant ſhould be good, then every Man might be defrauded of his juſt Debt; for the Creditor generally demands a Surety: And by this Caſe, if the Bar ſhould be good, by Corruption between the Debtor and the Surety, to which the Creditor is a mere Stranger, a Man would loſe his Debt, which would be miſchievous. But *Popham* and *Fenner* doubted; for they conceiv'd the Plaintiff ought to have taken a Traverſe to the Defendant's Plea, which in Truth cannot be; for he cannot traverſe a Thing which don't lie in his Conuſance, nor to which he is no Party.

Chambers *verſus* Maſon.

Ante 41. Cro. Jac. 33. Trover.

IN an Action of Trover for Tithes, &c. the Caſe was, that the Prior of *Wombridge* demiſed the Tithes of the Corn and Hay of *Loppington in Com' Salop'* to *A.* for 4 *l. per Ann'*, and by the ſame Indenture of Demiſe covenanted *dare & reddere* to the Leſſee, &c. for Portage of the Rent to the Priory 3 *s.* 4 *d. per Ann'*: The Priory is diſſolved, and comes by mean Diſcents to Q. *Eliz.* who *An* 37. demiſes to *B.* for Years the Rectory of *Loppington*, with the Appurtenances, and all Glebe-Land, Houſes, &c. *Specian' ad Rectoriam pred' & cum eadem Rectoria*

antehac

The King's Grant.

antehac uſualiter dimiſſa, pro Reddit. 3 *l.* 16 *s.* 8 *d. habend'* from *Michaelmas* next, if no Demiſe for Life or Years be *in eſſe* of the ſaid Rectory, and if any Demiſe thereof be, then from the End of the Term; and 'tis found by Special Verdict, that the Prior's Leaſe was then *in eſſe*, and did not end till *Anno* 43 *Eliz.* And it was *adjudg'd* for the Plaintiff, who had purchaſed the Inheritance of the ſaid Rectory, and that the Queen's Leaſe made to *B.* under which the Defendant claim'd, is void for two Reaſons. 1. Becauſe the Queen was deceiv'd in her Conſideration, *viz.* in the Rent reſerv'd; for ſhe intended to have the ſame Rent which had been reſerv'd before; and the Rent by the Prior was 4 *l.* for the 3 *s.* 4 *d.* for Portage was not to be defalked out of the Rent, but only to be paid by Way of Covenant, which Covenant by the Diſſolution of the Priory is gone; ſo the Queen ought to have been anſwer'd 4 *l.* yearly; and then when ſhe recites the Rent to be 3 *l.* 16 *s.* 8 *d.* where it really was 4 *l.* and intends to reſerve as much as was reſerved before, which was not; for there wants 3 *s.* 4 *d.* the Queen is deceived: And (by *Popham*) the Difference is, where the Queen is deceived in her Intent, and where ſhe is miſtaken in her Information; for if ſhe grants the Manor of *D.* of the Value of 10 *l.* where it is of the Value of 20 *l.* 'tis ill; for ſhe is deceived in her Intent, for the Smallneſs of the Value ſeems to be the Ground of her Patent: But if ſhe grants the Manor of *D. antehac* demiſed for 10 *l.* where it was really demiſed for 20 *l.* and ſhe reſerved 20 *l.* 'tis good. And if ſhe grants the Manor of *D. quod quidem Manerium eſt* of the Value of 10 *l.* and it is in Fact of the Value of 20 *l.* yet it is a good Patent; for in that ſhe is deceived only in her Information, and not her Intent. The ſecond Reaſon was, becauſe it appears to the Court, that the Tithes of the Corn and Hay were Parcel of the Rectory demiſed by the Queen, and in Leaſe by the Prior's Leaſe: Then the Queen's Leaſe for the Tithes demiſed by the Prior could not take Effect preſently, for there's a Leaſe in Being; and for the Rectory it ſelf it might take Effect immediately, for that is not in Leaſe at all; but that is contrary to the Queen's Intent, that her Leaſe ſhould take Effect by Parcels, *viz.* for the Rectory immediately, and for the Tithes of the Corn and Hay in Reverſion, and *in futuro*; for ſhe intended to have all that which ſhe demiſed in Poſſeſſion at one and the ſame Time. *Quod Nota. Per totam Curiam.*

Conſideration.

10 Co. 112. a. b.

Mich. 2 JAC. B. R.

Charnell *verſus* Holland.

THE Plaintiff declar'd, that the Defendant ſuch a Day and Year *dixit* of the Plaintiff, *Thou haſt ſtolen three Sheep of one* T. Diggins, and laid the Words to be ſpoke at *Witham in Com' Eſſex*. The Defendant juſtified, and that at *Dagnam* in the ſame County *Diggins* had three Sheep, and the Plaintiff ſtole them and carried, *&c.* wherefore he ſpoke the Words *Tempore quo, &c.* and upon Iſſue, *de Injuria ſua propria abſque tali Cauſa*; the Venue was awarded from *Witham* and *Dagnam*, and found for the Plaintiff. And *Yelverton* moved in Arreſt of Judgment, that the Venue was miſtaken; for it ought to be from *Dagnam* only; for by the Juſtification the Words are confeſſed, ſo that the Matter in Iſſue is now only upon the Cauſe, on which the Words were ſpoke, and that was the Plaintiff's *Stealing* of the *Sheep in Dagnam*; ſo that the Joining of *Witham* in the Venue makes it vitious; for no Part of the Cauſe in Iſſue comes *from Witham.* But if the Words had been laid in one County, and the Cauſe of Juſtification in another County, then the Trial ſhould be from both. *Quod fuit conceſſum in omnibus per Gaudy, Yelverton* and *Williams* Juſtices. But upon View of Precedents both Ways, from both Places, and alſo from the Place only where the Juſtification was, Judgment was given for the Plaintiff. But where the Defendant juſtifies in another Place, if the Venue be from the Place where the Words are ſuppoſed to be ſpoken only, it is not good: *Quod vide adjudg'd* in one *Cage*'s Caſe.

Cro. Jac. 43. Words. Venue. Juſtificat. Venue from two Counties. Precedents.

Vide 16, 17 Car. 2. c. 8. 1 Sand. 246. 1 Ven. 22, 263. Comb. 472.

Allein *verſus* Randall.

THE Plaintiff declar'd, *quod quoddam Colloquium & Bargania habit' fuer'* between him and the Defendant for the Wood in ſuch a Place, and that in Conſideration of 10*s.* paid, and 20*l.* to be paid on 20 *Decemb.* after, in the Houſe of *A.* and in Conſideration that the Plaintiff at the ſame Time and Place *aſportaret Sufficientem Hominem fore obligat'* to the Defendant for Payment of 20*l.* at a Day to come, the Defendant promiſed that the Plaintiff ſhould have and enjoy the ſaid Wood to his own Uſe; and ſhewed that he on 20 *Decemb.* at the Houſe of *A. obtulit* to the Defendant the 20*l.* which was to be paid, *& adtunc & ibidem aſportavit* B. *ſufficientem hominem fore obligatum* to the Defendant for the other 20*l. &c.* yet

Aſſumpſit.

the Defendant had ſold the Wood to *Hare*, whereby, &c. and upon *Non Aſſumpſit* pleaded, it was found for the Plaintiff: But *Judgment, quod Quer' nil cap' per billam*; for the Plaintiff ought firſt to have ſhewn, *quomodo* B. *fuit ſufficiens*: That it might appear to the Court to be according to the Conſideration and Agreement. 2. He ought to have ſhewn not only that he *aſportavit* B. *fore obligatum*, but to have alledg'd *in facto* that he and *B.* became bound, *& obtulerunt ſe ipſos obligari*; for perhaps *B. came to be bound*, and yet, being there, *refuſed*. *Per Gaudy*, *Fenner* and *Williams*, *Popham* and *Yelverton* being abſent.

Vide Hob. 69, 70, 77.

Vide 1 Bulſt. 169.

Game & Ux' *verſus* Harvie.

Aſſumpſit. THE Plaintiffs declare, in Conſideration that the Wife *dum Sola*, &c. 1 *Junii* 43 *Eliz.* at the Inſtance of the Defendant *accommodaret* to the Defendant 30 *l.* to be paid upon Requeſt, the Defendant promiſed to pay *prædictas* 30 *l.* to the Wife *quando requiſitus eſſet*. The Plaintiffs laid *in Facto* the 30 *l.* to be lent to the Defendant 1 *Junii* 43 *Eliz.* and that he had not paid the 30 *l.* to the Wife *dum ſola*, &c. nor to the Plaintiffs *poſt diſponſalia*, although he was by both the Plaintiffs requeſted at *B.* 1 *Maii* 44 *Eliz.* &c. And upon *Non Aſſumpſit* pleaded, it was found for the Plaintiffs: And in Arreſt of Judgment *Yelverton* ſhewed that the Conſideration was not ſufficient; for it is to pay *prædictas* 30 *l.* and that upon Requeſt; ſo that it appears that the Defendant was not to have any Benefit by it, for it might be lent with one Hand, and immediately demanded; and moreover it ought to be the ſame 30 *l.* *in Specie*, for ſo much is implied in this Word *prædictas*. But *tota Curia* clearly *contra*; for when the Intent of the Parties may ſtand with the Law, it ſhall be expounded accordingly; and the Meaning of the Parties here was to have *prædictam Summam* 30 *l.* and not the ſame Money *in Specie*, *& eo magis quia* (as *Popham* ſaid) the Promiſe is grounded on an Accommodation, *viz.* a Loan, which implies an Uſe of the 30 *l.* by the Defendant. Then it being agreed between them, that the Defendant ſhould uſe the Money, it is impoſſible for him to pay the ſame Money *in Specie* that he receiv'd. But if a Man delivers to *J. S.* a Bag ſealed with Money, and the Defendant promiſes to redeliver it upon Requeſt, no *Aſſumpſit* lies upon this; for the Defendant has not any Benefit by it, for the Money being in a Bag ſealed, *J. S.* could not have any Uſe or Imployment of the Money at all; ſo there he has only a Charge impoſed by the Keeping, *vide P.* 44 *Eliz.* before, the Caſe of *Riches* and *Brigges*, which *Yelverton* cited to be reverſt, and *Gaudy* and the Court ſaid it was erroneouſly reverſt. *Quod Nota.*

Ante 4.

Freſhwater *verſus* Rois.

TEnant in Tail covenanted to ſtand ſeiſed, in Conſideration of a Marriage to be had by his Son with the Daughter of *J. S.* to the Uſe of himſelf and his Heirs till the Marriage had, and afterwards to the Uſe of himſelf for Life, and afterwards to the Uſe of his Son and his Wife, the Daughter of *J. S.* and the Heirs of their Bodies, and ſuffer'd a ſingle Recovery to that Purpoſe, and died without Iſſue. Adjudg'd that the Entry of him in Remainder dependant on the Eſtate Tail is congeable; for firſt, in this Caſe there is no Conſideration to raiſe the Uſe, for the Conſideration is only the Marriage of his Son with a Stranger; which, as to change the Poſſeſſion, is not any Benefit to the Father, but he is in a Manner a Stranger to this perſonal and peculiar Conſideration: But if the Conſideration had been for the Eſtabliſhing of the Land in his Name and Blood, it had been good; for that merely concerns the Father. Secondly, the ſingle Recovery, as appears 13 *E.* 4. binds only the Eſtate in Poſſeſſion, and preſent, and then coming in this Caſe after the Tranſmutation of the Poſſeſſion by the Covenant, when he was not ſeiſed in Tail, does not bind the Remainder. But it was agreed by all the Juſtices, that notwithſtanding ſuch Covenant by Tenant in Tail, altho' as to himſelf it is an Alteration of the Eſtate, yet to all Strangers he remains Tenant in Tail; for if he marries after ſuch Covenant to ſtand ſeiſed to the Uſe of himſelf for Life, * his Wife ſhall be endowed. And (by *Williams* Juſtice) it has been adjudg'd, if Tenant in Tail bargains and ſells his Land to *J. S.* by Indenture inrolled, and *J. S.* ſells it again to Tenant in Tail; he is Tenant in Tail as he was at firſt. *Vide* according to this Reſolution in *Sir Hugh* † *Chamleis*'s Caſe, fo. 52. a. § *Blithman*'s Caſe, *H.* 35 *Eliz.*

Mo. 683. 1 Brownl. 193. Treſpaſs. Covenant to ſtand ſeiſed. Single Voucher. Change of the Tenant's Eſtate by Covenant or Recovery. Conſideration to raiſe an Uſe.

* Noy 46. Dower.
† Mo. 342.
2 Co. 52. a.
§ Cro. El. 279.
1 And. 291.

Wolfreſton.

UPON a *Latitat* awarded againſt *Wolfreſton*, the Sheriff returned a Reſcous *tali die*; but in the Return of it there was no Place mention'd where the Reſcous was. And therefore adjudg'd void; for *non conſtat* whether the Arreſt and Reſcous were within the County and Juriſdiction of the Sheriff, to whom the Proceſs was directed. But in the Caſe of one *Winch*, the Sheriff returned a Reſcous upon him at *Dale in Comitatu Buck*, which was the County to which the Proceſs was awarded; and Exception was taken, becauſe he did not ſay, *infra balliwam meam; & non allocatur*; for if it is within the County, it cannot be otherwiſe taken, but to be within his Bailiwick: And altho'

Reſcous. Place. Sheriff. Arreſt within a Liberty.

altho' the Arreſt was within a Liberty in the ſame County, yet the Reſcous is illegal, becauſe the Arreſt is good, and no Offence except the Lord of the Liberty. *Quod vide* 11 H. 4. 2. 14 H. 6. *Quare Impedit.*

Wood *verſus* Harburne.

Debt. Cap. ad Satisfac. Mandate to the Bailiff of the Dutchy. Election to charge the Sheriff or the Party.

WOOD *Serjeant at Armes* recover'd on a Bill of Debt againſt *Harburne*, and had a *Capias ad Satisfac'* to the Sheriff of *Middleſex*, who made a Precept to the Bailiff of the Liberty of the *Dutchy*, *viz.* the *Savoy*, and the Mandate was, *ad Cap'* Harburne *ad reſpond'* Wood, where in Fact it ſhould be *ad Satisfac'*, and the Bailiff returned the Precept ſerv'd, and the Sheriff return'd to the Court, *Cepi Corpus ſecundum exigentiam brevis*; and *Telverton* mov'd for *Serjeant Wood* to have a new *Capias ad Satisfac'* againſt *Harburne*; for altho' the Sheriff by his Return has charged himſelf to the Plaintiff, ſo that he may demand the Execution againſt him, yet where the Defendant was really never taken in Execution for the Debt, as in this Caſe, but was only taken *ad reſpond'*, there the Plaintiff is at Liberty to take new Proceſs againſt the Defendant. *Quod tota Curia conceſſit.*

Vide Cro. Car. 240.

Everard *verſus* Blach.

Reſcous. Bill of Middleſex. Latitat not abated by the Demiſe of the Queen. * 1 E. 6. cap. 7. 7 Co. 30. a.

BLach took out a *Latitat* againſt *Everard* in the Time of Queen *Elizabeth*, which was ſerv'd in the Time of this King, and *Everard* reſcued himſelf, and this Reſcous was returned by the Sheriff of *Eſſex*, to whom, *&c.* And *Bartlet* mov'd the Court, that upon the Matter this is no Reſcous, becauſe the *Latitat* by the Death of the Queen is abated and loſt; ſo the Arreſt ill. But (*per Curiam*) *contra*, and that a *Latitat* is within the Statute * 1 *E.* 6. which is not loſt by the Demiſe of the Queen; for it is no Original Writ, but is in the Nature of an Execution grounded on a Record precedent; for every *Latitat* is founded on a Bill of *Middleſex* precedent, and ſuppoſes that the Party cannot be taken by the Sheriff of *Middleſex*, *quia latitat & diſcurrit* in another County; ſo the *Latitat* iſſues on a Suit or *queritur* ſuppoſed to be depending.

Hargrave *verſus* Rogers.

Cro. Jac. 45. 1 Brownl. 85. Debt. Baile.

THE Bail enter'd into a Recogniſance for *A.* that upon 8 Days Warning *A. compareb.* to any Action to be brought by *B.* for ſuch a Debt:

Necnon, that if *A.* ſhould be condemn'd in the Action, and ſhould not pay, that they would anſwer to *B.* the Condemnation. *B.* brought an Action againſt *A.* in which *A.* was condemn'd, and did not pay; wherefore *B.* brought Debt againſt the Bail upon the Recogniſance, and ſhewed the Suit againſt *A.* and the Condemnation, and that he had not ſatisfied it; but did not ſhew that *A.* had eight Days Warning to appear to the Action. And by *Fenner* and *Yelverton* he need not ſhew it; for the Condition of the Recogniſance depends upon two Clauſes; the one the Appearance upon eight Days Warning, the other is the Satisfaction by the Bail, if *A.* does not pay the Condemnation, comprehended in theſe Words (*Necnon*): And in this Caſe the Action is brought upon the ſecond Clauſe, *viz.* the Default of *A.* that he has not anſwer'd the Condemnation; and therefore 'tis needleſs to meddle with that Part of the Condition, which goes to the Appearance to the Action. But if the Action had been brought on the firſt Clauſe, then *B.* ought to have ſhewn in certain the Warning to have been given by eight Days. But *Popham*, *Gawdy*, and *Williams contra*; and that the Plaintiff ought of Neceſſity to ſhew the Warning to have been by eight Days; for firſt it is not a Condition to be performed between the Parties, but between Strangers; for *A.* is a Stranger, and then the Bail are bound only to anſwer ſuch Condemnation in ſuch Action in which eight Days Warning ſhall be given, for that is the Ground of the Whole; and there is no Reaſon that *A.* by his voluntary Appearance without ſuch eight Days Warning ſhould prejudice his Bail; otherwiſe if the Contion had been between *A.* and *B.* for there if *A.* had appear'd without ſuch Warning, it's his own Folly, & *volenti non fit Injuria.* And according to this Opinion the Plaintiff diſcontinued his Suit, and the Defendant order'd to put in new Bail. *Quod nota.*

Condition of Warning.

Appearance on Warning.

Volenti non fit Injuria.

St. George's *Caſe.*

NOTA, the Practice in the King's Bench: That in all Actions brought againſt any Perſon upon any penal Statute, the Defendant ſhall put in common Bail only, and not ſpecial Bail; and this was one *St. George's* Caſe of *Norfolk*, upon an Action brought againſt him on the Statute of 13 *Eliz.* of fraudulent Conveyances, where the Rule *ſupra* was ſhewn by the Juſtices.

Pen. Statutes. Informations. Common Bail. Stat. 13 Eliz.

The ſame Practice in the King's Bench; that an Executor or Adminiſtrator ſhall put in only common Bail, becauſe they are to be charged but with the Goods of another, *viz.* of the Inteſtate.

1 Ven. 355. 1 Sid. 63, 355.

Pigot *verſus* Pigot.

Cro. Jac. 44. 1 Brownl. 183. Replevin. Iſſue. Traverſe.

Replevin; The Defendant avow'd, that *Ellen Enderby* was ſeiſed in Fee of three Acres in *D.* and took *F. Pigot* to Husband, by whom ſhe had Iſſue *Thomas*; *Ellen* dy'd, the Husband in by the Curteſy; and *Thomas*, the Heir in Reverſion, granted the Rent of 100 *s.* out of the three Acres to the Avowant, and for ſo much arrear, *&c.* The Plaintiff in Bar ſaid, That before *Ellen* had any Thing, one *Fiſher* was ſeiſed in Fee, and gave it to *John Enderby* in Tail: *John* had Iſſue *Ellen*, &c. who after the Death of her Father enter'd, and was ſeiſed in Tail, and took Husband, *ut ſupra*, and had Iſſue *Thomas*, *ut ſupra*, and dy'd; and *Thomas* being in Reverſion, in the Life of the Tenant by the Curteſy, granted, *ut ſupra*, *abſque hoc quod Ellen Enderby* was ſeiſed in Fee of the three Acres; and upon that Iſſue was join'd, and found for the Avowant; and it was ſhewn in Arreſt of Judgment, that in Effect there was no Iſſue join'd; for the Traverſe of the Seiſin of *Ellen Enderby* is idle, for no Title to the Rent is derived from her; but he ought to have traverſed the Seiſin of *Thomas* the Grantor; wherefore the Iſſue ought to be of ſuch a Nature, as might make an End of the Matter in Doubt, which is not in this Caſe, no more than if the Tenant in a *Formedon* would plead *Non culp'*: But (*per Curiam*) altho' an apter Iſſue might be taken, and the Traverſe is not good, yet it is aided by the Statute of Jeofails; for the Eſtate of *Ellen Enderby* was in a Sort and by Circumſtance material; for if ſhe was ſeiſed in Tail, and it deſcended to *Thomas* the Grantor, then by his Death the Rent is determined; but if the Fee-ſimple deſcended to *Thomas* from *Ellen*, then it enables the Eſtate of *Thomas* to be ſuch, out of which he might grant a ſufficient Charge; and although it may be imagined and intended that after the Fee deſcended from *Ellen*, that *Thomas* had changed it into an Eſtate-tail; yet (*per Popham*) the Court will not intend it now, becauſe the Parties are agreed to doubt nothing, but whether *Ellen* was ſeiſed in Fee or not when ſhe dy'd; and that Doubt is reſolv'd by the Verdict: As if the Defendant will plead the Feoffment of *J. S.* to *A.* and *B.* and that *A.* dy'd, and *B.* ſurvived, and enfeoffed the Defendant, if the Plaintiff will ſay, that *J. S.* did not enfeoff *A.* and upon that they are at Iſſue, and it is found againſt him, although it is no proper Iſſue; yet it is aided by the Statute, becauſe the Parties doubt nothing but the Manner of the Feoffment of *J. S.* whether it was made to *A* or not. And of that Opinion were *Popham*, *Fenner*, *Yelverton*, *Williams*. *Gaudy*, *contra*.

What Iſſue ſhall be a Jeofail. Statute of Jeofails.

The Caſe of a Prohibition.

THE Suggeſtion in a Prohibition was, that the Plaintiff from Time whereof, &c. had paid for Tithes of Wool and Lambs 2 *d.* and in Proof of his Suggeſtion *per Teſtes*, ſpoke nothing of Wool, but only that 2 *d.* had been paid for Tithes of Lambs; and thereupon *Henden* moved the Court to have a Conſultation as well for the Lambs as for the Wool, becauſe the Surmiſe is of a joint Preſcription & *modo decimandi* for Wool and Lambs; and now, no Proof being for the Wool, he has fail'd in the Whole: But (*per Curiam*) there is a Difference between a Suggeſtion to have a Prohibition, and a Preſcription compriſed in it, and a Preſcription made in Defence, or by Way of Plea in any original Action; for in the latter Caſe of a joint Preſcription made for two Things, a Failure in one deſtroys the Whole; becauſe that is by Way of Title: But otherwiſe here, becauſe this Prohibition is only to give Juriſdiction to the King's Court; and therefore, altho' the Plaintiff ſuppoſes that the Court ought to hold Plea both of the Tithes of the Wool and of the Lambs; and for the Wool it remains payable in Kind, and ſo to be determined in the Eccleſiaſtical Court; yet for the Lambs, in which the *Modus decimandi* is prov'd, the Court ſhall retain Juriſdiction; for now upon the Proof it ſhall be taken, that the Preſcription, which makes the Plea temporal, was only for the Lambs. *Quod nota. Per Fenner, Yelverton* and *Williams*, the others being abſent.

Preſcription in two Things, fails in one, yet good. Tithes. Suggeſtion to have Prohibition. Cro. El. 736.

Cro. El. 736.

Molineux *verſus* Rigges.

MOlineux as Adminiſtrator of one *Mering*, extended a Statute on the Land of one *Rigges*, and before his Acceptance pray'd that the Land might be deliver'd to the Extendors; wherefore Proceſs iſſued accordingly; and before the Return of the Writ, *Yelverton* mov'd the Court, that the Extendors could not have the Land; becauſe ſince the Extent *Rigges* is dead, his Heir within Age, and in Ward to the King; ſo the King now in Poſſeſſion, and the Land in another Plight than it was at the Time of the Extent; but *non allocatur per Curiam*: And (by *Popham*) the Extendors ought to ſue to be relieved in the Court of Wards. *Quod nota.*

Cro. Jac. 12. Statute-ſtaple. Where the Extendors cannot refuſe the Land. King's Wards. Court of Wards.

Fiſh *verſus* Richardſon.

THE Caſe was ſuch; *Fiſh* had a Debt owing to him by the Teſtator *Richardſon* on a ſimple Contract; and came to the Defendant and told

Cro. Jac. 47. Aſſumpſit.

told him of it; who ſaid, that if the Plaintiff would *forbear Suit* againſt him *for a Time*, he promiſed to pay him; it is a good Promiſe in Law; for although the Defendant might wage his Law in an Action brought againſt him by the Law, becauſe it is of another's Contract; yet in Law ſuch Debt on Simple Contract remains a Debt, and is not abſolv'd by the Teſtator's Death: And according to the Book 10 *Hen.* 6. an Action of Debt lies againſt the Executor for it; and if he pleads to it, and doth not demur upon the Declaration, Judgment ſhall be given againſt him; and the Court *ex Officio* will not abate it without the Challenge of the Party; but if the Heir promiſes on Forbearance of Suit to pay ſuch Debt, yet no *Aſſumpſit* lies againſt him; for there is no Conſideration, becauſe the Heir is liable to no Debt without Specialty.

Vide Moor 702, 703. Cro. El. 804. 9 Co. 94. a. Mo. 853, 854. 1 Ro. Rep. 379. Hetl. 1, 8, 11, 12.

Pikard *verſus* Cottels.

Aſſumpſit. Foreign Attachment. London.

THE Plaintiff ſhew'd that he was poſſeſſed of an Houſe in *London*, in which *Sebaſtian Underholſter* had a Chamber; that *Sebaſtian* was indebted to the Plaintiff in One hundred Pounds, and dy'd poſſeſſed of the Chamber, and of ſundry Writings and Sums of Money *ibid' remanen'*; and that the Plaintiff after his Death, for the Recovery of his Debt, attached the Goods, *&c.* being in the Chamber, in the King's Court, before the Mayor, *&c.* in the Plaintiff's Hands for his Debt, according to the Cuſtom of the City; and that the Defendant, in Conſideration the Plaintiff at his Requeſt would permit the Defendant to enter into the Chamber, and take and carry away the Goods attached, *necnon omnia Scripta obligat'* there being, promiſed the ſame Day to pay the Plaintiff his One hundred Pounds: And upon *Non aſſumpſit* pleaded, and found for the Plaintiff, it was moved in Arreſt of Judgment, that the Promiſe was upon no Conſideration; for, for any Thing that appears, the Debt was but upon Simple Contract, with which the Defendant is not chargeable; for he is a meer Stranger, and no Executor or Adminiſtrator, for any Thing that appears: Alſo Part of the Conſideration being the Diſcharge of the Attachment, the Plaintiff ought to have ſhewn that an Action of Debt was depending at that Time; for there ought to be ſome Perſon againſt whom an Action of Debt ſhould be brought; otherwiſe there could be no Attachment: To which it was anſwer'd, that the Shewing of the Attachment was but the Conveyance, and not the Subſtance of the Action; and moreover the Conſideration is not that the Plaintiff ſhall diſcharge or releaſe the Attachment, but only that he ſhall permit the Defendant to enter into the Chamber, and take and carry away the Goods attached; and alſo there being two Conſiderations expreſſed, the one the Carrying away of the Goods attached,

What ſhall be a good Conſideration on Aſſumpſit.

the

the other the Carrying away of certain Writings Obligatory, which were not attached, altho' the firſt Part of the Conſideration ſhould be void; yet the other would be ſufficient to maintain the Action; and Judgment accordingly *pro Quer' P.* 2 *Jac. Yelverton* and Serjeant *Tanfield* of Counſel with the Plaintiff.

King *verſus* Andrews.

THE Caſe: That after the Parties were at Iſſue in Treſpaſs, and an *Habeas Corpora* awarded againſt the Jury, the Common Pleas where the Action depended, awarded a *Superſedeas quia improvide, &c.* which was deliver'd to the Sheriff, who notwithſtanding return'd the Jury before the Juſtices of Aſſiſe, who proceeded; and it was found for the Plaintiff: And *Yelverton* aſſigned the Matter aforeſaid for Error; and the Defendant pleaded, *in nullo eſt erratum:* And it was adjudged Error; for the Error aſſign'd is a Matter in Fact depending on a Matter of Record; and then the Defendant by pleading *in nullo eſt erratum* has confeſſed it, *viz.* that ſuch *Superſedeas* was awarded and delivered to the Sheriff before the Trial: Whence it follows, that after the *Superſedeas* deliver'd, the Sheriff's Hands were cloſed, that he could not proceed to diſtrain the Jury, nor to return the Writ before the Juſtices of Aſſiſe. *Vide* 5 *Eliz. Dyer* 222, 223. a *Superſedeas* directed to the Sheriff upon an Exigent, and the Coroners proclaimed him outlawed when the Sheriff had the *Superſedeas*; and it ſeems to be Error if the Proclamation *& quinto exactus* be after the *Superſedeas* deliver'd.

Cro. Jac. 43. Error. Error in Fact. In nullo eſt erat. Superſedeas diſcharges the Jury. To proceed after is Error.

1 And. 35. Mo. 75.

Hill. 2 JAC. B.R.

Sir John Harpur *verſus* Beamont.

I Was at Sir J. Harpur's *Houſe, and* John Harpur *his Son drew me forth to ſee a Gelding, and then* Thomas Beamont *did throw his Dagger at me twice, and thruſt me through the Breeches twice with his Rapier to have killed me; all this was done by the Inſtigation of Sir* John Harpur, *and I can prove it.* And upon Damages given to 100 *l.* and in Arreſt of Judgment, *Popham Chief Juſtice*, and *Yelverton* were of Opinion that the Words would not maintain an Action; for when the Words ſpoken by the Defendant contain Matter of Fact, and Matter of Intention; as the Matter of Fact was, Thomas Beamont *threw his Dagger at me twice, and thruſt me through the Breeches twice*, the Matter of Intention

Cro. Jac. 56. Action for Words.

was, what the Defendant collected from this Fact, *viz. that it was done to have killed him*; and then concluded, *all this was done by the Inſtigation of Sir* John Harpur; they ſhall be taken in the *milder Senſe*, id eſt, *that that was done, was done by the Inſtigation*, &c. and that was only the *Flinging of the Dagger*, and the *Running him thro' the Breeches*, which is no Slander, but an Imputation of a Treſpaſs; and ſhall not be taken to refer to that which was but in the Intention of the Speaker, *viz.* That it was done to kill him: As if one ſhould ſay, J. S. *lay in Wait for me, and his Intention was to kill me, and he did it by the Procurement of* J. D. Theſe are not Words of Slander to *J. D.* for they extend only to *laying in Wait*; for that is the Fact, and the Intention of the *Laying in Wait* is a *By-thing* meant to be coupled with the other. But *Gaudy*, *Fenner* and *Williams*, *contra*. For the Words ſhall not be taken *dividedly*, but altogether as they were ſpoken, and ſo import Slander; as if he had ſaid, *Sir* John Harpur *procured* Thomas Beamont *to caſt his Dagger at me, to kill me*; and then there is no Queſtion but the Words are actionable. *Quod fuit conceſſum ab omnibus*; and Judgment enter'd accordingly againſt the Defendant.

Cro. Eliz. 308, 349. Cro. Car. 277.

King *verſus* Goſper *and* Shire.

Error. Infant by Guardian. Where Infancy ſhall not be Error for Want of a good Aſſignment. Error in Fact tried.

THE Defendants in Replevin, againſt whom Judgment was given, aſſign for Error, that where there were two Avowants: One of them was within Age, ſo he ought to have appear'd by Guardian, and not by Attorney; but in the Aſſignment of the Error, it is not concluded to the Country, *viz. Et hoc paratus eſt verificare, &c.* and the Defendant in Error pleaded *in nullo eſt erratum. Et per totam Cur'* (*Popham* being abſent) the Judgment ſhall be affirm'd; for when a Man aſſigns Error in Fact, he ought to put it to the Country; for the Jurors only ſhall be Triers of it, and not the Judges; and then in this Caſe by not concluding to the Country, it is an Error not triable by the Court, but in its proper Nature by the Country; ſo it cannot be adjudged; wherefore it is tantamount, as if no Error at all had been aſſigned; for the Defendant by pleading *in nullo eſt erratum*, has not confeſſed it to be Error, but has only put himſelf upon the Judgment of the Court; and the Court in this Caſe cannot be Triers of it. *Quod nota bene.*

Contra now 4 Mod. 11. 12. 3 Mansfield

9 Co. 30 b.

Paſch. 3 Jac. B. R.

Palmer *verſus* Welder.

ADjudged *una voce* that the Value belongs to the Lord without Tender; for it may happen that the Infant may be eloign'd, or he may travel beyond Sea in his Father's Life-time, that the Lord cannot come to tender; and the Statute which ſays, *de mero Jure*, ſhews, that the Value is not any Thing given by Law ſpecial, but by the Common Law and Rule of Reaſon, in Recompence of the Loſs of the Services, which the Lord ſuſtains by the Nonage; and alſo in this Action the Tender is not traverſable. *Quod nota.*

Cro. Jac. 65. 5 Co. 120. b. 6 Co. 70. b. Value of Marriage. Tender.

Barnes *verſus* Worlich.

IN an *Audita Querela* brought by the Plaintiff, *Maſſey* and others being his Bail *manuceperunt habere* the Plaintiff in Chancery ſuch a Day *ad ſtandum Juri in hac parte*; and that the Plaintiff *proſequeretur cum effectu, viz. quilibet eorum ſub pœna* 200 *l.* to the Uſe of the King, and 200 *l.* to the Uſe of the Defendant, according to the Statute 11 *Hen. 6. cap.* 10. *quas conceſſerant & quilibet eorum conceſſit de terris, &c.* according to the Statute *levari, Si præfat'* the Plaintiff before the King in Chancery on ſuch a Day *in forma prædicta non habuerint*; *ac ſi idem* the Plaintiff his Writ againſt the Defendant *in forma prædicta non proſequitur cum effectu*; and the Plea was proſecuted to Iſſue, and Judgment, *quod Quer' nil caperet per breve ſuum, &c. prædictus tamen* the Plaintiff after the Judgment *hucuſque* has not ſatisfied the Defendant the 200 *l.* nor render'd himſelf to Priſon till he ſhall ſatisfy the Debt *juxta Juris in hac parte Exigentiam, & ſic idem* the Plaintiff *non ſtetit Juri in hac parte*, whereby the Bail have forfeited their Recogniſance; and thereupon the Defendant demanded Execution againſt them: And upon this *Scire facias* brought againſt the Bail, they demur'd, ſuppoſing that no ſufficient Breach of the Recogniſance is aſſigned; for (*per Godfrey*) where the Condition is Parcel of the Recogniſance, there he who ſues Execution thereon, ought to ſhew the Court that the Condition is not perform'd; which was not in this Caſe; for the Recogniſance ſtands upon two Conditions, 1. If the Bail have the Plaintiff in Chancery ſuch a Day, *&c.* 2. If the Plaintiff proſecutes *cum effectu*; and the firſt of theſe Conditions

Cro. Jac. 67. Audita Querela, 11 H. 6. cap. 10. Recogniſance. Scire facias. Condition. Standum Juri.

Conditions is not ſhewn to be broken, *viz.* that the Plaintiff did not appear at the Day, *&c.* in Chancery; but the Breach is aſſign'd in a Point out of the Condition, *viz.* that the Plaintiff has not paid the 200*l.* *&c.* but *per Popham & totam Curiam* adjudged *contra*; for the Words in the Beginning of the Recogniſance, *viz.* [*Standum Juri*] import the Whole, and include all that is to be done, *viz.* as well in the Courſe of the Proſecution, as in the Effect of the Suit, *viz.* Execution; for to proſecute *cum effectu*, is *to follow the Suit*, till Judgment, and that is but Part of the Plaintiff's *ſtanding to the Law*; but *Finis Juris* in this Caſe is to pay the Condemnation; and therefore theſe Words in the End of the Recogniſance, *Si idem* the Plaintiff his Writ, *&c.* do not make any new Condition, but only in ſome Sort expound in Part theſe Words, *Standum Juri*: As appears by theſe Words (*in forma prædicta*) twice inſerted, which Words refer to *Standum Juri*; for that is the Form mentioned before.

Brigges *verſus* Tompſon.

Information. Venire facias.

IN this Term, between the King and one *Tompſon*, in an Information upon the Statute 21 *H.* 8. for taking to Farm Land by ſpiritual Men; the Award of the *Venire facias* to try the Iſſue was made returnable *ubicunq; &c.* but the Writ of *Venire facias* was made returnable *coram nobis*, omitting theſe Words *ubicunque*, *&c.* ſo that it did not anſwer the Award on the Roll; and the King's Bench is removable, ſo that *coram nobis* is altogether incertain, and out of Courſe; and Judgment was ſtaid on this Point.

Fairchild *verſus* Gaire.

Cro. Jac. 63. 1 Brownl. 201. Mo. 765. Treſpaſs. Donative. Reſignation. Ordinary. Collation. Exemption.

TReſpaſs for Tithes of the Church of *B.* on the Verdict the Caſe appear'd to be, that the Defendant was collated to this Church, being a Donative, by *A.* and *B.* the Patrons; and that this Church is exempt from the Juriſdiction of every Ordinary. The Defendant reſigned to *A.* and to *C.* who is a Stranger, *& quibuſcunque aliis perſonis*, who have Intereſt, *Eccleſiam ſuam de* B. *cum omnibus Juribus*, *&c.* both the Patrons paſſed their Eſtates to *D.* who collated and inveſted the Plaintiff in the Church; whereby he ſeiſed the Tithes in Queſtion, and the Defendant took them; and concluded, *Si conſtat Curiæ*, that the Reſignation is good, then *pro Querente*, otherwiſe *pro Defend'*. *Et per totam Curiam*, Judgment *pro Querente*; for the Reſignation is good, both in Reſpect of the Thing which is reſigned, and of the Perſons to whom; for this Donative

being exempt from Ordinary's Juriſdiction, the Reſignation cannot be into his Hands; and the Incumbent ſhall not be compelled to keep the *Church nolens volens*, if the Patron will accept it; and therefore there being no Perſon to whom the Reſignation can be made, but into the Hands of the Patron, it is good; and altho' the Reſignation is to one Patron and a Stranger, yet it is good to both the Patrons, and void as to the Stranger; and the rather by Reaſon of the Words ſubſequent (*quibuſcunq; aliis perſonis*); which Words include all that have any Manner of Intereſt. Then when it is found, that *D.* who collated the Plaintiff, had the Eſtate of both the Patrons, altho' no Agreement is found of the Patrons to the Reſignation, it is not material; for this Finding of the Grant over to *D.* implies as much in a Verdict; then this inveſting of the Plaintiff in the Church by *D.* is good to give him Power to take the Profits by Reaſon of the firſt Poſſeſſion; and altho' the Defendant reſign'd only the Church, yet that goes to all that belongs to the Church, and that the Defendant had as Rector there; and therefore *6 E.* 3.----is, that if the Patron grants *Eccleſiam*, it paſſes the Advowſon. (But *nota*, *Herle* there ſaid that was in ancient Time, *ergo* 'tis not ſo at this Day; to which the Court ſeem'd to agree:) *Et per Curiam*, (*a*) the Reſignation is the ſole Point which the Court is to determine in this Caſe, for of that alone the Jury doubted; and that is only refer'd to the Court. But *per Popham Ch. Juſt.* if the Patron of ſuch Donative will not collate, there is no Remedy to compel him; but it is left to his Conſcience, and he may in Time of Vacation (*b*) take all the Profits, and ſue for the Tithes in the ſpiritual Court: For this Donative grew at firſt by Conſent of all Perſons who had any Manner of Intereſt, *viz.* the Ordinary and Pariſhioners. But *Gaudy*, *Fenner*, *Yelverton* and *Williams contra*, and that the Ordinary might compel him to collate ſome Clerk; for *Rectoria* is only exempted from the Juriſdiction of the Ordinary, and not the Patron; and it goes only to Charges to be taxed upon the Church for the Ordinary's Attendance in Viſitations, and ſuch like: And *per Popham*, altho' the Church in the Execution of the Charge be ſpiritual, yet the Patron may collate a meer Layman, as well as the King may make a temporal Man a Dean, *quod Sæpe accidit*: But all the other Juſtices *contra*, in Caſe of the Perſon which is merely ſpiritual; but as to the Deanery they granted that; for that Function is temporal: And yet *Williams Juſtice* ſaid, that Lay-men, who have Deaneries, ought to have and always have had Diſpenſations from the Archbiſhop: And if the Incumbent, in this Caſe of the Donative, preaches Hereſy, or, &c. by the Attorney General and

An Act done to him who has Intereſt, and a Stranger.

Agreement implied in a Verdict. 9 Co. 51. b. Firſt Poſſeſſion.

Special Verdict. 1 Inſt. 17. b.

(*a*) 5 Co. 97. a. Cro. Car. 22. Cro. El. 238. Mo. 267, 268. Jury's Doubt. No Remedy.

(*b*) Vide Fitz. aid de Roy 103. Tithes. Spiritual Court.

Dean.

Diſpenſation.

Hereſy.

Popham, the Ordinary may correct him; for *Rector* is not exempt from the Juriſdiction, but *Rectoria* only: But *per Gaudy*, *Fenner*, *Yelverton* and *Williams*, the Ordinary cannot meddle with him, for the Perſon is privileged in Reſpect of the Place; but the Patron may by Commiſſion in its Nature examine the Matter, and ouſt and deprive him upon Cauſe; *Quod nota*: And *ſic accidit* in the Caſe of one *Covert*, as *Gaudy* and *Williams* ſaid, where the Biſhop of *Wincheſter* was Donator of ſuch Donative. *Vide* 13 *E.* 4.

Sir George Moore *verſus* Foſter.

Cro. Jac. 65. Words. Commiſſioner of Chancery. Star-Chamber. Bribery. Indictment. Forgery.

SIR *George Moore* (with others) being a Commiſſioner to examine Witneſſes on a Suit in Chancery between *A.* and *B.* *A.* one of the Parties (*poſito* the Defendant) ſaid to him, that he was a *corrupt Man*, and that B. *had ſet him on Horſeback with Bribes to ſuppreſs Juſtice, Truth and Equity*; and upon theſe Words, Sir *George* brought an Action; and this Matter appear'd in the Declaration, and it was found for the Plaintiff: And (by *Fenner* and *Williams*) Judgment ought not to be for the Plaintiff; for the being a Commiſſioner by the mutual Aſſent and Election of the Parties, is not in any judicial Courſe, but only arbitrary whether he will be or not; and alſo by the Common Law of the Land, the Miſuſage and Miſcarrying of a Commiſſioner of the Buſineſs is not puniſhable; for he is not ſworn to do any Thing, but it is only voluntary; alſo it does not appear that the Commiſſion was return'd; and ſo all former Proceedings fruſtrate; and altho' the Miſdemeanour of the Commiſſioner may be puniſhed in the Star-Chamber, yet that is but diſcretionary, and not *de rigore Juris*. But *Popham Chief Juſtice*, *Gaudy* and *Yelverton contra* ſtrenuouſly; for the Commiſſion in this Caſe to the Commiſſioners iſſues under the Great Seal, and is a ſpecial Truſt and Confidence which the Court and the King (as appears by the Stile of the Commiſſion) repoſe in the Commiſſioners; and to falſify this Truſt is a great Offence; and for Bribery to ſuppreſs Truth, is a heavy Slander. And if *J.* and *F.* are Arbitrators between *A.* and *B.* and *A.* ſays to *J.* that he has taken ſuch Bribes of *B.* that he is *fallen from hearing any Thing on his Side*, it is a Slander puniſhable; for by the Common Law ſuch Corruption in Matters of Reference may be puniſhed by Indictment; and ſo may Forgery be puniſhed at the Common Law; otherwiſe the Law would be defective, to ſuffer ſuch Offence without Puniſhment: And altho' the Commiſſioner is not ſworn, nor the Commiſſion return'd, yet that does not

9 Co. 70. b. 71. a.

extenuate the Slander; but the Defendant's Malice appears the ſame. And Judgment was given accordingly.

Sir Richard Champernon *verſus* Hill.

IN an Action on the Statute of 2 *E.* 6. for *not ſetting forth* of Tithes; the Plaintiff ſhew'd that the Rector of *Modbury* had two Parts of the Tithes in three Parts to be divided, and that the Vicar of the ſame Place had the third Part of the Tithes; and laid it to be by Preſcription as to the Manner of the Receipt of the Tithes by the Parſon and the Vicar, from Time whereof: He further ſhew'd, that the Parſon and Vicar had by ſeveral Leaſes demiſed the Tithes to him; and ſo he being *Proprietarius* of the Tithes, the Defendant ſowed ſo many Acres within the Pariſh, *viz.* *Wheat*, *Rye*, *&c.* and carried them away without ſetting forth *decimam partem decimarum prædictarum* to his Damage, *&c.* And upon *Nil debet* pleaded, it was found for the Plaintiff; and in Arreſt of Judgment it was ſhewn, that the Plaintiff has in this Writ compriſed ſeveral Actions upon the Statute; and this appears by his own Shewing; for he does not claim the Tithes under one Title, but under the ſeveral Titles, of the Parſon, *viz.* of the two Parts, and of the Vicar, *viz.* of the third Part; and no more than the Parſon and Vicar can join in this Writ, by Reaſon their Titles are divided; no more can the Plaintiff, who claims ſeverally under them. And it ſeems, that the Parſon cannot have this Action againſt ſeveral Tenants for not *ſetting forth* their ſeveral Tithes, tho' all the Tithes belong to him, becauſe he cannot comprehend two Actions in one; *quod Fenner concedit*; but all the other Juſtices *contra*; for altho' the Vicar and the Parſon in this Caſe cannot join, becauſe they claim the Tithes ſeverally by divided Rights, yet when both their Titles are conjoined in one Perſon, as they are here in the Plaintiff, then the Matter of the Title is likewiſe conjoined in one; and it is ſufficient to ſhew generally, that the Plaintiff is *Firmarius* or *Proprietarius* of the Tithes, without ſaying by what Title; for this is but a perſonal Action founded meerly upon the Contempt againſt the Statute, in not *ſetting forth* the Tithes; and alſo he doth not demand any Tithes by this Action, ſo that the Title cannot come in Debate; but the Defendant is only to excuſe himſelf of the Contempt: Yet it was agreed by all, that the Plaintiff ſhould recover the Tithes in Damages, and ſhould not demand them again by any Suit after his Recovery in this Action. *Quod nota.*

2 & 3 E. 6. 13. Cro. Jac. 68. 1 Brownl. 86. Mo. 914. Noy 3.

Tithes demanded on ſeveral Titles in one Action.

Joinder in Action.

Poſt. 127.

Damages.

D. For

Doctor Nevil *verſus* Bates.

Cro. Jac. 64. Treſpaſs. Amendment of the Venire facias.

AFter Iſſue between the Parties, the *Venire facias*, upon which the Trial was, was made returnable *quind' Hill'*, and bore *Teſte* 12 *Feb.* which is the laſt Day of *Hillary* Term; and yet (*per Curiam*) it ſhall be amended in the Date of the *Teſte*, *viz.* to iſſue forth before the Return of it, and that in Favour of Trials; for it is but the Default of the Clerk. And a Precedent was ſhewn where the *Venire facias* bore *Teſte* 24 *Feb.* which is out of Term returnable in the Term-Time; and it was amended. And alſo in the Caſe in Queſtion the *Diſtr' Jurat'* likewiſe bore *Teſte* 12 *Feb.* which is the ſame Day of the *Teſte* of the *Venire facias*; and this *Diſtr'* in its Nature iſſues after the *Venire facias* return'd; and amended alſo in that Point, for it is but a Miſpriſion of the Clerk: But in the ſame Caſe this Term, between (*a*) *Lee* Plaintiff againſt *Lacon* for a Treſpaſs in *Com' Salop*: After Iſſue between the Parties, and a *Venire facias* awarded on the Roll, (which Award is always general) the Writ of *Venire facias* was made (*Vicecomiti*) omitting (*Salop*) for a Space was in the Writ for it; but yet it was really executed by the Sheriff of *Salop*; and it was alledged in Arreſt of Judgment, that the *Venire facias* was vicious for that Reaſon: But by *Gaudy*, it ſhall be amended; and *per Fenner* and *Williams*, it is as no Writ, becauſe it is not directed to any Officer, and then it is aided by the Statute of Jeofails.

(*a*) Poſt. 69. Cro. Jac. 78.

Statute of Jeofails. Salk. 454.

Sir John Hollis *verſus* Briſcoe.

Cro. Jac. 58.

HE *keeps Thieves and Traytors to do Miſchief, and gives them nothing for their Labour but blue Liveries*: And by *Popham*, the Words are actionable; for the Words (*do Miſchief*) ſhall be intended *in that Kind*, and according to the Qualities of the *Perſons ſpoken of before*, viz. *to do Theft and Treaſon*; as if he had ſaid, J. S. *keeps a perjured Fellow in his Houſe for his Purpoſe, to ſerve his Turn withal*; it ſhall be intended, *to ſerve his Turn in Perjury*. But *tota Curia contra* in both Caſes; for a Man may *keep Thieves and Traytors*, and not know them to be of ſuch Condition; *and likewiſe he may keep them to do Hurt and Miſchief*, and yet not in Theft or Treaſon; as *to break down his Neighbour's Hedge, to chaſe his Cattle*, &c. and Judgment was enter'd, *Nil capiat per billam*. (This Caſe was adjudged in *Term. Hill.* 2 *Jac.*)

Birket *verſus* Manning.

DEBT by *J. Birket* againſt *William Manning*, as Adminiſtrator of *J. S.* The Defendant pleaded *Plene adminiſtravit:* The Plaintiff replied, that he ought not to be barred by any Thing ſaid *Per prædictum Willielmum*; for he ſaid *Prædictus J. habet, & die Impetrationis, &c. habuit, diverſa bona, &c. & hoc petit, &c.* And it was moved in Arreſt of Judgment, that there was not any Iſſue joined; for the Plaintiff ought to have replied, that the Defendant had Aſſets, and he ſays that he himſelf has Aſſets, which is not the Matter in Queſtion; but (*per Curiam*) it ſhall be amended, for it is but the Default of the Clerk: As *9 Eliz. Dy.* where it is ſaid, *& Prædict' Defendens ſimiliter*, where it ſhould be *Prædict' Querens ſimiliter*; and that has been often amended.

Cro. Jac. 67. 1 Brownl. 87. Debr. Amendment. Replication amended after Verdict.

Cro. Jac. 587. Palm. 524. Cro. El. 752. 8 Co. 161. b. Dyer 261. p. 25.

Trin. 3 JAC. B. R.

Middleton *verſus* Cheſeman. * Rot. 723.

* Vide 1 Mod. 294.

IN an Action of Covenant to deliver Iron, the Defendant pleaded two Pleas iſſuable, *viz.* a Delivery of the Iron according to the Covenant, and by his third Plea he pleaded a Concord; upon which the Plaintiff demurr'd generally, *Et dicit quod placitum prædict' minus ſuffic', &c.* And (*per Curiam*) it is a Diſcontinuance of the whole Matter; for this Word (*Placitum*) is incertain to which of the three Pleas it ſhall be referr'd, ſo that as to two Pleas pleaded, the Defendant remains unanſwer'd: Alſo if it ſhould be taken that this Word (*Placitum*) goes to the laſt Plea only, becauſe the Pleading of the Concord is the Matter only doubtful in Law, the other two Pleas being only iſſuable, upon which it ſhall not be preſumed that the Plaintiff would tender a Demurrer, then the Plaintiff not deſcending to Iſſue upon the other two Pleas, nothing is done as to them, ſo the Record is imperfect, and by Conſequence a Diſcontinuance of the whole Matter. *Per totam Curiam.*

Covenant. Incertainty. Demurrer. Diſcontinuance of Suit. 1 Sand. 338. contra. Placitum, to what it refers.

Sir Edward Winter.

Indictment. Wear. Where an Indictment ought to be contra Pacem nuper Reginæ, as well as contra Pacem Regis, &c. * Comb. 168. 1 Show. 28. Salk. 636. Lutw. 1604.

SIR *Edward Winter*, and ſeveral others were indicted for erecting a Wear upon the River *Wye*, whereby the Paſſage of the Subjects with Boats, *&c.* was ſtopped and hinder'd; and it was laid to be in the Time *Eliz. Anno* 43. and for the Continuance of it *ad Nocumentum* of the Subjects of the King that now is; and ſo the Jurors conclude, that the ſaid Wear was erected and continued *contra Pacem Regis nunc*, *&c.* and the Indictment adjudg'd void, becauſe 'tis not as well * *contra Pacem nuper Reginæ*, as *contra Pacem Regis nunc*; for the Commencement of the Tort was in the Time of the Queen, and that was an Offence to the Crown at that Time; for although the Parties might be indicted for the Continuance of this Tort only, without alledging *in facto*, or expreſly, when the Tort commenced, yet the Scope of this Indictment is not to make the Offences ſeveral, as they are *in ſe*; becauſe although the Jurors have concluded upon both, yet they have found the *Peace of this King* only to be broke. But, by *Popham Chief Juſtice*, if the Concluſion of the Jury had been upon the Continuance of the Tort only, then it ſhould be taken in Law to be an Indictment to that Purpoſe only, and the other Matter of the Finding of the Erection of the ſaid Wear to be but an Information *Quomodo Res geſta fuit:* Or if the Jurors had found, that whereas Sir *Edward Winter*, *&c.* had in the Time of the Queen erected, *&c.* they continued it in the Time of this King, *contra Pacem Regis nunc*, it had been good; becauſe the expreſs Matter found was only the Continuance of the Tort, and the other but a Recital or Introduction to the Matter found. *Quod Curia conceſſit. Yelverton* was for *Sir Edward.*

The Caſe of an Hoſtler.

Aſſumpſit. Requeſt. Act of Law. † Cro. El. 74, 91, 229. Hutt. 73. Poph. 160. Cro. Jac. 183, 523. 1 Sand. 33.

IN an Action on the Caſe on *Aſſumpſit*, the Plaintiff declared, and ſhewed himſelf to be an Hoſtler, and that the Defendant brought his Horſe to him, and agreed to give 6 *d.* Livery for Day and Night; and becauſe the Horſe had been there for ſo many Days and Nights, as amounted to 20 *l.* the Plaintiff brought the Action, and declared, *Licet ſæpius requiſitus*, without alledging a Requeſt *in facto:* And it was adjudged good; for † where the Ground of the Action is for a Debt, in which Caſe the Law implies the Promiſe, there the Requeſt is not iſſuable, nor Parcel of the Conſideration: Otherwiſe where the Action is founded upon a mere collateral Matter, and not upon a Duty, for there the Requeſt is iſſuable, and ought to

be expreſly alledged; and altho' the Agreement was for *6d. Day and Night*, and the Plaintiff has joined ſo many Days and Nights as amount to 20*l.* and demanded a Recompence upon the Promiſe accordingly, yet it is good; for the Plaintiff ſhall not be compelled to bring his Action for every *6d.* but the Promiſe is intire in it ſelf, *viz.* to pay all that the Horſe ſhall take *ſecundum Ratam 6d.* Day and Night. And it is not to be compar'd to a * ſingle Bond, on which the Action does not lie till all the Days are incurr'd; for there the Writing is Simple in the Whole: And in this Caſe it was ſaid by *Popham Chief Juſtice*, that if a Man brings his Horſe to an Inn, and leaves him there in the Stable without any ſpecial Agreement what to pay, there the Innholder is not bound to deliver the Horſe, till the Party and Owner has defrayed his Charge for the Horſe; † but he may juſtify the Detainer of the Horſe for his Food and Keeping: And after the Horſe has eat as much as he is worth, the Innholder, upon a reaſonable Praiſement, may ſell him, and it is a good Sale in Law. But in the Caſe *ſupra*, although the Horſe had eat out his double Price, the Innholder could not ſell him; for he has relied upon the Promiſe to pay *6d.* Day and Night, and he muſt reſt upon that. So if a †† Tailor has my Apparel to make, and he makes it accordingly, he is not obliged to deliver it till he is paid for the Making of it; but although in that Caſe he may detain till he is paid; yet for Default of Payment he cannot ſell it, as in the other Caſe he may ſell the Horſe; the Reaſon is, becauſe the Keeping of the Horſe is a Charge, becauſe he eats; but the Keeping of the Apparel is not any Charge. *Quod tota Curia conceſſit.*

Promiſe intire.
Single Bond is intire.
* Ow. 42. 10 Co. 128. b. 1 Inſt. 47. b.
292. b. Cro. Jac. 503. Cro. Car. 241.
Hoſtler.
† Salk. 388. 1 Rol. Rep. 449.
Mo. 877. Cro. Car. 271. Hob. 42.
Sale of a Horſe for not paying for his Livery.
†† Palm. 223. 8 Co. 147.
Taylor.

Broome *verſus* Wooton.

IN Trover of certain Goods in Particular; the Defendant pleaded that the Plaintiff had brought the like Action againſt *J. S.* for the ſame Goods before this Action brought, in which Suit he ſo far *proſequutus eſt* againſt *J. S.* that he had Judgment and Execution againſt *J. S.* and averr'd that the Goods contain'd in both Actions were the ſame Goods: Upon which the Plaintiff demurr'd; and it was adjudg'd againſt the Plaintiff. And a Difference was taken by the whole Court, where the Demand and Recovery is of a Thing certain, and where of a Thing incertain: As where two are bound in 100*l.* to *J. S.* jointly and ſeverally, there § Recovery and Execution againſt one is no Bar againſt the other; for Execution is not any Satisfaction of the 100*l.* demanded; according to the Books, 4 *H.* 7. 22. *E.* 4.

Cro. Jac. 73. Mo. 762. Trover.
Where Judgment againſt one bars the Plaintiff againſt another.
§ 2 Show. 394. 3 Mod. 86. Lutw. 878. 2 Show. 441, 494. Comb. 4, 33.

Action againſt two. Recovery againſt one. 14 H. 4 22. Thing certain and incertain.

E. 4.— and *Br.* Caſes. But where a Treſpaſs is committed by two, which reſts only in Damages, and the Plaintiff recovers againſt one, and has Execution, there it is a good Bar againſt the other. *Immo* it was agreed, that the very Judgment is a ſufficient Bar; for *Tranſit in Rem judicatam*, and the Thing incertain is now by the Judgment made certain, and ſo alter'd and changed into another Nature than it was at firſt; and therefore he cannot reſort to demand the Incertainty again, for the firſt Judgment ſhall be a Bar to it. The Law is the ſame of a Battery committed by ſeveral, and a Recovery againſt one, in an Action afterwards againſt the other for the ſame Battery, the firſt Recovery is a Bar; as it was this very Term agreed between *Hickman* Plaintiff, and Sir *John Poyns* and his Servants for the Battery of *Hickman*.

7 H. 4. 30. Judgment 66. Noy 4.

Chanel *verſus* Robotham.

Treſpaſs. Latin Word improper. Grant de bonis & Catallis. Where a Bond paſſes by a Grant de bonis & Catallis. Acceſſorium ſequitur ſuum Principale.

IN Treſpaſs, *Quare bona & Catalla ſua cepit, viz. unum Scriptum obligatorium, in quo continetur, quod J. S. tenetur* to the Plaintiff in 100*l.* and declares of ſeveral other Goods in Special, and among others, *De una Hama, Anglice, a Crow of Iron*; and upon *Non Culp'* pleaded, it was found for the Plaintiff, and Damages aſſeſs'd: But adjudged, *Nil capiat per Billam*; for by *Fenner*, *Yelverton* and *Williams*, when a Man expreſſes in *Latin* a Thing to be taken by Wrong, and engliſhes it; if the *Latin* Word has no ſuch Signification as is engliſhed, it is not good; and in this Caſe *Hama* is not *Latin* for a *Crow of Iron*, but for an *Engine* with which *a Houſe on Fire is pulled down*; but if he declares on a *Latin* Word, which has no perfect Signification, nor ſo elegant as it might be; yet upon his Engliſhing of it whereby the Plaintiff's Meaning appears to the Court, the Plaintiff ſhall recover, and the Jury ſhall be intended to give Damages according to the Declaration in *Latin*, not having Reſpect to the Engliſhing; but when there is a proper *Latin* Word to expreſs the Thing taken, there if the Plaintiff declares by another Word, it is not good. But that was taken by *Popham* and *Gaudy* to be too nice, and to tend to the Subverſion of ſeveral former Judgments. But *per totam Curiam* the Action does not lie; becauſe he declares of divers Goods and Chattels; and amongſt others, he declares of the Taking of a Bond; for a Bond, or the Value of it cannot be demanded by the Name of Goods and Chattels; for by ſuch general Name a Bond does not paſs contrary to 25 *H.* 8. *Dy.* the * Opinion of *Fitzherbert*: And although it was objected, that the Parchment and Wax are *Bona & Catalla*, and may paſs by that Name; yet for as much

* Dy. 5. pl. 3. Cro. Jac. 637. Cro. Car. 262.

as the Debt included and wrote upon it is the Principal, the Words of the Grant ought to comprehend the Name of the Principal. But (*per Popham*) if a Man grants to *J. S.* all his Goods and Chattels in ſuch a Box, and there are Bonds in that Box, there the Bonds paſs by Reaſon of the ſpecial Reference expreſſed by the Grant: *Quod Curia conceſſit.*

Hard. 111. 4 Mod. 156. Salk. 654. Vide Cro. El. 723. & Regiſtr. 106. b.

Lee *verſus* Lacon.

TReſpaſs; the Action was laid *in Com' Salop'*, and upon *Non Culp'* pleaded, a *Venire facias* was made *Vicecom'* with a Space for *Salop'*, but *Salop'* was not named at all, and by Virtue of this Writ the Sheriff of *Salop'* empanell'd the Jury, who found for the Plaintiff; and the Matter *ſupra* was alledg'd in Arreſt of Judgment, *viz.* that the *Venire facias* was vitious, ſo a Miſtrial: But by *Fenner* and *Williams* Juſtices, 'tis as if no *Venire facias* had been awarded, and ſo aided by the Statute of *Jeofails*; for in as much as the County, (*viz. Salop'*) is left out and omitted, the Sheriff of *Salop'* had no Power nor Authority to ſummon the Jury, becauſe the Writ, which is his Warrant, was generally (*Vicecomiti*) and is not of any County: But, *per totam Curiam*, the better Way is to amend it. In which this Difference was taken, where the Action is laid *in Com' Salop'*, and upon Pleading ſpecially, the Iſſue is drawn to a Foreign County, there the Entry and the Award of the *Venire facias* upon the Roll is ſpecial, *viz.* to the Sheriff of the County where the Iſſue to be tried ariſes; and therefore in ſuch Caſe a Writ of *Venire facias Vicecomiti* (with a Blank) will not be good, becauſe it ſtands indifferent to the Sheriff of which County the *Venire facias* was intended to be awarded; and upon that Incertainty it will be ill. But where the general Iſſue is taken, or the Matter is triable in the ſame County where the Action is laid, there the *Venire facias* in the Award upon the Roll is only, *Fiat inde Jurata*, which ought of Neceſſity to be to the Sheriff of the County where the Action is brought, and cannot be intended otherwiſe; and therefore it is but the Fault of the Clerk, which ſhall be amended: And ſo it was. *Yelverton pro Quer'.*

Cro. Jac. 78. 1 Brownl. 202. Treſpaſs. Void venire. County omitted. Statute of Jeofails. Venire facias amended. Incertainty. Ante 64.

Baily *verſus* Moone.

TReſpaſs of Battery in *Plimouth* before the Mayor and Bailiffs there; upon *Non Culp'* pleaded (which Iſſue appeared afterwards to be waived, and Judgment to be given for the Plaintiff) a Writ of Inquiry of Damages was directed to the Serjeants of the Mace there, that *per*

1 Brownl. 203. Treſpaſs. Error.

Sacramentum 12, *&c.* they ſhould inquire, *&c.* and it was made returnable *ad proximam Curiam* before the Mayor and Bailiffs: And upon a Writ of Error brought in the King's Bench, it appear'd by the Record returned, that the Writ of Inquiry of Damages was taken before the Mayor of *Plimouth*, who is alſo Judge of the Court, and for that Reaſon it was reverſed; for the Writ warrants the Inquiry of the Damages to be before the Serjeants at Mace, who for this Purpoſe by the Writ are made diſtinct Officers; then an Inquiry before the Mayor is not warranted by any Writ, and by Conſequence Judgment to recover ſuch Damages taxed before a wrong Officer, to whom the Writ was not directed, is erroneous. *Quod tota Curia conceſſit.* Yelverton *pro Querente.*

Vale *verſus* Egles.

Cro. Jac. 69. Error on Aſſumpſit. Conſ. in Law on Aſſumpſit. Damages more than Plaintiff demands.

THE Plaintiff declared in the Court of *Coventry* on an *Aſſumpſit*, that whereas the Plaintiff and Defendant ſuch a Day *inſimul computaſſent*, *viz.* 4 *Maii*, and the Defendant was found in Arrears 10 *l.* he *in Conſideratione inde* promiſed to pay it 19 *Maii* after; and declared that the Defendant had not paid it the ſame 19 *Die*, although *requiſitus*; to his Damages 10 *l.* And upon *Non Aſſumpſit* pleaded, it was found for the Plaintiff, and Damages given to 10 *l.* and for Coſts 20 *s.* and Judgment accordingly; and a Writ of Error was thereupon brought. And 1. It was aſſigned, that this Action does not lie, becauſe no certain Duty or Sum of Money appears to be due, upon which to ground the Action. But it was anſwer'd by the Court, that by the Accompt between the Parties, that which was before incertain is reduced to a Certainty, and of ſuch Eſtimation in Law, that the Party may have his Action of Debt, and by Conſequence an *Aſſumpſit* on the Conſideration in Law, *viz.* the Debt precedent. 2. It was moved, that the Party has recover'd more than he has declared for; for he has declared to the Damage of 10 *l.* only, and he has Judgment to recover 11 *l.* To which it was anſwer'd by the Court, that the Judgment is good; for the Judgment for the Damages is not more than the Plaintiff has declar'd; for the Jury have ſever'd the Damages and the Coſts, *viz.* Damages 10 *l.* and Coſts 20 *s.* and accordingly ſhall the Judgment be taken to be; and Damages and Coſts are given in the Action for ſeveral Cauſes; Damages for the Loſs ſuſtained before the Action brought, and Coſts for the Trouble and Expence in Suit; otherwiſe it is a true Rule, that the Plaintiff ſhall not recover more in Damages than according to his Declaration; for the Plaintiff is by the Law taken to be beſt conuſant of his own Damage, and ſo are the Books 13 *H.* 7. 2 *H.* 6. 3 *H.* 6. to be underſtood. 3. Error was moved that the

Cro. El. 544, 568. 2 Rol. Rep. 447.

Ante 45.

13 H. 7. 16, 17. 2 H. 6, 7. a.

Plaint was enter'd 16 *Maii* 44 *Eliz.* and the Plaintiff declares on an *Inſimul computaſſent* 4 *Maii* the ſame Year, and that the Defendant was then found in Arrears, and *in Conſideratione inde* he promiſed to pay the Plaintiff the 10*l.* 19 *Maii* after: And thereby it appears that the Plaintiff at the Time of the Entry of his Plaint, which was 16 *Maii*, had no Cauſe of Action; for 'till 19 *Maii* paſt, in which the Promiſe was to pay the 10*l.* there was no Breach of Promiſe, and by Conſequence no Cauſe of Action. And for this Reaſon, being apparent within the Record certified, the Judgment was reverſt. *Yelverton pro Defendente.*

Plaint enter'd before Cauſe of Action.

Paler & Bartlet *verſus* Hardyman and his Wife.

THE Plaintiffs brought an Action of Debt in the Common Pleas againſt *Paler* and *Bartlet*, *Quod reddant eis unum Dolium ferri, ad Valentiam* 12*l.* and declared upon a Bill, *prædictum Dolium deliberand'* within ſuch a Time; and that the Defendants had not deliver'd it accordingly, to Damage, *&c.* and upon *Non eſt Factum* pleaded, it was tried againſt the Defendants; whereby Judgment was given, *Quod Quer' recuperent Dolium Ferri, vel Valorem ejuſdem, ad damna, &c.* and thereupon a Writ iſſu'd *ad diſtringend'* the Defendants, *Quod reddant prædictum Dolium Ferri vel Valorem ejuſdem, & ſi non reddant Dolium, tunc per Sacrament', &c. inquirat quantum idem Dolium valet*, and before any Return of this Writ of Inquiry of Damages, the Plaintiffs in the Common Pleas took a *Capias* upon the Judgment, and an *Exigent* upon that; wherefore the Defendants brought a Writ of Error upon the Matter aforeſaid; and it was adjudged Error for two Reaſons: 1. Becauſe the Judgment is in the Disjunctive, *Quod Quer' recuperent Dolium Ferri, vel Valorem inde*; which ought not to be, but only, *Quod recuperent Dolium Ferri & ſi non Valorem inde*; as in Detinue; for in this Caſe it appears by the Judgment that the Plaintiffs may elect which they will have, *viz. Dolium, vel Valorem*, which ſhould not be; for if the Ton of Iron is to be had, they ſhall recover that only; but if it is not to be deliver'd, *tunc Valorem inde*, and not before. 2. Becauſe the Judgment is not perfect before the Writ returned, which iſſued to the Sheriff to diſtrain the Defendants *reddere Dolium*, and if not to inquire of the Value; and before the Return of the Writ, nothing in certain appears whereon to ground a *Capias*, or other Writ of Execution; for the Judgment comprehends no Certainty, but is to be made certain by the Return of that Writ. *Quod tota Curia conceſſit.* Yelverton *pro Quer'.*

1 Brownl. 87. Error on Debt. Judgment disjunctive. Detinue. Judgment imperfect till the Writ of Inquiry of Damages return'd.

Cro. Jac. 581.

2 Rol. Rep. 126. Noy 80. Stile 109. 1 And. 144.

Mich.

Mich. 3 Jac. B. R.

Stile *verſus* Heape.

Cro. Jac. 80, 120. Words.

Thou haſt moſt perjuredly preſented me at the Viſitation: Upon theſe Words the Plaintiff brought the Action, and ſhewed that he was a *Sideſman* in the Pariſh of *D.* where, *&c.* and was ſworn to execute his Office *truly*, and to preſent Offences within the Pariſh; and that he, *Vinculo Juramenti aſtrictus*, preſented the Defendant at the Biſhop's Viſitation, wherefore the Defendant ſpoke the Words: And it was found at the Aſſiſes for the Plaintiff; and it was moved in Arreſt of Judgment, that the Words are not actionable: 1. Becauſe the Defendant does not preciſely affirm any Perjury to be committed by the Plaintiff, but ſpeaks by a Term of Similitude (*viz. perjuredly*;) as if one ſays, *Thou haſt thieviſhly taken my Money out of my Purſe*; theſe are not actionable: The ſame Law if one ſays, *Thou haſt dealt traiterouſly with* J. S. no Action lies: But *Quære* if they were, *Thou haſt dealt traiterouſly with the King*; by *Yelverton* Juſtice. The ſecond Reaſon was, becauſe the Plaintiff does not ſhew what Preſentment he made at the Viſitation, ſo that it might appear to the Court to be within the Compaſs of his Office; for if the Plaintiff preſents one at the Viſitation for a Quarreller, or for a Thief, it is out of the Bounds of his Office, and no Perjury, although it be falſe, becauſe it is a Matter not examinable there. By *Fenner*, *Yelverton* and *Williams*; *Popham* being abſent.

Perjury.

Harris *verſus* Dixon.

Cro. Jac. 158. Words.

FRancis Harris *hath procured and ſuborned one* Smith *to come Thirty Miles to commit Perjury againſt his Father, before my Lord of* Wincheſter, *and gave* Smith 10 *l. to that Purpoſe:* And 40 *l.* Damages given to the Plaintiff. And in Arreſt of Judgment *Yelverton* moved that the Words are not actionable, becauſe it does not appear that *my Lord* of *Wincheſter* had any Commiſſion or Authority to take an Oath, and then it cannot be Perjury; for he is not any Judge known competent to take an Oath, unleſs by Virtue of ſome Commiſſion, which ought to be ſhewn to the Court. *Quod fuit conceſſum per Fenner*, *Yelverton* and *Williams*; *Popham* being abſent. *Yelverton* for the Defendant.

Carpenter *verſus* Colins.

J. Norrington had Iſſue a Son and a Daughter, and deviſed that his Son ſhould have his Land at the Age of Twenty-four, and gave 40 *l.* to the Daughter to be paid at the Age of Twenty-two; and further willed that *Carpenter* the Plaintiff ſhould be his Executor, and ſhould repair his Houſes, and have the *Overſight and Doing of all his Lands and moveable Goods* till the ſeveral Ages aforeſaid, and died. *Carpenter* the Executor demiſed the Land to *Colins* at Will, *Habend' a Feſto Die Mich' quamdiu Partibus placuerit*, yielding yearly 3 *l.* and brought Debt for the 3 *l.* and ſhewed that *Colins* enter'd and occupied *a Feſto Die, &c. uſque ad Feſtum Mich'*. And upon *Nil debet* pleaded, the Jury found the Matter *ſupra*, and that the Son died, (but did not find of what Age he was at the Time of his Death, but only that the Daughter at the Time of the Death of the Son was Nineteen *& non amplius.*) And found the Leaſe made by the Plaintiff, and that the Leſſee by Virtue thereof enter'd, and continued Poſſeſſion *a Feſto Die Mich'* for a Year and more; and found that within that Year the Daughter enter'd, and that the Defendant attorn'd to the Daughter, and refuſed to continue Tenant to the Plaintiff. And by *Fenner*, *Yelverton* and *Williams*, Judgment was given againſt the Plaintiff; for, by *Fenner* and *Yelverton*, the Plaintiff took no Intereſt in the Land by the Will; for the *Overſight* and *Doing of his Lands* ſhall be intended only in the Right of the Heir, and to his Uſe, becauſe the Teſtator *thought not his Son of Diſcretion and Government* till Twenty-four Years, and in the mean Time appointed the Executor *to overſee and order the Land* to the Profit of the Heir who wanted Diſcretion; like to 28 *H.* 8. *Dy.* 26. where *Ceſtuy que Uſe* declared, that *J. S.* ſhould have *tam Gubernationem, &c. Puerorum, quam* the *Diſpoſing*, *Setting*, *Letting*, and *Ordering* of his Lands: And *per Cur'* J. S. has it only to husband for the Profit of the Children, and not otherwiſe. But *Williams* Juſtice conceiv'd that he had an Eſtate on a Limitation to be determin'd at the Son's Age of Twenty-four, and becauſe it does not appear at what Age he died; (for that is not found by the Verdict) *ergo* it is incertain, and therefore the Entry of the Daughter lawful; for the Limitation goes only to the Age of the Son, and not to the Age of the Daughter; for the Daughter's Age ſhall be intended to be *ſet down* for the Receipt of her Legacy of 40 *l.* and for no other Purpoſe. Then it was moved that within the Time, in which this Rent demanded is ſuppoſed to be incurr'd, the Defendant has determin'd his Will, as appears by the Verdict, he attorned to the Daughter, and refuſed to be Tenant to the Plaintiff. But by *Fenner* and *Williams*, it is found by the Verdict, that by Force of the Leaſe made by the Plaintiff the Defendant enter'd and occupied for all the Time contain'd in the Declaration, and more: And alſo that a Tenant at

Mo. 774. 1 Brownl. 88. Debt. Demiſe. No Intereſt in the Land, but Overſight. Intereſt. Tenant at Will.

Cro. Eliz. 678, 734.

Will cannot determine ſo ſhort a Time before the End of the Year; for that would be miſchievous to the Leſſor, that his Tenant at Will ſhould determine his Will, and deny the Occupation two Days before the End of the Year, when he has taken the whole Profit of the Year. (And *revera*, *vide* 21 *H.* 7. *Crook's* Reports, and there *Patet* that Leſſee at Will cannot determine his Will within the Year, to the Prejudice of the Leſſor, but that he ſhall anſwer the whole Rent reſerved.) But *Yelverton contra*; and alſo (by him) the Declaration is not good; for by the Plaintiff's own ſhewing it appears, that there wants a Day of the Occupation for a Year; for he declares that the Defendant occupied it *a Feſto Die Mich' uſque ad Feſtum Diem*, &c. whereby *Michaelmas* Day is excluded: But *Nota*, that it does not appear that the Leſſee was expelled by the Plaintiff who was Leſſor; and no Entry of a Stranger upon him (although it be by his Agreement) ſhall determine the Leaſe againſt the Leſſor; for it is Covin, if the Leſſor is not privy and acquainted with it: *Quod fuit conceſſum* by the other Juſtices. But all agreed in the Title againſt the Plaintiff. (*Quod Nota*) *Popham* being abſent; who on the Report of the Caſe by *Thomas Warr* (as *Warr* ſaid) was of Opinion, that the Plaintiff took an Intereſt by the Words of the Will. *Nota*, *Yelverton pro Quer'*.

Keilw. 65. b. Salk. 413, 414. Aleyn 4. Cro. El. 775.

Cro. Jac. 300.

Faldo *verſus* Ridge.

Treſpaſs.

THE Plaintiff declar'd for a Treſpaſs in *Great-long-meade* in *D.* 12 *Maii Anno* 1. with Continuance, to his Damage, &c. The Defendant pleaded *proteſtando*, that the Treſpaſs is not continued *Modo & forma*, &c. *pro placito*, that at the Time of the Treſpaſs he was poſſeſſed of a Cloſe called *Wood-end* in *D.* for a certain Term *adtunc & adhuc ventur' cuidam Clauſo*, called *Little-long-meade*, *contigue adjacen'*, and that *Great-long-meade* to the ſame Cloſe, called *Little-long-meade*, *ſimiliter eſt contigue adjacens & exiſtens in* D. *prædicta*: *Quodque* the Plaintiff *ſimiliter tempore quo*, &c. was poſſeſſed of the ſaid ſeveral Cloſes, called *Little-long-meade* and *Great-long-meade*, for a certain Term then to come; and that the Plaintiff *prædicto tempore quo*, &c. *debuit reparare*, *facere & manutenere ſepes*, &c. *tam inter* the Cloſe called *Wood-end*, and the Cloſe called *Little-long-meade*, *quam inter Little-long-meade* and *Great-long-meade*; and that the Defendant ſo poſſeſſed of the Cloſe called *Wood-end*, *tempore quo*, &c. *poſuit Averia ſua præd'* into the ſame Cloſe called *Wood-end*, to feed there; and ſaid in *Facto*, that the Plaintiff *tempore quo*, &c. *permiſit ſepes & Fenſuras inter* the Cloſe called *Wood-end*, and the Cloſe called *Little-long-meade*, and the ſaid Cloſe called

Great-long-meade in quo, &c. for Default of Reparation *Remanere apertas, confract' & minime reparat'*; whereby the Cattle aforeſaid put by the Defendant into *Wood-end, per fracturam ſepium, &c.* between the ſaid Cloſe called *Wood-end*, and the ſaid Cloſe called *Little-long-meade, in, per & trans & extra* Little-long-meade *uſque in* Great-long-meade, *in quo, &c.* enter'd, and the Plaintiff's Graſs *adtunc & ibidem creſcen'* in the ſame Cloſe, in which in Default of ſufficient Reparation, *&c. conculcaverunt & conſumpſerunt modo & forma prout* the Plaintiff has declared, which is the ſame Treſpaſs, *&c.* And two Exceptions were taken to the Bar. 1. Becauſe the Defendant pleads generally, that he was poſſeſſed of the Cloſe called *Wood-end*, and does not ſhew of whoſe Leaſe, nor for what Time; and that is iſſuable and traverſable on the Part of the Plaintiff, as appears 21 *Eliz. Dy.* But *per Cur'* he need not, becauſe the Intereſt of the Cloſe called *Wood-end* is not in Queſtion; but is merely collateral to the Thing in Queſtion, and is but a * Conveyance to the ſubſequent Matter; for whether the Defendant is poſſeſſed or ſeiſed by Title or by Tort, the Poſſeſſion and Occupation of the Land is ſufficient to juſtify the Putting in of the Cattle into that Cloſe whereof he is poſſeſſed, although it be but at Will. The ſecond Objection was, becauſe the Defendant ſays only *Quod Quer. debuit reparare, &c.* and does not ſhew by what Title, and in what Sort; as 19 *H.* 6. 33. *b.* & 21 *H.* 6. 5. *a.* are; where alſo this Word (*Debuit*) cannot make an Iſſue triable by the Country; for every Man's Ground has an Encloſure in Law, the Bounds whereof his Cattle ought not to paſs without ſhewing a ſpecial Reaſon, as Covenant or Preſcription to make an Encloſure in Fact. But *per Curiam non allocat'*; for the Difference is, where the Right of Encloſing to charge the Inheritance is in Queſtion, and where the Plea goes only in Excuſe of a Treſpaſs; as *in Curia claudenda*, he ought to ſhew the Title in the *Debet & Solet*; for that is only in the Right, and binds the Inheritance for ever. 22 *E.* 4. *Curia claudenda* 2. 10 *E.* 4. 7. & 36 *H.* 6. *Barre* 168. but in this Caſe it goes only in Excuſe of a Treſpaſs *hac Vice*; and alſo the Defendant is a Stranger to the Plaintiff's Title, and cannot be preſumed to know by what Title he ought to repair; as 19 *H.* 6. 33. *b.* if the Tenant in a real Action pleads Jointenancy on his own Part, he ought to ſhew of whoſe Feoffment or Gift, becauſe he well knows how he came to the Land; but if he pleads Jointenancy on the Part of the Plaintiff it is otherwiſe; for he may well know that a Stranger has Title with the Plaintiff, and yet be ignorant by what Title: So here, the Defendant may well know that the Plaintiff ought to repair the Fence, and yet not know by what Title this

Repa-

Incloſure.

Dy. 365. b.

* Cro. Car. 138.

2 Mod. 70.

3 Mod. 132. Vide Lutw. 1492. contra.

Where debuit reparare ſhall be good Pleading.

Curia claudenda.

Jointenancy pleaded.

Reparation ought to be made. And *(per Popham)* it is good Policy for the Defendant in this Caſe to be ſparing in ſetting down the Plaintiff's Title leſt he ſhould miſtake it, and ſo be trick'd; and therefore the Bar is good by the Manner: And Judgment was given accordingly by *Popham*, *Fenner* and *Yelverton*; *Williams* being of a contrary Opinion. *Yelverton pro Defend' Hill. 5 Jac.* this Judgment was reverſt in the Exchequer, * and upon the Record return'd into the King's Bench, they gave Judgment, that the Plaintiff ſhould recover, contrary to the firſt Judgment; for otherwiſe they ſaid the Law would be defective: And a Precedent was ſhewn in † *Winchcomb*'s Caſe, 38 *Eliz.* where the ſame Courſe was taken.

* Nov 129. Cro. Jac. 206. 1 Show. 127.

† Cro. Eliz. 746.

Raynay *verſus* Alexander.

Aſſumpſit. Act preceding the Promiſe ought to appear to be performed. Election. Prædict' referr'd.

THE Plaintiff declar'd, that whereas the Defendant was poſſeſſed of ſeventeen Tod of Wool, and whereas *Colloquium fuit* betwixt them for fifteen Tod of the ſeventeen Tod, to be choſen by the Plaintiff; the Defendant in Conſideration of 6 *l.* to be paid on ſuch a Day, *&c.* promiſed to deliver the Plaintiff *prædictas* fifteen Tod of Wool, and ſaid *in Facto*, that he was ready at the Day to pay the Defendant 6 *l.* yet the Defendant had not deliver'd the Plaintiff the fifteen Tod of Wool, to his Damage, *&c.* And upon *Non Aſſumpſit* pleaded, it was found for the Plaintiff; and it was ſhewn in Arreſt of Judgment, that the Declaration was not good, becauſe the Plaintiff had not ſhewn, that he had choſen fifteen Tod out of the ſeventeen, and that is *quaſi* a Condition precedent; and an Act to be firſt performed by the Plaintiff before the Defendant is bound by his Promiſe to do any Thing: *Quod fuit conceſſum per totam Curiam.* But, *per Popham* Chief Juſtice, if the Defendant had ſold one of the Tods of Wool before Election made by the Plaintiff, that had deſtroy'd the Election, and made the Promiſe abſolute, and had been a Breach of it: The ſame Law if the Defendant would not have permitted the Plaintiff to ſee the Wool that he might make Election; for that had excuſed the Act to be done by the Plaintiff, and had been a Default in the Defendant. And the Matter aforeſaid is much enforced by the Word *Prædictas* in the Declaration; for that can be referr'd to nothing but the Communication, by which the Plaintiff of his own ſhewing ought to make Election: Then the Plaintiff omitting it in his Declaration ſhews the Fault is in himſelf, which ought to be removed before he can charge the Defendant: But if the Communication had been, that the Plaintiff ſhould chuſe fifteen Tod of ſeventeen, and the Plaintiff had declar'd the Promiſe to be to deliver fifteen Tod generally, without ſaying *prædictas*, there, if the Promiſe had been found, the Plaintiff ſhould have Judgment; for the *Colloquium* might be conditional, and the Promiſe abſolute.

5 Co. 21. a. 2 And. 18. Poph. 110. Cro. El. 450, 479. Mo. 452, 453. Rayn. 25, 26.

abſolute. *Quod Nota.* But the Judgment was, *Nil capiat per Billam.*

Lapworth *verſus* Waſt.

THE Plaintiff declar'd for Taking of certain *Corn, Hay, Beans, &c.* ſever'd from the nine Parts at *Ethorp in Com' War'* to his Damage, *&c.* The Defendant, as to Part of the Tithes taken, pleaded *Non Cul'*, and the Plaintiff *ſimiliter*; and as to the Reſidue pleaded a Deviſe of the Parſonage whereof, *&c.* from *Thomas Lapworth* to the Defendant at *Wapenbury* in the ſame County: And to enable the Deviſe of the Tithes in *Ethorp*, alledged *Ethorp* to be an Hamlet of *Wapenbury*, to the Intent that all the Tithes might paſs; and upon *Non deviſavit* being in Iſſue, the Venue was only from *Wapenbury*; and it was found for the Plaintiff, *Quod* Thomas Lapworth *non deviſavit*; and the other Iſſue of *Non Cul'* they found for the Defendant. And it was moved in Arreſt of Judgment, that the Venue was miſtaken; becauſe it was from *Wapenbury* only, and not from *Ethorp*; and they of *Wapenbury* cannot find or try a Matter in *Ethorp:* And altho' it was anſwer'd, that Treſpaſs lies for a Treſpaſs in an Hamlet, and that the Defendant himſelf has by his Plea confeſſed that *Ethorp* is but an Hamlet; yet *per Curiam* the Venue is miſtaken; for when the Plaintiff declares on a Treſpaſs in *Ethorp*, that by general Intendment is preſumed to be a Vill, by which Vill the Matter which is there in Iſſue ought to be tried: And altho' the Defendant has alledged *Ethorp* to be an Hamlet, yet that is only to enable the Deviſe, and does not extend to the Iſſue before, which is *Non Cul'* for Part; for in that Iſſue the Parties are both agreed that *Ethorp* is a Vill, and that is a perfect Iſſue by it ſelf, which has no Coherence with the other Iſſue, *Non deviſavit*; but if the Defendant had pleaded his Excuſe by the Deviſe to the whole Treſpaſs, and had alledged *Ethorp* to be an Hamlet of *Wapenbury*, and that only had been in Iſſue, there the Venue awarded by the Manner had been good. But in this Caſe the * Venue was adjudged to be miſawarded, and that the Plaintiff ſhould have a *Venire facias de novo*. *Quod Nota.* Yelverton *pro Quer'*.

Cro. Jac. 86. 1 Brownl. 203. Treſpaſs.

Venue.

Intendment.

* 16 & 17 Car. 2. c. 8. 1 Sand. 246. Comb. 472. & vide 5 Mod. 405.

Venire fac' de novo.

Shelley *verſus* Alſop.

IN an Action on the Caſe brought on a Promiſe ſuppoſed to be made by the Defendant, on *Non Aſſumpſit* pleaded, and tried in a baſe Court in the Town of *Stafford*; the Jury found that the Plaintiff by Non-performance of the Promiſe *ex parte* of the Defendant had ſuſtained Damage

Aſſumpſit. Verdict.

50 *s.* and aſſeſſed Coſts, and Judgment accordingly; and upon Error brought thereon, it was reverſt on the firſt Motion by *Fenner*, *Yelverton* and *Williams*; for the Verdict given by the Manner is no Verdict; for they have not found the Matter in Iſſue, with which they were charged, *viz.* whether the Defendant *Aſſumpſit*, *necne*; ſo it is altogether incertain and imperfect: For this Finding by the Manner, that the Plaintiff has ſuſtained Damage 50 *s.* by Non-performance of the Promiſe, is but a Finding of the *Aſſumpſit* by a Foreign Implication, which is not good on any general Iſſue; no more than in Treſpaſs, on *Non Cul'* pleaded; the Jury find that the Plaintiff is damnified 5 *l.* by the Entry of the Defendant; this is not good; for they ought to give their Verdict preciſely according to their Charge. *Quod Nota.* *Yelverton* of Counſel with *Alſop*.

Jeffrey *verſus* Guy.

1 Brownl. 89. Error.

DEBT on Bond; the Condition was, that if *Jeffrey* the Defendant performed all Covenants in ſuch an Indenture, that then, *&c.* and one Covenant was, that he ſhould permit *Guy* the Plaintiff *de Tempore in Tempus*, to come to ſee if Reparations were made of an Houſe demiſed by *Guy* and *Katherine* his Wife to *Jeffrey* for Years: In which the Caſe was, that *John Bill* and *Katherine* his Wife were Tenants in Tail of the Houſe, and had Iſſue *William*; *John* died, *Katherine* married *Guy* the Plaintiff, they made a Leaſe by Indenture to *Jeffrey* for Twenty Years, yielding to them and their Heirs 3 *l.* Rent *per Annum*, with ſuch Covenant as above; and *Jeffrey* pleaded in Bar the former Intail, and the Death of *Katherine*, and that *William* the Iſſue in Tail ſuch a Day enter'd, before which Entry no Covenant broke. *Guy* replied, that *William* came with him upon the Land to ſee if Reparations, *&c.* *abſque hoc*, *quod* William *intravit modo & forma*, *&c.* and Iſſue thereon, and found for the Plaintiff, and Judgment in the Common Pleas: Wherefore *Jeffrey* brought Error in the King's Bench, and the Judgment was affirmed. But the Error aſſigned was, that *Guy* had not laid any Breach of Covenant in *Jeffrey*, and ſo had not ſhewn any Cauſe of Action. But, *per Curiam*, he need not in this Caſe; for by the * Special Iſſue tender'd by *Jeffrey* he has obliged the Plaintiff to make a ſpecial Replication to that Point tender'd; and then the Plaintiff cannot proceed further: And therefore it is not like the Caſe of an Award, where in Debt on a Bond to perform it, the Defendant pleads *Non fecerunt Arbitrium*, there the Plaintiff in his Replication ought to ſhew the Award, and aſſign a Breach; becauſe the Defendant's Plea is general: But

Where a Breach of Covenant need not be aſſign'd.

* Ante 24. Cro. El. 320. Salk. 138. 1 Show. 148. 2 Show. 359. 1 Sand. 103. Arbitrament.

in ſuch Caſe, if the Defendant pleads a Releaſe of all Demands after the Award, whereby he offers a ſpecial Point in Iſſue, here it is ſufficient for the Plaintiff to anſwer the Releaſe, or other ſpecial Matter alledged by the Defendant without aſſigning any Breach; ſo in this Caſe the Defendant's ſpecial Plea has diſabled the Plaintiff that he cannot aſſign any Breach of Covenant, but muſt of Neceſſity anſwer the ſpecial Matter alledged. *Quod Nota.* Yelverton *pro Guy.*

Hutton *verſus* Barnes.

HUtton being ſued in the Spiritual Court in *Durham* for Tithes, brought a Prohibition there, and ſuggeſted that the Prior of *Durham* was ſeiſed of the Grange of *Seſgerſonwick* in Right of the Church, *viz.* the Priory; and preſcribed in the Prior and his Predeceſſors to hold that Grange without Payment of any Tithes; and ſhewed the Diſſolution of it, and how it came to *H.* 8. and the Statute 31 *H.* 8. to hold it as the Houſe of Religion held it before; and derived to himſelf a Leaſe for Fifty Years from Queen *Eliz.* and after his Preſcription laid *in non Decimando*, ſhewed how the Defendant ſued him in the Spiritual Court for the Tithes of Forty Fleeces of Wool. To this the Defendant pleaded that he ſued the Plaintiff for the Tithes of 400 Fleeces of Wool, and prayed a Conſultation; and for the Variance between the Libel and the Suggeſtion the Juſtices of Aſſiſe awarded a Conſultation, and adjudged double Coſts to the Defendant. And *Yelverton* aſſigned both theſe Matters for Error. And *per Curiam* they are Error; for the Variance is not material here, becauſe the Plaintiff preſcribes *in non Decimando*, and thereby ouſts the Spiritual Court of all Manner and Power of Juriſdiction for any Tithes ariſing from this Grange, becauſe it is diſcharged *in ſe*; but if the Suggeſtion had been on a *Modus decimandi*, then it would be otherwiſe; for there the Suit for Tithes belongs originally to the Spiritual Court; and therefore there the Suggeſtion ought to agree with the Libel; for if the Parſon libels for Tithe of Hay, and the other will ſuggeſt a Cuſtom for Tithe of Corn, that is not to the Purpoſe; for it is not for the ſame Thing: The ſame Law where they vary in the Quantity of the Tithes demanded, becauſe the Suggeſtion is grounded upon the Libel, and the Plaintiff is to ſtay the Proceedings there but for one Cauſe certain: But in the Caſe *ſupra* the Suggeſtion diſcharges the Spiritual Court from all Manner of Power for any Tithes at all; and therefore the Variance not material. 2. The Judgment for double Coſts was

Error on Prohibition.

Preſcription in Non decimando.

Conſultation.

Variance.

Libel.

Suggeſtion.

Hob. 300. Conſultation granted for Variance between Libel and Suggeſtion.

Where double Coſts ſhall be granted.

2, 3 E. 6. c. 13.

was Error on the expreſs Letter of the Statute 2 *E. 6.* which gives double Coſts only for Want of Proof of the Suggeſtion, and for no other Cauſe. *Quod Nota.*

Cruſh *verſus* Cruſh.

Action for Slandering his Title.

THE Plaintiff declared, that whereas he was ſeiſed of certain Land, in which he had good Right and Title, *&c.* The Defendant *malitioſe* to hinder the Plaintiff in the Sale of it, and alſo to diſcredit the Title in it, utter'd theſe Words: *He had rather buy the Title of* Thomas Cruſh (who was the Plaintiff's younger Brother) *than the Title* of the Plaintiff; and he further ſaid, *That he had ſeen an Indenture to lead the Uſe of a Fine, whereby it appear'd, that the Plaintiff had no Authority to ſell the Land*; and declared to the Damage of 100*l.* and upon *Non Cul'* pleaded, it was found for the Plaintiff. And it was moved in Arreſt of Judgment, that the Words import no Slander to the Title; for as to the firſt Words, they do not import any Colour of Action; for they ſhew only the private and particular Inclination of the Defendant, who in his own Choice *had rather buy the Land of the younger than of the elder Brother*, and that might well be without any Impeachment to the Plaintiff's Title; for perhaps the Inheritance was in the Younger, and the Freehold only in the Elder, or the like; and for the other Words, they are not any Diſcredit to the Plaintiff's Title in the Land; for the Title may be good and ſure, and yet the Words true, *viz.* that he has no Authority to ſell it; for it may well be, that the Land is tied with a Perpetuity, that he cannot ſell it, and yet the Eſtate and Title good. *Quod fuit conceſſum per Fenner, Yelverton* and *Williams*; *Popham* being abſent. And *Nil cap' per Billam* enter'd.

Raſtell *verſus* Draper.

Cro. Jac. 88. Noy 13. 1 Brownl. 90. Mo. 775. Debt. Flemiſh Money.

DEBT; the Plaintiff demanded 39*l.* and declared that he 1 *Maii anno* 1. *ſold* to the Defendant Twenty *Northern Cloathes* for 60*l. Flemiſh*, to be paid on Requeſt, which 60*l. Flemiſh attingunt ſe* to 39*l. Engliſh*; and that the Defendant, *licet ſæpius requiſitus*, had not paid the 39*l. ad Dampnum, &c.* The Defendant pleaded *Nil debet*; and it was found for the Plaintiff, and moved in Arreſt of Judgment, that the Plaintiff ought to have demanded the Sum according to the Contract, which was for 60*l. Flemiſh*, and to have ſhewn that it amounted to 39*l. Engliſh.* But *per totam Curiam, non allocat'*; for the Debt ought to be demanded by a Name known, and the Judges are not appriſed of *Flemiſh Money*; and alſo when the Plaintiff has his Judgment, he cannot have Execution by ſuch Name; for the Sheriff cannot know how to levy the

Money in *Flemiſh*; and moreover it is now made good by the Verdict, for they have found the Debt demanded, *viz.* 39 *l.* But if the Contract had been for ſo many Ounces of *Flemiſh* Money, or for a Bar of Silver or Gold, there it could not be demanded by the Name of 20 *l.* or ſuch Sum; becauſe it is not Coin, nor is uſed in Trade or Merchandize; but there he ought to have a Writ of *Detinue*, and thereby he ſhall recover the Thing or the Value: As alſo *Lib. Intr.* 158. is the Precedent, where Debt was brought on two ſeveral Bonds, and demanded 28 *l.* and declared ſeverally on each Bond, that he *debet* 19 *l.* 18 *s. de moneta Flandriæ.* And 34 *H.* 6. 12. agrees, and 9 *E.* 4. 42. But *nota* in this Caſe, the Plaintiff if he would might have declar'd in the * *Detinet*, and good alſo; for the Precedents go to both. *Quod nota. Telverton* for the Plaintiff.

Debt or Detinue.

* Latch 4, 77, 84. Noy 13. Palm. 407.

Sir Aud. Nowell.

J. S. and ſeveral others were indicted for a forcible Entry into an Houſe Parcel of the Manor of *D.* which was the Freehold of Sir *Aud. Nowell*, and whereof one *Fracy* was Cuſtomary Tenant, and for diſſeiſing Sir *Aud.* and expelling *Fracy* therefrom, *&c.* and altho' in this Caſe Sir *Aud.* endeavour'd and mov'd that no Reſtitution ſhould be had, (for in Truth the Entry of thoſe who were indicted, was by the Command of Sir *Aud.* upon *Fracy*, who had forfeited his Copyhold) and that it was objected, that Reſtitution is only to be made in Reſpect of the Freehold; and Sir *Aud.* who is ſuppoſed to be diſſeiſſed of the Freehold, does not require it, but the contrary; yet *per Curiam* Reſtitution was granted in Reſpect of *Fracy* the Copyholder; for in Regard the Indictment is a Record, by which the Diſſeiſin of Sir *Aud.* and the Expulſion of *Fracy* appear, the Court in Diſcretion, and the Jury alſo, ought to reform the Wrongs in their ſeveral Degrees, and that is to reſtore *Fracy* firſt who was expell'd; and thereupon the Reſtitution to the Freehold follows *ex conſequenti*. But if the Indictment had been only of a Diſſeiſin, without an Expulſion, there no Reſtitution could be, unleſs on the Prayer of him who had the Freehold: And (by *Williams* Juſtice) according to this Caſe was it likewiſe adjudg'd in the Caſe of the Lord *Norris*, who having made a Leaſe for Years to *A.* and ſeveral being indicted for a forcible Entry upon the Poſſeſſion of *A.* and diſſeiſing the Lord *Norris*, and expelling *A.* and altho' the Lord *Norris* withſtood the Reſtitution, yet *nolens volens* it was granted, to redreſs the Wrong done to *A.* the Termor, who by the Indictment is found to be expelled. *Quod nota.*

Indictment on 8 H. 6.

Copyholder.

Where Reſtitution ſhall be granted againſt the Will of the Freeholder.

Pratt *verſus* Moon.

Co. Entr. 590. 6 Co. 39. a. Brownl. 134. Replevin.

IN Replevin of Cattle taken in *D.* the Defendant avow'd as Bailiff to *H. Finch*: And the Caſe was ſuch; *Dame Finch*, the Mother of *H.* granted a Rent-Charge to *H.* out of her Manor of *N.* and out of all her Lands in *D. S.* and *V. in Com' Cantiæ, aut alibi in dicto Com' Cantiæ dicto Manerio Spectan' ſeu pertinen'*; and the Plaintiff, to deſtroy this Rent, pleaded an Abatement in *H. Finch*, in the Lands in *D.* and it was thereupon demur'd, for the Lands in *D. non fuerunt ſpectan' nec pertinen'* to the Manor of *N.* And it was adjudged for the Defendant, for no Land is charged by this Grant, unleſs it be *pertinen'* to the Manor; and that for two Reaſons: 1. Becauſe by the Words *aut alibi*, it appears that it is all but one Sentence, and the *Aut* conjoins the precedent Words, *viz.* all her Lands in *D. S.* and *V. in Com' Cantiæ*, with the ſubſequent Words, *viz. alibi in dicto Com' dicto manerio pertinen'*, and the Sentence is not perfect till it comes to the laſt Words (*dicto manerio pertinen'*) for if the Rent be iſſuing out of Land in *D. &c.* which is not *pertinen'* to the Manor; then the Sentence ought to be perfect at theſe Words (*Com' Cantiæ*) and then (*aut alibi, &c.*) muſt begin a new Sentence, which was never ſeen, that (*aut*) ſhould be the Beginning of a Sentence; and therefore it is not like the Caſe of * *Bacon* and *Baker* 2 *Jac.* on the Prohibition, where Queen *Elizabeth* granted all her Tithe Corn, *&c. in St. Edmund-Bury in Com' Suſſex, necnon* all her Tithe Hay, *&c.* within the *Liberty and Precinct of* St. Edmund-Bury, *dicto nuper Monaſterio Spectan' & pertinen', & quæ nuper per Eleemoſynarium dicti Monaſterii collectæ fuerunt*; for there the firſt Sentence is perfect and compleat at theſe Words, (*in Com' Suſſex*) and the (*Necnon*) which follows is a new *Sentence*; and therefore the laſt Clauſe (*& quæ per Eleemoſynarium, &c.*) goes only to the Tithes following the (*Necnon*) and not to the Tithes contained in the firſt Sentence: Otherwiſe if the (*Necnon*) had been [*una cum*] (as in Truth the Patent was, but was miſpleaded) for there the *Una cum* conjoins the Whole, and makes it all but one Sentence. The 2d Reaſon was in Reſpect of the Nature of the Thing granted, which is but a Rent; and therefore if Rent is granted out of a Manor *percipiend' de una acra*, it is good; and nothing is charged to Diſtreſs but that Acre, 17 *Aſſ.* But in Caſe of Land it is otherwiſe; for a Feoffment of a Manor, *habend'* one Acre, is a void *Habendum*; ſo here, for it appears that the Intent of the *Lady Finch* was only to charge

Expoſition of Grants.

* Cro. Jac. 48. Mo. 754.

How theſe Words Aut, Necnon, Una cum ſhall be taken.

Habendum void. Intent.

the Manor, and ſuch Lands only as were *pertinen'* to the Manor: But *Popham contra*; for he conceived, becauſe *D. S.* and *V. in Com' Cantiæ* were particularly named, and bounded *in by the Name of the Place and County*, that therefore they ſhould be charged, altho' they are not *pertinen'* to the Manor: As if a Man grants all his Lands in *D. S.* and *V. in Com' M.* and in *Down* in the ſame County, which he has by Diſcent from his Father; (by him) all the Lands by what Title ſoever paſs, which are in *D. S.* and *V.* and theſe Words (*which he has by Deſcent*, &c. go only to *Down*: *Quod fuit negatum per Curiam*; but he ſtrenuouſly perſiſted in it: And alſo, by *Popham*, by the firſt Grant of the Charge out of the Manor, all Lands Parcel of, or pertaining to the Manor are charged; and therefore the ſubſequent Words, if they ſhould be reſtrained *ut ſupra*, are idle and frivolus. But *per Yelverton*, theſe Words (*dicto Manerio ſpectan' ſeu pertinen'*) ſhall be taken to extend to Land occupied with the Manor, altho' it is not Parcel of it. *Quod* Fenner *and* Williams *conceſſerunt*. And ſo Judgment, that the Defendant ſhould have a Return. *Quod nota.* Grants.

Hill. 3 Jac. B. R.

Barnehurſt *verſus Sir* Charles Yelverton.

DEbt; the Plaintiff ſued as Adminiſtrator of *J. S.* on a Bond made by the Defendant, and had Judgment; and afterwards the Adminiſtration was revok'd; but notwithſtanding that, the Plaintiff proceeded and took the Defendant in Execution. And upon a Motion to the Court, (*a*) *Conceſſum per totam Curiam*, that the Execution was void, and that the Defendant ought to be diſcharged, *quia erronice emanavit*; for the Letters of Adminiſtration being revoked, the Plaintiff's Power is determined; for he proſecutes the Suit in another's Right, for he is but as the Ordinary's Servant; then the Ground of the Suit being overthrown, *viz.* his Commiſſion, he has no Authority to proceed further; and ſo the Execution awarded without Warrant. The ſame Law (*per Curiam*) on a Judgment had by an Adminiſtrator, the ſecond Adminiſtrator ſhall not (*b*) have Execution upon it, for he has not Privity to the Record. *Quod nota.*

1 Brownl. 91, Noy 15. Execution. Adminiſtrator. Privity.

(*a*) Co. Entr. 89, 90. 8 Co. 144. a. Cro. Car. 208, 227, 464. 2 Sand. 148. 1 Mod. 62. 2 Keb. 668.

(*b*) 29 Car. 2. c. 6.

Lea

Lea *verſus* Minne.

Cro. Jac. 110. Aſſumpſit. Aſſets. What ſhall be a good Conſideration, and where it ſhall be determin'd by the Death of a Stranger to the Promiſe. Averment of the Life. Salk. 117.

THE Plaintiff married with one *Alice*, Executrix of *J. S.* her former Husband; the Defendant was indebted to *J. S.* in 100 *l.* and promiſed the Plaintiff that if he would forbear any Suit againſt him on the Debt, which was by Bond until *Michaelmas* following, that then he would pay the Plaintiff the Debt: The Plaintiff brought *Aſſumpſit* upon this Promiſe, and ſhewed all the Matter aforeſaid; and that the Defendant was not moleſted, nor vexed, nor compelled until *Michaelmas*, *&c.* to pay the Debt. And upon *Non Aſſumpſit* pleaded, it was found for the Plaintiff; but *Nil capiat per billam* enter'd: And the peremptory Exception was taken by *Tanfield* Juſtice, becauſe the Plaintiff did not aver the Life of *Alice* his Wife, who was Executrix to *J. S.* for the Defendant's Promiſe was made in Reſpect of a Debt in another Right, which was to *Alice* as Executrix, and not in Reſpect of any Debt to himſelf; then the Promiſe follows the Nature of the Debt, *viz.* to be recover'd to another Uſe, *viz.* to the Uſe of *J. S.* and ſhall be Aſſets: And altho' it was in the Power of the Plaintiff to releaſe the Debt, which would be a *Devaſtavit*, yet now it appears that the true Intent was to have the Debt paid; and for the Nonpayment thereof, according to the Promiſe, was the Action brought: Then, foraſmuch as the Damages to be recover'd go to the Satisfaction of the Debt due to the Teſtator, and upon a Suit had on the Bond, may be pleaded in Bar; that ſhews and manifeſts the Promiſe to be to another Uſe, and ſo he ought to aver the Life of his Wife who was Executrix to *J. S.* for by her Death the Action on the Promiſe is determin'd; and altho' the Plaintiff cannot join his Wife with him in the Action, becauſe the Promiſe was particular and perſonal, yet he ought to aver the Life of his Wife, becauſe the Plaintiff ſhall recover nothing to his own Uſe. *Quod nota, fuit conceſſum.*

Cro. Jac. 110. con.

Paſch. 4 JAC. B. R.

Clark *verſus* Sir John Sydenham.

IN *Ejectment* brought by the Plaintiff on the Leaſe of one Maſter *Prowſe* and *B.* upon *Non Cul'*, and the Jury at the Bar, the Evidence for the Defendant was, by Reaſon of a Leaſe made of the Land in Queſtion by the Abbot of *Cleve*, before the Diſſolution, to *William Dovill*, *Johanna* his Wife, and *Frances* his Daughter, for their Lives, by Indenture, and by the ſame Indenture the Abbot covenanted, granted and confirmed to the three Leſſees, that the Land ſhould remain to the Aſſignee of the Survivor of them for Ninety-nine Years. *Frances* ſurvived and married one *Hill*, who 2 *Eliz.* granted his Eſtate for Life to *J. S.* and all his Intereſt in Remainder, and all his Power for the whole Term; and this by mean Aſſignments came to the Defendant; and whether any Intereſt paſſed in Remainder by the Abbot's Leaſe, was the Queſtion. And by all the five Juſtices, it is a good Intereſt in Poſſibility, and to be reduced into a Certainty in the Perſon of the Survivor: As Land is given to Three, and to the right Heirs of the Survivor; this is a good Limitation of the Inheritance immediately, but in Expectancy 'till the Survivor is known, and then the Fee is executed in him. And *Popham* vouched a Caſe of Experience 17 *Eliz.* in which Serjeant *Baber* was of Counſel; a Leaſe was made to Husband and Wife for Life, and for Forty Years to the Survivor of them; the Husband and Wife joined in a Grant of this Intereſt, and although it is certain one of them will ſurvive, yet the Grant is void, becauſe at the Time of the Grant there was not any Intereſt, but merely a Poſſibility in each of them; and although in the Caſe in Queſtion the Remainder is not limited to any of the three Leſſees, but to the Aſſignee of the Survivor; yet (*per Curiam*) that is not a bare Nomination in the Survivor, to appoint what Perſon he ſhall pleaſe, but a Term and an Intereſt: In which, *per Popham*, the Difference is, if a Leaſe be made to *J. S.* for Life, and after his Death to the Executors and Aſſigns of *J. S.* this is an Intereſt in *J. S.* to diſpoſe; but if it was limited to *J. S.* for Life, and afterwards to the Executors and Aſſigns of *J. D.* there it is a bare Power in *J. D.* and his Executors; becauſe they are not Parties, nor Privies to the firſt Intereſt. *Quod fuit conceſſum.* And alſo it was agreed, that whether it was an Intereſt, or a Power of Nomination only, it is ſaved to the Party by the Stat. of 31 *H.* 8. of Monaſteries, which gives the Houſes

1 Brownl. 136. Ejectment. Contingent Intereſt. Stat. 31 H. 8. of Monaſteries.

1 Inſt. 46. b.

Ante 9. contra.

Ante 9.

 diſſolved

diſſolved to the King, but in the ſame Quality, Degree, &c. as the Abbot had them; and the Abbot himſelf was charged by this Power given by himſelf, and ſo is the King. *Quod Nota.* *Yelverton* with the Defendant.

Grene *verſus* Auſten.

Cro. Jac. 116. Prohibition. Tithe paid the Parſon is a Diſcharge againſt the Vicar. But one Tithe for one Land. Vicar. Parſon. Endowment. Preſcription.

AUſten, Vicar of *Aveley* in *Eſſex*, libell'd in the Spiritual Court for Tithes of Herbage, and Agiſtment of Cattle on the Grounds there after Harveſt; this was againſt *Grene*, who brought a Prohibition, and laid a Cuſtom within the Pariſh: *Quod quælibet Perſona habens & poſſidens aliquod pratum ſive fundum in aliquo uno anno infra Parochiam prædict', unde fœnum eodem anno nactum fuit ſive provent' a tempore cujus, &c. uſa fuit & conſuevit aptis temporibus anni illius gramen ſuper hujuſmodi pratis ſive fundis creſcens ad expenſas ſuas proprias metere & defalcare, & gramen ſic meſſum poſtea ad ſimilia Cuſtagia, &c. in Cumulos, vocat' Cocks, congerere, & quemlibet decimum Cumulum ſic inde congeſt' a cæteris novem Cumulis, &c. ad uſum Rectoris Eccleſiæ parochial' præd' ſive ejus Firmarii, &c. dividere & exponere, in plenam & integram Contentationem, ſolutionem, Satisfactionem, & Exonerationem ac Nomine & Loco omnium & Singular' Decimarum quarumcunque dein vel ſuper aliquibus hujuſmodi pratis ſive fundis unde fœnum in hujuſmodi anno nactum fuit, eodem anno ſurgen', renovan', &c. quem quidem decimum Cumulum, &c. in forma, &c. congeſt', &c. omnes & Singuli Rectores, &c. in plenam & integram Contentationem, &c. ac nomine & loco, &c. acceptaverunt, &c.* And alledged *in Facto* a Performance of the Cuſtom, the ſame Year in which the Vicar libell'd, &c. and thereupon the Defendant, being Vicar, demurr'd; and it was adjudg'd for the Plaintiff: And two Points were reſolv'd. 1. That Payment of the Tithes to the Parſon is a ſufficient Diſcharge againſt the Vicar, becauſe all Tithes of common Right belong to the Parſon, and the Vicarage is derived out of the Parſonage; ſo that no Tithes *de Jure* belong to the Vicar, but only on an Endowment or Preſcription, which ought to be ſhewn *ex parte* of the Vicar, and the Court cannot intend it; for the Vicarage is a Diminution and Impairing of the Parſonage, of which the Court will not take Notice, unleſs the Parties ſhew it. 2. That the * Cuſtom *ſupra* is good; for in Regard the Owner of the Ground pays Tithe of Hay, he is thereby diſcharg'd of Common Right from Tithe of Agiſtment of the ſame Land in the ſame Year; becauſe one Land ſhall anſwer but one Tithe for one Year, and the Agiſtment is but the

* Lutw. 1071, 1074. 2 Inſt. 652. Cro. Jac. 42. 2 Brownl. 30. Noy 15.

Profit by the Mouths of the Beaſts of the ſame Land, of which before the Parſon had Tithe of Hay. And *Tanfield* Juſtice ſaid, that it was adjudged in one *Edolphe*'s Caſe *de Com' Oxon'*, that paying Tithe of *Rie* or *Wheat* by the *Sheaf*, he cannot afterwards pay Tithe of Halm of the ſame Land; for this Halm is but Part of the Stalk on which the Tithe *Sheaf* grew. According to *F. N. B.* 53. *b. Telverton pro Quer'.*

Dorrington *verſus* Eaſt.

IN Conſideration the Plaintiff would procure 6 *l.* to the Defendant for one whole Year, the Defendant promiſed to make a Leaſe to the Plaintiff of ſuch Houſe from *Michaelmas* next for three Years; the Plaintiff ſhewed that 23 *April* he procured *J. S.* to lend the Defendant 3 *l. pro uno anno integro*, & 24 *Junii* after he procured *J. D* to lend the Defendant 3 *l. pro uno anno integro*, which the Defendant accepted, and yet *dicit in facto*, that the Defendant has not made the Leaſe, &c. And upon *Non Aſſumpſit* pleaded, it was found for the Plaintiff: But in Arreſt of Judgment *Telverton* ſhewed that the Declaration was not good; for it appears by the Plaintiff's own Shewing, that the Conſideration on his Part is not performed, becauſe the 6 *l.* were not lent all at one Time, but 3 *l.* at one Time, and 3 *l.* two Months after, which is not according to the Agreement; for now it appears to the Court that the Defendant had not the Benefit of 6 *l.* for one whole Year, which was the Intent of the Parties, neither could the Defendant raiſe ſuch Profit to himſelf by having the 6 *l.* at ſuch divided Times, as he might if he had them *altogether*; then the Conſideration on the Plaintiff's Part not being perform'd is as a Diſſolution of the Promiſe *ex Parte* of the Defendant. And altho' it appears by the Declaration that the Defendant accepted the ſeveral 3 *l.* yet that is not material; foraſmuch as it is not performed according to the Agreement; but if the 6 *l.* had been lent by ſeveral Perſons, and at ſeveral Times in one and the ſame Day, it had been good; for the Law makes no Diviſion of a Day, but in Caſe of Neceſſity, but in general Intendment, what is done in a Day is done at the ſame Time: And if the Conſideration had been to have lent the Defendant 20 *l. in Gold*, and he declares and ſhews 10 *l.* of the 20 *l.* to have been *in Silver*, altho' in Subſtance of the Matter it is performed, yet it is not according to the Letter, which being put and expreſſed *in Specie*, gives Direction how it ſhall receive Conſtruction: *Quod omnes Juſtic' conceſſer' in toto*, and new Bail enter'd into by the Defendant to anſwer to a new Declaration. *Quod Nota Reſertur* for the Defendant.

Aſſumpſit. Where the Conſideration perform'd in Letter and not in Subſtance avails not, or e contra. Day. Intendment.

Randall

Randall *verſus* Wale.

Noy 16. Godb. 149. Cro. Jac. 59. Audita Querela. Recogniſance. Scire facias. Two Nihils returned. Audita Querela on Audita Querela. Judgment. Nonage. Re-inſpection.

RAndall, being an Infant, enter'd into a Recogniſance to *Wale* of 300 *l.* and brought *Audita Querela* in the Common Pleas within Age, and upon Inſpection was adjudged within Age, and a *Scire facias* was awarded againſt *Wale*, and as appeared by the Record, on one *Nihil* only returned, the Judgment was that the Recogniſance ſhould be cancell'd. Upon which *Wale* brought Error in the King's Bench, and aſſigned the Error aforeſaid, that there ought to be either two *Nihils* returned, or a *Scire feci*; for two *Nihils* amount to a Garniſhment, and without Garniſhment and Hearing of the Party to whom the Recogniſance was made, it ought not to be adjudged to be cancelled; and for this Reaſon it was reverſed: Whereupon *Randall*, being at full Age, brought another *Audita Querela* in the King's Bench, and comprehended all the Matter aforeſaid, and ſhewed that the firſt Judgment was only reverſed for Error in the Proceedings, and not in the principal Matter; and upon that *Wale* demurred. And it was adjudged that the *Audita Querela* did not lie; for the Judgment of Reverſal is general, and not for any Special Reaſon, but that the Party ſhall be reſtor'd to all that he loſt by the firſt Judgment; ſo the Recogniſance *ſet on Foot again*. 2. The Judgment of Inſpection, although it is but an Award, yet it is not of Force but in the ſame Court where the Proof *per Teſtes*, and the Inſpection was; and that does not conclude the Judges of the King's Bench, who are in Court, but that they ought to have a Re-inſpection, which cannot be in this Caſe, becauſe the Party Plaintiff is now of full Age; and if in this Caſe on the firſt Judgment reverſt, *Randall* being within Age had brought a new *Audita Querela* in the Common Pleas, he ought to be inſpected again; becauſe it is a new Original, and all the former Proceedings are diſſolved by the Reverſal of the Judgment. *Quod Nota.*

Sir Thomas Greſham *verſus* Grinſley.

Cr. Entr 35. Action for Slandering his Title.

THY Brother was a Fool, and was never born to do himſelf any Good; for that he could not hold his Hand from ratifying and ſubſcribing to his Father's Will; notwithſtanding I have that to ſhew in my Houſe, that, if his Heir Elizabeth Greſham *do not any ſuch Act as he hath done, it ſhall bring her to inherit* Titſley. Upon this Sir *Thomas* brought the Action againſt the Defendant, and ſhewed that his Father was ſeiſed of the Manor of *Titſley*, and of other Lands, and by Will deviſed them to *A.* his Wife, Remainder in Tail

to the Plaintiff, and that the Father had Iſſue *William* the Elder, who had Iſſue *Elizabeth* his Daughter and Heir, and this Plaintiff the younger Son, and that *A.* is dead, and the Plaintiff enter'd afterwards, and the Defendant in Slander of his Title ſpoke the Words aforeſaid; and ſhewed further that he had an Intention to make a Jointure to his Wife, and to paſs ſeveral Parcels of the Land to him deviſed to his younger Children for their Advancement, and was hinder'd in that Intent by thoſe Words, to his Damage 100*l.* And upon *Non Cul'*, it was found for the Plaintiff to 20*l.* Damage, but Judgment that *Nil cap' per Billam.* 1. Becauſe it does not appear by any Thing in the Declaration that the Plaintiff is damnified, *viz.* that he was *about to ſell it*, or had enter'd into a Bond to make a Jointure to his Wife, which by Reaſon of ſuch Words of the Defendant would not be accepted; and ſome * ſpecial Matter ought to be ſhewn in which Damage might be apparent, as in the Caſe of *Gerrard*, 32 *Eliz.* 4 *Co.* 18. *a.* for on ſuch general Words no ſpecial Slander can be impoſed: As if a Leaſe for Life be made with Condition of Re-entry, and *J. S.* will ſay, that he can ſhew that which will bring him in Reverſion to the Poſſeſſion; this is not any Slander, for the very Leaſe it ſelf by Indenture, by which the Land was demiſed will bring him to it, either by the Condition, or by the Determination of the Eſtate. 2. It appears by the Plaintiff's own Shewing, that *Elizabeth* is Heir at the Common Law, and that the Plaintiff himſelf has but an Eſtate Tail, and upon that determin'd, *Elizabeth* will have *Titſley* as general Heir; and the Defendant does not ſhew any Time certain when *Elizabeth* will have it, but indefinitely, and that ſhall be taken *in meliori ſenſu. Quod Nota*; *Yelverton* of Counſel with the Defendant.

* Cro. Car. 141. Cro. Jac. 397, 484. 1 Rol. Rep. 244. 3 Bulſt. 75. Palm. 531.

Trin. 4 JAC. B. R.

Higgins *verſus* Butcher.

THE Plaintiff declar'd that the Defendant aſſaulted and beat, *&c.* one *A.* his Wife ſuch a Day, of which ſhe died ſuch a Day following; to his Damage, *&c.* And it was moved by *Foſter* Serjeant, that the Declaration was not good; becauſe it was brought by the Plaintiff for Beating his Wife; and that being a perſonal Tort to the Wife, is now dead with the Wife: And if the Wife had been alive, he could not * without his Wife have this Action; for Damages ſhall be given to the Wife for the Tort offer'd to the Body of

1 Brownl. 205. Noy 18. Feme or Servant killed.

* 1 Rol. Rep. 360. Lit. Rep. 285. Cro. Car. 901

Baron or Maſter ſhall not have an Action for Loſs of Service.

his Wife. *Quod fuit conceſſum:* And by *Tanfield* Juſtice, if a Man beats the Servant of *J. S.* ſo that he dies of that Battery, the Maſter ſhall not have an Action againſt the other for the Battery and Loſs of the Service, becauſe the Servant dying of the Extremity of the Battery, it is now become an Offence to the Crown, being converted into Felony, and that drowns the particular Offence, and private Wrong offer'd to the Maſter before, and his Action is thereby loſt: *Quod Fenner* and *Yelverton conceſſerunt.*

Heake *verſus* Moulton.

Words. Barretor. * Cro. Eliz. 171. Hob. 140. Hutt. 104. Hetl. 143.

† Ante 57. Cro. Jac. 56.

§ Cro. El. 6.

THou art a common Barretor, and deſerveſt to be hanged: And, *per Curiam*, no Action on theſe Words: For the Words * (*common Barretor*) are no Slander; for the Offence is only made finable, and he is to be bound *de ſe bene gerendo:* And to ſay that a Man has broke the Peace, or is a common Rogue, or a common Hunter of Deer in Parks, and a Breaker of Foreſts are not actionable; for they are not Slanders, but found only in Diſgrace. The ſame Law to ſay, † J. S. *would have killed me*, is not actionable, becauſe no Act is done, but reſts merely in Conjecture: Otherwiſe to ſay § *He did lie in Wait to kill me*; for the Lying in Wait is puniſhable, and a Slander, as being an Introduction to a more wicked Intent. The ſame Law to ſay, *He prepared Poiſon to kill* J. S. altho' he never gave the Poiſon, yet the very Preparation is a Slander.

General Words are no Slander.

And for the other Words (*He deſerveth to be hanged*) they are too general and extravagant to ground an Action upon them; becauſe it is not ſhewn what Act was done to deſerve Hanging: And, *per Fenner* Juſtice, it was adjudged, that to ſay, *Thou art as very a Thief as any is in* Warwick *Goal* will bear an Action, with a particular Averment that ſuch a one by Name at the Time of the Words was a Thief in *Warwick Goal*; but, becauſe the Plaintiff in ſuch Caſe had alledged the Averment of ſuch a one who was not in the Goal for Felony, but only as Acceſſory to Felony, for that Reaſon there was enter'd *Nil capiat per Billam.*

Words actionable by Averment.

The King *verſus* Matthew.

Cro. Jac. 123. 1 Brownl. 166. Q. Impedit. Uſurpation on the King.

IN a Writ of Error, on a Judgment given in a *Quare Impedit* againſt the King in the Common Pleas to the Church of *A.* the Point was only, whether a double Uſurpation on the King put him in ſuch a Manner out of Poſſeſſion, that he ſhould be put to his Writ of Right?

And it was adjudged in the Common Pleas againſt the Opinion of *Anderſon*, Chief Juſtice there, that the King is put to his Writ of Right: But Error being brought on that Judgment, it was reverſed in the King's Bench by the Opinion of *Popham*, Chief Juſtice, *Yelverton*, *Williams* and *Tanfield*; *Fenner* being *contra*. And they alledged two Reaſons; 1. that the Right of the Patronage, and of the Advowſon it ſelf being an Inheritance in the Crown of Record, the Law ſo protects it, that it can be deveſted by no Tort committed by a Subject; for in the King's Caſe there ought to be the ſame Means to deveſt it out of the King, (*viz.* a Record) as there is to intitle him: And here is no Matter of Record againſt the King; for the Preſentation by a Subject is but Matter in Fact, which Act, altho' it is mixt with the judicial Act of the Biſhop, *viz.* Inſtitution, yet that does not prejudice the King; foraſmuch as it is grounded only on the Tort of a Subject. 2. Reaſon was; no Man can ſhew when, and at what Time the Uſurpation on the King commences; for there is no Doubt, but that after the ſix Months paſt of the Incumbency he may well preſent; for Plenarty is no Plea againſt the King, and *nullum Tempus occurrit Regi:* And after ſuch Uſurpation, it is not doubted *per Curiam*, but that the Patronage is yet in the King to grant. And *per Popham*, a Confirmation made by the King to ſuch Preſentee is good to eſtabliſh his Poſſeſſion againſt a Recovery in a *Quare Impedit* by the King afterwards; but it does not enure to any Purpoſe to amend the Eſtate of the Uſurper; for he gains no Poſſeſſion by the Preſentation againſt the King; but the Releaſe to him by the King is merely void for Want of Poſſeſſion; and during the Life of the firſt Preſentee it is not queſtion'd (by them all) but the King might preſent, then the Incumbent's Death cannot make that be an Uſurpation, which was not ſo in his Life; for his Death is a Determination of the firſt Tort, which ſhall rather aid than hurt the King. And (*per Tanfield*) according to this Reſolution was it likewiſe reſolved 23, 24 *Eliz.* in the Common Pleas in one * *Yardley*'s Caſe, altho' there was not any Induction in the Caſe; which was the Reaſon that the Opinion of the Judges was not deliver'd in Point of Judgment; but they were all of Opinion, as they in this Court now are; and no Book in the Law is contrary, but only glancing Opinions in 43 *E.* 3. 19 *E.* 3. & 18 *E.* 3. And in this Caſe *Popham* ſaid, that † *Quare Impedit* was at the Common Law, but that was only on a Preſentation without Induction; for on the Diſturbance at the Common Law the *Quare Impedit* lay. But if the Incumbent had been inducted, then at the Common Law a Writ of Right of Advowſon only lay. *Quod Nota; quia Verum eſt.*

* 1 And. 8. Owen 43. Mo. 338. 6 Co. 30. a. Noy 18.

† Q. Imp. 159.

Armiger

Armiger Brown *verſus* Wentworth.

Prohibition. Revocation of a Will how, and by what Proof it ſhall be tried.

Brown Adminiſtrator of one *R. Brown* his Uncle, was ſued in the Spiritual Court for a Legacy of 300 *l.* by one *Wentworth*, who claimed this Legacy by the Will of *R. Brown*. *Armiger Brown*, the Adminiſtrator, pleaded a Revocation of all former Wills by *R. Brown*, by Writing under his Hand, and offer'd to prove it according to the Courſe of the Common Law by one Witneſs, Compariſon of Hands and ſuch like, which Proof the Eccleſiaſtical Judge would not allow; upon which *Armiger Brown* brought a Prohibition in the King's Bench containing the Matter aforeſaid: And upon the Defendant's Motion to have a Conſultation, it was well argued by all the Judges there. And by *Popham* and *Williams* ſtrenuouſly, that a Conſultation ought to be awarded: For the Will in this Caſe is the Principal, of which without Doubt the Spiritual Court has Juriſdiction, and the Revocation is a Thing merely depending and waiting on the Will, and but acceſſory to it; and therefore ſhall be there alſo tried; for in Regard the Suit there is but for the Legacy, which is merely Eccleſiaſtical, and for which the Party cannot have Relief by the Common Law, there is no Matter contained in the Suggeſtion to entitle the King's Court either to the Thing demanded in the Spiritual Court, or to Juriſdiction: But if the Will had contained Land and Legacy alſo, and it had appeared by the Suggeſtion, there becauſe there might be Croſſing in Proof, to prevent this Contrariety, that the Proof in the Spiritual Court might be no Evidence at the Common Law, nor any Inducement to a Jury, it is uſual to grant a Prohibition: But *nunquam* where the intire Matter contained in the Suggeſtion belongs to the Spiritual Court. But *Fenner*, *Yelverton* and *Tanfield* reſolved to the contrary: 1. Becauſe the Revocation is merely a temporal Act, which diſcharges the Spiritual Court from having any Intermedling with it, and is not in any Sort dependant on the Will; for they are called Dependants which go in Affirmance of the Will, and not they which diſannul and diſaffirm the Will, as the Revocation does; for this Revocation is an Exemption of the Will, which ſhall not be ventilated there, by their ſtrict Kind of Proof, where there ought to be two *Teſtes omni Exceptione majores*; for a Revocation before one Witneſs is ſufficient in our Law. 2. Although the Spiritual Court has Power both of the Will, and of the Thing demanded there, *viz.* the Legacy; yet in its original Nature the Will it ſelf was Temporal: As appears by 2 *R.* 3. *Teſtament* 4. And a Thing which goes in Abridgment of the Common Law ſhall

Poſt. 135, 173. Cro. Jac. 269.

Legacy.

6 Co. 23. a. b. Hetl. 120.

Where one, and where two Witneſſes requiſite.

Probate of a Will originally Temporal.

ſhall be taken ſtrictly, and ſhall not have any Favour in Conſtruction, ſo that the Revocation being a Thing merely collaterateral to the Will, remains at the Common Law as to Proof. As 1 *R.* 3.—a Man by Will gave an Horſe to *J. D.* and afterwards by Delivery with his own Hand gave the ſame Horſe to *J. S.* if *J. D.* ſues in the Spiritual Court for the Horſe as for a Legacy, and the other pleads that the Teſtator gave it him in his Life-time, this ſhall be triable in the Spiritual Court alſo, for by common Intendment the Judge there will do Right to the Parties. But, *per Yelverton* in that Caſe, if the Judge will not allow * ſuch Proof as the Common Law allows, a Prohibition ſhall be granted; and yet the Common Law cannot determine the Thing demanded; yet it prohibits the Judge till he ſubmits himſelf to the Allowance of ſuch Proof as the Common Law requires: And this Point being preciſely put in the Suggeſtion, *viz.* Refuſal of ſuch Proof as the Common Law admits, was, as *Tanfield* ſaid, the chief Ground of his Opinion; for now the Plaintiff complains in a Point certain, and of ſuch Nature as by the Common Law ought to be redreſſed: Whereas if he had omitted ſuch ſpecial Matter, *viz.* Diſallowance of the Common Law Proof, a Conſultation ought to iſſue; for ſo was the Caſe 29 *Eliz.* in *B. R.* where in a Suit for a Legacy the Party Defendant pleaded a Releaſe, and becauſe the Judge would not allow it, he brought a Prohibition, and ſuggeſted nothing but that the Judge would not admit the Releaſe, and did not rely on the Manner of the Proof uſed there, and for that Reaſon a Conſultation was awarded; for the Court there may try the Releaſe, and by Refuſal of the Releaſe only by the Judge, the Party is not grieved in any temporal Sort and Kind; but he may well be relieved by Appeal; but if he had expreſſed his Grief by Rejecting ſuch Proof as the Common Law allows, then *Stet Prohibitioni. Quod Nota. Yelverton* of Counſel with the Plaintiff.

That which abridges the Common Law ſhall be taken ſtrictly.

* Poph. 58, 59. Hutt. 22. Latch 117, 217. Cro. El. 88, 666. Mo. 413, 907. Hob. 188, 247. 1 Rol. Rep. 12. 2 Rol. Rep. 42. 1 Show. 158, 172. 3 Mod. 283. Salk. 547.

Conſultation.

Wildbore *verſus* Cogan.

THE Plaintiff declared on three ſeveral *Aſſumpſits*, and laid the firſt *Aſſumpſit* 1 *Aprilis Anno* 44 *Eliz.* the ſecond *Aſſumpſit* 1 *Junii Anno* 44 *ſupradicto*; and the third *Aſſumpſit* in this Manner, *Cumque poſtea, ſcilicet* 12 *Feb. Anno* 44 *ſupradicto, &c.* And upon *Non Aſſumpſit* pleaded, it was found for the Plaintiff: But *Nil cap' per Billam* enter'd, becauſe the Promiſe, which was *prior tempore*, is put by the Declaration to be *poſterior ordine & tempore* alſo, by Reaſon of this Word (*ſcilicet*) annexed to this Word (*poſtea*) for as by the Word (*poſtea*) the Promiſe which follows is to be intended

Aſſumpſit.

Conſtruction of the Words Poſtea, ſcilicet.

intended of a Promiſe after the firſt *Aſſumpſit*, ſo being join'd with this Word (*ſcilicet*) which makes the Word (*poſtea*) which of it ſelf is general, to be now ſpecial, referring to a Certainty, cannot receive any Conſtruction, but that the third Promiſe was after the other Promiſe, which by expreſſing the Time to be 12 *Feb.* 44. is repugnant and contrary; for *Feb.* 44. is before *April* 44. But by *Popham* Chief Juſtice, where there is a Certainty expreſſed in Time, as the Day of the Bill purchaſed, which is alway *ſet down*, and afterward the Plaintiff will ſay in his Declaration, that the Day of the Bill purchaſed, *ſcilicet* ſuch a Day in certain, and miſtakes the Day, in that Caſe the (*ſcilicet*) is idle and void, by Reaſon of the former Certainty appearing of Record; but in this Caſe the (*ſcilicet*) denotes only the Certainty which was not expreſſed before, and that to be ſubſequent in Time to the former Promiſe, which appears otherwiſe; and therefore the Plaintiff cannot have Judgment, for Damages are intirely given for all three Promiſes; and it appears that one of them is not well laid. *Quod Nota.* But if (*ſcilicet*) had not been joined to (*poſtea*) then the Declaration had been good, and the (*poſtea*) only *per ſe* had been void. And *Tanfield* Juſtice ſaid, that according to this Reſolution, it had been adjudged before in the Caſe between *Drake* and *Younge*.

Cro. Jac. 97, 450, 618.

Mich. 4 JAC. B. R.

Hawkes *verſus* Brothwith.

IF a Parſon grants to a Pariſhioner his own Tithes by Way of Retainer, altho' it be not by Deed, but only by Parol, it is good; and a Prohibition ſhall be maintained on this Grant by Way of Suggeſtion, if it be * for Years; otherwiſe if it be as long as the Parties live, or ſuch like; for although it does not ſound in Intereſt by Way of Contract, but only by Way of Diſcharge, yet it is good without Deed; for it is in the Nature of a perſonal Compoſition, which may be without Writing, only by Parol. But between † *Nelſon* and *Woodward* and *Prettiman* it was ruled, that if a Parſon by Way of Contract by Parol agrees that *J. S.* ſhall have all his Tithes for three Years, or ſuch Term, by Virtue whereof *J. S.* takes the Tithes, and is ſued for them in the Spiritual

* May be for a Year, but not for Years, without Deed. Cro. Jac. 137. & vide Hob. 176. S. C.

† Cro. El. 188, 249.

Court, *J. S.* ſhall have a Prohibition on this Matter; for altho' it does not enure by Way of Intereſt to make it a Leaſe of the Tithes, becauſe it is without Deed, yet the Contract between them ſhall bind as to the Perception of the Tithes, of which Contract the Temporal Court ſhall judge; but if he aſſigns the Benefit of his Contract over to *J. D.* *J. D.* ſhall not have a Prohibition on a Suit in the Spiritual Court, becauſe no Intereſt was transferred by the Contract, but only a perſonal Bond between them, which runs only in perſonal Privity of the Contract, and does not extend to a Stranger. According to the principal Caſe was *Rolls* and *Rolls* a *Cornwall* Caſe, that on the Agreement to retain Tithes, if it be without Deed, a Prohibition will lie.

Deed. Vide Cro. Jac. 669. Where the Aſſignee of the Contract ſhall not have a Prohibition.

Tanner *verſus* Small.

NOta, *Paſch.* 5 *Jac.* between *Tanner* Plaintiff, and *Small* Defendant in a Prohibition, the Plaintiff ſuggeſted, that he being a Pariſhioner compounded with the Defendant to retain his Tithes for ſeven Years, rendring 50*s. per Ann.* and it was moved that it was not * good, becauſe it is not alledged to be by Deed: But *tota Curia contra*, and they took a Difference between ſuch Compoſition, to have for Years, and to have for Life; the Firſt is good without Deed, the Second not. And † ſo it has been often adjudged.

Noy 121. Tithes. Detainer.

* Cro. Jac. 137.

† Cro. Jac. 669.

It hath been ſince reſolved, that no Prohibition will lie upon any Compoſition, whether for Life or Years, for any Tithes; and therefore the proper Remedy is to appeal to the Arches, if the Conſiſtory Court ſhould refuſe a Plea of Compoſition. *Carthew* 70.

Hill. 4 JAC. B. R.

Parry *verſus* Dale.

THE Plaintiff declar'd on a Bond of 500*l.* The Defendant demanded Oyer of the Bond and Condition, which were enter'd *in hæc Verba*, *&c. Noverint*, *&c.* The Defendant *teneri & firmiter obligari* to the Plaintiff *in quinquegint' Libr'*, *&c.* and *per totam Curiam*, *præter* Williams, Juſtice, *Nil capiat per Billam* enter'd; for altho' falſe § *Latin* in a Bond will not make it void or vitious, as it will do in a Writ, 10 *H.* 7. becauſe a Man may purchaſe a new Writ at his Pleaſure, but not a new Bond, yet Words which have not any Senſe or Signification, or which are not *omnino Verba Latina*, will not bind any Man, and here the Word (*quimque*) with an (*m*) is no *Latin* Word, and altho' in Sound it reſembles (*quinque*) which is (five) yet, by the Entry of the Bond *in hæc Verba*, the Court ought to judge of every Letter and Syllable, and it is not like

Cro. Jac 146. Hob. 119. Bond. Falſe Latin. § Vide 10 Co. 133. a. Mo. 864. Cro. Car. 416, 418. Cro. Jac. 203, 290, 338, 607. Comb. 477. Salk. 462. 5 Mod. 281. Comb. 60. Lutw. 423.

9 *H.* 6. *Wiginti Libri*, which is taken to be good, becauſe in every (*w*) there is a ſingle (*v*). So here if it had been (*quinnque*) with a double (*n*) or, as *Popham* Chief Juſtice ſaid, (*quijnque*) with two Daſhes over the Head, it would be but incongruous *Latin:* But (*quimque*) with an (*m*) is no Word at all: So it is as if *J. S.* is bound *in libris* with a Space, without ſhewing *quantum*, which is not good. *Quod nota.* Yet *nota* in this Caſe I vouched a Precedent of a Caſe between * *Walter* and *Pigot* in the Common Pleas 43 *Eliz.* where the Writ of Debt was brought *pro ſeptingentis libris*, and upon Oyer of the Bond enter'd, the Bond it ſelf was *ſeptuagentis libris*, and a Variance pleaded between the Writ and the Bond, and yet adjudged good; which Judgment was affirmed upon Error, and yet there is no ſuch Word as (*ſeptuagent'*) but becauſe (*ſeptua*) is Part of a good *Latin* Word, as (*ſeptuaginta*) for (ſeventy) therefore (*ſeptua*) joined with (*gentis*) *viz.* wrote with an (*e*) and not with an (*i*) is good: It was ſaid *per Cur'*, they be not alike; but if it had been *ſeptuamgentis* with an (*m*) *aliter ſenſerunt.*

* Hob. 116. Mo. 645. Cro. El. 896. Septuagent.

Bagſhaw *verſus* Gaward.

1 Rol. Abr. 889. p. 1. Cro. Jac. 147. Noy 119. Treſpaſs. Departure. Demurrer. Treſpaſs ab initio. An Eſtray not to be miſuſed. Licence in Law.

THE Plaintiff declared for an Horſe taken at *B.* 14 *Nov.* 3 *Jac.* The Defendant pleaded, that he the ſame fourteenth Day, *&c.* ſeiſed it within his Manor of *D. &c.* as an Eſtray, and ſhewed that he had Title to Eſtrays there, and that the Plaintiff the ſame fourteenth Day, retook the Horſe, and was thereof poſſeſſed again: The Plaintiff replied that 16 Day *Novembr'* the Defendant uſed and rode the Horſe at *B. &c.* and upon that it was demurred, and adjudged for the Plaintiff; for the Matter alledg'd in the Replication is no Departure, but agrees, and is of the ſame Nature with the Treſpaſs ſuppoſed by the Declaration; for altho' at firſt by the Declaration in common Intendment the Plaintiff is to recover the Value of the Horſe in Damages, becauſe Treſpaſs diſaffirms Property; and altho' the Defendant ſhews that the Plaintiff has the Horſe again, yet that is but Mitigation of Damages; for now he recovers only for the Detainer: But when the Defendant by his Demurrer has confeſſed that he rode the Horſe 16 *Novembr'*, altho' the Taking of the Horſe as an Eſtray is juſtifiable, and no Treſpaſs; yet becauſe by the Seiſure as an Eſtray he has not the Property, but a bare Cuſtody; therefore the Riding is a Miſdemeanor, and makes the Seiſure tortious *ab Initio*; for it is a † Miſuſer of the Licence in Law; as if a Man diſtrains *Corn in Sheafs*, and *threſhes* it, 21 *E.* 4. or comes into a Tavern and ſteals a Cup, 13 *E.* 4. or the Leſſor comes to view Waſt and breaks the Hedge, in theſe Caſes they are Treſpaſſers

† 8 Co. 146. a. Perk. Sect. 190, 191. 1 And. 65.

ab Initio, and the very Entry is puniſhable, which at firſt by the Licence in Law was good, 5 *H.* 7. It is otherwiſe of a Licence in Fact, as *Yelverton* Juſtice ſaid, for that excuſes the Entry, altho' a tortious Act enſues, and the Party ſhall be puniſhed only for that in which the Act is tortious, and for nothing more. *Quod Nota.* 8 Co. 146. b.

Harrington *verſus* Launſdon.

Launſdon recover'd in the Court of *Shrewsbury* in Trover for Sheep againſt *Harrington* by Default, and a Writ was awarded to enquire of the Damages, returnable at the next Court, *ad quem Diem* the Plaintiff appeared, and the Writ was return'd ſerved, but *Jurata ponitur in reſpectu uſque ad proximam Curiam*, which is put in certain; and at that Day the Plaintiff appeared again, and the Jury *ponitur in reſpectu*, and Day given over till 10 *Junii*, *&c.* and on 10 *Junii Jurata* again *ponitur in reſpectu*; but the Plaintiff did not appear at that Day, nor * had another Day over; and at the Day given to the Jury they appear'd, and gave 20 *l.* Damages: Upon which the Plaintiff had Judgment for the 20 *l.* Damages, and Coſts. And *Yelverton* aſſign'd for Error, that the Plaintiff not having Day on the laſt Adjournment over, that the whole Matter was diſcontinued; for by the firſt Judgment the Defendant was out of Court, yet the Plaintiff ought to attend from Day to Day, becauſe his Judgment is not perfect 'till the Damages enquir'd: Then when the Plaintiff had Day 'till 10 *Junii*, *&c.* and did not appear at that Day, the Court *ex Officio*, without the Prayer of the Plaintiff, ought not to have made a Continuance of the Jury; for that ought always to be *ex Petitione* of the Plaintiff. *Yelverton* alſo aſſigned another Diſcontinuance in the Caſe, *viz.* becauſe the Jury was continued over by a *Ponitur in reſpectu*, which ſhould never be, but on an Iſſue to be tried between the Parties; for the Jury on a Writ of Inquiry of Damages is but an Inqueſt of Office, which has no other Continuance but by a *Non miſit breve* by the Officer, or by the Sheriff. *Quod fuit conceſſum per totam Curiam*, in both: And thereupon the Judgment was reverſed.

Noy 120. Error on Trover. Diſcontinuance of Suit. Judgment. Diſcontinuance of the Plea by a Ponitur in reſpectu. Writ of Inquiry. * Vide Cro. El. 144 774.

Martham *verſus* Jemx.

IN Debt on Bond, the Condition was to ſtand to the Award, Arbitrament, *&c.* of Maſter *Pooley* of *Grays-Inn* about the Title of a Copyhold Tenement: Mr. *Pooley* awarded, *&c.* that the Defendant ſhould pay the Plaintiff 6 *l.* on 21 *Maii* 3 *Jac.* at ſuch a Place, *viz.* in the Church Porch of *Rattleſden*; and further awarded, *&c.* that the Plaintiff by his Deed ſhould releaſe to the Defendant *totum Jus*, *&c. ſuper prædictum primum diem*

1 Brownl. 92. Cro. Jac. 149. Debt. Award repugnant.

Maii at the ſame Place on the Payment of 6 *l.* and in another Clauſe in the Award he awarded that the Plaintiff ſhould make *further Aſſurance* to the Defendant for the Extinguiſhment of his Title, as ſhould be deviſed, *&c.* And *Yelverton* moved, that this Arbitrament was void, and that it is in a Manner no Award; for it is repugnant and inſenſible; for altho' it is certain on what Day the Defendant ſhall pay his 6 *l.* yet *neſcitur quando*, nor on what Day the Plaintiff ſhall releaſe to the Defendant, for there is no ſuch *prædictum primum Diem Maii*, in the whole Award, and it is not bound or tied to any Year of the King, ſo that it is altogether incertain; and altho' it may be collected that the Arbitrator intended the Twenty-firſt Day of *May*, by Reaſon that it is limited to be made *ſuper ſolutionem* of the 6 *l.* which was 21 *Maii*, yet that is but by Way of Inference and Implication; and altho' it was objected, that admitting the Award void in that Point, yet it is good in the Reſidue, which is to be performed by the Plaintiff, *viz.* the Making of better Aſſurance: To which *Yelverton* anſwer'd, that all the Clauſes in an Award are material, and this Clauſe of further Aſſurance depends on the repugnant Clauſe of the Releaſe to be made; for the Arbitrator intended that the Releaſe limited to be made *ſuper prædictum primum Diem Maii* (where there is no ſuch Day) ſhould be the firſt Aſſurance, and the Aſſurances which are to be made by the ſubſequent Clauſe tend, in the Arbitrator's Intention, only to the Strengthening of the Releaſe. *Quod fuit conceſſum. Et per totam Curiam* there is a Difference between Wills and Deeds, and between Awards; for Deeds, *&c.* ſhall be conſtrued according to the Intent of the Parties, and upon the Words to be collected on the Deeds; but an Award is in the Nature of a Judgment and Sentence, in which there ought to be Plainneſs, and no Collection of the Intent of the Arbitrator, for it ought to be his Judgment, and not the Judgment of another on the Arbitrator's Words; and therefore by *Tanfield* Juſtice, it has been adjudged, * where an Arbitrator awards that one of the Parties ſhall become bound to the other in the Sum of ——, and mentions no Sum in Certain, but leaves a Space for the Sum, it is void; and if the Award is void in one Clauſe, altho' it is good in all the other Clauſes, yet it is in Law no Award; for a Judgment ought to be full and perfect *in omnibus*. *Quod Nota.* But if the Arbitrator awards that one of the Parties, and † *J. S.* a Stranger ſhall do ſuch a Thing, it is good as to the Party, becauſe within the Submiſſion, and void only for *J. S.* who is a Stranger. *Quod vide* 19 *E.* 4.

Award void in Part.

Deeds conſtrued according to the Intent of the Parties.

* 5 Co. 77, 78. Cro. El. 432. Mo. 359.

† Keilw. 43. a. 45. b. 3 Leon. 62. 5 Co. 78. a. Mo. 359. 2 Sand. 337.

The

The King *and* Fawcet.

FAwcet, and others, were indicted on the Statute 8 *H. 6.* for a Forcible Entry on the Freehold of the Earl of *Lincoln*, and it was for an Entry and Force before the laſt Pardon by Parliament: And *Crooke* moved to have Reſtitution; and *per Curiam*, *non potuit*; for the Statute 8 *H. 6.* provides two Means to puniſh Offenders, one at the Suit of the Party by Way of Action, the other at the King's Suit by Indictment: And in Caſe where the King is Party, the Force, which is the Offence againſt the Crown, is the Principal, and the Reſtitution is but acceſſory, and depends upon that, then when the King has pardon'd the Force, the Strength of the Indictment is gone; for the Party is not to have Reſtitution but by Means of the King, and the King has given away his Title (*viz.* his Fine) by the Pardon. And, by *Williams* Juſtice, ſo was it ruled before between the Lord *Stafford* and *Thinn* for Lands of the Lord *Stafford*, which *Thinn* was indicted for Entering with Force, but obtain'd the Queen's Pardon of the Force, which Pardon he ſhewed to the Court, and pleaded it in Bar againſt the Lord *Stafford* to prevent Reſtitution: *Et ſic fecit*, *per Opinionem Curiæ*.

Cro. Jac. 148. Noy 119. Indictment on 8 H. 6. Pardon of the Force prevents Reſtitution.

The King *verſus* Ford, *&c.*

FORD, and others, were indicted on the Statute 8 *H. 6.* for a Forcible Entry, and alſo for a Forcible Detainer of a Meſſuage, *&c. in Com' Eſſex*, being the Freehold of *Richard Harlakenden*; and this Indictment was preferr'd at the Seſſions to the Grand Jury; and they returned it in this Manner, *viz.* as to the Entry with Force, *Ignoramus*; as to the Detainer with Force, *Billa vera:* But this Endorſement not being ſpied, but being taken by the Juſtices of Peace for a full Indictment in both Points, they awarded Reſtitution to *Harlakenden*; but afterwards, this Indictment being certified into the King's Bench by *Certiorari*, and the Endorſement returned in Manner *ut ſupra*, they awarded Re-reſtitution; yet *Yelverton* moved, that they ought not to regard the Endorſement, for the Court did not ſend for it, but for the Indictment; and this Endorſement makes it no Indictment at all; ſo the Clerk of the Peace has done more than he was commanded to do; but, *per Curiam*, the Endorſement is Parcel of the Indictment, and the Perfection of it; and the Court ſent for the Indictment *cum omnibus id tangen'*; and the Endorſement touches it principally, for

Cro. Jac. 151. Indictment on 8 H. 6. Ignoramus to Part, where it deſtroys the Whole. Re-reſtitution. Indorſement.

for it is the Life of it. And in this Caſe, *per Curiam*, after ſuch Finding of the Jury, *Harlakenden* ought to have preferr'd a new Indictment for the forcible Detainer only; for now being made one intire Indictment, and the Jury finding only the laſt, it is no Indictment at all. *Quod Nota.*

Paſch. 5 JAC. B. R.

Baker and the Biſhop of Peterborough *verſus* Catesby.

6 Co. 62. Cro. Jac. 141, 166. Error in Q. Impedit. Tempus ſemeſtre. W. 2. c. 5. Months. Co. Lit. 135. b. 2 Inſt. 360.

FOſter, Parſon of *Whiſton in Com. Northampt'*, was deprived 15 *Jan.* 1604. The Biſhop of *Peterborough* as Ordinary gave Notice to *Catesby* the Patron 24 *Feb.* following, and afterwards 12 *Auguſt* next collated *Baker*, upon which *Catesby* brought a *Q. Impedit*, and recover'd in the Common Pleas, which Judgment was affirmed on Error in the King's Bench: And the ſole Queſtion was, whether *Tempus ſemeſtre*, which is limited to the Patron by the Statute *W.* 2. *c.* 5. ſhould be accounted a full *Half-year*, or ſix Months, according to Twenty-eight Days in a Month? And it was adjudged that it ſhould not be accounted by Months, but for a full *Half-year*, by dividing the Year into Days, *viz.* 182 for the Patron, and 182 for the Biſhop; and for the odd Day in the Year, that the Law does not regard it; and ſo much alſo appears by the general Courſe of the Law, which gives the Lapſe to the *Metropolitan* after the Year: Which is a Demonſtration that the firſt Year is to be divided between the Patron and the Biſhop. And altho' the Statute *W.* 2. in one Place ſpeaks of the *Tempus ſemeſtre*, and in another Place of the *Dimidium anni*; it was held that the one expounds the other, the firſt being ſpoke *in verbo artis* concerning Prelates, the other in plain Terms which concerns the common People for the Puniſhment. But it was held that in ſome Statutes where (a Month) by Name is mentioned, there the Account ſhall be by Twenty-eight Days to the Month; as on the * Statute of 27 *H.* 8. of Inrolments: And in this Caſe *Yelverton* Juſtice vouched *Spilman*'s Abridgment 21 *H.* 8. adjudg'd according to this Reſolution; and ſaid that *Walmeſley* Juſtice in the Common Pleas vouched a Manuſcript of the Time *E.* 1. next to the Statute according thereunto, that *Tempus ſemeſtre* ſhould be accounted *the full Half-year*; therefore in the Caſe *ſupra* on Computation, it appears that the Biſhop's Collation was twelve Days *infra*

* 5 Co. 1. b. Dy. 218. pl. 6.

Tempus ſimeſtre. Wherefore *Catesby* recover'd in the Common Pleas, and had his Judgment affirmed in the King's Bench; *Nullo contradicente* in either Court.

Ward *verſus* Walthewe.

THE Biſhop of *Exeter Tempore H.* 8. by Deed gave Land, *&c.* to *Nicholas Turner* and *Sybill* his Couſin, in Conſideration of Service done by *Turner*, and other Conſiderations him moving, to them and to the Heirs of their Bodies, and died; they had Iſſue *Jo.* and *William*; *Turner* died; *Sybill* married one *Clapham*; they alien the Land, *&c.* to *Jo.* in Fee; *Clapham* died, *Sybill* enter'd, *Jo.* levied a Fine to *Walthewe*, in Fee of the Land, *&c.* *Sybill* afterwards enfeoffed *William* the younger Son, who enfeoffed *Ed. Willoughby*; *Jo.* enter'd and demiſed to *Walthewe*, and afterwards *Walthewe* enter'd; and *Willoughby* to try the Title ſealed a Leaſe to *Ward*, who declar'd of ſo many Acres of Land, *&c.* in *Sutton Coefield*; and the Matter *ſupra* upon *Non Cul'* pleaded was found by Verdict: And that the Biſhop *dedit Tenementa prædicta per Factum ſuum, cujus quidem Facti tenor ſequitur, &c.* And by the Deed it appear'd that the Land was *in* Parva Sutton *infra Dominium* de Sutton *in* Coefield. And, *per Cur'*, the Plaintiff ſhall recover; for, 1. It was held, that it was not any Jointure within the Statute 11 *H.* 7. for it is not any ſuch Gift as is intended by the Statute; for the Biſhop was not any Anceſtor of the Husband, and the Husband gave nothing for it, but it is only a voluntary Recompence by the Biſhop given in Acceptation of paſt Service; and the Statute intends a valuable Conſideration and Gift in Fact; alſo the Biſhop might well intend the Gift for the Advancement of the Wife, who appears to be the Biſhop's Couſin; and, *per Tanfield*, if it ſhould be a Gift within the Statute 11 *H.* 7. it could be but for a Moiety, for the Gift was before the Marriage, when they took by Moieties, and the Husband dying firſt the Wife does not come to any Part by the Husband, but by Courſe of Law by Survivor. *Quære* of this Conceit; for the other Juſtices did not allow it. 2. They all held, that the Fine of *Jo.* the elder Son of *Sybill* levied to *Walthewe* deſtroyed the Entry of *John* and of *Walthewe*; for altho' in Truth the Fine paſſed nothing but by Concluſion, yet againſt the Fine the Son *Jo.* and *Walthewe* his Conuſee ſhall be eſtopped to claim any Thing by Way of Forfeiture on the Part of the Wife, on any Title accruing after the Fine; for they have no new Right, but *Jo.* being the Son to whom the Land was intailed, is barred by the Fine. 3. Altho' upon View of the Deed made by the Biſhop, the Land which by the Declaration is granted *in Sutton Coefield*, by the Deed

Cro. Jac. 173. Noy 122. 1 Brownl. 137. Ejectment. What ſhall be a Jointure within 11 H. 7. c. 20. Fine. Concluſion. Who ſhall enter for a Forfeiture within 11 H. 7. Where a preciſe Verdict makes the Count good, which otherwiſe would be ill.

appears to be *in parva Sutton*, &c. yet that is aided by the Finding of the Jury, who find expreſly that the Biſhop *dedit Tenementa infraſcripta*; ſo that being ſo preciſely found, the Deed is not material. *Quod Nota.*

Mich. 5 JAC. B. R.

Cox *verſus* Semor.

Prohibition. Suggeſtion. St. 50 E. 3. Divers Prohibitions non obſtan' Conſult'.

IN a Suit for Tithes of Lambs and Wool, &c. for Sheep depaſtur'd in a Cloſe call'd *Greenhil in Balking in Com' Berks.* The Plaintiff brought a Prohibition, and ſuggeſted, that *Greenhil* had always paid 10*s.* in Diſcharge of all Tithes of Lambs, Wool, &c. And *Yelverton* moved for a Conſultation, becauſe the ſame Suggeſtion had been made before in four ſeveral Prohibitions for the ſame Cloſe, and the ſame Manner of Tithing alledged, and a Conſultation always granted for Want of Proof within ſix Months; yet, *per Curiam*, it being only for Want of Proof, and not on the Right or Trial of the Cuſtom, and being alſo for Tithes of another Year, which were not in Demand before, the Suggeſtion is good; for the Statute 50 *E.* 3. goes to a Suggeſtion made upon the ſame Libel, and to a Conſultation duly granted, which is not done in the Caſe above, but only for Negligence in not having his Proofs ready. *Nota.*

Cro. Car. 208.
Cro. El. 736.

50 E. 3, 4.

Tanner *verſus* Small.

Prohibition. Where Suggeſtion need not be proved.

SMall ſued for Tithes, and the Plaintiff ſuggeſted a Concord and Agreement (he being a Pariſhioner) for 40*s.* yearly to retain his own Tithes, and did not prove it within ſix Months: And, *per Curiam*, he need not, for ſuch Proof goes only to a *Modus decimandi*, and not to another Suggeſtion on a Leaſe or Contract: And ſo is the Experience in the King's Bench.

Field *verſus* Hunt.

HUnt recover'd in *Worceſter* Court in Debt on a Contract for twenty Sheep, and had a Verdict there, and Judgment, and afterwards it was removed by Error into the King's Bench, and aſſigned generally that Judgment ought to have been for the Defendant, where it was enter'd for the Plaintiff. But upon the Opening of the Errors, it was ſhewn, that there was not any Declaration in *Worceſter* Court; for the Declaration was, Raphael Hunt *queritur verſus* H. Field *de placito quod reddat ei* 20 l. *quas ei debet & injuſte detinet, & unde idem quer' per M. Attorn' ſuum quod cum prædict' Def. &c.* And, *per Fenner, Williams* and *Crook*, this is no Declaration, for there wants the Word (*dicit*) and the Senſe is imperfect; and altho' *Yelverton* objected that the Declaration is ſufficient, if it is good to a common Intent, and that the Word (*quer'*) *breviter ſcriptum* may be *queritur*, and then it is (*unde idem queritur*. Yet, *per Curiam*, that will not aid it, for then it is not certain, to whom this Word (*idem*) refers, whether to the Plaintiff, or to the Defendant, and it ſhall be rather referr'd to the Defendant, becauſe *ad proximum antecedens*; and this, *per Curiam*, is Matter of Subſtance, which is wanting, therefore it is ill; but if it had been (*unde idem* Raphael *quer'*) *breviter ſcriptum*, it had been good, becauſe the Party Plaintiff is certainly named, and then (*quer'*) can have no other Senſe than *queritur*. And the Judgment was reverſed. *Quod Nota.*

[illegible] Noy 123. Error in Debt in Worceſter.

Where a Count ſhall be ill for Incertainty.

1 Inſt. 20. b.

Howſe *verſus* Webſter.

IT was agreed by *Yelverton, Williams* and *Crook* Juſtices, that if a Man demiſes Land by Indenture to *J. D.* for Years yielding Rent, and *J. D.* dies, making *A.* his Executor, the Leſſor may have Debt againſt the Executor for the Rent reſerved, and Arrear after the Death of the Leſſee, altho' the Executor never entered nor agreed; for the Executor repreſents the Perſon of the Teſtator, and the Teſtator by the Indenture was eſtopped and concluded during the Term to pay the Rent upon his own Contract, and therefore altho' the Rent is higher than the Profit of the Land, yet the Executor cannot wave the Land, but notwithſtanding that he ſhall be charged with the Rent. *Vide* the Opinion of *Aſcue*, 21 *H.* 6. 24. & 11 *H.* 4. *contra*; but it was denied to be Law.

Debt. Executor. Where an Executor cannot wave the Land.

Vide Salk. 297. 3 Co. 23. b.

Parkehurſt

Parkehurſt *verſus* Palmer.

Aſſumpſit. Venue miſtaken. 16, 17 Car. 2. c. 8. Ante 77.

AN *Aſſumpſit* laid at *Maidſton in Com' Kanc'*, and upon *Non Aſſumpſit* pleaded, the *Venire facias* was *de Viſ. Villæ & Paroch' de Maidſton.* And it was adjudg'd Error, and an inſufficient Trial; for the Trial ought not to be from a larger Precinct than the Plaintiff himſelf has ſuppoſed the Subſtance of his Matter to be; and this *per totam Curiam.*

Smith *verſus* Turner.

Cro. Jac. 202. Cro. El. 268, 621, 638. 1 Sid. 132. Words.

THou art no true Subject to the King; and, *per totam Curiam*, after Verdict againſt the Defendant, the Action does not lie; for the Words are too general to bear an Action, for they do not touch the Plaintiff any Way in his Loyalty particularly, or otherwiſe; and no Man is ſo *true* or good a Subject as he ought: And if an Accountant deceives the King, or his Leſſee is arrear with his Rent, he is not *true* in that; for he has broke the Truſt repoſed in him, and therefore is not a true Subject; the ſame Law, if a Subject does not pay his Subſidy. But if it had appeared by the Declaration, that the Words had been ſpoke upon any Diſcourſe of the Plaintiff's Loyalty, then the Opinion was otherwiſe.

Hoddeſdon *verſus* Greſil.

Cro. Jac. 195. 1 Brownl. 208. Commoner cannot kill Conies.

TReſpaſs for Entering the Plaintiff's Cloſe call'd *B.* at *Leighton-Buſſard*, and taking two Conies: The Defendant to all the Treſpaſs, except the Entry into the Cloſe, pleaded *Non Cul'*, and to the Entry juſtified, that he had Common in the Cloſe called *B.* and that he had five Cows ready to put upon the Common *ad utend'* the Common; and becauſe *quamplurimi Cuniculi* were there feeding, ſpoiling the Common, he in Preſervation of his Common enter'd *ad fugandum & occidend'* the Conies. And the Plaintiff demurred upon the Bar; and the Juſtification was adjudged ill; for a Commoner * cannot enter to chaſe or kill Conies; for altho' the Owner of the Soil has no Property in the Conies, yet as long as they are in his Land he has Poſſeſſion, which is good againſt the Commoner: For, if the Lord ſurcharges the Common with Beaſts, the Commoner cannot drive them out, but the Cattle of a Stranger the Commoner may diſtrain Damage-feaſant, or drive them out of the Common, for the Stranger has no Colour to have his Beaſts there. And alſo Conies are Matter of Profit to the Owner of the Soil for Houſe-keeping. Therefore foraſmuch as it appears that the Cauſe of the

* Cro. Jac. 229. Cro. Eliz. 876. Godb. 123. 2 Leon. 201. 4 Leon. 7. 2 Bulſt. 116. Ow. 114.

Entry was to chaſe and alſo to kill, which is unlawful as to the Lord who is the Plaintiff, therefore the Juſtification is not good in Matter; for if the Lord ſurcharges the Soil with Conies, the Commoner on this particular Loſs * may have an Action on the Caſe, which is a ſufficient Remedy againſt the Plaintiff. *Quod Nota.* Upon full and conſiderate Deliberation of all the Judges, they being all on the firſt Day of the Argument of the contrary Opinion. *P.* 43 *Eliz. Rot.* 134. between *Bellewe* and *Langden*, & 28 *Eliz.* between *Conny* and others agree, as *George Croke* vouched it, *ex relatione* Jo. Walter.

Action on the Caſe by a Commoner againſt the Lord.

* Lutw. 107. Poſtea 143.

Gerry *verſus* Davis.

DEBT on Bond; the Plaintiff declared on a Bond *de ſexcentis Libris*; the Defendant demanded Oyer of it, which was enter'd, and it appear'd to be, that the Defendant was bound to the Plaintiff *in ſexgintis Libris*, and adjudg'd *Nil capiat per Billam*, for *ſexgintis* is a Word of no Signification, and therefore the Bond it ſelf does not warrant the Declaration.

Cro. Jac. 190. Sexgintis. Vide ante 96.

Cox *verſus* Worrall.

THE Plaintiff declar'd, that whereas he was of a good Reputation, and ſo had lived free from all Felonies, Rapes, &c. yet the Defendant *falſe & malitioſe* preferr'd an Indictment for the Rape of *A.* an Infant at ſuch Aſſiſes, upon which he was arraigned *& legitimo modo acquietat*; the Defendant juſtified and ſhewed, that *A.* was his Daughter, and of the Age of eight Years, and came to him, and with Tears complain'd that the Plaintiff had raviſhed her, and thereby very much hurt her; whereupon the Defendant went to *J. S.* a Juſtice of Peace, and took his Daughter with him, and complain'd of it to the Juſtice, who thereupon ſent for the Plaintiff, and upon Examination of the Matter bound the Defendant to appear at the Aſſiſes, and to proſecute againſt the Plaintiff, and bound the Plaintiff to appear there likewiſe; wherefore the Defendant came to the Aſſiſes, and to ſave his Recogniſance preferr'd an Indictment of Rape againſt the Plaintiff, which was found by the Grand Jury: And ſhewed that he took his Daughter to the Aſſiſes alſo to give Evidence, *prout ei bene licuit.* Upon which Bar the Plaintiff demurr'd. And it was adjudged againſt the Plaintiff, and that the Juſtification was good; for the Plaintiff grounds his Action on the malitious Proſecution of the Indictment by the Defendant, and the Defendant ſhews how, by Degrees lawful and juſtifiable, he came to exhibit the Indictment: As, 1. That it was on his Daughter's Complaint, whom Nature obliges him to pity; and the Tenderneſs

Cro. Jac. 193. Action on the Caſe.

Where the Preferring of an Indictment againſt A. ſhall be juſtifiable.

1 Rol. Rep. 439. 3 Bulſt. 286. Cro. El. 900. Salk. 15.

of *A.*'s Age proves that there was no Malice in her, and the Defendant being her Father could not do leſs. 2. On this Complaint the Defendant did not noiſe it abroad, but took only the Courſe of Juſtice, and did nothing but in a Courſe of Juſtice, performing the Condition of his Recogniſance; and in 6 *E.* 3. — it appears that the Father may juſtify the Maintenance of his Daughter in Suing of an Appeal. And, 3. The Offence which the Daughter complain'd of, is a Vice committed in Secret, which has no Witneſſes; and therefore on the Daughter's Complaint, which is but Conjecture, the Father might well exhibit the Complaint to the Juſtice, and the Indictment at the Aſſiſes; and ſo it was adjudg'd.

Jennings *verſus* Haithwaite.

1 Brownl. 208. Treſpaſs. 13 El. of Non-Reſidence is a general Law. St. 21 H. 8. 1 Mod. 204. 2 Mod. 56. 4 Co. 76. a. 120. b.

IN Treſpaſs, on Not guilty pleaded, the Jury found the Defendant Vicar of *D.* and that he ſuch a Day, *&c.* demiſed his Vicarage to *J. S.* for three Years rendring Rent, which *J. S.* aſſigned one Acre Parcel thereof to the Plaintiff; and that the Defendant was abſent by ſeveral Quarters in a Year ſixty Days in each Quarter; but they did not find the Statute 13 *Eliz.* yet it was adjudg'd for the Defendant, for the Statute 13 *Eliz.* is a general Law, altho' it extends only to thoſe who have Cure of Souls, by Reaſon of the Multiplicity of Parſonages and Vicarages in *England*; and being a general Law the Judges ought to take Notice of it. And adjudg'd accordingly. The ſame Law of the Statute of 21 *H.* 8. of *Non-Reſidence.*

Drury *verſus* Dennis.

1 Brownl. 209. Treſpaſs. Verdict imperfect.

TReſpaſs againſt Husband and Wife; and declar'd that they beat a Mare of the Plaintiff, and committed ſeveral other Treſpaſſes, upon *Non Cul'* pleaded, the Jury found, that the Wife beat the Mare, and for the Reſidue they found for the Defendants. And, *per Cur' Nil capiat per billam* enter'd; for the Verdict is altogether imperfect, for they have found the Wife guilty of Beating the Mare, and have given no Verdict as to that touching the Husband, either by Way of Acquittal or Condemnation: And the Finding *pro reſid' non cul'*, or for the Defendants, extends only to the other Treſpaſſes contain'd in the Declaration, and not to the Battery of the Mare. And alſo, by *Williams* and *Crooke* Juſt. where Battery is brought againſt Husband and Wife, ſuppoſing that they both beat the Plt. or the Plt.'s Mare, and upon *Non cul'* it is found that the Wife only committed the Battery, and not the Husband, this Verdict is againſt the Plaintiff: For now the Plaintiff's Action appears to be falſe, for

1 Vent. 93. con. Where Baron and Feme ſhall join, and where ſever in Action.

the Husband ſhall not be join'd in ſuch Caſe but for Conformity. And there is a ſpecial Writ in the Regiſter to ſuch Purpoſe. And it is not like a Battery charged on *J. D.* and *J. S.* for there one of them may be acquitted, and the other found guilty, and good; for they are in Law ſeveral Treſpaſſers.

Blanchflower *verſus* Atwood.

THE Defendant ſaid of the Plaintiff; *I will hang him, for he hath ſpoken Words which be High Treaſon.* And *Yelverton* moved in Arreſt of Judgment, that the Words are too general to bear an Action; for *non conſtat* what the Words were, and the Law does not determine any Words to be Treaſon. But *non allocatur per Cur'*, for Words * may be Treaſon; as to ſay, the King is a Baſtard, or that another has a better Title to the Crown, for that may draw Subjects from their Allegiance, and create Mutiny in the Kingdom: And the firſt Words enforce the Slander, in Saying, *I will hang him*; and then by the ſubſequent Words he ſhews the Reaſon why; *for he hath, &c.* and, by *Fleming* Chief Juſtice, it is not ſafe for the Plaintiff to ſet forth in Certain what Words be ſpoke, for Words which are Treaſon are *Arcana Imperii*, and not to be publickly ſpoken and utter'd, but are only to be diſcover'd to the King or his Counſel, or other Magiſtrate, for otherwiſe by his ordinary Report of the Words, without diſcovering them, he may endanger himſelf.

Godb. 153. Words which are Treaſon ought not to be ſet forth.

* Poſtea 197. Cro. Jac. 276. 1 Bulſt. 148. Hutt. 75.

Heines *verſus* Guie.

ERror on a Judgment given in *Aſſumpſit* in the Court of *Tewksbury* on a Verdict given, where the Jury gave 8 *l.* Damages, and 2 *d.* Coſts; and the Judgment was, *Ideo conſiderat' eſt quod* the Plaintiff *recuperet damna ſua per Jurat' prædict' aſſeſſa in forma prædicta ad* 8 l. *necnon* 20 s. *pro Miſis & Cuſtag' de Incrementi Curiæ.* And adjudged Error, becauſe no Judgment is given for the 2 *d.* Coſts given by the Jury, but only for the 8 *l.* which was for Damages, and ſo the Coſts aſſeſſed omitted, and the other Coſts which follow are but the Act of the Court *ex Officio*, without any Reference to that which was aſſeſſed by the Jury.

Error. Damages. Coſts. Coſts omitted in the Judgment. 2 Show. 56, 38.

Owen

Owen *verſus* Williams.

Error. Cogniſance made, and as Bailiff to no Perſon, is void.

IN Replevin by *Owen* againſt *Williams*, *Price* and *Laborer*, of an Horſe taken, *&c.* *Williams* avow'd, and the others made Conuſance, to take the Horſe for 11 *d.* Rent arrear of a Rent-Service due by *Owen* to *Williams*: And it was found for the Defendants, and 2 *d.* Damages given by the Jury to all three Defendants, and the Judgment accordingly, that they three ſhould recover *dampna ſua prædicta per Jur' aſſeſſa*, *&c.* and foraſmuch as *Price* and *Laborer* made Cogniſance generally, and did not make it as Bailiffs or Servants to *Williams*, and the Cogniſance is in it ſelf a Title and Juſtification in another's Right, and Damages given to all three, and they two who make Cogniſance have no Cauſe to recover any Thing; therefore the Judgment reverſed.

Diſmo *verſus* Sherley.

Error in Debt. Where Want of an Original ſhall be Error. Judgment of Nihil in Miſericordia.

THE Defendant in the Common Pleas appeared the firſt Day that he had by the Summons, and afterwards the Plaintiff recover'd by *Non ſum informe*, but the Defendant *Nihil in Miſericordia quia venit ad primam Summonitionem*, in Error on this Judgment it was alledged, that there was no Original, and thereupon a *Certiorari* iſſued for the Original in that Term in which the original Action commenced, which is certified that in that Term there is no Original between the Parties; and it was ſaid that the Original might be enter'd of another ſubſequent Term; therefore the *Certiorari* was too ſtrict to tie it to one Term *in Specie:* But, *per Cur'*, in this Caſe, if there be any Original of another Term it will not ſerve, becauſe the whole Matter was begun and ended in one and the ſame Term, as appears by the Judgment of *Nihil in Miſericordia*, *quia*, *ut ſupra*, but where the Defendant does not come the firſt Day, but by mean Proceſs, there the Judgment is, that he ſhall be *in Miſericordia*, and there an Original certified between the Parties of any Term pending the Plea, is ſufficient. *Quod Nota*, by Experience.

Harriſon *verſus* Fulſtow.

Cro. Jac. 185. 1 Brownl. 96. Error in Debt.

FULSTOW brought Debt of 86 *l.* in the Common Pleas againſt *Thomas Harriſon*, and enter'd his Plaint againſt *Thomas Harriſon*, and the *Capias* continued accordingly againſt *Thomas*. But the *Plures* was againſt *William Harriſon* (which was the Defendant's true Name) and that was but for 85 *l.* which varied from the firſt Entry, and upon the Exigent *William Harriſon* appeared, and the Plaintiff declar'd againſt

William, and they pleaded, and were at Iſſue by the Name of *William*, and there was a Verdict *pro Quer'*, and Judgment accordingly againſt *William*; and now in Error it was aſſigned that the Original did not maintain the Proceedings; for that is againſt *Thomas*, whereas the Proceedings are againſt *William*, and altho' the Plaintiff's Counſel would excuſe it, that this Judgment being againſt *William*, and the Original againſt *Thomas*, as it is certified, that that could not be the Original againſt *William*, and ſo the firſt Judgment againſt *William* is without an Original, which is aided by the Statute after Verdict: Yet, *per Cur'*, it is Error; for there is a Difference between a bad Original and no Original; for the Want of an Original is aided, but not a vitious Original; and if the Original in this Caſe was not againſt *Thomas*, then there was not any Continuance, nor *obtulit ſe omnino:* And alſo Diminution being alledged, it is certified as the Original in this Suit: And therefore the Judgment was reverſed.

Vitious Original not aided by the Statute of Jeofails.

Cro. Jac. 479. 1 Saund. 317, 318. 5 Co. 37. b. Cro. El. 722. 5 Geo. c. 13.

The Ld. Sands *and* Swayne *v.* Scullard *and* Dawby.

TReſpaſs was brought by the Plaintiffs againſt the Defendants for an Entry into their Cloſe: *Dawby* had Judgment againſt him by *Nihil dicit*; *Scullard* pleaded to Iſſue *Non cul'*, upon which a *Venire facias* is awarded upon the Roll between the Parties *tam ad triand' Exitum quam ad inquirend' de dampnis*, and the Plaintiffs take their *Venire facias ad triand' Exitum* between the two Defendants and the two Plaintiffs, and the *Hab' Corp' & Diſtring'* were accordingly; but the Plaintiffs (knowing *Dawby* to be dead) took their Record of *Niſi prius* againſt *Scullard* only, and he is found guilty: And in Arreſt of Judgment *Yelverton* ſhewed, that the *Ven. fac.* was vitious, for there was no Iſſue to be tried between the Plaintiffs and *Dawby*; for Judgment being given on *Nihil dicit* againſt *Dawby*, the Writ ought to have made Mention only of the Iſſue between the Plaintiffs and *Scullard*, and to have been an Inquiry for Damages between the Plaintiffs and *Dawby* according to the Award upon the Roll, which is the Ground of the *Ven. fac.* And it was likewiſe ſhewn that the Jury have not done all that for which they were ſummoned, for they have given their Verdict only againſt *Scullard*, and no Verdict at all againſt or for *Dawby*; juſt as if two Matters had been in Iſſue, and they give a Verdict for the one, and nothing for the other, it is ill for the whole. And that was the Opinion of the whole Court *præter Williams* Juſt. who relied on 9 *El. Dy.* 260. *b.* Sir *Ant. Cooke* and *Wooton*'s Caſe: Where in Partition againſt two, one confeſſed the Action, and the other pleaded to Iſſue, and yet the *Ven. fac.* was to try the Iſſue between the Plaintiff and the two Defendants, and by the Opinion it was amended. But *Nota*; there is a Difference, for no

1 Brownl. 209. Treſpaſs. Venire facias vitious. Amendment.

Damages are to be recover'd in Partition; but it is otherwiſe in Treſpaſs: Therefore in *Cooke*'s Caſe the Court ſaid, it was as if a mere Stranger to the Record had been named in the *Venire facias*.

Holſworth *verſus* Sir Stephen Procter.

Cro. Jac. 188. Amendment. Statute of York.

A Verdict was found for the Plaintiff at the Aſſiſes, and he prayed his Judgment; but in Arreſt of Judgment, *Yelverton* ſhewed that the *Diſtringas* was *album breve*, without an Indorſement, *viz. Executio iſtius brevis, &c.* and without the Sheriff's Hand ſet to it. And, *per Cur'*, it is a good Matter to have a new Trial, for it * cannot be amended: And by the Statute of *York* the Sheriff ought to put his Name on the Back of the Writ. *Quod vide* 8 *H.* 6. And the Jury being taken on this *Diſtringas in pais*, they come in without any Warrant at all; and altho' the Writ is made returnable *in initio* of this *Mich.* Term (*niſi Juſtic' ad Aſſiſas prius venerint*) and it was objected that the whole Term being but one Day, that the Court might call in the Sheriff to amend it, yet it was anſwer'd, that the Jury being paſt *in pais*, the Tenure and Subſtance of the Writ is paſt, and that this Court cannot amend it, for that was to make the Trial good which was taken without Warrant, for now upon the Matter there was no *Diſtringas* at all, and ſo no Commiſſion to the Juſtices of *Niſi prius* to take it: But if the Trial had been in Court this Term, the Court might *call in* the Sheriff to amend it before the Verdict paſſed, or after in the ſame Term; becauſe they ſit by Patent, and not by Commiſſion. *Vide Rowland*'s Caſe, 5 *Co.* 41. *b.* Judgment reverſed, becauſe the Sheriff's Name was not put to the † *Venire facias*, and yet the Jury was not taken on that Writ, but on the *Diſtringas* which is a ſtronger Caſe.

* Cro. El. 310. Mo. 868. Vide Cro. El. 466. Breve album cannot be amended after a Trial in Pais, otherwiſe on a Trial at Bar.

† 3 Bulſt. 220. Noy 115.

The Lord Mordant *verſus* Walden.

Error on Aſſumpſit. Incertainty.

THE Plaintiff ſhewed that *Lewes* Lord *Mordant* the Plaintiff's Father was ſeiſed of the Manor of *D.* and of divers Lands, *&c.* in *D.* in Fee, and in Conſideration that the now Plaintiff with his Father *Sigillaret quandam Indenturam per quam* the Lord *Mordant barganizaret, &c.* the ſaid Manor, and the ſaid Lands and Tenements in *D.* to the Defendant, the Defendant promiſed to pay the Plaintiff 100*l.* and ſhewed *in facto*, that the Plaintiff ſuch a Day, *&c. Sigillavit Indenturam prædictam*; yet the Defendant had not paid the 100*l. &c.* And upon *Non Aſſumpſit* pleaded

pleaded it was found for the Plaintiff, and he had Judgment accordingly in the Common Pleas; but it was reverſed by Error for two Reaſons: 1. Becauſe (*diverſa Terras & Tenementa in* D.) are incertain, and do not comprehend all the Lands in *D.* therefore the Plaintiff ought to have ſhewn in Certain, and particularly what Lands were contained in the Indenture: As if a Man promiſes to convey to *J. S.* all the Lands deſcended to him from his Father, he ought to ſhew *in Specie* (what Lands) and that they are (all). 2. The Plaintiff has not laid the Performance on his Part certain and ſufficiently, becauſe (*Indenturam prædictam*) cannot be good becauſe (*prædictam*) ought to refer to ſome Certainty before, and nothing is certain before, for (*quandam Indenturam*) at firſt is incertain; for it is all one as if he had ſaid (*unam Indenturam*) and then the (*prædictam*) which follows could not be good; for that is *incertum per incertius:* But the Plaintiff ought to have ſhewn in Certain, that he had ſealed ſuch an Indenture in Certain, *per quam Lewes* Lord *Mordant* and the Plaintiff *barganizarent, de Verbo in Verbum, prout* it is laid in the Premiſſes of the Declaration; as if a Man promiſes to execute *quoddam ſcriptum obligatorium* whereby he will become bound to *J. S.* in 100*l.* in an Action on this Promiſe, it is no Plea to ſay, *quod* (*fecit ſcriptum obligat' prædictum*) becauſe no Bond in Certain was mentioned before; but if in this Caſe it had been a perfect Indenture in Date, in Nomination of the Parties, and Limitation of the Land, then it had been good to ſay, that he had ſealed (*Indent' prædictam*) becauſe by the Premiſſes it appears to be a true and perfect Indenture *in facto.* But here it is but a pretended Indenture. *Quod Nota.*

Vide 2 Leon. 53. 3 Leon. 91. Where (prædict') refers to a Certainty.

Paine's *Caſe.*

NOTA; *per Williams* Juſtice, that it was reſolved by all the Juſtices of *England* in the Star-Chamber in the Caſe of one *Paine* of *Middleſex*, who was ſued there for Perjury in the Court of Requeſts on his Depoſition in a Caſe there depending, where the Conveyance and Title of Land and Freehold came in Queſtion; that this Perjury was not puniſhable; for it is but a vain and idle Oath, and not a corrupt Oath, becauſe the Court of Requeſts have nothing to do with, nor can examine Titles of Land, which are real, and are to be diſcuſſed and determin'd in the King's Courts. *Quod Nota.*

1 Bulſt. 107, 108. Noy 114. Perjury in Court of Requeſt, where it ſhall not be puniſhed. Authority of that Court.

Tompſon

Tompſon *verſus* Colier.

1 Brownl. 138. Where a Man ſhall plead in Abatement. Where a Reſpondeas Ouſter.

THE Plaintiff declar'd on a Leaſe made by *Robinſon* and *Stone* of a Meſſuage and 40 Acres of Land, in the Pariſh of *Stone* in the County of *Stafford*, the Defendant imparl'd to another Term, and then pleaded that within the Pariſh of *Stone* there are 3 Vills, *A. B.* and *C.* and becauſe the Plaintiff did not ſhew in which of the Vills the Land lay, he demanded Judgment of the Bill, *& quod ob Cauſam prædict' Billa prædict' caſſetur:* And the Plaintiff demurr'd upon the Plea; and it was adjudged for the Plaintiff: For, 1. The Defendant * cannot plead in Abatement of the Bill after an Imparlance, for he has admitted it to be good by his Entering into Defence, and by his Imparlance. 2. The Matter of the Plea is not good, becauſe the Defendant does not ſhew in which of the Vills the Meſſuage and 40 Acres lie; and that he ought to do; for where a Man pleads in Abatement, he ought always to give the Plaintiff a better Writ. *Quod Nota.* But, *per tot' Cur'*, this Plea does not go in Bar, but only a *Reſpondeat Ouſter.* And by *Williams* Juſt. the Difference is, where the Plaintiff demurs on a Plea in Abatement, and where he goes to Iſſue upon it; for if they † go to Iſſue upon ſuch Plea, and it is found againſt the Defendant, it is peremptory, and he loſes the Land: But upon a Demurrer it is not peremptory, but only a *Reſpondeat Ouſter.* *Quod Nota.* *Vide* 22 *H.* 6. 55. *b.* *Foxley*'s Caſe, 5 *Co.* 111.

* Lutw. 24. 2 Show. 145. Salk. 1.

† 2 Inſt. 242.

Bromley *verſus* Littleton.

Error in Dower.

MRS. *Littleton*, the Wife of *Gilbert Littleton*, recover'd her Dower in the Common Pleas by Default, and had a Writ of Seiſin to the Sheriff of *Stafford*, and a Writ of Inquiry whether the Husband died ſeiſed, and of what Eſtate, whether in Fee or Fee-tail; the Jury found, that the Husband died ſeiſed, but whether in Fee or in Tail, *ignorant*; and found the Value of the Land, *&c.* and *quantum tempus elabitur, &c.* whereupon Judgment was given, that ſhe ſhould recover, *&c.* and her Damages to 60*l.* And thereupon a Writ of Error was brought; and after the Record removed, Mrs. *Littleton* the firſt Plaintiff died, wherefore the Plaintiff ſued a *Scire facias* againſt Sir *Thomas Cornwal*, Mrs. *Littleton*'s Executor, againſt whom two *Nihils* were returned, upon which the Plaintiff proceeded and aſſigned Errors, *viz.* that no Judgment ought to be to recover Damages, becauſe the Jury have not found any dying ſeiſed of any Eſtate of Inheritance in *Gilbert* according to the Purport of the Writ; for without a Dying § ſeiſed of ſuch Eſtate the Wife ſhall not have Damages; as if the Husband aliens and retakes for Life, and dies, the Wife ſhall have Dower, but no Damages from this Dying ſeiſed, for it was only of the Freehold. And it was adjudg'd

§ 1 Inſt. 32. b. Dy. 264. p. 33.

adjudg'd Error. Then the Doubt was, if by the Death of Mrs. *Littleton* the Writ of Error was not abated, and that a new Writ ſhould be ſued out againſt the Executors? And, *per Curiam*, the Writ ſhall not abate. And there is a Difference between the Death of the Plaintiff, and the Death of the Defendant; in the firſt Caſe it ſhall * abate 2 *R.* 3. but not in the other Caſe. And it was likewiſe held, that the Executors, by the *Scire facias* and two *Nihils* returned, which amount to a Garniſhment, are made Parties to the Writ of Error well enough; for becauſe the Damages in the firſt Judgment are to go to the Executors, therefore they ought to be warned; for although the Plaintiff in the Writ of Error, by the Death of Mrs. *Littleton* is diſcharg'd of the Title of Dower which lies on the Land, yet he is ſtill to be eaſed of the Damages, which ought to be againſt the Executors, who are to be made Parties by this Means of the *Scire facias*. And ſeveral Precedents were ſhewn accordingly in perſonal Actions, where Damages are to be recover'd, and Error is ſued, and the Defendant in Error dies, his Executors have been made Parties to the firſt Writ of Error by the Suit of the *Scire facias*. *Quod Nota*; *per tot' Cur'*, without Contradiction.

Where Executors ſhall be made Parties by Scire fac' on Death of Defendant in Error.

* Poſtea 208.

10 Co. 135. a. Comb. 263, 441. Mo. 701. 2 Bulſt. 231. Vide 2 Keb. 594.

1 Rol. Rep. 23.

Brinsby *verſus* Balgy.

THE Plaintiff ſhewed, that whereas ſhe was of a good Reputation and a pure Virgin, and ſought in Marriage by one *Dunne*, *&c.* Dunne *interrogavit* the Defendant, why the Plaintiff did not come to Church? The Defendant *reſpondendo dixit*, *It is no Marvel ſhe comes not to Church, for it is thought ſhe is with Child, and I fear it is too true:* Whereby ſhe loſt her Marriage with the ſaid *Dunne*, to her Damage, *&c.* Upon *Non Cul'* pleaded it was found for the Plaintiff: But *Yelverton* moved in Arreſt of Judgment. 1. Becauſe the Plaintiff did not ſhew, that the Defendant was *Sciens* of the Marriage between the Plaintiff and the ſaid *Dunne*, nor doth it appear in the Declaration that the Words were ſpoken *malitioſe*. 2. It appears by the Plaintiff's own Shewing, that the Defendant had not any Intention to ſlander the Plaintiff; for the Defendant's Words aroſe not from himſelf but on a Queſtion propounded by *Dunne* a third Perſon concerning the Plaintiff's not coming to Church, to which the Defendant anſwer'd; which Anſwer does not import any direct Slander, for her Honeſty was not queſtion'd, but Abſence from Church, which is collateral; and moreover the Defendant affirm'd nothing preciſely, but his *Thought* and his *Fear*; which imply that the Defendant *rather wiſh'd there was no ſuch Cauſe:* So that the Defendant's Words depend merely upon an Eccleſiaſtical Cauſe, *viz.* her Abſence from Church: But if *J. S.* asks *J. D.* concerning a Robbery committed, and *J. D.* anſwers, that he thinks the

Words.

Vide 3 Bulſt. 83.

Robbery was committed by *A.* and he *fears it is too true*; it is a Slander; for the Inducement, *viz.* the Queſtion, is *circa* ſuch a temporal and infamous Act, as the Defendant by his Anſwer has detected of *A.* wherefore it ſeems that *A.* may have his Action. *Quod fuit conceſſum per totam Curiam, præter Fenner.* And *Nil capiat per Billam* enter'd.

Winkworth *verſus* Man.

1 Brownl. 210. Noy 125. Cro. Jac. 183. Where Verdict of the Moiety ſhall be good. Ejectment. Hab. fac. poſſ.

THE Plaintiff declar'd on a Treſpaſs in an Acre of Land in *D.* and abutted it *Eaſt*, *Weſt*, *North* and *South*: Upon *Non Cul'* the Jury found the Defendant *Cul' in dimidio Acræ infraſcript'*; and it was moved in Arreſt of Judgment, that upon the Matter no Treſpaſs at all is found; for there is no ſuch Moiety bounded, as the Plaintiff has declared, for the intire Acre is only bounded, and the Plaintiff confining his Treſpaſs within certain Bounds, the Defendant ought to be found a Treſpaſſer within thoſe Bounds; *aliter* it is not good; and it is impoſſible for the Moiety of the Acre to be within thoſe Bounds, whether the Acre be taken in Length or Breadth, or what Way ſoever: But *per totam Curiam, præter Fenner*, the Plaintiff ſhall have Judgment; for if the Plaintiff lays the Treſpaſs in one Acre, and the Jury find it only in a Foot of that Acre, it is good: And here they have found the Treſpaſs in the Moiety of the Acre bounded, and that is ſufficient in this Action where Damages only are to be recover'd; but if it was in Ejectment, the Verdict had been ill; for it is incertain in which Part the Plaintiff ſhall have his *Habere facias Poſſeſſionem.*

Redhead *verſus* Harpur.

Noy 124. Aſſumpſit.

THE Plaintiff declar'd, that 12 *Octobr' Anno* 2. at *Staines* in *Middleſex*, there was a Communication between them about Buying 300 *Ewes* and 14 *Rams*, and that the Defendant affirmed, and warranted and promiſed them to be ſound, *& tunc bene valere* 9 *l. per* Score, and if they ſhould not be of ſuch Value to the Plaintiff to be ſold, the Defendant would make them worth 9 *l. a Score in ready Money*; yet the Defendant *Sciens* them not to be ſound, nor of ſuch Value, ſold them to the Plaintiff the ſame Day for 130 *l.* paid *ibid'*; yet the Plaintiff ſaid *in Facto* that 100 of the *Ewes* at the Time of the Bargain were *rotten*, and died before 24 *March* following of the Rotteneſs, and the other 200 at the Time of the Bargain were not worth 9 *l.* a Score, nor could be ſold for more than 4 *l.* a Score, ſo the Defendant had deceived him to his Damage 100 *l.* The Defendant ſaid that the Bargain was for Ewes and Rams *then going in Wildmore* in the County of *Lincoln*, which were ſound and worth 9 *l.* a Score, and might have been ſold for that

Price; and that he averr'd, upon which the Plaintiff demurr'd; and it was adjudged for the Plaintiff; for the Defendant has not anſwer'd the Matter in the Declaration, *viz.* the Warranty and Promiſe, which is the Cauſe and Ground of the Action, and the Diſceit laid to the Defendant's Charge, and that of Neceſſity ought to be traverſed and denied by the Defendant. The Defendant's Plea is likewiſe idle and vain; for the Agreement and Bargain for the Sheep, being a Thing tranſitory and not local, it is not material where the Sheep were at the Time of the Bargain, whether in *Lincolnſhire* or in *Middleſex*; and ſo was the Opinion of the whole Court.

Lathbury *and his* Wife *Adminiſtratrix of* William Ridges *verſus* Michael Humfry.

DEBT as Adminiſtratrix on a Bond of forty Marks dated 4 *Apr'* 39. made by the Defendant to the Inteſtate: The Defendant pleaded that *Ridges* the Inteſtate 1 *Octobr'* 1 *Jac'* made his Will, and made the Defendant Executor, and bequeathed the Bond and the Money therein contained to one *Humfry* the Defendant's Son, and died; after whoſe Death the Defendant took upon him as Executor, and adminiſtred ſeveral Goods of *Ridges*, and that he is ready to aver: Upon which Plea the Plaintiff demurr'd generally; and it was adjudged for the Plaintiff, for the Defendant's Plea is not good without a Traverſe that *Ridges* died Inteſtate: For the Action being brought as Adminiſtratrix, and they declaring on a Dying Inteſtate, it is ſuch a material Suppoſal in the Declaration, that it being the Ground of the Action ought to be traverſed; as 9 *H.* 6. 7. Debt againſt one as Adminiſtrator of *J.* and declared that *J.* died Inteſtate, the Defendant pleaded that *J.* made his Will, and made him Executor, and becauſe the Plaintiff declar'd that *J.* died Inteſtate, it was held no Plea without a Traverſe of it. The ſame Law 7 *H.* 6. 13. Debt againſt one as Executor of *R.* The Defendant pleaded that *R.* died Inteſtate at ſuch a Place, and held no Plea; for if the Plaintiff maintains that *R.* made the Defendant Executor, and the other ſays that *R.* died Inteſtate, that will not make an Iſſue; and therefore the Defendant ought to traverſe, *viz.* that *R.* died Inteſtate, *abſque hoc*, that he made him Executor. And 4 *H.* 7. 13. *a.* this very Caſe in Queſtion is adjudged, that ſuch Plea in Bar is not good without a Traverſe, *viz.* to ſay, *abſque hoc*, that *Ridges* died Inteſtate. 3 *H.* 7. 14. agrees. And this *per totam Curiam* without Argument.

1 Brownl. 97, Debt as Adminiſtrator.

Traverſe of the dying Inteſtate. Declaration.

Theloall. 98, 6. Vide Salk. 297, 298. Lutw. 890. Cro. El. 102.

Andrew

Andrew *verſus* Hundred' de Lewkner in Com' Oxon'.

Cro. Jac. 187. Noy 125. Hue and Cry. Stat' Winton 13 E. 1. Stat. 27 El.

THE Plaintiff declar'd on the Statute of *Winton* 13 *E.* 1. and ſhewed that he had performed the Limitations and Ordinances in the Statute 27 *El.* and concluded *contra formam Statuti prædicti*, and the Iſſue being found for the Plaintiff, it was alledged in Arreſt of Judgment, that the Declaration was not good, becauſe he having declar'd on two Statutes, *viz.* the Statute 13 *E.* 1. and the Statute 27 *Eliz.* he ought to have concluded *contra formam Statutorum prædictorum*. But *non allocatur per totam Curiam*, becauſe the Action in this Caſe is given and grounded only on the Statute 13 *E.* 1. and the Statute 27 *Eliz.* is rather in Reſtraint and Hindrance of the Action than otherwiſe; for whereas before the Statute 27 *Eliz.* the Party might have had his Action generally to have charged the Hundred on any Robbery, now certain Circumſtances are to be performed by the Statute 27 *Eliz.* before the Party ſhall have his Action, and before he can charge the Hundred, *viz.* the taking of the Oath before a Juſtice, that he was robbed, and that he does not know the Felons, *&c.* So that the Statute 27 *Eliz.* was made in Eaſe of the Hundred, and not in Advantage of the Party robb'd; therefore it is ſufficient to conclude *contra formam Statuti*, which ſhall of Neceſſity have Reference to the Statute 13 *E.* 1. which gives the Suit: And ſeveral Precedents were ſhewn accordingly in 28 *Eliz.* & 35 *Eliz.* And, *per Curiam*, if the Plaintiff had concluded *contra formam Statutorum*, it had not been good, becauſe the Statute 27 *Eliz.* does not enable the Party to ſue.

Comb. 160, 161.

The Concluſion ſhould be contra formam Statuti, and not Statutorum.

Arundell *verſus* Tregono.

Action on the Caſe.

THE Plaintiff declar'd, that whereas he was of a good Reputation, *&c. free from Theft*, yet the Defendant at the general Seſſions of the Peace, *&c.* held at *Truro in Comitatu Cornubiæ 7 Jan.* 3. *coram Thoma' St. Aubyn & Johanne Arundel & Sociis ſuis tunc Juſticiariis*, *&c. malitioſe*, *&c. quandam billam Indictamenti* againſt the Plaintiff *Scribi fecit*, *continen'* that the Plaintiff amongſt others broke and enter'd the Houſe of *A.* and *ſtole half a Buſhel of Wheat*; and exhibited it to the ſaid Juſtices *ibid'*, who cauſed it to be openly read, and deliver'd to the Grand Jury, and afterwards the Defendant at the ſame Time affirmed the Matter in the ſaid Bill contained to be true, whereby the Plaintiff is damnified, *&c.* The Defendant pleaded an inſufficient Juſtification, on which they were at Iſſue, and it was found for the Plaintiff. And *Telverton* moved in Arreſt of Judgment; 1. Becauſe it does not appear that the Juſtices before whom the Indictment

Ante 105.

was preferr'd, were Juſtices of Oyer and Terminer, but only Juſtices of Peace, who could not arraign the Plaintiff and put him in any Jeopardy: Who was anſwer'd by the Court, that as this Caſe is; the Declaration is good enough, for the Plaintiff has laid it to be *ad generalem Seſſionem*, which has ſuch ſtrong Intendment to carry this Circumſtance, that it was before Juſtices, who had ſufficient Authority: And the rather, becauſe in this Action their Authority cannot come in Queſtion or Debate. Otherwiſe if it was on an Indictment, for there ſuch general Stile had not been good, but their Authority ought to appear in Certain, becauſe the Party ſhall be put to anſwer to it. Then *Yelverton* moved, that the Plaintiff has not ſhewn ſufficient Cauſe of Action; for the Defendant has done nothing but in a * Courſe of Juſtice to prefer an Indictment, and that is lawful; for if Men ſhould be puniſhed for preferring Indictments, it would be a great Hindrance of Juſtice: And, as 43 *E.* 3.—is, a Man ſhall never be puniſhed for bringing a falſe Action; and the rather here, becauſe *non conſtat* what was done on the Indictment, whether the Plaintiff was acquitted or arraigned upon it, or not: And if nothing was done upon the Indictment, the Plaintiff will clear himſelf too ſoon, *viz.* before the Fact tried, which will be inconvenient; *quod fuit conceſſum per totam Curiam, & nil capiat per Billam* enter'd.

Where the Authority of the Juſtices ought to be ſhewn, and where not.

* 4 Co. 14 b. 1 Ro. Rep. 61. Palm. 188, 189. Mo. 820.

Preferring an Indictment no Cauſe of Action till Trial had.

St. John *verſus* Commyn.

SAint *John* brought *Ejectt' firmæ* in the Common Pleas in *Ireland* on the Leaſe of *R. G.* againſt *Commyn*, and declared *de Caſtro, Villa & Terris de Kilbrough* in ſuch a County; and upon Iſſue pleaded, it was found for the Plaintiff, and he had Judgment there; upon which *Commyn* brought his Writ of Error in the King's Bench in *Ireland*, and aſſigned for Error the Want of an Original, to which *St. John* rejoined and pleaded, that ſuch a Day an Original Writ was deliver'd to ſuch one, *&c.* and concluded to the Country, and the Judgment was reverſed there for Want of an Original: Whereupon *St. John* brought a Writ of Error of the Judgment of Reverſal in the King's Bench here in *England*; and the Judgment given in the King's Bench in *Ireland* was reverſed here, becauſe the Matter was diſcontinued; for when the Plaintiff in the Writ of Error in *Ireland* aſſigned his Errors, and the Defendant there replied and concluded to the Country (where in Truth the Matter of his Plea ſhould be tried by the Record, *viz.* whether the original Writ was deliver'd or not, for that appears of Record) and then the Plaintiff in Error there did not reply or demur on the Defendant's Plea, the whole Matter was thereby diſcontinued; for there was no full Record of the Proceedings before the Juſtices of the King's Bench there, becauſe the Plaintiff

Error in Ireland.

Diſcontinuance of Action.

had not rejoined to the Defendant's Bar there. And now it was moved to have the Record remanded into *Ireland* with a Certificate of the Judges of their Reverſal here, to be made to the Juſtices of the King's Bench in *Ireland*, that he who firſt recover'd might have his Execution: For they pretended that by the Reverſal of the Judgment in the King's Bench there, the firſt Judgment in the Common Pleas there was affirmed; to which *Yelverton* anſwer'd, 1. That the Record ſhould not be remanded; for although 33 *E.* 3. *Error* 83. is, that out of *Ireland* no more ſhall be certified than the Tranſcript, and according to that is 34 *Aſſ.* yet the Law is not ſo at this Day; for the Writ of Error, which goes out of the Chancery here to the King's Bench there, commands the Record to be ſent; and the Return of the Juſtices there does likewiſe prove it, which is *in hæc Verba*, *Record' miſſum:* Alſo the Reaſon why at firſt the Tranſcript is ſaid to be ſent only, is for Fear it ſhould be deſtroyed by the Sea in the Carriage: But when ſuch Fear is over by the ſafe Arrival of the Record, and by the Entry of it in the Rolls here, then it ceaſes to be a Record in *Ireland*, and is a perfect Record here. *Quod fuit conceſſum per Curiam*; and Mr. *Man* the Secondary ſhewed Precedents in 9 *H.* 6. that a Record ſent out of *Ireland* remains here; and ſo of another Record in 32 *H.* 8. But if the Judgment had been reverſed on the Truth of the Matter, although the Judges here cannot award Execution, becauſe they have no Officer that is ſubject to their Command, yet they ſhall make a Mandate to the Chief Juſtice there, that he ſees Execution done; and that is the Courſe: *Quod fuit conceſſum.* Then *Yelverton* and Mr. *Stephens* moved to have a new Writ of Error here of the firſt Judgment in the Common Pleas there; for although, as 5 *E.* 2. *Error* 89. a Writ of Error cannot immediately be brought here of a Judgment in the Common Pleas there, but it ought to come here by Degrees, *viz.* firſt into the King's Bench there, and then into the King's Bench here, becauſe ſuch is the Uſage there, yet this Record being come by ſuch Degrees into the King's Bench here, it ſeems they may have, and the Court after great Debate granted that they ſhould have, a new Writ *quod coram nobis reſidet, de bene eſſe*; for the Reverſal here, as appears before, was upon a collateral Point, becauſe for Want of a Demurrer, or other Replication to the Defendant's Plea in the Writ of Error in *Ireland*, the whole Cauſe was diſcontinued; for this Court perceived the firſt Error, *viz.* Want of an Original, to be Cauſe ſufficient to reverſe the firſt Judgment in the Common Pleas there, as alſo for another apparent Error in the Declaration, *viz.* that the Action is brought *de Caſtro, Villa & terris in Kilkrough* * without expreſſing the Number and Certainty of Acres, which is inſufficient; for upon ſuch general

Cro. Jac. 534.

A Record ſent from Ireland remains here.

Cro. Car. 512.

F. N. B. 22. E.

* Cro. Car. 573. Mo. 422, 702. Ow. 18, 19. 1 Show. 338. 4 Mod. 97. Salk. 254. Comb. 198.

Demand no *Habere facias Poſſeſſionem* can be awarded and executed. *Quod Nota bene. Per Curiam.*

Hill. 5 JAC. B. R.

Cobb *verſus* Hunt.

COBB ſued a Prohibition in the Common Pleas againſt *Hunt*, Parſon of *D.* in *Kent*, and ſuggeſted a *Modus decimandi* as to Part of the Tithes demanded againſt him in the Spiritual Court, and as to the Reſidue ſuggeſted a Contract executed and performed between him and the Parſon in Satisfaction of the Reſidue; and becauſe he did not prove his Suggeſtion within ſix Months, *Hunt* the Parſon had a Conſultation and Coſts aſſeſſed by the Court to 50*s.* and Damages 50*s.* which by the Statute 2 *E.* 6. ſhall be doubled, but in Truth there was no Judgment given to recover them, *viz. ideo conſiderat' eſt quod recuperet*) was omitted; yet *Hunt* thinking that all was perfect, brought Debt in the Common Pleas for the Coſts, *&c.* and declar'd on the whole Matter *ſupra*, and that Damages were aſſeſſed, *ſuper quo tunc conſiderat' fuit quod recuperet*, *&c.* and that the Coſts were not paid, *per quod Actio accrevit*, *&c.* and thereupon he recover'd againſt *Cobb* by *non ſum informatus:* And thereupon *Cobb* brought Error *tam in Recordo & Proceſſu*, *&c.* of the Prohibition, as of the Debt for the Coſts; and aſſigned generally for Error, that the Judgment in the Common Pleas ſhould be for *Cobb* where it was for *Hunt*. But *Telverton* alledged two Errors in Special. 1. That there was no Judgment in the Prohibition to recover the Coſts, but only an Aſſeſſment of them, without more, which is not ſufficient; for the Aſſeſſment alone is but Matter of Office in the Court, but no Judgment of the Court that will bind. *Quod fuit conceſſum per totam Curiam.* 2. Error, that no Coſts at all ought to be aſſeſſed or adjudged in the Caſe *ſupra*; becauſe the Prohibition is grounded as well on a *Modus decimandi*, which wants Proof, as on a Contract between the Parties, which does not want Proof; and the Suggeſtion being intire, and Part of it wanting no Proof, they cannot give any Coſts at all; for that is only where the whole Matter in the Suggeſtion wants Proof; ſo the joining of the Contract with the Manner of Tithing privileges the whole as to Coſts: But they may grant a Conſultation as to that

1 Brownl. 98. Error on Debt on St. 2 E. 6. Coſts aſſeſſed and not adjudged. Prohibition. Where Coſts ſhall not be given for Want of Proof of the Suggeſtion. Conſultation. Aſh. 445.

Ante 102.

Cro. El. 54.

that Part of the Suggeſtion of the Manner of the Tithing, and *Stabit pro reſiduo. Quod fuit conceſſum.* So both the Judgments reverſt. *Quod Nota.*

Sir Robert Miller's *Caſe.*

Noy 128. Cro. El. 148. Daliſ. 84, 85. 3 Inſt. 166.

SIR *Robert Miller* was Defendant in a Bill in the *Star-Chamber*, and being examin'd on Interrogatories, the Plaintiff ſuppoſing that he had committed Perjury on his Examination procured him to be indicted on the Statute 5 *Eliz.* and *per totam Curiam*, he cannot be indicted on the Statute, becauſe he is not *Teſtis*, but remains Defendant yet, although it be upon Interrogatories, for if he confeſſes Matter againſt himſelf upon the Interrogatories he ſhall be condemned. *Quod Nota.*

Markam *verſus* Molineux.

1 Brownl. 99. Error on Debt. Where ſeveral Additions of the Defendant will make the Suit erroneous. Salk. 6.

MOlineux enter'd his Original in the Common Pleas againſt *Markam* in an Action of Debt on a Bond, by the Name of *J. Markam Alderman de D.* and all the mean Proceſs was continued againſt him by the Name of *Alderman*; *Markam* appear'd, and the Plaintiff declar'd againſt him by the Name of *Markam de D. Eſquire*, and the Parties were afterwards at Iſſue, and it was found for the Plaintiff, and Judgment given; and it was now reverſt for Error, becauſe *non conſtat* that this *Markam* is the ſame *Markam*, againſt whom the Original was enter'd, and the Proceſs continued, but rather that he is another Perſon by Reaſon of the ſeveral Additions of *Alderman*, and *Eſquire*. *Quod Nota.*

Fernely *verſus* Fawſett.

Cro. Jac. 203. Scire facias. Corpus cum Cauſa. Bail. Where Bail ſhall be diſcharged notwithſtanding a Procedendo.

FErnely brought an Action on *Aſſumpſit* againſt *Brome* in the Court of *Norwich*, and had *Fawſett*, and *J. S.* for his Bail there; a *Corpus cum Cauſa* iſſued 19 *Junii* 3. out of the King's Bench to appear before *Popham* Chief Juſtice 9 *Julii* next at *Norwich*; afterwards a *Procedendo* iſſued the ſame 19 *Junii*, notwithſtanding the firſt Writ, *Popham* 9 *Julii* took Bail at *Norwich*, and diſcharg'd the Sheriffs there of *Brome*; afterwards 20 *Julii* the *Procedendo* was deliver'd to the Sheriffs of *Norwich*: They proceeded, and Judgment was given there againſt *Brome*, who brought Error in the King's Bench, and the Judgment was affirmed, and after two *Nihils* againſt the Party the Plaintiff ſued out a *Scire facias* againſt *Fawſett* one of the Bail, who pleaded the Matter *ſupra*, and the Plaintiff replied and ſhewed the *Procedendo*, and ſo a Demurrer upon that; and it was adjudged that

Fawſet the Bail is diſcharg'd; for by the Taking of Bail by *Popham*, the Bail in the inferior Court at *Norwich* is abſolutely diſcharged; altho' the Bail taken by *Popham* was not filed in Court; for that could not be till Term: And altho' a *Procedendo* iſſued, which might have been a *Superſedeas* to the firſt *Habeas Corpus*, yet that not being deliver'd before 20 *Julii*, which was after the Bail taken by *Popham*, the Body of *Brome* was lawfully diſcharg'd by the Bail taken at *Norwich*; as if the Body comes by *Habeas Corpus*, and becauſe he cannot find good Bail, the Judge commits the Party to the Marſhal, that diſcharges the Bail. But they all agreed, that if the *Procedendo* had been deliver'd to the Sheriffs before 9 *Julii*, which was the Time in which *Popham* took the Bail, then it had been a *Superſedeas* to the firſt Writ, and then the Bail in the Court of *Norwich* ſhould ſtand.

Procedendo. Superſedeas. Ante 57. Vide Bro. Mainpriſe 96. Procedendo 13. Cro. Jac. 363.

Aſhe *verſus* Doughty.

THE Plaintiff ſhewed that he and the Defendant, and ſeveral other Tenants (Copyholders of the Manor of *D.* in *Norfolk*) were Plaintiffs in Chancery againſt *R. Wood* Lord of the Manor to have their Fines made certain by Decree, and that in Conſideration the Plaintiff at his Coſts and Labour ſhould procure a Decree there for the Enjoyment of their Copyholds at a Fine certain, the Defendant promiſed to pay the Plaintiff after ſuch Decree obtained 3 *l.* when he ſhould be requir'd. The Plaintiff ſhewed in Certain that he at his Coſts and Labour obtained the Decree accordingly, and *licet* the Plaintiff ſuch a Day and Place requeſted the Defendant to pay the 3 *l.* yet he denied it, *&c.* The Defendant pleaded *Non Aſſumpſit*, and it was found againſt him: And it was moved in Arreſt of Judgment; 1. That the Requeſt was not well laid, for the Requeſt, being Parcel of the Promiſe, ought to be alledged *in facto*, and not by this Word *licet*, which is but argumentative, and not directly; but it was reſolved, that *licet* is a Word affirmative, and being conjoined with Time and Place certain, is as well iſſuable as the Word *in facto*; as appears by *Buckley*'s Caſe *Com'*, and by ſeveral Precedents in Court. 2. It was moved, that there is no Notice laid to be given to the Defendant of the Decree in Chancery, and the 3 *l.* are to be given by the Defendant for and in Recompence of the Decree: But it was reſolved, in this Caſe no perſonal Notice is neceſſary to be given the Defendant of the Decree, becauſe it appears by the Declaration, that the Defendant was one of the Plaintiffs in Chancery on the Suit, in which the Decree was granted; ſo that he himſelf is Party to the Decree; and it is not like the Caſe of *Street* and *Wheeler* lately adjudged in this Court; for there

Aſſumpſit. Licet as good as in facto. Requeſt. Where Notice ſhall be given, and where not.

Plow. Com. 127. b.

Poſt. 168. denied. per tot' Cur'.

Wheeler promiſed *Street* upon the Marriage of *Wheeler*'s Son with *Street*'s Daughter, *ad Maritagium* to give 100 *l.* to the Son, the Parties intermarried, and *Wheeler* did not pay the 100 *l.* and in *Aſſumpſit* brought by *Street* againſt him, becauſe it did not appear by the Declaration, that *Wheeler* had Notice of the Marriage, and he being a Stranger to the Marriage could not pay 100 *l.* *at the Marriage* without having Notice of it, therefore there *Street* was barred: But in this Caſe the Defendant is Party to the firſt Bill, and therefore might have as good and full Notice of the Succeſs in the Suit, and Decree, as the Plaintiff had: Wherefore Judgment was given for the Plaintiff.

Lane *verſus* Alexander.

Cro. Jac. 202. 1 Brownl. 140. Ejectment. Traverſe. Day.

THE Plaintiff declared on a Leaſe made to him by *Mary Plantet* for three Years: The Defendant ſaid, that the Land, &c. is Copyhold of the Manor of *Fawkenham* in *Norfolk*, whereof Queen *Eliz.* was ſeiſed in Fee, and long before the Leſſor had any Thing, *viz.* ſuch a Day, &c. by *J. S.* her Steward, at a Court, &c. granted the Land to the Defendant by Copy in Fee according to the Cuſtom; and ſo juſtified the Entry on the Plaintiff. The Plaintiff replied and ſaid, that long before the Copy granted to the Defendant, *viz.* at a Court of the Manor held ſuch a Day, &c. *Anno* 43 *Eliz.* the Queen by Copy, &c. granted the Land to the Leſſor for Life according to the Cuſtom, by Virtue whereof ſhe entered and demiſed to the Plaintiff, &c. The Defendant by Way of Rejoinder maintained his Bar, *abſque hoc*, that the Queen at the Court of the Manor by *J. S.* her Steward ſuch a Day, &c. granted the Land to the Leſſor; and thereupon the Plaintiff demurred in Law generally. And *Yelverton* moved, that the Traverſe was good in ſuch ſpecial Manner, of the Day and of the Steward, &c. wherein the Difference is where the Act done may be indifferently intended to be on one Day or another, there the Day is not traverſable; as in Caſe of a Feoffment by Deed ſuch a Day, the Day of the Feoffment is not traverſable, for it paſſed by the Livery and not by the Deed; and the Livery is the Subſtance, and the Day but of Abundance, 10 *E.* 4. 6. The ſame Law of the Day in Treſpaſs, the Day is not traverſable; for although it be on another Day it is not material. But where a Man makes his Title by a ſpecial Kind of Conveyance, as in this Caſe the Plaintiff makes his Title by a Copy, there all that is contained in the Copy is material, and the Party cannot depart from it, for he cannot claim this Land by any other Copy than that which is pleaded; as 18 *H.* 6. 14. in an Action againſt *J. S.* for Taking his Servant, and declares that he by Deed retained his Servant the Monday in ſuch a Week; in ſuch Caſe it is a good Plea for the Defendant to ſay, that the

Servant

Servant was retain'd with him the Friday after, *abſque hoc*, that the Plaintiff retain'd him the Monday. The ſame Law, as it ſeems, of Letters Patent, the Day and Place are traverſable, becauſe they are the ſpecial Conveyance of the Party, from which he cannot depart. It ſeems likewiſe here, that although the Day in this Caſe be traverſed, yet on a general Demurrer the Statute 18 *Eliz.* of Demurrers aids it, for the Day here is not of Subſtance but of Form. But, *per totam Curiam*, the Day is not traverſable here, but whether the Queen granted an elder Copy to the Leſſor of the Plaintiff before the Copy granted to the Defendant, ſo the Traverſe ſhould be *abſque hoc, quod Domina Regina conceſſit modo & forma* to the Leſſor of the Plaintiff. The ſame Law in Caſe of Letters Patents before; the Traverſe ſhould be, *abſque hoc, quod Dominus Rex conceſſit modo & forma*, and the Day and Place does not come in the Traverſe. *Fenner* Juſtice contrary, for the Reaſon given before by *Yelverton*. And alſo (by him and the Chief Juſtice) it is aided by the Statute 18 *Eliz.* for it is but Form; for if the Jury find an elder Grant by the Queen to the Leſſor of the Plaintiff, although it be at another Court, it is ſufficient; and by Conſequence the Day is not material in Subſtance. *Quod Nota.* But *Williams* Juſtice contrary. And by all, but *Fenner*, adjudged, that the Traverſe is ill; for the Jury are thereby bound to find a Copy on ſuch a Day and by ſuch Steward, which ought not to be: And alſo it is Matter of Subſtance not aided by Statute 18 *Eliz.*

Where the Day and Place are traverſable, and where not. St. 18 El.

2 Mod. 184. Poſt. 141.

Darby *verſus* Boice.

IN *Ejectment* for an Houſe in *London*, on *non cul'* pleaded, the Jury found a Special Verdict, and the Caſe was ſuch: Tenant in Tail of ſeveral Meſſuages in *London* 7 *Jan.* 44 *Eliz.* bargained and ſold them to *J. S.* and deliver'd the Deed off of the Land: 8 *Jan.* the ſame Year Indentures of Covenants were made to have a Common Recovery ſuffer'd of thoſe Meſſuages, 9 *Jan.* afterwards a Writ of Right was ſued in *London* for thoſe Meſſuages returnable at a Day to come; and 10 *Jan.* the ſame Year, the Tenant in Tail made Livery of Seiſin to *J. S.* of one Houſe in the Name of all, where the other Meſſuages were in Leaſe for Years, and the Leſſees never attorned. The Queſtion was, if the Meſſuages paſſed by the Bargain and Sail, or by the Livery? And it was adjudged, that they paſſed by the Bargain and Sale. And a Difference was taken by *Yelverton* between ſeveral Conveyances, both executory, and where one is executed immediately; as in Sir *Rowland* * *Hayward*'s Caſe, where ſeveral Lands were given, granted, leaſed, bargained and ſold to ſeveral for Years, the

1 Brownl. 141. Ejectment.

* Poph. 95. 2 And. 202. 2 Co. 55. a.

Cuſtom of London that Land paſſes by Bargain and Sale, and not by Livery. Intent.

the Leſſee was at Election, either to take by the Bargain on the Statute 27 *H.* 8. or by Demiſe at the Common Law. But it is otherwiſe, where the one is executed at firſt; for there the other comes too late; as in this Caſe, by the very Delivery of the Bargain and Sale the Land it ſelf paſſed by the Cuſtom of *London* without Enrolment (for, *Nota*, the Cuſtom was found in the Verdict) and ſo much is expreſſed by the Statute of Enrolments, which excepts *London*; then being executed, and the Conveyance perfect by the Delivery of the Deed, without any Circumſtance, the Livery of Seiſin comes too late; for it is made to him who has the Inheritance of the Meſſuage at the Time; and Poſſeſſion executed hinders Poſſeſſion executory. As if a Bargain be of Land, and before Enrolment the Bargainee takes a Feoffment, that hinders the Enrolment, becauſe the Taking of the Livery has deſtroyed the Uſe which paſſed by the Bargain. *Quod fuit conceſſum.* Another Reaſon was given, becauſe it appears that the Intent of the Parties was to have the Land paſs by the Bargain, becauſe it was to make a perfect Tenant to the *Præcipe*, as appears by the Acts ſubſequent, as the Indentures of Covenants, the Bringing of the Writ of Right, *&c.* all which would be fruſtrated, if the Livery of Seiſin ſhould be effectual: And when the Act is indifferent, it ſhall be taken neareſt to the Intent of the Parties; as if a Man has a Manor, to which an Advowſon is appendant, and makes a Feoffment by Deed of the Manor *cum pertin'*, and delivers the Deed, but does not make Livery of Seiſin; although the Deed *per ſe* is ſufficient to paſs the Advowſon; yet, becauſe the Party did not intend to paſs it in Groſs, but as appendant, if the Manor does not paſs, the Advowſon alone does not paſs; as it was agreed 14 *Eliz.* in * *Andrewe*'s Caſe. *Quod Nota. Per totam Curiam.* And Judgment given accordingly, that the Defendant, who claimed under the Bargain, ſhould enjoy the Land.

* Dy. 311. a. b. 1 And. 17. Mo. 105. Bendl. 201.

Samford *verſus* Cutcliffe.

Covenant. Concord pleaded.

COvenant brought by the Heir in Reverſion againſt the Executor of Tenant for Life for a Breach of Covenant in the Teſtator in not repairing the Houſe demiſed; the Defendant pleaded, that the Teſtator, Tenant for Life, died 19 *Martii*, and that 22 *Martii concordat' & agreat' fuit inter* the Plaintiff and Defendant, that the Defendant ſhould quietly depart and leave the Poſſeſſion to the Plaintiff, and *in Conſiderat' inde*, the Plaintiff agreed to diſcharge him from the Breach *in non reparando.* And ſhewed that 25 *Martii* he quietly departed and left the Houſe to the Plaintiff; and ſhewed an Execution of the Concord, as he ſuppoſed, and demanded Judgment *ſi Actio:* Upon which the Plaintiff demurred in Law. And it was adjudged for the Plaintiff; for, *per Fenner*, the Concord is void, for there is not any Recompence, nor *quid pro*

quo for the Plaintiff; for the Executor has not any Intereſt in the Houſe after the Death of the Tenant for Life, but only a Licence in Law, to enter and take away the Goods, *&c.* then the Accord, that he ſhall leave the Houſe, is to no Purpoſe, becauſe he has no Intereſt in it. And, by *Yelverton* and *Crook*, the Plea is not good; becauſe the Time is incertain on this Agreement, when he ſhall depart, and altho' the Defendant ſhews that he really departed within five Days after, yet that will not aid the firſt Incertainty; for the Concord is the Foundation of the Whole, which ought to be certain, when it ſhall be performed; therefore, by them, the Concord ought to have contained a certain Time, in which the Defendant ſhould depart, if he would take Advantage of it. And, by *Williams* Juſtice, it is not a good Concord as it is pleaded; for the Time being indefinite, when the Defendant ſhould depart, he ought to ſhew a preſent Execution of it, *viz.* that he inſtantly departed: As if a Man comes into a Shop to buy, he ought inſtantly to pay, otherwiſe it is no Contract executed. But all three, *præter Fenner*, agreed, that if the Defendant's Plea in the Time of the Departure from the Houſe had been certain, and executed according to the certain Agreement, it had been good; becauſe altho' the Action is grounded on the Deed, yet it is only to recover Damages. And ſo agrees with * *Blake*'s Caſe, *6 Co.* 43. *b.*

* Cro. Jac. 99. Noy 110.

Paſch. 6 JAC. B. R.

Ket *Plaintiff as Adminiſtrator of* J. S. *verſus* Life.

IN Trover, after Verdict, and before the Day in Bank, the Defendant pleaded, that the Plaintiff, who brought the Action as Adminiſtrator of *J. S.* being cited in the Spiritual Court, had *per debitam Juris formam*, the Letters revoked, and Adminiſtration committed to another. And, *per Curiam*, no Plea; for it is a Matter only wherein the Defendant ſhall be aided by *Audita Querela*, on the Letters of Adminiſtration, and not by Plea; no more than in the Caſe of a Releaſe, *&c.* 21 *H.* 7.

Trover. Audita Querela. Letters of Adminiſtration revok'd. Vide ſupra 83. 2 Ro. Rep. 467.

Bury *verſus* Wright.

Words. Palm. 68.

BEAR *Witneſs, Miſtreſs, that he hath ſtolen my Hair-cloth:* And *per Cur'*, *Nil capiat per Billam*; for it is no direct Affirmation to charge him with the *Stealing* of it, no more than if he ſhould ſay, *Miſtreſs, you will bear Witneſs that he hath ſtole my Horſe*, for thereby the Party who ſpeaks does not ſlander the other, but leaves it to the Teſtimony of others for the Proof of it; as if he ſhould ſay, J. S. *will prove you ſtole my Horſe*; theſe Words will not maintain an Action. *Quod Nota.*

Strickland *verſus* Thorpe.

1 Brownl. 211. Cro. Jac. 207. Error in Treſpaſs. Judgment in Treſpaſs after a Pardon. 16, 17 Car. 2. c. 8.

THorpe brought Treſpaſs againſt *Strickland*, *quare Clauſum fregit*, &c. 20 *Junii Anno* 3. with a Continuance till 6 *Novembr'* after; upon *Non cul'* a Verdict was found for the Plaintiff, and Judgment given: But it was enter'd, *Nihil de Fine quia pardonatur*. And upon Error, he aſſigned, that the Judgment ought to be *Capiatur*; becauſe by Reaſon of the King's Pardon by Parliament *Anno* 3. which pardons all Offences before 25 *Septembr'* preceding, he alledg'd, that but Part of the Treſpaſs was pardon'd, *viz.* from 20 *Junii* to 25 *Septembr'* following; but that the Treſpaſs from 25 *Septembr'* to 6 *Novembr'* is not pardon'd; therefore as to that there ought to be a *Capiatur*. But, *per Curiam*, the Judgment is well enter'd, for the firſt Entry in Treſpaſs being only *Vi & Armis*, that being pardon'd, all that depends upon it is pardon'd, for the firſt Entry only makes the Treſpaſs. It appears likewiſe by the Declaration, that the Continuance of the Treſpaſs is not laid in the Entry, but only *quoad depaſturat' & Conſumptionem herbæ*, which is added only to increaſe Damages to the Party; but not for the King's Fine.

5 Co. 49. a. b.

Oliver *verſus* Collins.

1 Brownl. 100. Debt on 2 E. 6.

THE Plaintiff brought Debt on the Statute for not *ſetting forth* of Tithes, and ſhewed that he is Parſon of the Pariſh Church of *parva Lavar in Com' Eſſex*, and that the Defendant had ſo many Acres *infra Paroch' de parva Lavar* ſown with Wheat, whereof the tenth ſever'd from the nine Parts came to 28 *l.* And ſhewed that the Defendant *apud parvam Lavar prædict'* took and carried away the Wheat, not ſetting out the

Tithes contrary to the Statute, whereby he forfeited 60*l.* which the Plaintiff demanded treble Value, *&c.* to his Damage 100*l.* and on *Nil debet* it was found for the Plaintiff, and alledg'd in Arreſt of Judgment, 1. That the Statute was miſrecited; for where the Plaintiff declares, *quod cum* 4 *Novembr'* 2 *E.* 6. it was enacted, *&c.* it was ſaid, there is no ſuch Statute, for the Parliament began 1 *E.* 6. and continued *per Prorogationem* till 4 *Novembr'* 2 *E.* 6. So the Plaintiff is miſtaken in it. *Sed non allocatur*; for 1000 Precedents are contrary: And in Reſpect of the continual Uſe to lay the Statute in this Form as the Plaintiff has declar'd, the Court ſaid, they would not alter it, for that would be to alter all the Judgments that were ever given in this Court. 2. It was objected, that the Matter was miſtried, and there ought to be a new Trial, becauſe the *Venire facias* was *de parva Lavar*, where by their Pretence it ought to be from the Pariſh *de parva Lavar*: To which *Yelverton* anſwer'd, that the Trial was good, for by this Action no Tithes are demanded nor recover'd, but the Defendant puniſhed only for the Contempt againſt the Statute in *not ſetting forth his Tithe*; and this Wrong, which the Plaintiff complains of, is laid only in the Town of *parva Lavar*, and not in the Pariſh; for all the Places in the Declaration, where the Pariſh is named, are but Conveyance to the Action, and not of the Subſtance of it; becauſe that only is, where the Tort and Grievance to the Plaintiff ariſes, which is only *in parva Lavar*. *Quod fuit conceſſum per Curiam*, upon great Debate at ſeveral Days: And Judgment was given for the Plaintiff. The like Judgment between *Barnard* and *Coſterdam* in an Action on the ſame Statute, for the laſt Point of the Venue: *Quod Nota* well adjudged in this Point: But in the Caſe of *Coſterdam*, which concerned the Earl of *Klenrichard* (with whom *Yelverton* was Counſel) it was reſolved, that the Iſſue being on the Cuſtom of Tithing, which is found againſt the Defendant, he ſhall pay the Value expreſt by the Plaintiff in his Declaration: Becauſe by the collateral Matter pleaded in Bar the Declaration is confeſſed in the Whole.

Co. Entr. 161. a. 1 Show. 337. Dy. 171. a.

Precedents. 2 Mod. 241. Vide Lutw. 140.

Where the Venue ſhall be from the Vill, and where from the Pariſh. Ante 63.

Collateral Matter pleaded in Bar confeſſes the Declaration.

Trin. 6 Jac. B. R.

Pickas *verſus* Guile.

Aſſumpſit. What ſhall be a good Conſideration.

THE Plaintiff declar'd, that the Defendant in Conſideration the Plaintiff *adtunc & ibidem* at the Defendant's Requeſt *deliberavit* to the Defendant four broad Cloths, and two Packs and a half of Wool of the Plaintiff's to the Value 50*l.* promiſed the ſame broad Cloths and Packs of Wool to the Plaintiff upon Requeſt to redeliver: The Plaintiff ſaid *in facto* that he did deliver them to the Defendant; yet the Defendant had not, altho' he was ſuch a Day, *&c.* requeſted, redeliver'd them: And on *Non Aſſumpſit* pleaded, it was found for the Plaintiff: And *Yelverton* ſhewed in Arreſt of Judgment, that there is no Conſideration laid in the Declaration to draw a Promiſe from the Defendant, for the Defendant had no Benefit by the Cloths, *&c.* but *nudam cuſtod'*, which is rather a Charge than a Benefit; for the Defendant could not uſe them; and therefore it is to be reſembled to 9 *E.* 4. where Delivery of the Evidences to the true Owner is no Conſideration, for the Owner ought to have them of common Right. *Quod fuit conceſſum per totam Curiam.* And *Nil capiat per Billam* enter'd.

Ante 4, 50. Cro. El. 883.

Croft *verſus* Walbanke.

Aſſumpſit. Adminiſtrator during Minority, where it ought to be alledged. 5 Co. 29. a. Hob. 251.

AN Action is brought againſt the Defendant as Adminiſtrator of *J. S.* during the Minority of *D.* and Iſſue join'd, and found for the Plaintiff; and alledged in Arreſt of Judgment, that the Declaration is not good, becauſe *non conſtat*, whether *D.* be at the Time of the Action under 17 Years, at which Time the Authority is determin'd. But it was adjudged, that it need not be ſhewn: 1. Becauſe the Plaintiff is a Stranger to the Power given the Defendant, and cannot know of what Age *D.* the Infant is. 2. Becauſe the Defendant by joining Iſſue has admitted that his Power continues: For otherwiſe the Exception taken by the Defendant ſhould be pleaded by the Defendant in Diſcharge of himſelf, for it lies properly in his Notice, and it is for his Benefit to alledge it.

Burges *and* Dixon *verſus* Aſhton.

Prohibition.

THE Defendant, Vicar of *A.* libell'd ſeverally againſt the Plaintiffs in the Spiritual Court for ſmall Tithes, and alſo for Herbage, Wood, Milk; the Plaintiffs joined in Prohibition, and ſurmiſed for all (but

for ſmall Tithes) a Cuſtom of Tithing. And, *per totam Curiam*, the Prohibition is not well brought in both their Names; for the Suit below being upon ſeveral Libels, they cannot join in a Prohibition, for the tortious Vexation of the one does not extend to the other, no more than two can join in an Action for ſlanderous Words; as appears, *Dyer — Quod Nota.* Yet the Court did not grant any Conſultation, becauſe the Matter being on a Cuſtom triable by the Common Law, they of the Spiritual Court were juſtly prohibited, though not in ſuch due Form as they ought to be; and therefore they awarded that the Plaintiffs ſhould make ſeveral Declarations, and ſo proceed as upon two Prohibitions.

Several Declarations on one Prohibition. Noy 131. Dy. 19. a. Cro. Jac. 647. Palm. 313. F. N. B. 192. K.

Kenrick *verſus* Pargiter.

THE Defendant juſtified the Taking of Cattle Damage-feaſant, on Surmiſe of a Cuſtom, that the Plaintiff being Lord, and enjoying the Place where, *&c.* ſolely to himſelf till *Lammas-day*, after that Day it ſhould be Common for the Tenants, and the Plaintiff ſhould put in but three Horſes, *&c.* and becauſe the Plaintiff after *Lammas-day* put in more Cattle than three Horſes, *&c.* he took them Damage-feaſant, as he lawfully might. And they were at Iſſue on the Cuſtom, and it was found againſt the Plaintiff. And *Yelverton* ſhewed in Arreſt of Judgment, that the Defendant could not take the Cattle Damage-feaſant, for it appears the Defendant is but a Commoner, and it likewiſe appears that the Place where, *&c.* is the Plaintiff's Soil, and his Cattle cannot be taken Damage-feaſant in his own Soil; no more than the Tenant can have Treſpaſs againſt the Lord *Vi & Armis*, in Reſpect of his Seigniory, as *Lit. & 5 H. 7.* are: But, *per Curiam*, the Matter of the Taking of the Cattle Damage-feaſant will not come in Queſtion, becauſe nothing is in Iſſue but the Cuſtom, which is tried againſt the Plaintiff. But if the Plaintiff would have taken Advantage of it, he ought to have demurred; and although he had thereby confeſſed the Cuſtom, yet whether a Commoner might take the Lord's Cattle Damage-feaſant had then properly come in Debate: And, by *Fenner*, *Williams* and *Crooke*, ſuch taking Damage-feaſant is good; for by the Cuſtom, the Lord is excluded from having but his Stint, and the Lord may well be ſtinted, and the whole Veſture and Benefit of the Soil is to the Commoners, and they have no Remedy to preſerve their Intereſt in Feeding their Cattle but by taking the Lord's Cattle that offend: And the Cuſtom here has made the Lord as mere a Stranger as any other,

1 Brownl. 187. Cro. Jac. 208. Noy 130. Replevin. The Lord may be ſtinted in his own Soil. Where a Commoner may take the Lord's Cattle Damage-feaſant.

Lit. Sect. 484.

Con. 2 Ro. 267.

* 9 Co. 112. b. and the Cattle of a * Stranger clearly a Commoner may take Damage-feaſant, 15 *H.* 7, &c. the Chief Juſtice and *Yelverton* doubted; and that as the Tenants by Cuſtom have gained a ſole Feeding in the Lord's Land, ſo they ought to alledge Cuſtom and Uſage alſo to diſtrain the Lord's Cattle, and that had been good. *Quod Nota.*

Ventres *verſus* Carter.

Noy 129. Error on Covenant. Inquiry. Judgments. Videtur, conceſſum, liquet, are not Words of Judgment, but conſideratum.

AN Action of Covenant brought in a baſe Court, and Judgment given there by *Nihil dicit*, and in Error brought thereon, they aſſigned two Errors; 1. That on the Writ of Inquiry of Damages, the Jury not appearing, they awarded an *Habeas Corpora*, and upon that the Damages were found. And adjudged Error, for the Law does not give any *Habeas Corpora* in ſuch Caſe, but only where the principal Matter comes in Debate and in Iſſue; for if the Jury does not appear at the Day prefixt on the Writ of Inquiry of Damages, there ſhall iſſue an *Alias* and *Plures* only, &c. but not an *Habeas Corp'*. The ſecond Error was, that the Judgment was *Ideo videtur Cur'*. And that was likewiſe adjudg'd Error; for it ought to be *Ideo conſiderat'*, &c. for that alone is the Word of Effect, which imports the Judgment to be on great Advice: But *videtur*, or *liquet*, or † *conceſſum* is not good. And upon this Word *conceſſum* another Judgment given in *Norwich* was this Term reverſed. But *Nota*, in Fact the Words in this laſt Caſe were, *Ideo inconceſſum fuit*, where it was ſaid by *Davies* of *Lincolns-Inn*, that the Word *in* was void, and the Judgment good by the Word *conceſſum*. But, *per totam Curiam*, if *conceſſum* had been a proper Word, *inconceſſum* had made the Judgment erroneous; for that is *Quaſi non conceſſum*. *Quod Nota.*

† Noy 77. Latch 83, 177, 188. Poph. 203. Cro. Car. 442. Cro. Jac. 386. 3 Bulſt. 92, &c. 16, 17 Car. 2. c. 8.

Smith *verſus* Smith.

1 Brownl. 101. Executor ought to be named, tho' Adminiſtration is committed during Minority.

BISSE made *Katherine* his Wife, and *John* his Son (being but of the Age of one Year) Executors; *K.* only proved the Will, and married the Plaintiff, and they brought Debt as Executor againſt the Defendant omitting *John* the Son: The Defendant pleaded in Abatement of the Bill, that *John* was made Executor with *Katherine*, and is yet in full Life, not named, &c. The Plaintiffs replied, that *John* was but of the Age of one Year, and that *Katherine* proved the Will, and had Adminiſtration committed *Durante minore ætate*, and that *John* is, and the Day of the Writ purchaſed was, under ſeventeen Years. And thereupon *Yelverton* demurred; and it was adjudged for the Defendant, *Quod Billa caſſetur*, for both really are Executors, and ought

to be * named in the Action: And although by the Adminiſtration committed *Durante minore ætate* Katherine had the full Power; yet the Infant ought to be named, for that affirms him to be Executor. * Vide 1 Lev. 181. Raym. 198. 2 Lev. 240.

Reps *verſus* Bonham.

THE Caſe was, a Feoffment was made of three Acres to *A.* and *B.* to the Uſe of *Richard Reps* and *Mary* his Wife for their Lives, and afterwards to the firſt, ſecond, and third Son of the Body of *Mary*, and afterwards to the Heirs of the Body of *Mary* by *Richard* to be begotten: They had no Son, but a Daughter now Plaintiff; *Richard* levied a Fine of the Land, *Mary* died, the Plaintiff enter'd, and the Defendant pleaded the Fine of *Richard*. And adjudged that the Plaintiff is not barred by the Fine; for *Richard* had it but for Life, and the Eſtate-tail was in the Wife only; by all the five Juſtices; for they ſaid, that the Husband is named only to declare what Heir of the Body of the Wife ſhall inherit, not every Heir, but ſuch Heir only, as *Richard* her preſent Husband ſhall beget; and if the Limitation had been to the Heirs of the Body of the Wife by the Husband, and by *J. S.* begotten, the Inheritance would be only in the Wife; but yet it is by the later Words enlarged; for if ſhe has no Iſſue by the Husband, if ſhe afterwards marries *J. S.* the Heir ſhe ſhall have by him ſhall inherit. And they all conceived, that the Inheritance is only in the Wife, becauſe the Word [Heir] which makes the Eſtate of Inheritance, is annexed only to the Body of the Wife: But if it had been to the Heirs which the Husband ſhould beget on the Body of the Wife, there it is a Tail in both. 19 *H.* 6. 75. *a.* The ſame Law, if it had been to the Heirs of the Body of the Wife, and of the Body of the Husband begotten, for the Word [Heir] is indifferently limited. *Quære*, if it had been to the Heirs *ſuper Corpus* of the Wife by the Husband begotten; for *Yelverton* urged that Caſe, and they ſeemed to agree, that it is a Tail in both: Then there is a ſmall Difference between *ſuper Corpus* and *de Corpore*: *Vide* alſo *Lit.* 82. *b.* and compare the Caſe there with this Caſe; and, as *Yelverton* thought, *Lit.* is againſt this preſent Opinion: Yet adjudged *ut ſupra* by all without any Scruple.

1 Brownl. 211. Treſpaſs.

What ſhall be an Eſtate-tail, and in whom.

1 Inſt. 26. a.

Edmonds *verſus* Booth.

BOoth, Parſon of *B.* in *Suffolk*, leaſed all his Tithes of 200 Acres of Land, whereof *Rabbit* was then ſeiſed, to him and his Wife, and the Heirs of *Rabbit*, to the ſaid *Rabbit* by Indenture, *Habend'* from *Mich'* next to him and his Heirs during the Life of *Booth*: *Rabbit* died, and *E* his Wife had theſe 200 Acres for her Jointure; ſhe married

Prohibition.

Fowler

Fowler, who demiſed the 200 Acres to *Edmonds* the Plaintiff, and the Heir of *Rabbit* granted alſo to the Plaintiff the Tithes of theſe Acres at Will, and being ſued by *Booth* for Tithes in the Spiritual Court againſt his own Leaſe, he brought a Prohibition on the Matter aforeſaid; and upon Demurrer it was adjudged for the Defendant, and that he ſhould have a Conſultation: Wherein the Point was, whether the Leaſe was void, becauſe it was to commence at a Day to come, and it was for Life? And *Fleming* Chief Juſtice, *Fenner* and *Williams* conceived, that it is void; for although Tithes are Spiritual, and are not extinct in the Land, yet in the Conveyance of them, they ought to follow the Nature of the Land, Rent or other Hereditaments, which being *in eſſe*, as 8 *H.* 7. 3. is, cannot be granted to commence at a Day to come, if an Eſtate for Life be limited; and as 21 *H.* 6. 46. Tithes are always *in eſſe*. But by *Yelverton* and *Crooke* contrary; for here the Leaſe is made but of thoſe Tithes, which ſhould be due for the Land of which *Rabbit* was then Owner, ſo that it does not enure by Way of Intereſt, but by Way of Diſcharge and Retainer, for *Rabbit* cannot have Tithes of his own Land; and then a Diſcharge may well commence at a Day to come, as to be diſcharged from Suit to a Mill, or ſuch like: But by the Chief Juſtice and *Williams*, as the Leaſe is pleaded, it cannot be taken to enure by Way of Diſcharge; for the Plaintiff pleads, by Force whereof *Rabbit* was ſeiſed of the Tithes to him and his Heirs for the Life of *Booth*: So that the Plaintiff having pleaded it by Way of Intereſt, they as Judges cannot intend or conſtrue it otherwiſe. And, by *Fleming* Chief Juſtice, this Leaſe cannot enure by Way of Diſcharge, for there are no ſuch Words in the Leaſe; which proves it was not intended by the Parties to operate but by Way of Intereſt, and that was more beneficial for the Leſſee; for if it ſhould enure by Way of Diſcharge only, it is ſuch a Privilege annexed to the Land, as cannot be granted over; but if by Way of Intereſt, it may well be granted over. And ſo much appears alſo in this Caſe; for the Wife of *Rabbit* is Owner of the Land, but the Son takes upon him to be Owner of the Tithes, which cannot be, if the firſt Leaſe had enur'd by Way of Diſcharge: And *Yelverton* inclined much thereto, that the Pleading of the Leaſe, and of the Seiſin by Force of the Leaſe, was not good. *Quod Nota.*

Tithes cannot be granted for Life to commence at a future Day.

Where a Grant ſhall enure by Way of Intereſt, and where by Way of Diſcharge.

4

Gomerſal

Gomerſal *verſus* Aske *Adminiſtratrix of her Husband.*

THE Plaintiff brought Debt againſt the Defendant as Adminiſtratrix of her Husband on two former Judgments given in two Actions of Debt againſt the Inteſtate, and ſhewed the Recoveries: The Defendant pleaded, that the Inteſtate enter'd into a Recogniſance *Anno* 35 *Eliz.* in Chancery to Sir *Hugh Bethel*, and ſhewed that after the Judgments obtained by the Plaintiff, Sir *Hugh* had Judgment againſt the Inteſtate on the Recogniſance, and that ſhe had not Aſſets to ſatisfy the Plaintiff of the Goods of the Inteſtate *ultra bona onerabilia* to the Judgment on the Recogniſance: And thereupon the Plaintiff demurred. And, by *Fenner* and *Williams* Juſtices, the Plea in Bar is good; for although the Plaintiff's Judgments in his Actions are prior to Sir *Hugh Bethel's* Judgment, yet the Plaintiff by this Action does not demand Execution of the firſt Judgments, but only demands his Debt recorded; for this Action is an Original, and in the ſame Courſe, as if he had demanded the Debt on the firſt Bonds. So that, foraſmuch as the Plaintiff has not ſued his *Scire facias* to execute the firſt Judgments, but has brought his new Original, the Plea is as well allowable here, as if it had been upon the Bonds themſelves. *Fleming* Chief Juſtice and *Yelverton* contrary: For this Plea had not been good by the Inteſtate himſelf, and the Executor or Adminiſtrator does but repreſent his Perſon; and alſo this Plea is not good, but in Excuſe of a *Devaſtavit*; and they conceived that Payment in *Pais* to the Plaintiff had been a good Bar againſt Sir *Hugh*, becauſe it trenched to the Satisfaction of a Judgment on Record, which is equal in Nature with Sir *Hugh's* Judgment. And they were likewiſe of Opinion, that this Action is in Nature of a *Scire facias*, for he demands the Debt in another Courſe than it was originally; for the Debt which was on a Matter of Writing, is now by the Judgment become a Debt of Record, and of ſo high a Nature, that, pending the Judgment in its Force, he * cannot reſort to have an Action on the Bond: *Quod vide* adjudg'd in *Higgen's* Caſe, 6 *Co.* 44. *b.* *Crooke* Juſtice doubted: Therefore, becauſe the Defendant was dead, the Court would not reſolve.

1 Brownl. 101. Debt.

Where a former Judgment ſhall be a Bar.

* Cro. El. 608. Mo. 545. Ow. 37. contra.

Bettiſworth *verſus* Campion.

THE Plaintiff, as Executor of *J.* his Father, declared againſt the Defendant, that whereas there was a Communication and Agreement, that the Defendant ſhould have all the Iron made in ſuch a Furnace, paying *ſecundum Ratam* of 40 *s. per* Ton, and that the Teſtator *aſſumpſiſſet* to the Defendant, that he ſhould have

Aſſumpſit.

M 2 all

all the Iron made in that Furnace, *in Conſideratione inde* the Defendant promiſed the Teſtator to pay *ſecundum Ratam* aforeſaid; and ſhewed that the Defendant had had ſo many Tons and ſo many Pounds of Iron, which amounted, according to the Rate aforeſaid, to ſo much Money; and confeſſed Satisfaction of Part, and 119*l.* to be arrear and not paid to the Teſtator or the Plaintiff. The Defendant pleaded Payment, and Iſſue thereon, which was found againſt the Defendant, to the Damage of 200*l.* And it was ſhewn in Arreſt of Judgment, that the Plaintiff has not ſhewn the Conſideration was performed on his Part, for the Defendant was induced to make the Promiſe in Hopes and in Conſideration that he ſhould have all the Iron made there, and the Plaintiff has not averr'd, that the Iron deliver'd was all; as 13 *H.* 7. & 6 *E.* 4. A Man is bound to enfeoff *J. S.* of all the Land deſcended from his Father; it is no Plea, that he has enfeoffed *J. S.* of 100 Acres deſcended, without an Averment that thoſe 100 Acres are all that deſcended. To which it was anſwer'd by the Court, that the Conſideration *ex parte Querentis* was not, that Defendant ſhould have all the Iron; but that the Teſtator promiſed that the Defendant ſhould have all the Iron; ſo that the Conſideration on each Part was the mutual Promiſe the one to the other; and altho' the Teſtator is now dead, whereby the Defendant cannot have an Action againſt the Plaintiff as Executor on the Teſtator's Breach, yet the Promiſe *ex Parte* of the Defendant continues. 2. It was objected, that the Defendant promiſed to pay for every Ton 40*s.* and the Plaintiff demands for Pounds and Sows of Iron, which is not within the Promiſe. To which it was anſwer'd by the Court, that the Promiſe was to pay *ſecundum Ratam*, and a Ton amounting to 40*s.* the Defendant muſt pay for Pounds and Sows according to the Rate, computing how many Pounds or Sows will make a Ton; and Judgment was given accordingly for the Plaintiff.

Cro. El. 543. Hob. 88. Promiſe againſt Promiſe is a good Conſideration.

Mich. 6 JAC. B. R.

Scadding's *Caſe*.

Noy 131. Habeas Corpus.

AN *Habeas Corpus* iſſued out of the King's Bench to have the Body of one *Scadding* committed to the Marſhalſea by Sir *Thomas Crompton* Judge of the Admiralty: And upon the Return of it, the Cauſe appeared to be, for aiding and abetting one *Exon*, who was

indicted for Piracy, to eſcape out of Priſon, and aſſiſting him with Ropes and other Engines to break the Priſon and eſcape. And, *per totam Curiam*, altho' the whole Fact committed by *Scadding* be upon the Land, and within the Body of the County; yet, becauſe it depends on the Piracy committed by *Eaton*, with which the Temporal Judges have nothing to do, but it is delegated by Parliament to the Admiral to try, in Nature of a Felony, for this Reaſon they remanded the Priſoner; for it is *quaſi* an Acceſſory to the firſt Piracy, and determinable by the Admiral: As if a Sentence be given in the Court of Admiralty for a marine Cauſe, the Execution of this Sentence, either for the Body or for the Goods of the Party condemned, extends throughout the whole Realm to the Court of Admiralty, becauſe it depends on the principal and firſt Sentence. *Quod vide* 19 *H.* 6. *Quod Nota. Per Curiam.*

Admiralty, and its juriſdiction. Cro. El. 685. Cro. Jac. 269.

Appleton *verſus* Doily.

APpleton, as Executor of one *Appleton*, brought Debt againſt *Doily* for Arrears of ſeveral Rents, as well Copyhold Rents, as Free Rents, belonging to the Manor of *D.* whereof the Teſtator was ſeiſed and died ſeiſed, and the Rents not paid to him in his Life-time, whereby they belong'd to the Plaintiff as Executor; and the Defendant, altho' requir'd, had not paid, *contra formam Statuti* 32 *H.* 8. and, *per Curiam*; 1. The Action does not lie for the Copy Rents, for the Statute 32 *H.* 8. does not extend to them, but only to Rents out of free Land. 2. It does not lie for the free Rents, becauſe the Plaintiff has not declar'd, that the Defendant attorned to the Teſtator in his Life-time; and altho' in Pleading, it is good to alledge a Feoffment of a Manor, without pleading any Livery, or any Attornment of the Tenants, yet when the Rent of any Freeholder comes in Debate, both the Owner of the Manor, and his Executor who demands it ought to convey a Privity, between the Tenant and the Lord, which muſt be by Attornment, for the Rents and Services do not veſt without Attornment. *Quod Nota.*

1 Brownl. 102. Debt on Stat. 32 H. 8. Arrears of Rent. Feoffment. Livery. Attornment. 1 Co. 82. b. Cro. El. 401.

Peirſon *verſus* Pounteys.

THE Plaintiff, as Executor of *Nicholas Peirſon* brought Debt againſt *John Pounteys* of *London* Merchant, *quod reddat ei* 303 *l.* 12 *s. pro eo quod cum* the Defendant 8 *Octobr'* 1598. at *London*, *&c. per Billam ſuam*, *&c. cognovit ſe debere* to the Teſtator 1518 Florence Poliſh, which *tunc* amounted to 303 *l.* 12 *s.* to be paid to the Teſtator *ad Solutionem*

1 Brownl. 102. Debt.

Candlemas a Payment uſed among Merchants 20 Febr. Averment. Of what Things Judges will take Notice. Florence Poliſh demanded by the Name of Engliſh Money.

Solutionem Feſti Purificationis, &c. vocat' Candlemas-day next following; and to that Payment bound himſelf by the ſame Bill: And the Plaintiff *in facto dicit, quod præd' Solutiones dicti Feſti Purificationis, &c.* next after the making of the Bill, *fuerunt ſecundum Uſum Mercator' 20 Febr'* 1598. yet the Defendant had not paid, *&c.* the 1518 Florence Poliſh, or the 303 *l.* 12 *s.* to the Teſtator, nor to the Plaintiff, *&c.* To this the Defendant pleaded *Non eſt factum*, and it was found againſt him. And it was moved in Arreſt of Judgment, that the Declaration is not good. 1. Becauſe the Payment of *Candlemas* is not known in our Law, *quid intelligitur* by it: But *non allocatur*; for that, which *prima facie* is unknown in ordinary Intendment, is aided and manifeſted by the Averment in the Declaration, that ſuch Payment among Merchants is known for the 20 *Febr'*, and the Judges ought to take Notice of that which is uſed amongſt Merchants, for the Maintenance of Traffick; and the rather, becauſe the Defendant does not deny it, but pleads *Non eſt factum*, whereby he confeſſes the Declaration to be true in ſuch Averment. 2. It was objected, that as this Caſe is, the Uſe of Merchants is not material, becauſe the Teſtator, for any Thing that appears, was no Merchant. But *non allocatur*; becauſe it appears, that the Defendant, who bound himſelf to the Payment, was a Merchant, and the Teſtator muſt take the Bill as the Defendant will make it; and it ſeems that he choſe to make Payments according to the Uſe among Merchants, and not according to the ordinary Intercourſe between Party and Party. *Quod Nota. Per totam Curiam. Yelverton* of Counſel with the Defendant.

Dromant *verſus* Weſtofer.

Words.

THE Defendant ſpoke theſe Words of the Plaintiff; *Dromant's* Wife (*innuendo uxorem* of the Plaintiff) *pick'd* 5 s. 6 d. *out of* H. Davie's *Wife's Pocket, and her Husband* (*innuendo* the Plaintiff) *was conſenting to the ſame.* And Judgment was given in the Common Pleas for the Plaintiff, and alſo affirmed on a Writ of Error; for the firſt Words laid to the Plaintiff's Wife's Charge are ſlanderous, for *to pick a Pocket, &c.* is in common Phraſe taken *in pejori Senſu*, and all one with *Stealing*, eſpecially as this Caſe is; for ſhe is charged not only *to pick a Pocket*, but *to take* 5 s. 6 d. out of it, which greatly enforces the Slander; and being ſlanderous to the Wife, ſo it is likewiſe to the Husband, who is Plaintiff; becauſe he is charged to be *conſenting to the ſame*, which imports that he animated and abetted his Wife *in her evil Courſes, and in her Picking and Stealing. Quod Nota.* Yelverton *pro Quer'*.

Talbot *verſus* Godbolt.

GOdbolt 28 *Eliz.* ſealed a Bill in ſuch Form: Memorand' *that I have receiv'd of* Edward Talbot (who was the Plaintiff's Teſtator) *to the Uſe of my Maſter Mr. Serjeant* Gaudy *the Sum of* 40 l. *to be paid at* Michaelmas *following*. In Debt on this Bill the Plaintiff declared *verbatim* as the Bill was, and demanded the 40 *l.* and the Defendant demurred: And his Pretence was, he ſuppoſed, that he received it but as Servant to another's Uſe, and ſo was not to be charged as principal Debtor; for the Bill is but a Teſtimony of the Receipt, as 1 *H.* 6. & 2 *H.* 6. in Account, an Indenture teſtifying the Receipt under his Seal does not alter the Nature of the firſt Account. But it was adjudged for the Plaintiff; for although the Premiſſes of the Bill mention the Receipt to another's Uſe, yet in the laſt Clauſe of Repayment it does not ſay, *to be repaid by his Maſter*; for then it had not charged him. But the Clauſe is general (*to be paid*) which muſt of Neceſſity bind him who ſealed; for otherwiſe the Party would loſe his Debt, for he has no Remedy againſt Serjeant *Gaudy*: And therefore the Debt appearing to be due, it ſhall be conſtrued ſtrongly to go in Satisfaction of the due Debt. *Quod Nota.* Yelverton *pro Quer'*.

1 Brownl. 103. Poſtea 147. Bill of Debt. What Words in a Bill ſhall charge a Man in Debt.

Vide 5 E. 4. 55. b.

Alexander *verſus* Lane. Weſt *verſus* Lane.

ALexander brought Debt on a Bond of 40 *l.* againſt *Lane* as Executor of *P.* The Defendant pleaded, that *P.* in his Lifetime was indebted to him in 40 *l.* juſt Debt, and that Goods to the Value of 10 *l.* came to the Defendant's Hands, which he retained towards the Satisfaction of his own Debt; and averr'd, that *nulla bona plura* above Goods to the Value of 10 *l.* came to the Defendant's Hands to be adminiſter'd, &c. The Plaintiff replied, and ſhewed that the Defendant is Executor *de ſon Tort* to *P.* & *quod habet multa alia bona* of *P. adminiſtrand' apud S.* in the ſame County of *Norfolk*, and concluded, & *hoc paratus eſt verificare*, &c. The Defendant rejoined, and demanded Judgment, if the Plaintiff ſhould be received to ſay, that the Defendant is Executor *de ſon Tort*; foraſmuch as by the Declaration he has affirmed him to be *Executor' Teſtamenti*; and thereupon the Plaintiff demurred in Law. And as to the Matter in Law the whole Court was with the Plaintiff; for he may well reply, that the Defendant is Executor *de ſon Tort*, notwithſtanding the Declaration; * for there is no other Form of Declaration, as it is adjudged in *Coulter*'s Caſe 5 *Rep. fol.* 30. But, *per tot' Cur'*, the whole Plea is diſcontinued; for the Defendant having pleaded as to Goods to the Value of 10 *l.* which he retained for a Debt, and that he had not *plura bona adminiſtrand'*, that is an Offer

1 Brownl. 103. Debt. Executor de ſon tort cannot pay himſelf.

* 1 Mod. 208.

Where an ill Concluſion of a Plea diſcontinues the Whole. Judgment on a Matter confeſſed notwithſtanding the ill Plea of the Party. * Cro. El. 630. Mo. 527. 5 Co. 30. b. 1 Mod. 208. † The Original is hors de liver.

of a good Iſſue; then when the Plaintiff replies, that he has *plura bona, &c.* and concludes, *& hoc paratus eſt verificare*, it is not good; for he ought to have ſaid, *& hoc petit quod inquirat' per Patriam*; for now there is a Surpluſage of Goods denied by the Defendant, and urged by the Plaintiff, which ought to come in Iſſue, but cannot by Reaſon of the ill Concluſion. But in the ſame Term between *Weſt* Plaintiff, and *Lane* Deſendant, where *Weſt* demanded but 4*l.* Debt againſt *Lane* as Executor, *ut ſupra*; and all the Reſidue of the Plea was, *ut ſupra*, Judgment was given for the Plaintiff, becauſe the Defendant had confeſſed Goods in his Hands to the Value of 10*l.* which is more than the Debt demanded; and therefore foraſmuch as by Judgment in Law an Executor *de ſon Tort* * cannot retain to pay himſelf, altho' the other Proceedings in the Plea are ill, yet all that is out of the † Caſe, and Judgment ſhall be given on the Defendant's Confeſſion, and ſo it was. *Quod Nota. Telverton* of Counſel *pro Querente.*

Grene *verſus* Eden.

1 Brownl. 104. Debt.

DEBT on a Bond of 200*l. dat'* 3 *Septembr'* 1 *Jac'*, the Condition was, that if the Defendant 4 *Septembr' Anno* 2. paid 100*l.* to *J. S.* at ſuch a Place, and alſo ſaved the Plaintiff harmleſs from any Suit, *&c.* which might be brought againſt him by Reaſon of the Bond in which the Plaintiff, as Surety for the Defendant, *Stat obligat'* to the ſaid *J. S.* that then, *&c.* The Defendant pleaded that well and true it is, that he *per ſcriptum ſuum obligat' gerens Dat'* 3 *Septembr'* 1 *Jac'* acknowledged himſelf bound in 200*l.* to the Plaintiff: But he further ſaid, that the ſaid Bond was not deliver'd as the Defendant's Deed till 17 *Septem' Anno* 2. and that then *fuit primo deliberat'*, and pleaded further, that he had ſaved the Plaintiff harmleſs, *&c.* upon which the Plaintiff demurred. And it was adjudged for the Plaintiff: For the Bond in the Declaration is not anſwer'd; for the Plaintiff ſuppoſes in Fact that the Defendant was bound to him, *&c. per ſcriptum obligat'* bearing Date the ſame Day, *&c.* which is intended a perfect Bond at that Day which the Plaintiff has declar'd; then for the Defendant to ſay, that it was firſt *deliberat'* 17 *Septembr' Anno* 2. which is a Year after, is but by Way of Argument and ill, without taking a Traverſe, that it was made 3 *Septembr'* 1 *Jac.* 2. As the Defendant has pleaded, he has made Part of the Condition idle and vain; for where by the Bond expreſt in the Declaration there is a Condition annexed for Payment of 100*l.* at a Day to come, *viz.* 4 *Septembr' Anno* 2. now the Defendant has made the Day of Payment paſt before he ſuppoſes the Bond to be deliver'd, which tolls in a Manner the Effect of the Plaintiff's Suit. And if the Condition had not ſtood on two Branches, but on one only, and the Defendant would

Primo deliberat', where it ſhall be pleaded without a Traverſe.

plead the Delivery after the Condition impoſſible to be performed, then is the Bond become ſingle for the whole 200 *l.* *Quod Nota.* *Per totam Curiam.* *Yelverton* of Counſel *pro Quer'.*

Pincombe *verſus* Rudge.

RUdge demiſed the Manor of *D.* to *Hunt* for Twenty-one Years; and afterwards by the Words, *dedi, conceſſi, dimiſi & ad firmam tradidi*, demiſed the ſame Manor to the Plaintiff for Life, who enter'd, and was ouſted by *Hunt* the firſt Termor; upon which he brought Covenant, and ſuppoſed the Breach, foraſmuch as *Hunt* had expelled him. To which the Defendant pleaded, that before this Writ purchaſed, the Plaintiff on the ſame Covenant had brought *Warrantia Chartæ* againſt him in the Common Pleas, which yet depends, and demanded Judgment if, the *Warrantia Chartæ* indiſcuſſed, the Plaintiff ſhould have this Action? Upon which the Plaintiff demurred, and it was adjudged for him. For, 1. It was held, that the Bar is not good; for an Action of Covenant and a *Warrantia Chartæ* are of ſeveral Natures, the one is real, *viz.* the Warranty of Charters, and by that he ſhall bind the Land it ſelf, which the Leſſor has at the Time of the Judgment; the other is perſonal, *ſcil'* the Covenant, and by that he ſhall only have Damages. Then it was moved that the Declaration was not good, becauſe it appears that the Plaintiff is Tenant for Life, and Tenant for Life ſhall not have Covenant on a Warranty in Law, but only on a ſpecial Covenant, as 26 *H.* 6. *Covenant* 10. To which it was anſwer'd, that the Difference is, where the whole Eſtate for Life is evicted, and where only the Poſſeſſion for a Time; for if a Stranger enters without Title, be it a Term or a Freehold, no Covenant lies by 26 *H.* 8. 3. & 32 *H.* 6. But if the whole Eſtate for Life be evicted under the Title of the Leſſor, the Leſſee ſhall not have Covenant, for thereby he is to recover only Damages, which are perſonal, which are no Recompence for the Loſs of the Freehold. But in the Principal Caſe a Term for Twenty-one Years is only evicted, and the Leſſee who is Plaintiff continues ſeiſed of the Freehold; and therefore, becauſe it is but a Chattel that is evicted, the Plaintiff by this Action of Covenant may have full Satisfaction. And the Words in the Leaſe will enure to a double Warranty, *dedi*, for a Warranty of the Freehold, and *dimiſi* for a Warranty againſt an Eviction for Years; for otherwiſe the Leſſee is without Remedy, which is not reaſonable, when by any Conſtruction by the Words of the Leaſe Remedy is given; and therefore 17 *E.* 3. 18. *a.* *Thorpe.* If a Man makes a Feoffment of Land by Deed with Warranty, and a Stranger extends a Recogniſance of the Feoffor on the Poſſeſſion of the Feoffee, Covenant well lies on the Deed with Warranty.

Nov 1587. Hob. 3 Covenant.

Warrantia Chartæ depending is no Plea in Covenant.

On what Eviction Leſſee for Life ſhall have Covenant.

Dedi, a Warranty for the Freehold; Dimiſi for a Term.

Covenant on a Warranty.

Warranty. And 18 *E.* 3. *Statham. Covenant. Placito ultimo. T.* made a Feoffment by Colluſion, and died, the Lord recover'd the Ward of the Land for his Time; adjudg'd that the Feoffee ſhould have Covenant againſt the Heir when he came to full Age. And that was *conceſſum per totam Curiam.* And adjudged for the Plaintiff. *Yelverton pro Querente. Nota* well this Caſe, for it is the firſt adjudged in this Point.

Ewer *verſus* Moile.

Cro. El. 771. Waſte.

THomas *Moile* brought Waſte againſt *Ewer* for Waſte done in a Meſſuage, Land, Meadow and Wood to him demiſed by the Plaintiff for a Term of Years then paſt, and declared that he was ſeiſed *in Dominico ſuo ut de feodo* of the ſaid Meſſuage, *&c.* and leaſed to the Defendant for a Term of Years, *&c.* who had done Waſte. The Defendant ſhewed, that the Meſſuage, *&c.* was Parcel of the Manor of *Caverfield*, which came to *H.* 8. by Diſſolution, and ſo to Queen *Elizabeth*, who by her Letters Patent dated, *&c.* granted it to *R. Hitchcock* in Fee, who conveyed it to the Defendant in Fee, who regranted it to the Plaintiff and his Heirs, as long as *Hitchcock* had Iſſue of his Body, by Virtue whereof the Plaintiff enter'd, *&c.* and demiſed to the Defendant *prout* in the Declaration: *Et dicit ulterius in facto*, that *Hitchcock* died at *D.* without Iſſue of his Body, 20 *Jan. Anno* 3. (which was after the original Writ of Waſte purchaſed and the very Day of the Return of it) and concluded, *& hoc parat' eſt, &c.* upon that the Plaintiff demurred generally, and had Judgment in the Common Pleas; whereupon the Defendant brought Error; and in the King's Bench the Judgment was affirmed; for there are two great Faults in the Defendant's Plea; 1. Where the Plaintiff in the Action of Waſte declares of a Seiſin in Fee in himſelf, out of which the Defendant's Leaſe is derived, which ought to be intended a pure and abſolute Fee, the Defendant does not diſcloſe any Eſtate in the Plaintiff, but a Fee determinable, which is another Kind of Eſtate than the Plaintiff has alledged; and therefore it is not good without a Traverſe; for the Defendant's Plea ought either to confeſs and avoid, or traverſe the material Point in the Declaration, which is the Seiſin in Fee: And the Defendant by his Plea does not confeſs it; for Confeſſion is only, where the Plaintiff and Defendant agree in one and the ſame Thing, which is not here; for the Plaintiff claims an abſolute Fee, and the Defendant gives him only a Fee determinable; and therefore he ought of Neceſſity to traverſe; for where the Parties vary in Eſtate, in the Quantity of it, there a Traverſe ought to be taken; as if the Plaintiff had intitled himſelf to a Fee as long as *J. S.* had Iſſue, and the Defendant would derive an Eſtate in Fee as long as *J. D.* had Iſſue, he ought to take a Traverſe; for although they agree in the

Where Seiſin in Fee ſhall be traverſed.

Nature of the Eſtate, yet they vary in the true Subſtance, by Reaſon of the different Limitations. The ſame Law if the Plaintiff in Waſte declares of an Eſtate to him and the Heirs Male, and the Defendant derives the Eſtate to the Plaintiff and the Heirs female, &c. it is not good without a Traverſe of the Eſtate furniſhed by the Plaintiff. So in 32 *H.* 6. where a Man intitled himſelf to a Rent-charge by Preſcription, and the other would ſay, that the Grant commenced by Deed after Time of Memory, he ought to traverſe the Preſcription. 2. The Defendant's Plea is not good, becauſe he alledges the Death of *Hitchcock* without Iſſue, 20 *Jan.* 3. and *Non conſtat*, whether 20 *Jan. Anno* 3. was before the Writ purchaſed, or after; and that is very material; for if he died before the Writ purchaſed, then nothing in Reverſion at the Time of the Writ purchaſed, is a good Plea for the Defendant; and if he died after the Writ purchaſed, then he ought to alledge the Death without Iſſue pending the Writ; as in 2 & 3 *H.* 4. In Waſte brought by Tenant in ſpecial Tail, the Defendant alledged the Death of the Iſſue pending the Writ, whereby the Plaintiff was but Tenant in Tail after Poſſibility. And although the 20 *Jan. Anno* 3. was after the Original purchaſed and the Day of the Return of it; yet the Judges will not take Notice of it without the Allegation of the Party: And ſo agree all the Books, that it ought to be pleaded pending the Writ; for in Pleading a Thing after the laſt Continuance, it is not good Pleading, *quod poſt ultimam Continuationem* ſuch a Thing happen'd, but it ought to alledge preciſely the very Day, *viz.* from ſuch a Day to ſuch a Day. So in Error on a Judgment given, the Judges do not inquire for any Errors in the Record, unleſs the Party firſt aſſigns ſome. And alſo here the Defendant does not offer the Plaintiff any Iſſue, for if he takes Iſſue, that *Hitchcock* did not die without Iſſue 20 *Jan. Anno* 3. if he died 10 *Jan. Anno* 3. nay, if he died without Iſſue before the Leaſe made to the Defendant, yet it will be found againſt the Plaintiff; for Death without Iſſue any Time before the 20 *Jan. Anno* 3. deſtroys the Plaintiff's Action; and therefore the Day cannot be made Parcel of the Iſſue, as it will, if the Defendant's Plea in Bar ſhall be good. *Quod Nota. Per totam Curiam. Yelverton* was of Counſel with *Moile* the Defendant.

Where the Day ſhall not be Parcel of the Iſſue.

Plea poſt ult' continuationem. Lutw. 1139, 1142.

Horne *verſus* Widlake.

IN Treſpaſs, *Quare clauſum fregit*, and ſpoiled his Graſs in *D.* The Defendant pleaded, that in the Cloſe, where the Plaintiff ſuppoſes the Treſpaſs, is and from Time whereof, &c. has been a *Foot-way* for all the King's Subjects *in*, *per & trans* the ſaid Cloſe to ſuch a Place; and that the Plaintiff ſuch a

1 Brownl. 212. Noy 128. An old Way ſtopt, and a new Way aſſigned.

Day *ploughed up* the ſaid *Foot-way*, and ſowed it with Wheat, and *laid Thorns at the Side of it*; and pleaded, that within the ſame Cloſe *prope* the antient *Foot-way*, the Plaintiff before the Treſpaſs ſuppoſed, *reliquit & aſſignavit* another *Foot-way* for all the King's Subjects to go over this new Way, which Way from the Time that it was *laid forth*, had been uſed by all *Foot-Paſſengers*; wherefore the Defendant *Tempore quo* went in the Way ſo aſſigned to ſuch a Place, *&c.* which is the ſame Treſpaſs, and demanded Judgment. Upon which the Plaintiff demurred. And it was adjudged againſt the Plaintiff; for the Defendant's Plea is a good Excuſe againſt the Plaintiff, becauſe the Plaintiff did the firſt Tort in ſtopping the antient Way, and alſo he has aſſigned this new Way for Paſſengers, wherefore contrary to his own Agreement he ſhall not puniſh the Defendant; as if there had been a *Foot-way* over the Cloſe of *J. S.* by a Hedge, and *J. S.* will remove the Hedge into a new Place; if Paſſengers in uſing their Way go by the Hedge, where it is newly ſet and fixed, they ſhall not be puniſhed for it, becauſe it ariſes from the Act and Tort of the Plaintiff himſelf, and *volenti non fit Injuria*, as 8 *E.* 4. 5. *a.* if Water runs through the Land of *M.* and *M.* ſtops the Water in its Courſe, ſo that it ſurrounds my Land, I may abate that which ſtops it, and he ſhall not have an Action againſt me for entring into his Cloſe, becauſe the Stopping was his own Act. The ſame Law in the Principal Caſe: And although the Defendant pleads generally, that the Plaintiff *aſſignavit viam*, and does not ſhew to whom, it is not material; for *quod eſt commune omnibus* cannot be aſſigned to any particular Perſon. *Quod Nota. Per totam Curiam, præter Yelverton* Juſtice.

Where the Defendant may excuſe a Tort in himſelf, by a Tort aſſigned in the Plaintiff.

Nile *verſus* Swanſon.

Godb. 157. Words.

THE Plaintiff ſhewed, that 44 *Eliz.* he was made Town-Clerk to the Mayor, *&c.* of *Clipſton Dartmouth*, and Steward of their Courts, by Patent under their Common Seal for Life, *ſi ſe bene geſſerit*; and although *continue poſtea hucuſque* he had executed it to his great Profit; yet the Defendant 5 *Apr' Anno* 5 *Jac' dixit* of the Plaintiff, *He* (*innuendo* the Plaintiff) *hath taken* 40 *s. for a Bribe.* And upon *Non cul'* pleaded it was found for the Plaintiff, and Judgment accordingly; for although the Plaintiff in his Declaration has not ſhewn, that there was any Diſcourſe had as to his Behaviour in his Office; yet foraſmuch as the Plaintiff hath ſhewn himſelf to be an Officer of Truſt at the Time of the Speaking of the Words, they cannot be taken or conſtrued but in Slandering him in his Office, for he can by no other Colour take a Bribe. The ſame Law, if ſuch Words

are ſpoken of a Juſtice of Peace, or Clerk of Aſſiſe. Yet *Yelverton* objected, that theſe are Officers known, but the Office of a Town-Clerk is not known. *But, per Curiam*, the Plaintiff hath furniſed himſelf *in facto* to be both Town-Clerk and Steward of the Courts; and it is well known, that in both theſe Places a Man may be bribed. Cro. Car. 225.

Challenor *verſus* Thomas.

ERror brought on a Judgment given in Ejectment *in Com' Carmarthen:* And *Yelverton* aſſigned the Error, becauſe the Ejectment was brought *de Aquæ Curſu*, called *Lochar* in *Llandeby*, and declared on the Leaſe of *David Rees ap Thomas de quodam Rivulo & Aquæ Curſu, ut ſupra.* And, *per totam Curiam*, the Judgment was reverſed; for *Rivulus ſeu Aquæ Curſus* doth not lie in Demand, neither doth a *Præcipe* lie of it, nor can Livery of Seiſin be made of it; for *non moratur*, but is ever flowing; nor can Execution by *Habere fac' Seiſinam* be made of it; for it is not conſtant to be put in Poſſeſſion of it: And it is like a Protection *quia moratur ſuper Mare*, which is not allowable by 35 *H.* 6. for *Mare non moratur*; but as 12 *H.* 7. 4. is, the Action ought to be for ſo many Acres of Land *aqua cooperta*; and Ejectment well lies of a Gorce or Pool, for a *Præcipe* lies for them, and a Wife ſhall be endow'd of the third Part of a Gorce, as 11 *E.* 3. is. But if the Land under the River or Water does not belong to the Plaintiff, but the River only, then on a Diſturbance his Remedy is only by Action on the Caſe on any Diverſion of it, *& non aliter. Quod Nota.*

1 Brownl. 142. Error. Ejectment does not lie for a Watercourſe.

Protection quia moratur ſuper mare. 1 Inſt. 4. b. Pl. Com. 228. b.

Greſill *verſus* Sir Chr. Hoddeſden.

RObert *Greſill*, the Plaintiff's Father, was ſeiſed in Fee of an Houſe and 1000 Acres of Land, *&c.* and he and all they whoſe Eſtate, *&c.* have had for them and their Farmers Common appurtenant for all Cattle levant and couchant in a Place called the *Heath*, within the Manor of *Leighton Buſſard*, as appurtenant to the Meſſuage, *&c.* The Defendant, Owner and Lord of the Manor, erected an Houſe on the Common, and alſo made Cony-boroughs in the ſaid Common called the *Heath*. *Robert* died, whereby the Meſſuage, *&c.* deſcended to the Plaintiff, and he brought an Action on the Caſe againſt the Defendant for erecting the ſaid Houſe, and making the Cony-boroughs in the Time of his Father; and declared, that by the Increaſe of the Conies in thoſe Boroughs the Plaintiff had loſt his

Ante 104. Caſe. Cony-boroughs, &c. made in the Father's Time, and continued in the Heirs.

Cro. El. 402. 3 Leon. 174. Salk. 460. Lilly Entr. 82.

his Common after the Death of his Father. And, *per Curiam*, the Action well lies; for although the Defendant has not made any new Erection, nor new Boroughs in the Plaintiff's Time, yet his ſuffering the Conies to increaſe and the Houſe to ſtand, is a new Tort to the Heir, for which he may have an Action, like the Caſe 15 *El. Dy.* 319. where the Turning of a Cock for the Water and uſing of it, altho' it was ſet and fixed long before, was adjudged a new Diverſion. *Yelverton* of Counſel with the Defendant.

Tompſon *verſus* Knott.

Words.

YOU *might have known your own Sheep, and not have ſtolen mine.* And, by *Fleming* Chief Juſtice and *Yelverton*, they are not actionable; for there was not any direct Affirmation, that the Plaintiff had *ſtolen any Sheep*, but only by Implication; and a Slander ſhall not be *drawn in* by a ſtrained Conſtruction: And here the firſt Words (*You might have known your own Sheep*) are no Words to beget an Action, and the ſubſequent Words (*and not have ſtolen mine*) depend on the former, and divided from them are not any Slander; for then they are, *You might have ſtolen mine, or my Sheep*, which do not import any Slander; they are likewiſe pronounced but by Way of Queſtion in a Manner; as if a Man ſhould ſay, *What need you have ſtolen my Sheep*; Which will not bear an Action, for he does not affirm any Theft on him directly. *Williams* and *Crooke* Juſtices to the contrary, and that they cannot be taken in another Senſe, than by a ſtrong Implication and neceſſary Conſequence to charge the Plaintiff to have *ſtolen Sheep*; as if it was, *You could not ſee your own Horſe, for Stealing of mine*; and the Words being intirely ſpoken ought to receive an intire Conſtruction. *Quod Nota.* And *Quære*, for *pendet* without Judgment.

Wilſon *verſus* Weddell.

1 Brownl. 143. Treſpaſs.

THE Plaintiff's Grandfather being a Copyholder in Fee furrender'd to *Leonard Weddel* in Fee, who ſurrender'd to the Uſe of *Margery J.* for Life, who is admitted, *&c.* but *Leonard* himſelf was never admitted, the Grandfather and the Father die, and the Son who is Plaintiff is admitted, and enters upon the Land, *Margery* then being in Poſſeſſion, and the Defendant then living as Servant with *Margery* in the Tenements: This was the Special Verdict; and Judgment was given *pro Quer'*. And, 1. It was held, *per Curiam*, that the Defendant is found to be a ſufficient Treſpaſſer and Ejector, although he is but a Servant of the pretended

Owner of the Land, becauſe the Verdict finds that the Defendant *adtunc commorabat* with *Margery*; and in ſuch Caſe he, who has the true Title and enters, may bring the Action againſt Maſter or Servant at his Election; and perhaps the Maſter abſconds and cannot be arreſted. 2. It was adjudged, that a Surrender to *J. S.* of a Copyhold is not of Effect till *J. S.* is admitted Tenant; and that if *J. S.* before Admittance ſurrenders to a Stranger who is admitted, that it is nothing worth to the Stranger; for *J. S.* himſelf had nothing, ſo could paſs nothing; and the Admittance of his Grantee ſhall not be taken by Implication the Admittance of himſelf, for an Admittance ought to be of a Tenant certainly known to the Steward, and enter'd on a Roll by itſelf. But it was held, that the Right and Poſſeſſion remain yet in him who ſurrender'd, and deſcend to his Heir, who is the Plaintiff: And a Difference was taken between an Heir to whom a Copyhold deſcends, he may ſurrender before Admittance, and well, becauſe in by Courſe of Law; for the Cuſtom, which makes him Heir to the Eſtate, caſts the Poſſeſſion upon him from his Anceſtor; but a Stranger, to whom a Copyhold is ſurrender'd, has nothing before Admittance, becauſe he is a Purchaſer; and a Copy to him made, upon which he is admitted, is his Evidence by the Cuſtom, and before that he is not a cuſtomary Tenant, ſo he can transfer nothing to any other. Adjudged accordingly 24 *Eliz.* Alderman *Dixie*'s Caſe. *Yelverton pro Quer'*.

Vide ante 16. A Copyholder has nothing, nor can ſurrender before Admittance.

4 Co. 22. b. Cro. Eliz. 349. Poph. 127.

Gold *verſus* Robins.

THE Defendant ſpoke of the Plaintiff theſe Words; *I* (*innuendo* the Defendant) *did meet* Thomas Gold (the Plaintiff) Thomas Gifford, Robert Gifford, *and* Cuthbert Clarke *upon* Cheſham *Fair-day at Night upon* Whitehil *at* Cheſham *Town's End in the Evening, as I* (*innuendo* the Defendant) *was going Home; and there they did bid me deliver my Purſe, and I* (*innuendo* the Defendant) *being afraid, put my Hand into my Pocket, and took out* 2 s. 6 d. *and gave it over my Shoulder to one of them, I knew not which.* And it was adjudged by all, *præter Yelverton* Juſtice, that the Action lay; for every Circumſtance within the Words import Slander. 1. They are the uſual Words of a Thief, *to bid a Man give him* his Purſe. 2. For the Time, it was *in the Evening*, which carries a vehement Suſpicion of an intended Robbery. 3. By the Uſage laid to the Charge of the Plt. and thoſe that were with him, one of them took 2 *s.* 6 *d.* which was given *over the Shoulder*. 4. The Def. himſelf makes the Slander more apparent, becauſe he ſays, that he was *afraid*, and his Fear could not be, but on a Suſpicion that the Plt. *&c.* would have robb'd him; ſo that there is not

Words.

Cro. Jac. 277.

any Conſtruction ſtrained or by Implication: But in Truth *Lingua ſua eſt Flagellum*, as *Crooke* Juſtice termed it. *Nota bene.*

Wilſhire *verſus* ——

Words. JAmes Wilſhire *hath forged the late Queen's Writ.* And affirmed upon a Writ of Error, that the Words are actionable; for the Queen's Writ is of an high Nature, and of Record, being the Ordinary Proceſs to bring in the Party to anſwer, and for Forging of which Writ the Party may be puniſhed both at Common Law, and
Cro. El. 178. in the Star-chamber. But, by *Crooke* Juſtice, to ſay *J. S.* hath forged his Father's Hand, whereby he procured the Tenants to pay him the Rent due to his Father, is not actionable; as it was adjudged
Cro. El. 166. 3 *Eliz.* becauſe it refers only to a private Matter, and is rather an Aſperſion than a Slander; for the Son by no Law is puniſhable for it. *Yelverton* of Counſel *pro Querente.*

Sir Anthony Cope *verſus* Temple.

Replevin. THE Plaintiff brought Replevin of his Sheep wrongfully taken in *Cotteſmore Common*; the Defendant as Bailiff of the Provoſt, *&c.* of *Eaton College*, made Cogniſance, becauſe *Cotteſmore Common* belong'd to the Provoſt, *&c.* and the Sheep were there Damage-feaſant, wherefore, *&c.* he took them. The Plaintiff pleaded in Bar to the Cogniſance, that *Cotteſmore Common* contained — Acres (without ſhewing how many, but left a Blank for the Number,) and that he himſelf is ſeiſed of 100 Acres Parcel of the Common in Fee, and that he and all thoſe whoſe Eſtate, *&c.* have had Common for 400 Sheep in the Reſidue of *Cotteſmore Common* as appurtenant to 100 Acres of Land, *&c.* wherefore he put them in to uſe the Common. The Defendant maintained his Cogniſance, and traverſed the Preſcription, which was found for the Plaintiff. And it was ſhewn in Arreſt of Judgment, that by Reaſon of the Number of Acres omitted by the Plaintiff in his Bar to the Cogniſance, *Non conſtat* to the Court, *quid* the *Reſiduum* is, and ſo incertain in Matter. But it was adjudged, *per totam Curiam, præter Williams* Juſtice, that the Plaintiff ſhould have Judgment; for in this Action he is not to recover any Land, but only Damages for the unjuſt Taking, and ſo the Title of the Land is not in Queſtion. 2. The Plaintiff ſhews, that he is ſeiſed of One hundred Acres Parcel of the Common, and *non eſt Parcella* but in Reſpect of a *totum*; ſo the Common muſt contain more than the Parcel which the Plaintiff has; and alſo the Parties on both Sides are agreed, *quod eſt reſiduum* of the Common,

Where by an Acknowledgment of a Reſiduum an Omiſſion of the Number of Acres ſhall not be material.

Common, and ſo is it found by the Verdict; and be that *reſiduum* more or leſs, it is all one; for in that, which remains above the 100 Acres the Plaintiff has, the Plaintiff ought to have Common; ſo that the Omiſſion of the Acres in Number is but Form, which is aided by the Statute. *Quod Nota.* *Telverton* of Counſel *pro Querente.*

Talbot *verſus* Godbolt.

DEBT as Executor on a Bill of 40*l.* made by the Defendant, whereby he acknowledged *ſe recepiſſe* of *Talbot* the Teſtator 40*l.* to the Uſe of his Maſter, Mr. Serjeant *Gaudy*, *reſolvend'* at *Michaelmas* following, and it was dated 28 *Eliz.* and ſealed by the Defendant; and the Defendant demurred upon the Declaration, ſuppoſing that it was only a Deed teſtifying the Receipt to the Uſe of another, and not to charge himſelf; * but it was adjudged for the Plaintiff, for although the Bill teſtified the Receipt to the Uſe of his Maſter, yet in the Clauſe of Repayment it is general, and does not ſay to be repaid by his Maſter; and therefore being ſealed by the Defendant makes him Debtor; for it does not appear that the Teſtator had any other Aſſurance for the 40*l.* but truſted only to this Bill; but if the Bill had recited the Repayment alſo to be made by Maſter Serjeant *Gaudy*, then they all agreed, that the Bill ſhould be but a Receipt only, and merely to the Uſe of another. *Per totam Curiam*, and that on Conference with all the Juſtices in *Fleet-ſtreet.* *Telverton* of Counſel *pro Querente.*

1 Brownl. 103. Antea 137. Debt.

By what Words in a Bill a Man ſhall be charged.

* Vide 5 E. 4. 55. b.

Witham *verſus* Barker.

TReſpaſs, that the Defendant 1 *Aug' Anno* 5. the Plaintiff's Cloſe *apud L. in Com' Suff.* broke and enter'd, and ſpoiled his Graſs with his Cattle, *&c.* The Defendant pleaded, that *tempore quo*, the Freehold of the Land, where, *&c.* was in Sir *John Tyndall*, and he as Servant, and by his Command enter'd and put in the Cattle, *&c.* The Plaintiff replied, *Quod bene & verum eſt*, that the Freehold was in Sir *John T.* but ſaid, that long before the Time in which, *&c.* Sir *John T.* demiſed the Cloſe to the Plaintiff at Will, by Virtue whereof he enter'd and was poſſeſſed till the Defendant committed the Treſpaſs, *&c. abſque hoc*, that the Defendant by the Command of Sir *John T.* enter'd and put in the Cattle, *&c.* Whereupon the Defendant demurred, and it was adjudged againſt the Plaintiff; for the Bar is good and not avoided by the Replication; for his Replication is ill, in Regard it being by Way of Title he does not intitle himſelf to any good Leaſe at Will; for he does not alledge in Fact any Seiſin in Sir *John T.* or any Poſſeſſion in himſelf, out

1 Brownl. 213. Treſpaſs.

The Plaintiff in his Replication ſhall not traverſe the Bar, without making a good Title to himſelf.

Cro. Car. 571. Mo. 846. 1 Rol. Rep. 393. Lutw. 1492. Comb. 476.

out of which the Leaſe at Will can be derived; and although a Declaration may be good to a common Intent, and that in Debt on a Leaſe, as 21 *H.* 7. is, the Plaintiff may declare *quod dimiſit*, and need not alledge Seiſin in himſelf when he made the Leaſe, *&c.* yet when a Title is made by a Bar or Replication, as 2 *E.* 4. 9. is, it ought to be certain to all Intents, becauſe it is traverſable; and here, foraſmuch as the Defendant has made a good Juſtification in Law, it ought to be anſwer'd by the Plaintiff with a good Title, *viz.* that Sir *John* was ſeiſed and demiſed to him at Will, which is not done here; but it is all one as if he had replied *Robin Whood* in *Barnwood Stood*, *abſque hoc*, that the Defendant by the Command of Sir *John*. *Quod Nota*. *Per Fenner*, *Williams* and *Crook* Juſtices being only in Court. And Judgment given accordingly. *Tilverton* for the Defendant.

Goodman *verſus* Aylin. Hill. 5 Jac. Rot. 834.

1 Brownl. 213. Treſpaſs.

TReſpaſs, that the Defendant 8 *Febr'* 4 *Jac. apud P. Domum* of the Plaintiff broke, and one *Braſſe-chaffer* of the Plaintiff's, value 20*s.* took and carried away, *&c.* The Defendant pleaded, that the Houſe is Parcel of an half Yard-Land in *P.* and that it was held of *H.* Earl of *Northumberland*, as of his Manor of *W.* by Homage, Fealty, Eſcuage incertain, Suit of Court, Incloſing of the Park Pale, and the Rent of a Pound of Cumin, and for the Cumin arrear for three Years, and the Homage and Fealty of *Thomas Peller* Tenant *inde*, the Defendant, as Servant to the Earl, and by his Command juſtified the Entry and Taking, *&c.* The Plaintiff replied, that it was held of *R. Stanley* as of his Manor of *Lee*, *&c. abſque hoc*, that it was held of the Earl *modo & forma*; and upon that they were at Iſſue: And the Jury found that it was held of the Earl as of his Manor of *P.* by Homage, Fealty, Incloſing of the Park, Rent of a Pound of Cumin, *& non aliter*, and *ſi videbitur Curiæ*, that it is not held *modo & forma*, they find for the Plaintiff, *&c.* And it was adjudged for the Defendant; for altho' the Verdict does not agree with the Plea in the Manner and Nature of the Tenure, yet it agrees in Subſtance in the Point for which the Taking was, *viz.* that the Land is held of the Earl; and that is ſufficient: For there is a Difference between Replevin and Treſpaſs; for in Replevin, becauſe the Plaintiff is to have a Return, (*viz.* the Avowant, for the one is Actor againſt the other) the Avowant ought to make a good Title *in omnibus*; it is otherwiſe in Treſpaſs, for there he is only to excuſe the Treſpaſs; and therefore if there be any Tenure at all it is ſufficient: For if the Lord, or his Bailiff in his Right diſtrains for Rent which is not due, yet he is not puniſhable in Treſpaſs. *Quod vide*

Where a Verdict which finds the Tenure in Subſtance, altho' it is not modo & forma, ſhall be good. The Difference between Replevin and Treſpaſs. Vide 2 Mod. 4, 5.

vide Lit. 114. *pro modo & forma* in Treſpaſs, and 9 *H.* 7. 3. for Replevin. *Quod Nota. Per tot' Cur'.* And *Fleming* Chief Juſtice vouched 33 *H.* 8. *Dy.* 48. *b.* where the Iſſue was, if Villain regardant, *&c.* or free? And the Jury found Villain in Groſs, yet good, for the Subſtance of the Villenage, and of the Iſſue is found. 1 Inſt. 282. a. 9 Co. 11[illegible] a.

Poole *verſus* Nedham.

ON a Special Verdict the Matter in Law was; *John Paradine* Tenant in Tail Male, of a Meſſuage in *London*, the Remainder in Fee to *Tho. Paradine: Thomas* by Deed inrolled granted his Eſtate and Right in Remainder to Q. *Eliz.* in Fee during the Life of *John Paradine*, and after his Death, as long as any Iſſue Male of *John* ſhould live; *John* ſuffer'd a Common Recovery under which the Plaintiff claimed, *John Paradine* died without Iſſue, and the Defendant as Servant to *Thomas Paradine* enter'd, *&c.* And it was adjudged, that the Common Recovery barred the Remainder of *Thomas* notwithſtanding his Grant to the Queen; for the Grant to the Queen is void; becauſe it can never come in Poſſeſſion; and a Remainder is *quaſi terra remanens*, for by the Death of *John*, Tenant in Tail, without Iſſue Male, the Eſtate of the Queen is determined; ſo that ſhe ſhall not have any Benefit by the Grant, but it is a dry Remainder without Profit. But if there had been ſuch a Grant of the Reverſion made to the Queen, it had been good; becauſe during the firſt Intail there would be an Attendancy for the Services and Wardſhip, *&c.* of the Iſſue of the Donee. Which Difference *vide* in *Cholmley's* Caſe, 2 *Rep.* 51. *& vide* 12 *E.* 4. 3. Tenant for Life with ſeveral Remainders for Life; he who had the Fee granted that, after the Death of the firſt Tenant for Life, it ſhould remain to *J. S.* in Fee, it is void; for it cannot take Effect in Poſſeſſion at the Time appointed. But it was objected by *Davenport* (who argued for the Defendant) that if *John Paradine* in the Caſe at the Bar had Iſſue a Daughter, who had Iſſue a Son, that altho' this Son could not inherit the Tail, yet he might well ſupport the Eſtate of the Queen; and if alſo in this Caſe *John Paradine* be attainted of Treaſon, that the Queen ſhall be in of her Remainder granted by *Thomas*, and by this Means ſhe ſhall avoid Leaſes made by *John* the Tenant in Tail. To which *Yelverton* anſwer'd, (who argued for the Plaintiff) that in the firſt Caſe, if the Daughter ſurvived the Tenant in Tail, altho' ſhe had Iſſue male, and died, the Eſtate of the Queen is determin'd for Want of Iſſue male; for when ſhe ſurvived, then there was a Failure of Iſſue male of *John*, and altho' ſhe died afterwards, her Son, who is now Iſſue male of the firſt Tenant in Tail, ſhall not revive it again: No more than where Land is given to *J. S.* in Fee,

Noy 132. Ejectment.

2 Co. 15. b. Mo. 195. 1 And. 141. Where a Common Recovery ſhall be good, notwithſtanding a Grant to the King.

Difference where the King is in by Reverſion, and where by Remainder.

as long as *J. D.* has Iſſue, *&c.* if *J. D.* dies without Iſſue, his Wife pregnant, the Iſſue born after ſhall not revive the Eſtate, for it is a collateral Determination, which being once interrupted, ſhall never be *ſet on Foot* again: And as well as in Diſcent he ought to convey all by Heirs Male; ſo *Yelverton* apprehended he ought in the Continuance of the Eſtate. *Quod fuit conceſſum per totam Curiam.* And to the ſecond Caſe put by him, *Yelverton* anſwer'd that where the Queen comes to Poſſeſſion by the Attainder, ſhe ſhall not avoid the Leaſe, but ſhall be in of the Eſtate of the Tenant in Tail; becauſe ſhe is not to have any greater Eſtate nor more beneficial Eſtate by the Remainder than by the Attainder; therefore it is not like *Walſingham's* Caſe *Com.* 560. where Tenant in Tail of the Gift of the Queen was attainted; for there by the Attainder ſhe was in in Point of Remainder. *Quod fuit* alſo *conceſſum per totam Curiam*; for it was ſaid by the Court, that where the King comes to Land in Point of Reverter on the Attainder of Tenant in Tail, he ſhall not avoid Leaſes, becauſe he has the Remainder only by Purchaſe, and ought to keep it as a Purchaſe, and not in Point of Reverter. *Quod Nota.* And Judgment was order'd to be enter'd. But on the Defendant's Motion it was referr'd to *Williams* Juſtice, who reported, that he could not end it; and therefore Judgment was given for the Plaintiff. *Trin.* 7 *Jac.*

Caſe of a Slander.

Words. Nicromancy.

THE Defendant ſaid of the Plaintiff; *Thou doſt work by Nigromancy, and doſt work by the Devil.* And adjudged actionable; for although the Word *Nigromancy* is not proper, nor a Word known in Law, yet in vulgar Senſe it is known to import *Conjuring*; which Word joined with the others (*working with the Devil*) explains the firſt Word, and ſhews Malice in him who ſpoke, for it imports a Familiarity and an immediate Uſe of the Devil as an Inſtrument, which is a great Slander; for although ſuch Working, *&c.* is not Felony, unleſs the Death of a Man or Beaſt enſues, or otherwiſe that the Party invoked the Devil, yet it touches a Man much in his Credit, in begetting Infamy and Reproach to the Party, that his Neighbours fear his Company. *Per totam Curiam, præter Williams* Juſtice.

3 Inſt. 45. Mo. 868.

Paſch. 7 JAC. B. R.

Bedell *verſus* Lull.

THE Plaintiff declar'd on a Leaſe made by *Eliz. James* of certain Land, &c. The Defendant pleaded, that before *Elizabeth* had any Thing, one *Martin James* was ſeiſed thereof in Fee, and had Iſſue *H. James*, and died ſeiſed, whereby it deſcended to *H.* as Son and Heir; and *Elizabeth* enter'd and was ſeiſed by Abatement, and made the Leaſe to the Plaintiff; after which the Defendant as Servant to *H. James*, *& per ejus præceptum & in ſuo Jure* enter'd, as he lawfully might, &c. The Plaintiff replied, and confeſſed the Seiſin of *Martin James*, but ſaid, that he ſo ſeiſed by his laſt Will in Writing deviſed it to *Elizabeth* in Fee, and afterwards died ſeiſed; wherefore ſhe enter'd by Force of the Deviſe, and made the Leaſe to the Plaintiff; *abſque hoc, quod* Eliz. *ſeiſita fuit per Abatamentum modo & forma.* And thereupon the Defendant demurred, and ſhewed for Cauſe, that the Traverſe is not good: And it was adjudged for the Defendant; for the Plaintiff ought not to confeſs and avoid, and alſo traverſe the Abatement; for the Plaintiff making a Title to his Leſſor by Way of Deviſe from the Anceſtor, that proves ſhe enter'd lawfully and not by Abatement, as the Defendant has ſuppoſed: Then beſides that, to take a Traverſe is trifling, and makes the Plea vitious; for a Traverſe ſhould not be taken, but where the Thing traverſed is iſſuable, and here the Deviſe is the whole Title and only iſſuable. It was alſo held *per Curiam*, that the Traverſe taken by the Manner is not good, for he ought not to traverſe, *abſque hoc, quod ſeiſita fuit per abatamentum*, but it ought to be, *abſque hoc, quod abatavit*; and alſo if the Plaintiff intended fully to anſwer the Defendant, he ought to have traverſed in the ſame Words as the Defendant pleaded againſt him, *viz. abſque hoc, quod intravit & fuit ſeiſita per abatamentum. Quod Nota.* This Caſe concerned Sir *Henry James* to whom the Defendant was Tenant. *Yelverton* of Counſel for the Defendant.

1 Brownl. 144. Cro. Jac. 221. Ejectment. Where Abatement ſhall be traverſt. Vide 1 E. 4. 9. Action.

Co. Entr. 505. a. Lutw. 1558.

Sir Francis Goodwin *verſus* Welſhe & Over.

SIR *Francis* brought ſeveral Actions of Treſpaſs againſt the two Defendants for Goods taken, and declared to Damages. The Attorney for the Defendants pleaded *Non ſum informatus*; and thereupon Judgment

1 Brownl. 214. Cro. Jac 220. Treſpaſs

is given ſeverally for the Plaintiff, and Writs of Inquiry of Damages iſſued, and were returned. And it was moved that the Writs ſhould not be filed, becauſe the Plaintiff at the Time of the Inquiry did not prove that the Goods belong'd to him, but only prov'd the Value of the Goods; for by Serjeant *Nicholls* there is a Difference between an Action confeſſed and *Non ſum informatus*; for in the firſt Caſe the Property is likewiſe confeſſed to be in the Plaintiff, but it is not ſo in the other Caſe; for this Judgment paſſes without the Defendant's Privity, and only for Want of Pleading, as in the Caſe of *Nihil dicit*. But, *per tot' Cur'*, it is all one, and the Plaintiff need not prove Property in either of the Caſes; and the Reaſon is, becauſe the Writ commands only the Value to be inquired and no more, and that alone is the Charge of the Jury. And, by all the Juſtices, they themſelves as Judges, if they would, might in theſe Caſes aſſeſs Damages, without iſſuing any Writ; for it iſſues only *quia neſcitur quæ damna*; but if they will trouble themſelves with the Aſſeſſment of Damages they may: But it is otherwiſe in the Caſe of *Non cul'* pleaded, for there the Treſpaſs is denied, which muſt be tried by the Jury, and there the Property and the Value alſo ought to be proved. *Nota* alſo, in the firſt Caſe, the Judgment is, *Quod recuperet Querens:* If then upon a Writ of Inquiry of Damages the Plaintiff ſhould be obliged to prove Property, and fail of it, that would go in Avoidance of the firſt Judgment, which cannot be. *Yelverton* of Counſel with the Plaintiff.

On an Inquiry the Plaintiff need prove only the Value. 2 Show. 86.

Higges *verſus* Auſten.

Words.

THOU haſt ſtolen as much Wood and Timber as is worth 20*s.* The Jury found the Words, with this Addition, (*off my Landlord's Grounds*) and it was adjudged *pro Querente*; for the Words found by the Jury more than were in the Declaration do not qualify the firſt Words, for it cannot be Timber as long as it is growing, but *Wood* only; Timber carries this Senſe with it to be ſever'd from the Soil. *Quod Nota. Per totam Curiam. Yelverton* of Counſel with the Plaintiff.

Barret *verſus* Fletcher.

1 Brownl. 105. Cro. Jac. 220. Debt.

DEBT on a Bond of 500*l.* The Condition was to ſtand to the Award of *J. S.* and *J. D. Ita quod, &c.* The Defendant pleaded *Nullum fecerunt Arbitrium:* The Plaintiff replied, and ſhewed the Award made *de Verbo in Verbum*, and concluded, *Et ſic fecerunt Arbitrium*; but did not

aſſign any Breach. The Defendant rejoined, that the Deed of the Award pleaded was not the Deed of the Arbitrators: And upon Iſſue joined thereon, it was found for the Plaintiff. And *Yelverton* moved in Arreſt of Judgment, that the Plaintiff ſhould not have Judgment, becauſe in his Replication he has not aſſigned any Breach of the Award, and then he has not ſhewn any Cauſe of Action, for the Bond is not for any Debt, for it is guided by the Condition, which goes in Performance of a collateral Thing, *ſc.* of an Award; and though the Defendant had no Anſwer to the Breach, if it had been aſſigned, yet the Court ought to be ſatisfied, that the Plaintiff has Cauſe to recover, otherwiſe they will not give Judgment: And although the Verdict is found for the Plaintiff, yet this Imperfection in the Replication is Matter of Subſtance, which is not aided by the Statute. *Quod Nota. Per totam Curiam, præter Williams* Juſtice. And Judgment was arreſted.

If the Plaintiff does not aſſign a Breach of the Award, he ſhall not have Judgment, altho' he has a Verdict. 5 E. 4. 108, 109. Salk. 138. Ante 78.

Weblin *verſus* Mayer.

IT would be proved by many vehement Preſumptions, that the Plaintiff was a Plotter and Contriver of the Death of one Powel, *becauſe he would not ſell him his Land.* And, *per Curiam*, they are not actionable; for they affirm nothing of the Plaintiff, but refer to Preſumptions, which are incertain; and Words of Slander ought to be ſpoke affirmatively. *Quod Nota.* Judgment arreſted.

Words.

Pridham *verſus* Tucker.

THOU art a Healer of Felony, and haſt ſhewed ſuch Favour to a Horſe-ſtealer in the Time of thy Conſtable-ſhip, that thereby both the Horſe and Thief were conveyed away, and that it lieth in my Power to hang thee. And adjudged *pro Querente*; for *Healer* of Felony is a Word known in the County of *Devon*, where the Action is brought, to be a *Concealer* or *Hider* of Felony. As in the County of *York* to ſay to one, *Thou haſt ſtrained a Mare*, will bear an Action; for it is vulgarly taken *to ſteal a Mare:* And altho' it is not laid expreſly, that the Plaintiff was Conſtable at the Time of the Speaking of the Words, it is not material; for though he is out of his Office, yet he ought not to be ſlander'd with any Thing done in his Office; as if a Juſtice of Peace be put out of Commiſſion, and one will ſay to him, *When thou wert a Juſtice, thou wert a bribing Juſtice*; it is actionable; for although it refers to a Thing paſt, yet it defames him for ever,

Noy 134. Words.

Cro. El. 250

Poſt. 158. con.

in the Opinion of others, and makes him accounted unworthy to bear an Office for the future. *Quod Nota.*

Newlyn *verſus* Faſſet.

Words. THE *Plaintiff is a Felon. Take Heed what you ſay*, ſays a Stranger. Why, ſays the Defendant, *is not he a Felon, that knew of a Murder and concealed it? He* (*innuendo* the Plaintiff) *knew of the Murder of* Anne Lanaway, *and did not reveal it till long after it was openly known.* And it was adjudged *pro Querente*, for the firſt Words are actionable; and the ſubſequent Words increaſe the Slander; for altho' to conceal a Felony is not Felony, but fineable, and an Offence for which he ought to be bound *de ſe bene gerendo*, yet it ſhews Malice in the Defendant, and is a great Imputation to the Plaintiff. 2. There is a Difference between Words utter'd *continuata Voce*, and at ſeveral Times, or upon ſeveral Occaſions: As to ſay, *Thou art a Felon, for that thou ſtoleſt my Apples off my Trees*, is not actionable, for the Reaſon of the Speaking inſtantly annexed qualifies the precedent Words; but if a Man ſays, *Thou art a Thief*, and a Stander-by ſays, *Beware what you ſay*, and the other ſays, *I will juſtify he is a Thief, for he ſtole my Evidence*; this is but *inepta Ratio* of the firſt Words, not voluntarily proceeding from the Party, but as it was forced by another, and therefore ſpoke too late to qualify the firſt Words. And although *Yelverton* Juſtice ſaid, that if a Man ſays, J.S. *is a Traitor, for he robbed a Man by the Highway*, it will not bear an Action, becauſe the Reaſon does not concur nor depend on the firſt Words; yet *Fleming* Chief Juſtice denied it, for both the Words are ſlanderous; and although the Reaſon of the Speaking does not depend on the Word *Traitor*, yet it ſhall be conſtrued but greater Malice, becauſe he charges him with two ſeveral Matters, which deſerve Death: Which ſeems to be good Law. *Quod Nota.* Judgment *pro Querente. Per totam Curiam, præter Yelverton.*

I

Trin. 7 Jac. B. R.

Markham *verſus* Turner.

NOTA; *Markham* was Bail for Sir *John Skinner* in an Action of Debt brought by *Turner*, and was within Age; Judgment paſſed againſt *Skinner*, and he did not offer his Body: Wherefore on two *Scire fac'* and *Nihil* returned againſt *Markham*, Judgment was given againſt him. And *Yelverton* and *George Crooke* moved to have an *Audita Querela*, becauſe *Markham* was yet within Age; and by *Williams* Juſtice it does not lie, but he ought firſt to have Error to reverſe the Judgment, for during the Judgment in Force the Recogniſance is affirmed: But to that *Yelverton* at the Bar anſwer'd, that then we are without Remedy, and *Markham* in great Miſchief, if he cannot have *Audita Querela*; for perhaps the Judgment has no Error in it, and upon the *Scire facias Markham* the Bail could not have pleaded his Infancy, for that Suit goes in Affirmance of the Recogniſance and demands Execution of it; but yet the Error of the Infancy remains, and the Recogniſance to be avoided by this Suit by Inſpection; and therefore it is like an Aſſiſe of Rediſſeiſin, which a Man may have on the firſt Judgment in the Aſſiſe, and thereupon the Recovery in the Rediſſeiſin is reverſed. So here by the *Audita Querela* the Recogniſance being avoided for Infancy, the Judgment thereon is likewiſe avoided. *Quod fuit conceſſum per totam Curiam, præter Williams* Juſtice: And the *Audita Querela* was allowed *de bene eſſe*, for to deny it, if it lay by Law, was Injuſtice.

Audita Querela. Judgment on Recogniſance. Bail. Scire facias. Infancy.

Cro. Jac. 646. Co. Entr. 87. b. 88. a.

Paſton *verſus* Luſher.

THree Executors recover'd in the Common Pleas in Debt by Default, the Defendant brought Error and aſſigned a Diſcontinuance, *viz.* that the Suit being by three Executors, at the Day which they had by the Roll on a Continuance, two Executors only appeared, and by the ſame Roll Day given over to all three till another Day: And *Yelverton* urged that it is not a Diſcontinuance, but only the Default of the Clerk amendable; for it cannot be intended, when the Court gave Day to all three Executors, but that all appear'd, and that it was the Negligence of the Clerk to omit the Entry of the Appearance of the third

Error in Debt.

Amendment

third Executor, and upon that *Yelverton* vouched 26 *H.* 6. *Amendment* 33. Writ brought by Husband and Wife, and the Parties appeared and had Day to another Term, but no Appearance was had of the Wife, nor no Day by the Roll given to the Wife, and yet, forasmuch as it appeared to be the Fault of the Clerk, it was amended: But, *per totam Curiam*, in the Case *supra*, it is a Discontinuance, and cannot be amended; for Credit ought to be given to the Roll: And therefore *Non constat*, but that two only appeared, and that the third made Default, which is a Non-prosecution by him at that Day, which goes to the whole Suit and Time after. *Vide* 21 *E.* 4. 3. And, *per Curiam*, in the Case 26 *H.* 6. it shall be intended that there was some Remembrance in some By-roll, by which the Court was instructed, that the Wife also appeared, altho' it was not enter'd at the Day in the principal Roll; and thereupon, *per totam Curiam*, the Judgment was reversed.

Three Plaintiffs, two appear, and Day given by the Roll to all is a Discontinuance.

7 E. 4. 10.

Belcher *versus* Hudson.

Cro. Jac. 222. 1 Brownl. 15. Hob. 216. Assumpsit.

Belcher and *Anne* his Wife were Plaintiffs in *Assumpsit* against *Hudson*, and declared that in Consideration *Anna dum sola fuit* would marry one *Thomas Mason* at the Defendant's Request, the Defendant promised after the Death of *Thomas Mason* to pay the said *Anne* 40 *s.* a Year for her Life; and shewed, that thereupon she married *Thomas Mason*, who afterwards died; and she took to Husband *Belcher* the Plaintiff; and shewed that 4 *l.* were arrear for two Years after the Death of *Mason*, contrary to the Defendant's Promise, to Damage, *&c.* The Defendant pleaded in Bar a Release made by Deed to him by the said *Thomas Mason* during the Marriage with *Anne* one of the Plaintiffs, whereby he released to the now Defendant all Actions, Quarrels, Controversies, Claims and Demands whatsoever, which he had, or might have against the said *Hudson*, *&c.* upon which the Plaintiffs demurred: And it was adjudged *pro Quer'*, that the Release would not discharge this Promise: Because altho' the Promise was present, yet the Execution of the Promise was *in futuro*, and such, that he who released could never have an Action on it; but if he had released by express Words all Promises, or all Actions and Quarrels which he or his Wife had or might have, then it was held, that the Promise had been released; for the Promise, being a special Cause of Action, cannot be released till it comes *in esse*, no more than a Covenant, as 5 *Eliz.* it is adjudged, and 35 *H.* 8. *Dy.* 56. *b.* Wherefore Judgment was given *pro Quer'*, *Fleming* Justice being absent. *Quod Nota bene.* *Yelverton* of Counsel with the Defendant.

By whom, and by what Words a Promise may be released. 5 Co. 71. a Lutw. 249. Salk. 171. Mo. 34. Dy. 217.

Prowſe *verſus* Turner, *Bail of* John Skinner.

IN a *Scire facias* againſt the Bail, who on the ſecond *Scire facias* was condemned for not having the Body of the Principal, Judgment was given that the Plaintiff ſhould recover *ſuper Recuperationem prædictam*, where it ſhould be *ſuper Recognitionem prædictam*; wherefore *Telverton* and *George Crooke* moved to have a Writ of Error. And, *per Curiam*, * no Writ of Error lies in the Exchequer-chamber, becauſe the Judgment is in a *Scire facias*, which is a judicial Writ, and is not expreſly named in the Statute 27 *Eliz.* which gives the Error in the Exchequer. And they were likewiſe of Opinion, that it does not lie in the King's Bench, as upon Error in Proceſs, for there is no Error in the Proceſs; for that is where the Proceſs is miſtaken, *ſcil'* one Proceſs for another, and here the Proceſs is not miſtaken, but iſſued in due Form of Law; but the Error is only in Point of Judgment, *viz. Recuperationem* for *Recognitionem*, which is clearly another Matter, and no Remedy, as it ſeems, but in Parliament. And alſo *Williams* Juſtice conceived, that the King's Bench could not reform the Error in Proceſs, unleſs in the ſame Term. *Quod vide* accordingly, *F. N. B.* 22. Then *Telverton* moved that it is a void Judgment, and that the Bail ought not to be vexed thereby; for there is not any Judgment at all upon the Recogniſance given by the Court, upon which Execution can be demanded. *Ad quod non dederunt Reſponſum. Quod Nota, & Quære.*

Scire facias. Where an erroneous Judgment ſhall not be reformed in the Exchequer-Chamber. Stat. 27 El. Error in Parliament. * Cro. Jac. 171, 384. Hob. 72. Cro. Car. 300. 1 Ven. 38, 169.

Taylor *verſus* Markham.

TReſpaſs of Battery ſuch a Day, and declared accordingly, *&c.* The Defendant pleaded that he, *Tempore quo*, was ſeiſed of ſuch a Rectory, in the Place where the Treſpaſs is ſuppoſed, in Fee, and that *Tempore quo* there was Corn ſever'd from the nine Parts at the Place aforeſaid, and the Plaintiff came to take away the Corn, and the Defendant in Defence of his Corn, and to keep the Plaintiff from taking it, ſtood there to defend it, and the Ill that the Plaintiff had was of his own Wrong, *&c.* The Plaintiff replied, *de Injuria ſua propria abſque tali Cauſa:* Upon which the Defendant demurred in Law. And it was adjudged for the Plaintiff: For ſuch general Replication is good, and the Plaintiff need not anſwer the Defendant's Title, becauſe the Plaintiff by his Action claims nothing in the Soil or Corn, but only Damages for the Battery, which is merely collateral to the Title. But where the Plaintiff makes Title by his Declaration to any Thing, and the Defendant will plead another Thing in Deſtruction of it, or of the Plaintiff's Cauſe of Action, there he ought to reply ſpecially, and ſhall not ſay

1 Brownl. 215. Cro. Jac. 224. Treſpaſs. Replication. Where de Injuria ſua propria abſque tali Cauſa, ſhall be a good Iſſue.

abſque tali Cauſa, as 14 *H.* 4. 32. *b.* Treſpaſs for taking his Servant, the Defendant ſhew'd that the Father of him, whom the Plaintiff ſuppoſed to be his Servant, held of him in Chivalry, *&c.* and died ſeiſed, his Heir (*viz.* he who is ſuppoſed the Servant) being within Age, wherefore he ſeiſed him as his Ward, as he well might; there the Plaintiff replied, *de Injuria ſua propria abſque tali Cauſa*; and it was diſallow'd by the Court without anſwering to the Seigniory, *viz. de Injuria ſua propria, abſque hoc*, that the Father of him who is ſuppoſed Servant held of him in Chivalry; the Reaſon was, becauſe the Plaintiff by his Action made Title to the Servant, according to 16 *E.* 4. 4. *Quod Nota.* And Judgment was given accordingly. *Telverton* of Counſel with the Defendant.

Tuthil *verſus* Milton.

Cro. Jac. 222. Words.

THE Plaintiff declared, that whereas he is a *Freeman* of *Wells*, and *exercens Artem ſive Myſterium* of a Linen-Draper within the ſame City for five Years paſt, and by his Credit, *&c.* had gained much, *&c. vendendo & emendo*, *&c.* yet the Defendant 28 *Julii Anno* 5 at *Briſtol in Warda omnium Sanctorum* within the Juriſdiction there, *ad eundem Querentem dixit & ad* Franc' Tuthill, *viz. You both (innuendo* the Plaintiff and *Francis Tuthill) are Bankrupts and not worth a Groat*; *ad damnum*, *&c.* and it was found by Verdict there for the Plaintiff by a Venue *de Warda omnium Sanctorum*, and Judgment given there; and it was removed into the King's Bench by Error, and the Judgment affirmed; yet two Exceptions were taken; 1. That after an Attachment awarded in *Briſtol*, a *Capias* iſſued againſt the Defendant there, where by the Statute 19 *H.* 7. it ſeems, that a *Capias* in an Action on the Caſe doth not lie but in the King's Bench and Common Pleas. To which *Telverton* anſwer'd; Firſt, That is an Exception which ſubverts all Proceedings in inferior Courts, which always uſe ſuch Proceſs of *Capias* as the ſecond Proceſs in ſuch Actions; but if they commence there with a *Capias*, as the firſt Proceſs, without Summons or Attachment, it is not good, but is *continuè* adjudged Error: 2. This Judgment is grounded on the Verdict precedent, becauſe the Party has appeared, and the *Capias* is but mean Proceſs, which is *out of Doors* by the Appearance of the Party, *Quod tota Curia conceſſit.* The ſecond Error, on which they inſiſted, was, that the Declaration is not good, becauſe it is not laid preciſely, that at the Time of Speaking the Words the Plaintiff was a Linen-Draper, but only for the Space of five Years paſt: To which *Telverton* anſwer'd; that there is a Difference between Slanders of one in Reſpect of an Office, and in Reſpect of a Trade or Profeſſion: For if a Man ſays of a Juſtice of Peace, that he is a Briber, *&c.* he

19 H. 7. 9. Capias in an Action on the Caſe.

muſt ſhew in an Action for thoſe Words expreſly in his Declaration, that he was a Juſtice of Peace at the Time of the Words ſpoke, becauſe they found in Slander of his Perſon in Reſpect of his Office only, which Office continues during the King's Pleaſure only, being by Commiſſion. But where a Man is ſlander'd in his Profeſſion or Trade, there it need not be ſo preciſely alledged, that at the Time of the Words ſpoken he was a Lawyer, Phyſician, Merchant, or Linen-Draper; but it is ſufficient to ſhew, that he is of ſuch a Trade, and has exerciſed it for ſeveral Years paſt, without ſaying *ultimo* or *jam elaps'*; for a Man ſhall not be intended to alter his Trade or Profeſſion, but by Preſumption he continues it during his Life. *Quod fuit etiam conceſſum per Curiam. Quod Nota.* And the Judgment was affirmed. *Vide Trin. 6 Jac' Rot'* 1272. for the Caſe. Accordingly *Trin'* 38 *Eliz. B. R. Rot.* 546. between *Gardyner* Plaintiff, and *Hopwood* Defendant on the ſame Words, *Thou art a Bankrupt*, the Plaintiff alledging *Quod per multos Annos jam retroactos Artem merchandizandi, vendendi & licite barganizandi exercuit & uſus fuit*, and Judgment given for the Plaintiff. It was alſo agreed, that the Venue was well awarded from a Ward within the City, *melius quam de Civitate*, contrary to 8 *H.* 5.

Vide Palm. 566. All. 63.

Venue from a Ward.

Godley *verſus* Frith.

THE Plaintiff declared for a Diſturbance in a Way, and declared that he was ſeiſed of a Meſſuage, *&c.* and that he and his Anceſtors, and they whoſe Eſtate, *&c.* have had a Way from his Meſſuage to ſuch a Place for them, their Servants and Farmers, as well *on Foot*, as with Carts, *&c.* and ſo *retrorſum*, and that the Defendant had ſtopped the Way, to his Damage, *&c.* And upon *Non cul'*, the Jury found the Way as the Plaintiff had declared, but found it to be appurtenant to the Meſſuage, and if it ſhould be intended the Way which the Plaintiff declared for, they found for the Plaintiff, *aliter non*; and aſſeſſed Damages. And, *per Curiam*, the Verdict has not found any Thing againſt the Plaintiff, but that he ſhall recover, for the Plaintiff in his Declaration ſhall never lay the Way to be appendant or appurtenant, becauſe it is only an Eaſe and not an Intereſt; it is otherwiſe of a Common, for that is an Intereſt, and may be of ſeveral Natures, appurtenant, appendant, or in Groſs; but a Way cannot be ſo. And all the Precedents in the Book of Entries are according to the Declaration here, without laying the Way appurtenant or appendant. And Mr. *Man* Secondary, informed the Judges that a Judgment in the King's Bench was reverſed in the Exchequer, becauſe the Plaintiff had

Caſe.

1 Bulſtr. 47. A Way, an Eaſement, and not an Appurtenant. Common.

had alledged a Way appurtenant to an Houſe, becauſe he claimed it in another Manner and Nature, than he ought by the Law: *Quod Nota.* Wherefore Judgment was given for the Plaintiff. *Yelverton* of Counſel with the Plaintiff.

Vide Cro. Jac. 190.

Flud *verſus* Rumcey.

Prohibition. A Debtor made Executor, yet he ſhall pay Legacies.

THE Suggeſtion was, that whereas he was indebted to *J. S.* in 30*l.* which *J. S.* afterwards in his Life-time by his Deed gave all his Goods and Chattels to *A.* and afterwards made the Plaintiff and *B.* his Executors, and deviſed that the Plaintiff ſhould pay out of the 30*l.* that he owed him 10*l.* to the Defendant for a Legacy, the Defendant had drawn the Plaintiff, into the Spiritual Court for the Legacy, where by the Law the 30*l.* Debt is extinguiſhed by making the Plaintiff Executor: And ſhewed that he proved the Will, *&c.* And, *per Curiam*, the Defendant ſhall have a Conſultation; for, although the joint Executor has no Remedy to recover this 30*l.* againſt the Plaintiff his Co-executor, nor no Action can be uſed for it in the Plaintiff's Life, yet the Debt is not extinguiſhed, but remains as Aſſets to any other Creditor, as 8 *E.* 4.— is: And by the ſame Reaſon that ſuch Debt ſhall ſatisfy a Debt, it ſhall alſo ſatisfy a Legacy; and the rather, becauſe the Teſtator's expreſs Intent was ſo, having preciſely limited the Legacy to be paid out of the Debt. *Quod Nota. Per totam Curiam.* And a Conſultation was awarded accordingly. *Yelverton* was of Counſel with the Plaintiff.

Salk. 306.

Mich. 7 JAC. B. R.

Staverton *verſus* Relſe.

Words.

I *Will prove thee a perjured Knave.* And it was objected in Arreſt of Judgment, that the Words were not ſpoken *affirmativè*, but doubtfully, and in the future Tenſe, (*I will prove*, &c.) But, *per totam Curiam*, theſe Words (*I will prove*) are a vehement Affirmative, which import not only that Perjury was committed, but that the Defendant would openly traduce the Plaintiff for it, in ſuch Sort that it ſhould be openly proved. And, by *Williams* Juſtice, it is like the Caſe. *Dy. fol.* 72. *b. Thou wilt be a Bankrupt within few Days:* And adjudged there, that the Action lay; for altho' the Words

March 19. Hutt. 75.

in their Signification refer to a Time future, yet they are a preſent Slander. *Quod Nota.* *Per totam Curiam.*

Bell *verſus* Fox & Gamble.

THE Plaintiff declared, that the Defendants *Conſpiratione habita* cauſed the Plaintiff to be indicted at *York*, &c. for a common Barretor, & *ea Occaſione* at *York* he was taken and detained in Priſon *quouſque* before the Juſtices of Aſſiſe ſuch a Day, &c. *ſecund' Leg' & Conſuetud' hujus Regni Angliæ acquietatus fuit, ad damnum*, &c. And upon *Non cul'* pleaded, it was found for the Plaintiff, and moved in Arreſt of Judgment, that the Declaration was not good, becauſe there wanted this Word (*inde*) *acquietatus*, or (*de præmiſſis*) *acquietatus*; ſo that altho' upon the Indictment the Plaintiff was taken, yet *Non conſtat*, of what Thing the Plaintiff was acquitted; for he might, for any Thing that appears to the Court, be taken and committed for a Barretor, and yet be acquitted of another Thing as well as of the Barretry: But on View of the Precedents in the Book of Entries and *F. N. B.* Judgment was given for the Plaintiff; for the Writ never has the Word *inde*, and the Precedents are both Ways; and the rather becauſe tis all but one Sentence, and can have none other Reference than to the Indictment of Barretry, for that is *Subjecta Materia* on which the whole depends. *Per totam Curiam* on great Debate. *Yelverton* of Counſel with the Defendants.

Cro. Jac. 230. Conſpiracy.

Inde omitted, and yet good.

Cro. Car 286. 315, 419. F. N. B. 114. G. Reference of Words.

Stone & al' *verſus* Bromwich.

THE two Plaintiffs declared againſt the Defendant for diverting an antient Water-courſe, which Time whereof, &c. *ante talem Diem* ran *in & per* their Land, which they held in Common, and ſhewed their ſeveral Titles in their Declaration, and that ſuch a Day after the Defendant diverted the Water there running, &c. to their Damage, &c. and upon *Non cul'* pleaded it was found for the Plaintiffs, and moved in Arreſt of Judgment; 1. That the Plaintiffs ought not to join in this Action, becauſe they are Tenants in Common, no more than in Aſſiſe of Nuſance: But *Non allocatur*, for the Aſſiſe of Nuſance is in the Realty, but this Action is only in the Perſonalty, and does not concern the Title but only the Poſſeſſion, whereby the Profits of the Land are diminiſhed; for *conceſſum fuit*, that in an Action for Slandering their Title, or in Forger of falſe Deeds, they muſt ſever, and cannot join, becauſe it concerns the Title, which is ſeveral, and ſo is 19 *H.* 6.—2. Exception was, becauſe the Plaintiffs ſhew that it was an antient Water-courſe, which

Cro. Jac. 231. Noy 135. Caſe.

1 Inſt. 198. a. Where Tenants in Common ſhall join in Action.

ran *per & trans* the Plaintiff's Land till 1 *Maii* ſuch a Year, which was before the Action laid, and before the Stopping laid in the Declaration, ſo that it does not appear that the Water-courſe had Continuance at the Time of the Diverſion; but becauſe it appears afterwards in the Declaration, that the Plaintiffs charge the Defendant with the Diverſion ſuch a Day after, which is now found by the Verdict, the Court cannot intend but that the Water-courſe continued. *Per totam Curiam.* And Judgment accordingly.

Bedle *verſus* Morris.

Cro. Jac. 224. Co Entr. 347. b. Caſe. Hoſteler. Maſter brings Action where the Servant is robb'd in an Inn.

RIchard *Bedle* brought an Action on the Caſe againſt *Morris*, and declared on the general Cuſtom of the Realm, that all Inn-keepers, who keep common Inns, ſhall keep the Goods of their Gueſts ſafe, ſo that in Default of the Inn-keepers or their Servants they ſhall not be loſt; and declared that the Defendant *ante* 20 *Decembr' Anno* 6 *ac eodem die cuſtodivit & adhuc cuſtodit & tenet commune Hoſpitium in Dunchurch in Comitatu War'*, and one *W. Bedle* the Plaintiff's Servant, as his Gueſt the ſame 20 *Decembr' in Hoſpitio ſuo hoſpitavit, eodem W. Bedle adtunc & ibidem habente in legitima cuſtodia ſua* a Purſe, value 3 *d.* and 76 *l. de pecuniis numeratis* in the ſame Purſe *incluſis*, as the Goods and Chattels of the Plaintiff *adtunc & adhuc exiſten'* a lawful Subject of this Realm, Malefactors unknown to the Plaintiff the ſame 20 *Decembr' Anno* 6 *ad Dunchurch prædictum* the ſaid Purſe and 76 *l.* in the ſame Purſe *adtunc & ibidem incluſas*, in Default of the Defendant and his Servants, took and carried away, againſt the Law and Cuſtom aforeſaid: And upon *Non Cul'* pleaded, it was found for the Plaintiff. And it was moved in Arreſt of Judgment, that the Action did not lie for the Maſter on a Robbery of the Servant. But *Non allocatur*; for none can have Satisfaction but he who has the Loſs, and the Loſs is to the Maſter, and he only ſhall have an Appeal of Robbery: 2. It was objected, that it does not appear that he was his Servant at the Time of the Money and Purſe loſt; *ſed non allocatur*; for it is alledged expreſly that he was the Plaintiff's Servant at the Time he was lodged in the Inn; and moreover it is not material whether he was his Servant or not; for if it was his Friend by whom the Party ſent the Money, and he is robbed in the Inn, the true Owner ſhall have the Action. *Per totam Curiam.* And Judgment given accordingly.

Appeal of Robbery. Noy 79. Poph. 178. Latch 127. Daliſ. 8.

Alban *verſus* Brounſall.

THAT the Def. 20 *Febr' An.* 5. the Plaintiff's Cloſe called *Sandey-heath* at *Sandey* broke and enter'd, and ſpoiled his Graſs, and 100 Conies *ibidem tunc interfecit*, took and carried away: *Necnon* that the Defendant the ſame Day the Plaintiff's free Warren at *Sandey* aforeſaid, *&c.* enter'd and chaſed without Licence, and fifty Conies killed, took and carried away, to his Damage, *&c.* The Defendant to all the Treſpaſs *præter* breaking and entering the Cloſe called *Sandey-heath*, and treading the Graſs, pleaded *Non cul'*, and upon that Iſſue was joined; and as to breaking the Cloſe, *&c.* the Plaintiff ought not to have his Action; for he ſaid, that *W.* Lord *Ruſſel* and *Eliz.* his Wife *fuerunt & adhuc ſunt* ſeiſed in Fee in Right of *Eliz. in quadam pecia brueræ continen'* 10 *Acras in Sandey, contigue adjacen' & undique Sept'* to the Place called *Sandey-heath*, and that they and all thoſe whoſe Eſtate they have in the ſaid Piece of *Heath*, *&c.* have had and uſed to have *pro ſe & Firmariis ſuis dictæ peciæ brueræ*, *&c.* *& pro Servien' ſuis Paſſagium uſque eandem Peciam brueræ & ab eadem pecia in, per & trans* the ſaid Cloſe called *Sandey-heath in quo*, *&c.* all Times of the Year at their Pleaſure, *ad capiendum & percipiendum* the Profits *ejuſdem peciæ brueræ.* And the Defendant further ſaid, that long before the Treſpaſs, *&c.* many Conies in the ſaid Piece of *Heath* were wandring, and ſeveral *Cony-holes ibidem fuerunt effoſſa, & in eiſdem antris effoſſis dicti Cuniculi habitare gaudent*, the ſame Piece of Heath *eodem tempore quo, &c. herbam ibidem creſcen' depaſcen' fuerunt*, and the Defendant as Servant to the Lord *Ruſſel*, and by his Command, *tempore quo, &c. in, per & trans* the ſaid Cloſe *in quo, &c. verſus & uſque ad prædictam peciam brueræ pedibus ambulando itineravit ad venandum & capiendum prædictos Cuniculos in prædicta pecia brueræ, &c. tunc ibidem errantes & depaſcentes, prout ei bene licuit, &c. Quæ quidem Ambulatio in, per & trans Clauſum prædictum in quo, &c. pro Cauſa prædicta eſt eadem Clauſi Fractio & Intratio, &c.* of which the Plaintiff complains; and avers that the Place in which the Defendant *ex Cauſa præd' ambulando itineravit in Sandey-heath prædicto in quo, &c.* was *propinquius Paſſagium, quo ipſe uti potuit uſque prædictam peciam brueræ continen'* 10 *Acras.* Upon which the Plaintiff demurred: And *per Curiam* the Bar is not good; for *Paſſagium* is properly a Paſſage over the Water, and not over Land, and here the Defendant ought to have preſcribed in the Way and not in the Paſſage, for he ought to obſerve the uſual Words, and thoſe which are known in the Law, as a Preſcription and Uſage for a Way

1 Brownl. 215. Treſpaſs.

Paſſagium ſhall not be taken for a Way.

1 And. 234. Jenk. Cent. 142.

Way and not for a Paſſage. *Quod vide* 32 *Aſſ.* 58. & 11 *H.* 4. 82. *b.* 2. The Preſcription is not good, becauſe it is not ſhewn *a quo loco ad quem locum* the Paſſage or Way is, and altho' a Way may be in Groſs, yet it ought to be bounded and circumſcribed to ſome certain Place, *præſertim* when it appears to lie in Uſage from Time whereof, &c. for it ought to be *in loco certo*, and not in one Place *hodie*, and in another Place *cras*, but conſtant and perpetual in one Place. *Quod Nota.* 3. The Bar is not good, becauſe it is not ſhewn, what Manner of Paſſage it is, whether *on Foot*, *or Horſe*, *or Cart-way*; ſo that it is in the whole incertain. And Judgment given accordingly.

Brand *verſus* Liſley.

Aſſumpſit.

THE Plaintiff declar'd, that whereas one *Williams* was indebted to him in 100 *l.* and for the Satisfaction of that Debt deliver'd to the Defendant ſundry Goods *in Specie* amounting to the Value of the Debt to ſatisfy the Plaintiff the ſaid 100 *l.* and whereas the Plaintiff came to the Defendant, and requir'd him to ſatisfy the ſaid 100 *l.* with the Goods in his Hands, the Defendant in Conſideration the Plaintiff would forbear him for a certain Time, aſſumed and promiſed by ſuch a Day to pay and ſatisfy the Debt. The Plaintiff alledged *in facto*, that he did forbear the Defendant accordingly, yet he had not paid the 100 *l.* altho' ſuch a Day required, &c. and upon *Non aſſumſit* pleaded it was found for the Plaintiff, and ſhewn in Arreſt of Judgment, that there is no Conſideration on the Part of the Defendant; for by the Delivery of the Goods by *Williams* to him, he had no Intereſt in the Goods nor Profit by them, and ſo no Benefit at all. But it was adjudged for the Plaintiff; for by the Delivery of the Goods to the Defendant to ſatisfy the Plaintiff the 100 *l.* the Plaintiff had an Intereſt and Property in the Goods, and then by the Plaintiff's Forbearance of the Defendant for a Time, the Goods being due to the Plaintiff immediately, the Defendant had a Benefit, and *quid pro quo*. *Yelverton* of Counſel with the Defendant.

What ſhall be a good Conſideration. Vide 1 Lev. 222. 1 Sid. 337.

Saunders *verſus* Cottington.

1 Brownl. 144. Ejectment.

EJectment of two Meſſuages; but the Bill on the File was only *de uno Meſſuagio*; and the Defendant by his Paper-book pleaded *Non cul'* to two Meſſuages; and the Roll in Court, and the Record of *Niſi prius* were both of two Meſſuages; and there was a Verdict for the Plaintiff, and Judgment accordingly; now after Error brought by the Def. and before the Record removed, it was moved that the Bill on the File might be amended and made 2 Meſſuages; and becauſe the Def.

pleaded to two Meſſuages in his Plea in Paper, and the Record of *Niſi prius* and the Roll in Court were accordingly; it was reſolved *per totam Curiam*, that the Bill on the File ſhould be amended and made two Meſſuages; for the Bill which ſpeaks *de uno Meſſuagio* only cannot be the Ground of all the Proceedings after; but it is as if no Bill at all had been filed, and that ſhall be ſupplied, as it has been *ſæpius* in Experience, before the Record removed. *Quod Nota. Telverton* of Counſel with the Plaintiff.

Where the Bill on the File ſhall be amended by the Roll.

Freiſton *verſus* Shellito.

MR. *Shellito* of *Grays-Inn*, and ſeven others, were indicted for a forcible Entry into a Cottage and Croft in an Hamlet of *Heath* in the County of *York* in the Weſt-Riding *Com' præd'*, that they *Manu forti* enter'd on the Poſſeſſion of *Anne Binnes*, Farmer of *Richard Freiſton*, and diſſeiſed *R. Freiſton*, and *ſic diſſeiſitum* him *extraten'* till the Day of the Inquiſition. And *Telverton* moved, that the Indictment was inſufficient, becauſe they have not found that *Anne Binnes* the Farmer was amoved and expelled, and that is the Force of the whole Matter; for the Poſſeſſion of the Farmer or Termor is the Poſſeſſion of the Reverſioner, and without ouſting the Leſſee there can be no Diſſeiſin to him who has the Freehold. *Quod fuit conceſſum per totam Curiam*, and the Indictment was diſcharged: But if the Indictment had not expreſſed *Anne Binnes* to be Farmer, but generally the Cottage, *&c.* to be in her Occupation, then by *Williams* Juſtice, the Indictment which found the Diſſeiſin only had been good, becauſe no Title is found in any other but in him who is found to be diſſeiſed, but finding the Woman to be Farmer, that is an Eſtate known and certain, and ſuch Farmer muſt be ejected, or elſe he who has the Freehold cannot be diſſeiſed. *Quod Nota. Per totam Curiam.*

Indictment on 8 H. 6.

Where the Farmer muſt be ouſted, otherwiſe it is no Diſſeiſin.

Draper *verſus* Fulkes.

A Man brought an Action on the Caſe on Trover againſt Husband and Wife, and declared that he was poſſeſſed of ſeveral Goods *in Specie*, till ſuch a Day he loſt them, which came to the Poſſeſſion of both the Defendants, and * they converted them to his Damage, *&c.* and on *Non cul'* pleaded, it was found for the Plaintiff, and Judgment given in the Common Pleas, and affirmed in the King's Bench on a Writ of Error: Yet an Exception was taken to the Declaration, becauſe the Converſion is laid to the Charge of the Wife as well as to the Charge of the Husband, and a Feme Covert cannot convert

Trover.

* Vide 1 Ven. 24.

Feme Covert may convert Goods.

Goods, but it ſhall be ſaid the Converſion of the Husband only, for in Regard ſhe can have no Property, but the whole is in the Husband, therefore the Converſion ſhall be ſaid the Act of the Husband only. To which *Yelverton* anſwer'd, that this Action is not grounded on any Property ſuppoſed to be in the Defendants, but on the Poſſeſſion only, and the Point of the Action is the Converſion, which is a Tort with which a Feme Covert may be well charged, as well as ſhe may be charged with a Treſpaſs or Diſſeiſin committed. And if a Feme Covert takes my Sheep and eats them, or other Goods and converts them, I may well have this Action againſt Husband and Wife, and ſuppoſe the Converſion in the Wife only, *viz.* the Tort. But Husband and Wife cannot have an Action on Trover, and ſuppoſe the Poſſeſſion in them both, for the Law will transfer in Point of Ownerſhip the whole Intereſt to the Husband, as 21 *E.* 4. 4. is. *Quod fuit conceſſum per totam Curiam.*

Noy 79. Ow. 48. Latch 126.

Salk. 114.

THE Plaintiff declared in Ejectment on a Leaſe of an Houſe, ten Acres of Land, 20 *Acras Prati*, 20 *Paſturæ*, by the Name *unius Meſſuagii*, 10 *Acr' Prati*, *be it more or leſs*: And on *Non cul'* pleaded had a Verdict, but *Nil capiat per billam* was enter'd; for on the Matter diſcloſed by the Plaintiff himſelf in the Declaration, he cannot have his Execution of the Quantity found by the Verdict; for in the Leaſe there are but ten Acres demiſed, and theſe Words (*more or leſs*) cannot in Judgment of the Law extend to thirty or forty Acres, for it is impoſſible by common Intendment, and the rather becauſe the Land demanded by the Declaration is of another Nature than that which is mentioned in the *per Nomen*; for that goes only to Meadow, and the Declaration to Arable and Paſture. *Quod Nota. Per Curiam.*

1 Brownl. 145. Ow. 133. Cro. El. 13. Where the per Nomen deſtroys the Quantity in the Declaration.

Troughton *verſus* Googe.

TReſpaſs for entering into his Cloſe called *Wildmarſh*, and five Loads of Hay there *meſſuit & aſportavit* to his Damage, *&c.* the Defendant ſaid, *Quod Clauſum prædictum contin' 12 Acr'*, whereof long before the Treſpaſs, *& Tempore quo*, *&c.* the Mayor, *&c.* of *London* were ſeiſed in Fee, and ſo ſeiſed demiſed to the Defendant for Years before the Treſpaſs ſuppoſed, by Virtue whereof he enter'd till the Plaintiff claiming by Deed from the Mayor, *&c.* for Life, where nothing paſſed, enter'd, and the Defendant *Tempore quo*, *&c.* re-enter'd, as he well might, *&c.* The Plaintiff replied, that the Cloſe in which the Treſpaſs is ſuppoſed contains an Acre and three Roods, and abutted it *Eaſt*, *Weſt*,

1 Brownl. 217. Treſpaſs.

Weſt, *North* and *South*, and one of the Abuttals was on the twelve Acres mentioned in the Bar; and concluded that it is *aliud quam* the Cloſe mentioned in the Bar containing twelve Acres. Upon which the Defendant demurred; and as it ſeemed to the Court on the firſt Opening of the Matter, the Replication is not good; becauſe it does not anſwer to the Title ſuppoſed by the Bar, for when the Plaintiff in his Declaration gives the Place a Name certain (as here *Wildmarſh*) and the Defendant by his Plea in Bar agrees to the Place; as here, *viz.* *Quod Clauſum prædictum* (*id eſt* Wildmarſh) is the Inheritance of the Mayor, &c. and he, as Leſſee for Years to them, makes Title to it, the Plaintiff ought to anſwer the Title or avoid it, which he does not by the Replication; for the Plaintiff thereby endeavours to aſſign a new Place, which cannot be, when they are before agreed of the Place: And therefore he ought to have pleaded, that there were two Cloſes called *Wildmarſh*, the one containing twelve Acres, &c. as the Defendant had alledged, the other containing one Acre and three Roods, whereof the Plaintiff was ſeiſed, and that the Cloſe where the Plaintiff ſuppoſed the Treſpaſs was in the Cloſe called *Wildmarſh* containing one Acre and three Roods. *Quod Nota.* And *vide* 21 *H.* 4. and ſeveral other Books, which make a *Quære* of this Pleading: And *Curia adviſare vult.*

Where the Plaintiff and Defendant agree in the Name of the Place, the Plaintiff ought to traverſe or avoid, and not conclude quod eſt aliud.

Barwicke *verſus* Foſter.

DEBT for Rent; the Caſe was ſuch: The Plaintiff demiſed certain Land to the Defendant at *Mich'* 1 *Jac.* for five Years, yeilding Rent *at our Lady-day and Michaelmas yearly, or within ten Days after*; and for the Rent arrear at the laſt *Michaelmas* the Plaintiff declared, as for Rent due at the Feaſt of Saint *Michael.* And *prima facie* it ſeem'd to the whole Court, except *Crooke* Juſtice, that the Action did not lie, but the Rent for the laſt Quarter is gone; for it is not due at *Michaelmas* as the Plaintiff has declared, for by his own Shewing it is payable, and reſerved at *Michaelmas*, or within ten Days after, ſo that altho' the Leſſee may pay it at *Michaelmas-day*, yet it is not any Debt that lies in Demand by Action till the ten Days paſſed, and the Reſervation, being the Act of the Leſſor, ſhall be conſtrued ſtrongly againſt himſelf; ſo that foraſmuch as the End of the Term is at *Michaelmas*, and before the ten Days, (till which Time the Rent is not due, and at that Time the Term is ended) therefore the Leſſor ſhall loſe the Rent; as if the Leſſor died the next Day after *Michaelmas-day*, the Executor ſhould not have the Rent, but the Heir by Diſcent as incident to the Reverſion; and if the Leſſee had paid the Rent to the Leſſor on *Michaelmas-day*, and had died before the ten Days, his Heir in Ward to the King, the King ſhould have it again; for it ought

1 Brownl. 105. Cro. Jac. 227, 233. 2 Brownl. 220. 1 Bulſt. 1. Where Rent reſerved at Mich', or within ten Days after, ſhall be good, and where not.

44 E. 3. 3. b. 10 Co. 127. b. ought not of Right to be paid till the ten Days, like to 44 *E.* 3. But this Caſe being moved *Term. Hill.* after, *Fleming* Chief Juſtice, *Fenner* and *Yelverton mutata Opinione* held ſtrongly, that the Leſſor ſhould have the Rent, for it is reſerved *yearly*, and the ten Days added ſhall be expounded to give Liberty to the Leſſee within the Term for his Eaſe to protract Payment. But becauſe the ten Days after the laſt *Michaelmas* are out of the Term, rather than the Leſſor ſhall loſe the Rent *yearly* reſerved, the Law will reject the laſt ten Days. *Quod Nota.* A good Reaſon.

Vide 10 Co. 129. b.

Brenley *verſus* Todd.

Cro. Jac. 228. Noy 135. What ſhall be a good Conſideration, and where Notice need not be given.

THE Plaintiff declared, that in Conſideration the Plaintiff at the Defendant's Requeſt would take to Wife *J. S.* the Defendant aſſumed to pay the Plaintiff 50*l.* on Demand; the Plaintiff ſhewed *in facto*, that he Truſting to the Defendant's Promiſe did marry *J. S.* ſuch a Day, yet the Defendant had not paid the 50*l.* altho' he was requeſted ſuch a Day, to his Damage, *&c.* And on *Non Aſſumpſit* pleaded, it was found for the Plaintiff, and alledged in Arreſt of Judgment, that the Plaintiff ought to give the Defendant Notice of the Marriage, becauſe the Defendant is a Stranger to it by Preſumption, and cannot have Notice. But it was adjudged for the Plaintiff; and that Notice was not neceſſary, for the Defendant has bound himſelf by his Promiſe as ſtrongly as by his Bond; and moreover the Notice is no Part of the Promiſe, and therefore need not be alledged: And it was never ſeen, that Notice was inſerted in the Declaration, for the Defendant ought to take Notice at his Peril. And ſo it was adjudged between *Warley* and *Hodges T.* 44 *El. Rot.* 238. and the Caſe of *Street* and *Wheeler* now lately adjudged to the contrary was denied *per tot' Cur'*; for if a Man promiſes on a good Conſideration to pay *J. S.* 10*l.* when *J. D.* ſhall come to *Pauls*, he muſt do it at his Peril, for it is intended that he has Power over *J. D.* either not to come at all, or not without his Privity. *Quod Nota.*

3 Bulſt. 326. Latch 97. Cro. Jac. 404. 1 Rol. Rep. 433. 3 Bulſt. 235.

1 Brownl. 107. Cro. Jac. 229. 4 Mod. 245. 3 Lev. 375. Comb. 228. Salk. 207. 6 Mod. 93, 94.

IT was adjudged *per tot' Cur'*, where an Executor is Plaintiff for a Thing touching the Will, and is nonſuited, or a Verdict paſſes againſt him, that he ſhall not pay Coſts on the new Statute 4 *Jac.* for the Statute ought to have a reaſonable Intendment, and no Default can be preſumed in the Executor who complains, becauſe it concerns the Act of another, which he cannot have perfect Notice of, and ſo it was ſaid to be reſolved and adjudged now lately by all the Juſtices of the

Common Pleas. *Quod Nota.* A ſettled Judgment by both Courts contrary to ſome few Precedents, which have been in the King's Bench to the contrary. *Quod Nota.*

Hill. 7 Jac. B. R.

Molineux *verſus* Molineux.

IN Debt in the Common Pleas againſt *Molineux* on a Bond as Heir to his Father, the Defendant there pleaded *Riens per Diſcent* except twenty Acres in *D.* in ſuch a County. The Plaintiff replied, that the Defendant had more by Diſcent in *S. viz.* ſo many Acres: And upon that they were at Iſſue, and it was found for the Defendant, that he had nothing by Diſcent in *S.* wherefore the Plaintiff recover'd and had Judgment to have Execution of the twenty Acres in *Dale:* Upon which Judgment the Defendant in the Common Pleas brought Error; and aſſigned for Error a Diſcontinuance in the Record of the Plea *a Termino Paſchæ uſque ad Term' Mich'* after. And whether it was aided by the Statute 18 *Eliz.* becauſe it was after Verdict, was the Queſtion? And it was adjudged that it is out of the Statute, and that it is Error; becauſe the Judgment was not founded on the Verdict, but only on the Defendant's Confeſſion of Aſſets, and the Verdict here was to no Purpoſe, but made the Defendant's Confeſſion more ſtrong; ſo the Statute 18 *Eliz.* is to be intended where the Trial by Verdict is the Means and Cauſe of the Judgment. *Quod Nota.* Wherefore the Judgment was reverſt. The Law ſeems the ſame, if the Plaintiff brings Debt of 40 *l.* and declares for 20 *l.* on Bill, and 20 *l.* on *mutuatus eſt;* and on *Non ſum informatus* the Defendant as to the *mutuatus* is condemned, and they are at Iſſue for the 20 *l.* on the Bill, which paſſes likewiſe for the Plaintiff, whereby he has Judgment to recover the 40 *l.* demanded, and the Damages aſſeſſed by the Jury, *nonobſtante* for Coſts ſo much; ſo that the Judgment for the Coſts is intire: In this Caſe, if it be diſcontinued on the Roll, it ſeems the whole ſhall be reverſed, notwithſtanding the Verdict, becauſe the Verdict alone is not the Cauſe of the Judgment, but the *Non ſum informatus* alſo, and the Coſts intirely aſſeſſed for both. *Quære* this.

1 Brownl. 106. Cro. Jac. 236. Error in Debt.

Where a Diſcontinuance ſhall be notwithſtanding a Verdict and the Stat. 18 El.

Vide Cro. Jac. 211. Cro. El. 339, 412.

Goddard *verſus* Thorlton.

Treſpaſs. WHereas the Plaintiff 2 *Novembr' Anno* 6. *apud London, &c. in dampno ſuo, viz. in Shopa ſua per Tho. Hugon* his Servant, *three green Fiſh*, being in the Shop Damage-feaſant, cauſed to be taken, and would have impounded them, the Defendant the ſame Day reſcued them from the Servant, and took them away, to his Damage, *&c.* The Defendant ſaid, that before the Treſpaſs, *&c. H. Offley* was ſeiſed of the Shop in Fee, and ſo ſeiſed 16 *Maii Anno* 30 *Eliz.* demiſed it to *Sanders, &c.* and derived an Intereſt to himſelf under that Leaſe, giving Colour to the Plaintiff under *H. Offley*, and ſo juſtified, *&c.* The Plaintiff replied, that before *H. Offley* had any Thing, *T. B.* was ſeiſed of the Shop in Fee, and 7 *E.* 6. deviſed it to *Tho.* his Son in Tail, the Remainder to *Jo.* in Fee, and died: That *Tho.* by Deed inrolled in the *Huſtings* bargain'd and ſold it to *Eliz.* in Fee, who enter'd, *Jo.* died without Iſſue, whereby his Remainder in Fee deſcended to *Tho'*; *Eliz.* deviſed the Shop to *Tho. Offley* and *R. Offley* in Fee, and died ſeiſed, they enter'd and were ſeiſed in Fee; *Tho.* died ſeiſed of the Remainder in Fee without Iſſue, whereby the Shop, *proteſtando* deſcended to *R. Goddard* as Coſin and Heir, *Tho. Offley*, and *R. Offley* died, after which *H. Offley* named in the Bar enter'd, and ſo intruded himſelf into the Shop, and by ſuch Entry and Intruſion was thereof ſeiſed in Fee; and he ſo ſeiſed, *R. Goddard* 2 *Octobr'* 29 *Eliz.* died, whereby the Shop, *proteſtando*, deſcended to *W. Goddard* as Coſin and Heir, *W. Goddard* died without Iſſue, whereby it deſcended to *Nicholas* the Plaintiff as Coſin and Heir, and afterwards 16 *Maii Anno* 30 *Eliz. H. Offley* demiſed, *&c. prout* in the Bar, and the Plaintiff enter'd, as he well might, *&c.* The Defendant, *ut prius*, by Way of Rejoinder ſaid, that *H. Offley* was ſeiſed of the Shop in Fee, and demiſed, *ut ſupra*, in the Bar, *abſque hoc, quod H. Offley in Shopam præd' intravit, & ſe ſic intruſit modo & forma, &c.* And thereupon the Plaintiff demurred in Law, becauſe the Traverſe was not good; for the Intruſion, being the Means to avoid the Title of *H. Offley*, ought
Traverſe. to be traverſed expreſly, and not by Way of Circumſtance; as to ſay, *Abſque hoc, quod intruſit*, for that had been a full Anſwer; but it is not ſo, to ſay, *Abſque hoc, quod H. Offley intravit & ſic ſe intruſit.* To which *Tilc.* being of Counſel with the Def. anſwer'd, that, as this Caſe is, it is not material whether the Traverſe be good or not; for the Replication is vicious, and the Title alledged in the Bar not anſwer'd; for the Def. alledging a Seiſin in Fee in *H. Offley*, and a Title under that, the Title alledged in *H. Offley* ought to be avoided directly, and

it

it is only by Suppoſal of an Intruſion in *H. Offley*, which cannot be by Law on an Eſtate of Inheritance: And *R. Offley* and *Thomas Offley* by the Plaintiff's own Shewing had Fee-ſimple, ſo that no Intruſion could be on an Eſtate in Fee-ſimple; but in Propriety of Speech in Law, * Intruſion is only after the Death of Tenant for Life, and an Eſtate of Freehold ended; then if the Title alledged in *H. Offley* is not avoided, but only by alledging his Entry by Way of Intruſion, and by Law no Intruſion can be, then the Bar is unanſwer'd; ſo the Plaintiff cannot have Judgment, but the Defendant ſhall be acquitted of the Treſpaſs. *Quod fuit conceſſum per totam Curiam.* And *Nil capiat per Billam* enter'd. *Quod Nota bene*; and that the Traverſe in the Rejoinder was really inſufficient.

Intruſion cannot be on an Eſtate of Inheritance.

* 1 Inſt 277 a. F. N. B. 203. Fleta, Lib. 4. c. 30.

Where the Plaintiff ſhall not have Judgment, altho' the Rejoinder is inſufficient.

Dalby *verſus* Cook.

THAT whereas the Defendant accounted with the Plaintiff 1 *Martii Anno 6 Jac.* touching ſeveral Sums of Money due from him to the Plaintiff, and was found in Arrears *6 l. in Conſideratione inde* he promiſed to pay them to the Plaintiff when he ſhould be thereunto required, yet he had not paid the *6 l.* altho' required ſuch a Day, to his Damage 20 *l.* The Defendant ſaid, that before 1 *Martii Anno 6.* in which the Account and Promiſe is ſuppoſed, the Defendant accounted with the Plaintiff, and was found in Arrear *6 l.* and that afterwards, and before 1 *Martii Anno 6. viz.* 5 *Decembr' Anno* 41 *Eliz.* for the better Security of the *6 l.* the Defendant and another enter'd into a Bond to the Plaintiff in 14 *l.* for Payment of 7 *l.* at a Day to come, which Bond the Plaintiff accepted for Security of the *6 l. abſque hoc*, that the Defendant *ante vel poſt* the Bond accounted with the Plaintiff, *&c.* and thereupon the Plaintiff demurred. And it was adjudged for the Defendant, and that the Traverſe was good; for the Conſideration is not merely traverſed in this Caſe; for it was agreed, that is not traverſable, but here the Account which makes the Conſideration perfect is only traverſed; for the Debt is confeſſed and avoided by the Satisfaction by the Bond, and thereby the *Aſſumpſit* is alſo confeſſed. And here it is as much as if the Defendant had pleaded Payment, and the Plaintiff had demurred; for this Action being to recover Damages for the Money not paid according to Promiſe, and the Plaintiff by the Demurrer confeſſing Payment, or other Satisfaction by Bond, as in this Caſe, it appears now to the Court, that the Plaintiff is not grieved, nor has any Cauſe of Action. *Quod Nota.* Vide [illegible] of Counſel with the Plaintiff.

Cro. Jac. 234. 1 Bulſt. 16 Aſſumpſit.

The Conſideration is not traverſable, but the Inducement to it.

Lee

Lee *verſus* Atkinſon & Brook.

Cro. Jac. 236. 1 Brownl. 217. Battery.

THAT the Defendants 1 *Octobr' An.* 6 *Jac.* at *London* aſſaulted the Plaintiff, *viz.* in ſuch a Pariſh and Ward, and beat, wounded, and evil treated him, *Ita quod de Vita ejus deſperabatur, &c.* to his Damage 200 *l.* The Defendants to the Force pleaded *Non Cul'*; to the Reſidue, that *Atkinſon tempore quo, &c.* at *Graveſend in Com' Kent* was poſſeſſed of a Gelding, and ſo poſſeſſed the Plaintiff *tempore quo, &c.* came to him to hire the Gelding for four Shillings for two Days, that the Plaintiff might ride from *Graveſend præd' uſque Nettleſted* in the ſame County, *& abinde uſque tunc ad Graveſend* within the two Days; wherefore the Defendant for the Conſideration aforeſaid, *tempore quo, &c.* lent the Gelding to the Plaintiff, who had it, and *in recta linea* towards *Nettleſted* by the Space of a Mile rode on the Gelding, *quouſque* the Plaintiff *tempore quo, &c.* intending to deceive the Defendant of the Gelding, turned him out of the Way to *Nettleſted*, and rode towards *London*; wherefore *Atkinſon* in his own Right, and *Brook* as his Servant came to the Plaintiff, and at the ſame Time *quo, &c.* required the Plaintiff then riding on the Gelding towards *London* to deliver the Gelding, which he refuſed; wherefore *Atkinſon* in his own Right, and *Brook* as his Servant, and by his Command, *tempore quo, &c.* to repoſſeſs him of the Gelding laid Hands on the Plaintiff, and took him off the Gelding, and would have taken the Gelding from the Plaintiff; upon which the Plaintiff with Force aſſaulted the Defendants, *& manu forti* detained the Gelding; wherefore the Defendants defended the Poſſeſſion of the Gelding againſt the Plaintiff *prout licuit*; and ſaid that the Damage, if any the Plaintiff had, was from his own Aſſault, and in Defence of the Poſſeſſion of the Gelding; *abſque hoc*, that the Defendants *fuit cul' in London vel alibi extra Kent, &c.* and thereupon the Plaintiff demurred; and it was adjudg'd for the Plaintiff, for the Battery is confeſſed, and to ariſe on ill Uſage from the Defendants, for by their own Bar it appears that the Plaintiff had hired the Gelding for two Days, and that they within the two Days diſturbed him in the Poſſeſſion of the Gelding, and *thruſt him off his Back*, which is not lawful, for the Plaintiff had a good *ſpecial Property* for the two Days againſt all the World; and although the Defendants pretend that the Plaintiff miſbehaved himſelf in Riding to another Place than was intended; yet that is to be puniſhed by an Action on the Caſe, but not to ſeize the Gelding. *Quod Nota. Tilerton* of Counſel with the Plaintiff

What Act ſhall be called an Aſſault.

Starkey *verſus* Barton & Gore.

Cro. Jac. 234. Prohibition.

THE Caſe was ſuch; *Barton* and *Gore* Church-wardens of *Aughton* in the County of *Lancaſter*, libelled before the Ordinary

the Biſhop of *Cheſter*, for a Tax of 3 *s.* 4 *d.* made *Anno* 2 *Jac.* by the Pariſhioners againſt *Starkey* the Plaintiff, in which *Starkey* had Sentence, upon which the Church-wardens appeal'd to the Metropolitan of *York*, and pending the Appeal, *ſcil' ult' Decembr' Anno* 4 *Jac' Gore* one of the Plaintiffs in the Appeal releaſed to *Starkey* all Actions, Suits and Demands, *&c.* and afterwards *Barton* in his own Name, and in the Name of *Gore* ſued to reverſe the Sentence given at *Cheſter*, and proſecuted the Appeal, whereupon *Starkey* brought a Prohibition, ſuppoſing that the Releaſe had diſcharged the Appeal; upon which *Barton* appear'd and demurr'd in Law; and *Gore* who made the Releaſe made Default, wherefore Judgment was given, that he ſhould not have a Conſultation. And now on Argument of the Caſe in Court all the Judges were of Opinion *una Voce*, that the Prohibition did not lie on this Suggeſtion of the Releaſe; and that for two Reaſons: 1. Becauſe the temporal Court hath nothing to do with the principal Matter, *viz.* the Tax laid for Repairs, for that is merely Spiritual, and to be determined in the Court Chriſtian; then the Ground of this Suit belonging to the Court Chriſtian, all Things * dependant thereon ſhall be to them alſo; and whether this Releaſe will bar both the Church-wardens or not, this Court cannot judge, but it ſhall be determined there: As in the like Caſe, if a Legacy be given to a Feme Covert, and the Husband releaſes, and afterwards he and his Wife ſue in the Spiritual Court for the Legacy, the Party ſued ſhall not have a Prohibition on the Releaſe of the Husband, becauſe the Temporal Judges cannot meddle with the Legacy, neither can they by Conſequence determine, whether the Releaſe will extinguiſh it; as the Caſe was 29 *Eliz.* adjudged. 2. The Court held, that the Suit for this Tax is all in Behalf of the Pariſh, and the Suit maintained at their Charge, and the Coſts recover'd in the Spiritual Court ſhall go to the Pariſh in Satisfaction of their Expences, and therefore they conceived no Difference between Things in the Poſſeſſion of the Church-wardens, and Things in Action, for which they are forced to ſue: And 13 *H.* 7. 10. is, if Church-wardens releaſe, or give the Goods of the Church, it is nothing worth; for the Law gives them Power to receive a Thing for the Advantage of the Church, but not for the Diſadvantage; and therefore although Judgment is given againſt *Gore* on his Default, that he ſhall not have a Conſultation, yet the Court will give Judgment generally, *quod fiat Conſultatio.* And Judgment was enter'd accordingly. *Yelverton* of Counſel with the Plaintiff.

Legacy. Baron and Feme. Where the Releaſe of one Church-warden will bar the other, and where not. Conſultation.

* Cro. El. 685. 2 Sand. 260. 2 Lev. 25. 1 Ven. 173, 308. 1 Sid. 320

Prieſtley *verſus* White.

THE Plt. declar'd, that 8 *Maii An.* 6. he was poſſeſſed at *Lond'* in ſuch a Ward of ſeveral Goods (and named them *in Specie*) and them

Treſpaſs.

caſually loſt, which came to the Hands of the Defendant, who 1 *Octobr' Anno* 6. knowing them to be the Plaintiff's Goods converted them to his own Uſe, to his Damage, *&c.* The Defendant pleaded in Bar, that before the Plaintiff had any Thing, one *W. Dickenſon* of *New Malton* in the County of *York* was poſſeſſed of the Goods, as of his proper Goods; and ſuch a Day *Anno* 4. for a good Conſideration in Law gave them to the Defendant, whereby he was poſſeſſed; the Defendant 1 *Maii Anno* 5. loſt them, and 2 *Maii* the ſame Year they came to the Hands of *W. Dickenſon* at *London*, who the ſame Day gave them to the Plaintiff, whereby he was poſſeſſed, and loſt them 1 *Oct. An.* 6. and they came to the Defendant's Hands, and he converted them to his own Uſe as his proper Goods, *& hoc, &c.* Upon this the Plaintiff demurred; and it was adjudged for the Plaintiff, for the Bar is * not good; becauſe it neither confeſſes, nor avoids, nor traverſes the Plaintiff's Title to the Goods alledged in the Declaration, but only gives the Plaintiff Colour of a Poſſeſſion without Right or Property, and that on an ill and defeaſible Gift made to him by *Dickenſon*: In which a Difference was taken between this Action and an Action of Treſpaſs *Quare vi & armis*; for in Treſpaſs Colour of a Poſſeſſion given by the Defendant to the Plaintiff is ſufficient, becauſe the Declaration is general on a Suppoſal without any Title ſet forth in certain, and therefore it is ſufficient to anſwer a Suppoſal with a Colour of Poſſeſſion only; but now in this Action of Trover, and in all other Actions, where the Plaintiff makes Title to the Thing demanded, or to the Thing for which he demands Damages, there the Defendant ought to make a better Title to himſelf, and to traverſe the Plaintiff's Title, or otherwiſe to confeſs and avoid it. As 4 *Jac.* in the King's Bench, it was adjudged in Trover of Goods, where the Defendant made Title to them paramount, and that he deliver'd them to the Plaintiff to keep, whereby the Plaintiff was poſſeſſed, and that the Defendant, as he well might, took them as his own Goods, and adjudged no Plea; becauſe it only anſwer'd the Plaintiff's Title with a Colour of a Poſſeſſion. The ſame Law in the Caſe *ſupra*. *Quod fuit conceſſum per totam Curiam*, on Argument, *Yelverton* of Counſel with the Plaintiff.

* Cro. El. 262. contra. Vide Salk. 654.

In Trover The Plaintiff's Title ought to be anſwer'd expreſly.

3

Paſch.

Paſch. 8 Jac. B. R. 25-112.

Johnſon *verſus* Procter.

A Bond of 300 *l.* the Condition was to perform Covenants, Grants, Articles and Agreements in ſuch an Indenture, *&c.* now the Indenture recited, that whereas a Leaſe had been made by the Biſhop of *York* to *Johnſon*, the Plaintiff in Error, and to one *Vaviſor* of a Mill, certain Land, *&c.* and that the whole ſurvived to *Johnſon*, as he ſuppoſed, now *Johnſon* granted the Mill, Land, *&c.* and all his Eſtate, Title, Intereſt, *&c.* therein to *Procter*, and covenanted that *Procter* ſhould enjoy it for any Act done by him, *&c.* now *Johnſon* the Defendant in the firſt Suit pleaded, that the Plaintiff had enjoyed it, *viz.* the Mill, and Land, *&c.* for any Act done by him, *&c.* The Plaintiff replied that *Vaviſor*, who was the Jointenant with *Johnſon*, in his Life aſſigned his Eſtate, *&c.* in the Mill and Land, *&c.* to *J. D.* who enter'd and expell'd him: Upon which the Defendant in the Common Pleas demurred; and it was adjudged againſt him, and affirmed upon Error: For it is not like *Noke's* Caſe, 4 *Co.* 80. *b.* for there the Grant was once good for the Whole, and became bad by Eviction after; and therefore there the Covenant ſubſequent qualified the general Covenant; but here the Grant, according to the Purport of it, was never good; for of the Moiety *Johnſon* had no Power to grant, becauſe it was granted before by *Vaviſor* his Companion; and yet he has in his Conveyance to *Procter* expreſly granted by preciſe Words the Mill and Land, and therefore the Condition of the Bond being to perform all Grants, *&c.* the Grant being defective at firſt, as to a Moiety, which is the Subſtance of the Agreement of the Parties, is not qualified by the ſubſequent Covenant. *Per totam Curiam. Quod Nota. Yelverton* of Counſel with the Plaintiff in Error.

Cro. Jac. 233. 1 Bulſt. 3. 2 Brownl. 212. Error in Debt.

Where a particular Covenant ſhall not qualify the general.

R. Rock *verſus* N. Rock.

WHereas the Defendant 10 *Febr' Anno* 1. at *B.* in the County of *York*, in Conſideration that he *tunc* was indebted to the Plaintiff in 40 *l.* for ſeveral Sums *antetunc* lent by the Plaintiff to him, and for divers Wares before receiv'd, and for certain Sums of Money at the Inſtance of the Defendant paid to *J. Anyas* for the Debt of the Defendant, he promiſed to pay 40 *l. ante Inceptionem* of the Plaintiff of his next Journey to the City of *London*, and ſaith *in facto*, that he on 23 *Febr'*

Cro. Jac. 245. Aſſumpſit.

Where the Conſideration ought to be preciſely alledged.

23 *Febr'* *Anno* 1. *incepit Iter ſuum* towards the City of *London*, and came there the 28 *Febr'* in the ſame Year, yet the Defendant had not paid the 40*l.* to his Damage, *&c.* and upon *Non Aſſumpſit* pleaded, it was found for the Plaintiff. And *Telverton* ſhewed in Arreſt of Judgment, that it does not appear by the Declaration, that the Journey began by the Plaintiff towards *London* 23 *Febr'* was the firſt and next Journey after the Promiſe, as it ought to be by the Agreement of both Parties, and that the Plaintiff ought to have averred *in facto*. *Quod fuit conceſſum per totam Curiam*; for as the Defendant is bound by his Promiſe, ſo likewiſe is the Plaintiff bound to ſhew the preciſe Conſideration agreed, or of his Part alſo to be performed; and the Payment on the Part of the Defendant commences on the Plaintiff's firſt Journey to *London*, and not on the ſecond or third; and therefore the Plaintiff ought to alledge preciſely that it was the firſt Journey, otherwiſe no Breach appears to the Court. *Quod Nota.* And *Nil capiat per Billam* enter'd.

Trin. 8 JAC. B. R.

Okeley *verſus* Salter, *&c.*

Noy 137. 43 El. c. 2. Error in Treſpaſs. Overſeers of the Poor. Coſts. Damages.

AFfirmed upon Error in the King's Bench, on the Statute 43 *Eliz.* for the Relief of the Poor, although the Statute expreſſes by Name but [Sale and Diſtreſs of Goods,] yet if the Plaintiff voluntarily delivers any Money for which he is aſſeſſed to the Poor, and afterwards brings Treſpaſs of it againſt the Overſeers, it is within the Statute; for theſe Words [Sale and Diſtreſs] are put in the Act only for Examples, and the Statute ſhall be conſtrued largely, becauſe it tends to *Opus Charitatis*, and Treſpaſs brought after ſuch voluntary Delivery of the Money is Vexation, which the Statute intended to ſuppreſs. And it was likewiſe there agreed and adjudged *per Curiam*, that Damages in this Action for the Defendants by Reaſon of their Vexation ſhall be aſſeſſed by the Jury, but ſhall be trebled by the Court, and that the Court may thereon give Coſts *de Incremento*; for no Evidence for Coſts can properly be given to the Jury, foraſmuch as that depends on the Uſage of the Court, in which the Suit is. And according to this Reſolution was the Caſe between *Menial* and *Bell*, *Trin.* 44 *Eliz.* *Rot.* 516. *B. R.* *Telverton* of Counſel with *Salter*, *&c.* for whom

Judgment was affirmed, they being Overſeers for the Poor in *Ipſwich*.

Rolls *verſus* Yate.

INdenture of Covenants between two of the one Part, and one *Yate* of the other Part; and among other Covenants one was, It is agreed between the Parties, that *Yate* ſhall enter into a Bond to pay *Rolls* (by Name, who was one of the two of the one Part) 160 *l.* by ſuch a Day, which was not paid; *Rolls* died, and *Rolls* the Plaintiff took Adminiſtration, and brought Covenant againſt the ſaid *Yate* for Non-payment of the 160 *l.* to *Rolls* in his Life-time. And it was adjudged, that it did not lie; for although the Money was to be paid to *Rolls*, who is dead, yet he who ſurvives, and who is Party to the Indenture ought to have Covenant; for *Rolls*, and he who ſurvives make, as to this Purpoſe, but one Perſon. As if a Bond is made to three to pay Money to one of them, all ought to join in the Suit, for they are all as one Obligee; and if he who ought to have the Money dies, the other two who ſurvive muſt ſue, altho' they have no Intereſt in the Sum contained in the Condition. The ſame Law here, for the 160 *l.* payable to *Rolls* in his Life-time, being to be obtained by Suit on this Indenture, none can have an Action thereon but thoſe who are Parties during their Lives, and after their Death the Executor or Adminiſtrator of the Survivor. *Quod Nota. Per totam Curiam. Yelverton* of Counſel with the Plaintiff.

2 Brownl. 207.
1 Bulſt. 25. Covenant.

Vide 5 Co. 19. a.
3 Leon. 161.
1 Sand. 155.
3 Mod. 263. Where one ſhall have an Action for a Debt due to another.

Broxholme *verſus* Thorold.

REplevin for taking four Oxen at *Coringham in Com' Lincoln'*, in a Place called *Dowgate Leyes* 29 *Septembris Anno* 6 *Jac'*. The Defendant ſaid, the Place contained four Acres of Paſture *in Coringham magna*, which was his Freehold, and juſtified Damage-feaſant. The Plaintiff in Bar of the Avowry ſaid, that the Place where, *&c.* lay in a Place called *Have-acre-quarter*, Parcel of a great common Field called *Easfield in Coringham prædict'*. *Cumque* the Plaintiff *prædicto tempore quo, &c. & diu antea* was ſeiſed in Fee of a Meſſuage and fourteen Acres of Land, Meadow and Paſture, with the Appurtenances *eidem Meſſuagio ſpectan'*; and that the Plaintiff, and they whoſe Eſtate he has in the Tenements have had Common, *&c.* and ſo preſcribed to have Common for himſelf, his Farmers and Tenants of the Tenements aforeſaid *in loco in quo, &c. pro omnibus Averiis ſuis communicalibus ſuper Tenementa præd' cum pertinen' levan', &c. tanquam ad Tenementa prædicta pertinen'*. And thereupon Iſſue was taken on the Common: And it was found for the Plaintiff, and alledged in

1 Brownl. 188.
Cro. Jac. 238. Replevin.

The Land to which, and in which Common is claim'd ought to be certainly ſhewn.

Venue.

Arreſt of Judgment, *quod non conſtat* by the Bar to the Avowry, in what Place the Meſſuage and Land, to which the Common belongs, lie, *viz.* whether they lie *in Coringham*, or in any other Town or County; and that of Neceſſity ought to be ſhewn in certain, becauſe the Venue ought to be from the Place where the Houſe and Land lie, as well as from the Place where the Land, in which the Common is claimed, lies; and therefore muſt neceſſarily be ſhewn in certain, and ſhall not be intended of Neceſſity to be *in Coringham* where the Common is; for Common may be appurtenant or appendant to Land in another County, and then the Trial ſhall be from both Counties. *Quod Nota.* So Judgment was ſtayed, and a Repleader awarded. *Telverton* of Counſel with the Plaintiff.

Sir John Ratcliff *verſus* Davis.

Cro. Jac 244. Noy 137. 1 Bulſt. 29. Trover.

When a Pledge ſhall be redeem'd.

TRover for an *Hatband ſet with Diamonds*, upon *Non cul'* the Jury found, that the Plaintiff was poſſeſſed of the *Hatband*, and pawned it to one *Whitlock* for 25 *l.* but that no Time of Redemption was limited: They found that the Wife of *Whitlock* (the Husband being ſick) by the Aſſent of the Husband deliver'd the *Hatband* to the Defendant; *Whitlock* died, the Plaintiff tender'd the 25 *l.* to the Wife being Executrix, who refuſed it; and found that the Plaintiff demanded it of the Defendant, who refuſed to deliver it, and converted it to his own Uſe, *Et ſi, &c.* And Judgment *pro Quer'*; for, *per Curiam*, in Caſe of a Pawn, he who pledges it has Time to redeem it during his Life; for it is a Condition ſolely knit by him, and to be performed by him, and the Death of him to whom it was pawned is no Impediment of the Redemption; but it is otherwiſe of the Death of him who pawned it; for his Executor cannot redeem it, for it is a Condition perſonal, and being generally pawned extends only to the Perſon of him who pawn'd it: It was likewiſe held, *per Curiam*, that although the Defendant had the Delivery of the *Hatband* by *Whitlock*, yet the Tender of the 25 *l.* ought to be to the Executrix, and not to the Defendant, for the Delivery makes but a bare Cuſtody of it; and if the Delivery had been on a Conſideration, yet it does not alter the Caſe, for the Defendant is not privy to the firſt Contract of the Pawning, nor to the Condition; and therefore it is not like a Mortgage, for there he who has Intereſt ought to have the Money; but in Caſe of a Pledge it is but a ſpecial Property in him who takes it, and the general Property continues in the firſt Owner. *Per Fleming* Chief Juſtice. *Quod non fuit negatum.* And all ſeems to be proved by the Books 13 *R.* 2. *Pledges B.* 31. & 22 *E.* 4. 10. & 16 *H.* 6. *Barr. Fitz.* that if he

who pawns Goods be attainted, the King by Payment of the Money may redeem them. And it was held, that inſtantly on the Tender of 25 *l.* and Refuſal of it, the Property was intirely reduced to the Plaintiff without Claim: But *per Curiam* the Executrix ſhall have Debt for the 25 *l.* againſt the Plaintiff, for on the Redemption it remains a Duty. *Quod quære*, for *mirum mihi* foraſmuch as there was no Contract for the Money between the Parties: It was likewiſe held by the Chief Juſtice, *& non dedicitum*, that if the Pawn be of a periſhable Nature, as Corn, Oil, *&c.* and no Time of Redemption limited, and the Party ſtays till it is periſhed in Nature and ſpoilt, foraſmuch as there is no Default in him who took the Pledge, he ſhall have Debt for his Money, and the other no Remedy for his Pawn, for the Law of this Part hath diſſolved the Contract; for Things in their Nature periſhable cannot be preſerved. *Quod Nota bene.* *Telverton* of Counſel with the Defendant.

1 Inſt. 209. a. b. Where a Man ſhall have Debt without any Contract.

Goodyer *verſus* Junce.

JUNCE recover'd 120 *l.* in the Common Pleas againſt *Goodyer* *in Craſtino Animar' Anno* 6 *Jac'*, *&* 28 *Novembr'* in the ſame Term, being the laſt Day of the Term; the Plaintiff pray'd an *Elegit* againſt *Goodyer* to the Sheriffs of *London* (where the Action was brought) and to the Sheriff of *Lancaſter* returnable *Craſtino Purific'* after, which was granted *per Curiam*; afterwards *Junce* the Plaintiff took an *Elegit Vicecomiti Lancaſtriæ*, which, as the Courſe is, by *Scire facias* is firſt directed to the Chancellor of the County Palatine, and this *Elegit* in the End of it appear'd to be grounded on a *Teſtatum* firſt made by the Sheriffs of *London*, that *Goodyer* had nothing in *London*, *ubi revera* they never made ſuch Return; and on this *Elegit*, by a Jury taken before the Sheriff of *Lancaſter*, they extended a Leaſe of a Tithe for fifty-nine Years to come, to the Value but of 100 *l.* which the Sheriff deliver'd to *Junce* the Plaintiff, as the Chattel of *Goodyer* for 100 *l.* and returned it, and that *Goodyer* had not *plura bona*, *&c.* and thereupon *Goodyer* brought Error in the King's Bench, and aſſigned for Error *in adjudicatione Executionis*, *viz.* that no Return was made by the Sheriffs of *London*, nor filed in the Common Pleas; and it was adjudged Error; for although according to the Prayer of the Plaintiff in the Common Pleas he might have taken his *Elegit* immediately both into *London* and into *Lancaſter*, yet when he waives the Benefit of it, and will ground his Execution on a *Teſtatum* by former Sheriffs of *London*, which is falſe, it makes Error in the Execution; for as 18 *H.* 6. 27. *&* 2 *H.* 6. 9. *a.* a *Teſtatum* is grounded on a former Return filed, that the Party has nothing in the County

1 Brownl. 107. Cro. Jac. 246. 2 Brownl. 208. Error in Debt. Elegit in the County Palatine. Teſtatum.

County where the Action is brought; and although the Prayer to have the *Elegits* into *London* and *Lancaſter* appears of Record to be 28 *Novembr'* the laſt Day of the Term, and by the *Teſtatum* it is ſuppoſed that the Sheriffs of *London* had returned *Quinden' Martini*, (which is before 28 *Novembr'*) that he had nothing in *London*, which ſeems to be contrary to the Record, yet that is not material, but makes the Matter more vicious; for it ſtands well with the Judgment, which was *Craſtino Animar'*, that ſuch Writ might iſſue *Vicecomitibus London'* returnable *Quinden' Martini*, and it ſhall be deemed the Plaintiff's Fault that he did not file it; and it ſhall be preſumed there was ſuch Writ, becauſe the Proceſs taken by the Plaintiff himſelf recites it. *Quod Nota. Per totam Curiam.* It was alſo adjudged in this Caſe, that *Goodyer* ſhould be reſtored to the Term again, and although it was valued by the Jury but to 100 *l.* and deliver'd to *Junce* the Plaintiff to hold *ut bona & catalla, &c.* yet againſt *Junce Goodyer* ſhall have it again; for he being the Party himſelf, it is in Law but a bare Delivery *in Specie*, as it is, which ought to be reſtored *in Specie* again, and doth not alter the Property abſolutely, but attends on the Execution to be good or bad, as the Execution is. And it was adjudged accordingly before in the Caſe of one *Robotham*, and alſo in the Caſe of one *Worrel* (as Maſter *Noy* told *Yelverton.*)

Dy. 363. a. Mo. 573. Cro. El. 278. But if the Sale had been to a Stranger by the Sheriff of this Term for 100 *l.* although the Value was 1000 *l.* yet upon the Reverſal he ſhould not have the Term again, but the Money, *viz.* 100 *l.* according to the Opinion 20 *Eliz. Dy.* for it is the Party's Folly that he does not pay the Judgment; and if ſuch Sales ſhould be avoided none would buy Goods of the Sheriff, whereby many Executions would fail. *Quod Nota. Per totam Curiam. Yelverton* of Counſel with *Goodyer*, the Plaintiff in Error.

Mich. 8 JAC. B. R.

Moore *verſus* Hawkins.

1 Brownl. 145. Cro. Jac. 261. 1 Bulſt. 92. Lane 81, 86. Godb. 406. IN Ejectment after Iſſue joined, on *Non Cul'* the Cauſe came to be tried before *Yelverton* and *Crooke* Juſtices of Aſſiſes *in Com' Oxon'*; the Plaintiff had declar'd of ſeveral Meſſuages and ſeveral Acres of Land in three Vills in the ſame County; and at *Niſi prius* before the Jurors were ſworn, Maſter *Walter* (of Counſel with the Defendant) put in a Plea; that after the

laſt Continuance, *viz.* ſuch a Day *Term' Trin'* before the Day of Aſſiſe, *viz.* 20 *Julii* (the Aſſiſes being held at *Oxon'* 22 *Julii*) the Plaintiff had enter'd into ſuch a Cloſe by Name, containing eight Acres *parcell' præmiſſor' in Narratione ſpecificat'*, &c. and this Plea was receiv'd by the Juſtices of Aſſiſe; and afterwards in this Term, *viz. Mich.* 8. Mr. *Walter* and *Telverton* of Counſel with the Defendant prayed that they might amend the Plea, *in hoc tantum*, by putting in the true Vill where the Cloſe lay, in which the Plaintiff's Entry was; foraſmuch as it was only Matter of Form, and not of Subſtance, for *parcell' præmiſſor'* is ſufficient. And they conceived, that the Trial of this new Iſſue ought to be from all the three Vills named in the Declaration. But *Telverton* Juſtice, having moved all the Juſtices of *Serjeants-Inn* in *Fleetſtreet*, reported their Opinions openly in the King's Bench (although the Record of *Niſi prius* was returned into the Exchequer) *viz.* that it is in the Diſcretion of the Juſtices of Aſſiſe to accept ſuch Plea as before, and ſuch Plea may well be allowed, as 10 *H.* 7.—is, and it ſtays the Verdict: But it is otherwiſe of a Protection, for although they allow a Protection, yet the Juſtices may take the Verdict *de bene eſſe*; yet he ſaid, that in 7 *E.* 3. in a *Præcipe quod reddat* a Releaſe was pleaded at *Niſi prius*, and yet the Jury was taken; but it is in the Diſcretion of the Juſtices to allow or diſallow. It was likewiſe held by all the ſaid Juſtices (as he reported it) that in this Caſe the Plaintiff could not have replied to this Plea at *Niſi prius*, for the Juſtices of Aſſiſe have no Power either to accept a Replication on the Plea, or to try it, but only to return it as Parcel of the Record of *Niſi prius*. It was alſo held, that the Plea put in *in Pais* could not be amended by adding the Vill in Certain in which the Cloſe lay, for it is Matter of Subſtance; and the Court of Exchequer, where the Record is, will not award the Venue from all the three Vills named in the Record, unleſs it appears to them judicially, that the Cloſe extends into all three Vills; and that does not appear, for *parcell' præmiſſor'* does not neceſſarily extend to all the Vills, but may be, and may well be preſumed to be in one Vill only; therefore it is Matter of Subſtance, and the Juſtices of Aſſiſe have no Power, after their Commiſſion determin'd, to amend the Plea: Wherefore *Telverton* ſent the Plea without Amendment into the Exchequer. This Caſe concerned Sir *H. Brown*, *ex parte Querentis*, and the Counteſs of *Pembrook*, *ex parte Defendentis*.

What Pleas a Tenant ſhall have at N. P. prius.

2 Ro. 630.

Protection.

Power of the Juſtices of Aſſiſe.

Davis *verſus* Purdy.

1 Brownl. 146. Ejectment. Where Words in a Declarat' ſhall be void rather than the Declaration vitious.

THE Plaintiff declar'd on a Leaſe made by one *Chriſtmas* 6 *Maii Anno* 7. of a Meſſuage, &c. in *D.* by Virtue whereof the Plaintiff enter'd, and was poſſeſſed *quouſque poſtea* the Defendant 18 *Die ejuſdem Menſis Maii Anno* 6 *ſupradicto* ejected him, &c. and upon *Non Cul'* pleaded, a Verdict being found againſt the Plaintiff, *Yelverton* moved in Arreſt of Judgment (to ſave Coſts) that the Declaration was inſufficient, for this Action is grounded on two Things; 1. On the Leaſe; 2. On the Ejectment; and theſe two ought to concur one after the other; and in this Caſe the Ejectment is ſuppoſed a Year before the Leaſe made; for the Leaſe is *Anno* 7. and the Ejectment ſuppoſed to be made *Anno* 6. and therefore the Declaration ſeems to be ill. And *Yelverton* vouched the Caſe between *Powre* and *Hawkins Anno* 7 *Term' Paſchæ*, where the Plaintiff declared on a Leaſe from *Edward Ewer* 27 *Apr' Anno* 6. and laid the Ejectment to be 26 *Apr' Anno* 6 *ſupradicto*; and by the Opinion the Declaration was ill, *Cauſa qua ſupra.* Yet the Declaration was adjudged good, and the Word *ſexto* to be void; for the Day of the Ejectment being 18 *ejuſdem Menſis*, it cannot be intended but to be the ſame Year, in which the Leaſe is ſuppoſed to be made. *Per Curiam.*

Cro. Jac. 96, 428. Salk. 325.

Kniveton *verſus* Roiley.

1 Brownl. 218. 2 Ro. 613. Treſpaſs.

TReſpaſs for breaking his Cloſe called *G. in Woodthorpe in Com' Derb'* to his Damage, &c. The Defendant pleaded that the Cloſe is known as well by the Name of *D.* as by the Name of *G.* and that it is, and Time whereof, &c. has been Parcel of the Manor of *Wingerworth*; and pleaded his Freehold in the Manor: The Plaintiff maintained his Declaration, and traverſed, that the Place where the Treſpaſs, &c. is not Parcel of the Manor; and upon that they were at Iſſue, and the *Venire facias* was awarded from *Woodthorpe* only. And it was moved in Arreſt of Judgment *ex parte* of the Defendant (the Verdict being for the Plaintiff,) that it is a Miſtrial; for it ought to be as well from the Manor as from *Woodthorpe*; for although the Parties are agreed, that the Place where the Treſpaſs, &c. lies in *Woodthorpe*, yet it being ſuppoſed in Fact to be Parcel of the Manor of *Wingerworth*, the Venue of the Manor will by Intendment have a better Conuſance of it than the Vill of *Woodthorpe* only. *Quod fuit conceſſum per totam Curiam*, and a new *Venire facias* awarded to try the Iſſue *de novo*.

16, 17 Car. 2. c. 8.

Aylet *verſus* Choppin.

THE Plaintiff declared on a Leaſe made by *Jo. Aylet* for a Year of certain Land in *E. in Com' Eſſex*, by Virtue whereof he enter'd and was poſſeſſed till ejected by the Defendant, *&c.* The Defendant pleaded that the Land is Copyhold Parcel of the Manor of *D. &c.* whereof *Jo. Aylet*, the Leſſor's Father was ſeiſed in Fee according to the Cuſtom, and that he ſurrender'd to the Uſe of his Will, and thereby deviſed the Land in Queſtion to *Jo.* the Leſſor, and *H. Aylet* his Sons, and to their Heirs Male of their Bodies: And order'd by his Will that they ſhould not enter till their ſeveral Ages of twenty-one Years; and further willed, that *W. Barnard* and *H. Barnard* his Executors ſhould have the ſaid Land to perform his Will till his ſaid Sons *Jo.* and *H.* ſhould come to their ſeveral Ages of twenty-one Years, *&c.* To which the Plaintiff replied and confeſſed the Will *prout*, *&c.* but he further ſhewed, that ſuch a Day in ſuch a Year before the Leaſe *Jo.* his Leſſor came to his full Age of twenty-one Years, and enter'd and demiſed to him *prout*, *&c.* upon which the Defendant demurred. And it was adjudged for the Plaintiff; for although the Eſtate to *Jo.* and *H. Aylet* precedes in Words, and the Deviſe to the Executors follows, yet in Conſtruction the Eſtate to the Executors precedes in Poſſeſſion, and is as if he had deviſed that his Executors ſhould have the Land till his Sons *Jo.* and *H.* ſhould attain their ſeveral Ages of twenty-one Years, and afterwards to them and their Heirs Male, *&c.* to be enjoyed in Poſſeſſion at their ſeveral Ages, ſo that the Executors have only a limited Eſtate, determinable in Time, when each Son *ſeparatim* comes to his full Age, for his Part; for ſo the Intent appears to be, that each of the Sons may enter when he attains to twenty-one Years. And although it was objected by *Williams* Juſtice, that the two Brothers are Jointenants by the Will; and if one enters when he attains to his full Age, the other Brother being under Age, that will deſtroy the Intent of the Deviſor, for then they will not take jointly. To that the Court anſwer'd, that the Entry of him who comes to full Age does not deſtroy the Jointure, but they ſhall be Jointenants notwithſtanding that; for this Entry in the Deviſor's Intent was only as to the Perception of the Profits, and as to the Poſſeſſion, and not as to the Eſtate in Jointure; and all this is proved by 30 *H.* 6. *Deviſe* 12. where a Deviſe was to four in Fee, and that one ſhould have all during his Life; and it was adjudg'd good, and that is as to the Perception of the Profits only. *Quod Nota. Per totam Curiam præter Williams* Juſtice, who proteſted againſt the Judgment. *Yelverton* of Counſel with the Plaintiff.

1 Brownl. 147. Cro. Jac. 259. 1 Bulſt. 42. Ejectment.

Expoſition of Wills.

Cro. Jac. 655. 1 Sand. 180, 186.

Smith

Smith *verſus* Jones.

Cro. Jac. 257. 1 Bulſt. 44. Ow. 133. Aſſumpſit.

THE Plaintiff declar'd, that *Gregory Smith* his Father was Poſſeſſor of ſeveral Goods and Chattels, and by his Will bequeathed 7 *l.* as a Legacy to the Plaintiff, and made *Conſtance* his Wife Executrix and died, and that the Defendant married with *Conſtance*; and that ſuch a Day in Conſideration that Goods of *Gregory Smith* came to the Poſſeſſion, and were in the Hands of the Defendant ſufficient to ſatisfy Debts and Legacies; and in Conſideration the Plaintiff at the Defendant's Requeſt would forbear the 7 *l.* till *All-Saints* following, the Defendant promiſed to pay the Plaintiff the 7 *l.* at *All-Saints* next, and ſhewed *in facto* that he had forborn the 7 *l.* till, *&c.* yet the Defendant had not paid him according to his Promiſe, to his Damage, *&c.* The Defendant pleaded that *Conſtance* the Executrix of *Gregory Smith* died inteſtate at ſuch a Place, before the Promiſe made, upon which the Plaintiff demurred. And it was adjudged againſt the Plaintiff; for the Demurrer confeſſing the Death of the Executrix before the Promiſe, it thereby appears to the Court, that there is not any Conſideration ſufficient to charge the Defendant; for the Thing, for which the Plaintiff would have Damage by his Action, is for a Legacy, which muſt be ſued for only in the Spiritual Court, and by the Death of the Wife, the Defendant is not chargeable with the Legacy, for he is not Executor nor privy to the Will of *Gregory Smith*; and although he had Poſſeſſion of the Goods, yet foraſmuch as he came to it lawfully by the Intermarriage with *Conſtance* the Executrix, by her Death the Defendant has but a bare Cuſtody of the Goods, for which he ſhall not be charged, either in the Spiritual Court, or at the Common Law, without Imployment or Converſion of the Goods to his own Uſe after the Death of the Wife; then there is no Reaſon to charge the Defendant with any Promiſe, when it is not grounded upon any Conſideration, for the Plaintiff could not charge the Defendant with the Legacy, but he might compel the Defendant to deliver the Goods to the Ordinary, or to take Letters of Adminiſtration, to the Intent that he might ſue in the Spiritual Court for the Legacy. The Declaration was alſo held ill, becauſe it does not ſhew preciſely what Perſon the Plaintiff was to forbear to ſue for the 7 *l.* for it cannot be intended that he ſhould forbear the Defendant, becauſe it appears by the Law, that he is not chargeable with it. *Quod Nota. Per totam Curiam. Telverton* was of Counſel with the Plaintiff.

What ſhall be a good Conſideration.

I

Trulock

Trulock *verſus* Rigsby.

REplevin for taking ſix Kyne in a Place called *Briſley-Hill* in *Radley in Com' Berks*, the Defendant as Bailiff of Mr. *Reade* made Conuſance, and ſaid, that the Place where, *&c.* contained fifty Acres, and is Parcel of the Manor of *Barton*; and ſhewed that *E.* 6. was ſeiſed of the Manor of *Barton*, of which the Place where, *&c.* is Parcel, and granted it by Letters Patents, *&c.* to *Richard Lee*, *necnon* ſeveral other Lands by the Name of *Coxlies*, *&c.* and among other Particulars in the Patent the King granted *Briſley Hill in Barton*, *&c.* and deduced the Freehold of the Manor, whereof the Place where, *&c.* is Parcel, to Maſter *Reade*, and he as Bailiff to him took the Kyne Damage-feaſant, *&c.* The Plaintiff replied and ſhewed, that one *Hide* is ſeiſed of a Meſſuage and ſeveral Acres of Land in *Radley*, and that he and they whoſe Eſtate, *&c.* have had for themſelves, their Tenants and Farmers Common in the ſaid Place called *Briſley-Hill* in *Radley*, when the ſaid Field called *Briſley-Hill* in *Radley* lay freſh and not ſown, for all the Year with their Cattle levant, *&c.* and when the ſaid Field is ſown with Corn, when the Corn is carried away till *reſeminatur*; and ſo juſtified the putting in of the ſix Kyne to uſe the Common, becauſe the ſaid Field was not ſown with Corn. To which the Defendant rejoined and ſaid, that Part of the Field called *Briſley-Hill*, in the Avowry named, was ſown with Corn *Tempore*, *&c.* wherefore, *&c.* upon which the Plaintiff demurred. And it was adjudged for the Plaintiff for two Reaſons: 1. Becauſe the Defendant in his Rejoinder refers his Plea to another Place than where the Taking is ſuppoſed, and that is not in Queſtion, and in which the Plaintiff does not claim Common; for the Plaintiff claims Common only in *Briſley-Hill* in *Radley*, and the Field named in the Defendant's Avowry, to which he refers his Plea, is *Briſley-Hill* in *Barton*, for *Briſley-Hill* in *Radley* is not named in the Avowry by ſpecial Name, but only by Implication by this Name, *Locus in quo*; and for this Reaſon the Rejoinder does not anſwer the Matter alledg'd in the Replication: The ſecond Reaſon was, becauſe the Plaintiff claims Common when *Briſley-Hill* in *Radley* is not ſown with Corn, and yet the Defendant, if his Plea had referr'd to the ſame *Briſley-Hill*, does not give any full Anſwer; for he ſays, *Quod parcella dicti Campi* was ſown with Corn, and *per Curiam*, the Sowing of a ſmall Parcel of the Field does not ouſt the Plaintiff from uſing his Common in the Reſidue, for that may be by Covin to deceive the Plaintiff of his Common; and therefore the Plaintiff claiming Common *quando Campus* (*id eſt totus Campus*) is not ſown, ſhall not be barred of Common by Sowing of Parcel of it; for notwithſtanding

1 Brownl. 189. Replevin.

that, the Field is not ſown, *per Curiam*. *Yelverton* was of Counſel with the Plaintiff.

Woodley *verſus* Denbaugh.

Ejectment.

THE Plaintiff declar'd on a Leaſe made to him by *James Woodley*, *&c.* by Virtue whereof he enter'd, and was poſſeſſed till he was ejected by the Defendant; upon *Non cul'* pleaded the Parties went to Trial, and the *Poſtea* (which is the Warrant for the Juſtices of Aſſiſe) in the End of it was, *Jurata inter Peter Wooley* Plaintiff, *& Alfrid Denbaugh* Defendant *de placito tranſgr' & eject' firmæ*, *&c.* and the Verdict being for the Plaintiff, *Yelverton* moved in Arreſt of Judgment, that the Juſtices had no Warrant to try the Iſſue; for no *Jurata* was returned between *Woodley* and *Denbaugh*, but only between *Wooley* and *Denbaugh*: Which *Wooley*, who is ſuppoſed Plaintiff by the *Jurata*, is another Perſon than *Woodley*, who brings the Action, and ſo a Miſtrial: But, *per Curiam* it ſhall be amended; for all the Proceedings, except this Miſpriſion in the *Poſtea*, are between the right Parties, and that is but the Default of the Clerk, who had the Record and *Diſtringas* before him. *Quod Nota*: And ſo it was amended, and many Precedents are accordingly: But the whole Court agreed, that it was in the Breaſt of the Judge at the Aſſiſes whether he would proceed on that Record or not, becauſe the *Jurata* is miſtaken.

Poſtea amended.

Godfrey *verſus* Bullein.

1 Brownl. 189. 1 Ro. Rep. 32, 73. 1 Bulſt. 46. 6 Co. 77. b. 11 Co. 42.

Bullein brought Replevin againſt Mr. *Godfrey* for taking ſix Cattle in ſuch a Place in *Bale in Com' Norfolk*, to his Damage, *&c.* The Defendant as Bailiff to *Richard Godfrey*, Eſq; (the Counſellor) made Conuſance, becauſe before the Time, and at the Time of the Taking, the ſaid *Richard Godfrey* was ſeiſed of a Court-Leet in *Bale* of all the Inhabitants and Reſiants within the Precinct of his Manor of *Bale*, to be held within the Precinct of the Manor, as belonging to his Manor; and ſhewed that he uſed to have a Fine of 10*s.* called a *Leet* Fine of all the Chief Pledges of his Leet; and if they failed to pay it, that the Steward uſed, *&c.* to amerce him who made Default in Payment; and ſhewed that at a Court held within the Manor ſuch a Day, *&c.* it was preſented, that the Plaintiff in the Replevin, being an Inhabitant in *B.* and reſiant within the Precinct of the Manor, made Default in Payment of the Fine of 10*s.* being then one of the Chief Pledges at the Court; wherefore he was amerced

to 5 *l.* for which not paid the Defendant took the Cattle, *&c.* and the Iſſue was, whether *Bullein* the Plaintiff was at that Court a Chief Pledge or not? And the Venue to try it was only from the Manor, and it was found for the Plaintiff, and Damage and Coſts to 30 *l.* given againſt *Godfrey*; upon which he brought Error in the King's Bench; and it was adjudged Error, and the Judgment reverſed; for the Trial ought to be as well from *Bale*, which is the Vill, as from the Manor, becauſe altho' the Court is held within the Manor, yet the Leet itſelf is within the Vill of *Bale*, and the Plaintiff an Inhabitant and Reſiant within the Vill, which Vill is within the Precinct of the Manor, and altho' (as *Fleming* Chief Juſtice held) nothing is in Queſtion, but whether the Plaintiff was chief Pledge at the Court held within the Manor, ſo that nothing within the Vill is in Queſtion, or can come in Queſtion; yet it was reſolved *per tot' Cur'* (*præter* the Chief Juſtice) that they of the Vill of *Bale*, might well have Conuſance, whether the Plaintiff being an Inhabitant within the Vill, in which the Leet is, was a Chief Pledge at the Court or not; for to have a Chief Pledge is proper for a Leet, which Leet is within the Vill; and therefore they of the Manor cannot have ſo good Conuſance of this Matter, as they of the Manor and of the Vill alſo: Therefore the Trial ought to be from both, as in Caſe of a Common, and a Way in one Vill to an Houſe in another Vill, it ought to be tried from both Vills; ſo of the Tenure of Lands in *D.* held of the Manor of *Sale*, the Trial ought to be as well from the Vill where the Land is, as from the Manor of which the Land is held, as it was adjudged *H.* 45 *Eliz.* in the King's Bench, in *Lovelace*'s Caſe. *Quod Nota.* Wherefore the Judgment was reverſed. *Vide* 6 *H.* 7. 12. and *Arundel*'s Caſe, *Coke*. *Yelverton* of Counſel with *Godfrey* the Plaintiff in Error.

Error on Replevin. 16, 17 Car. 2. c. 8.

6 Co. 14. a. Mo. 494, 495.

Dewclas & Kendall *v.* Kendall, Beſſon & Hands.

THE Plaintiffs declared, that the Defendants 21 *Jan.* 6. *Vi & Armis* thirty Cart-loads of Thorns of the Plaintiffs ready to be carried away, in a Place called the *Common Waſt*, or Warren at *Chippingwarden in Com' North'* took and carried away to their Damage 10 *l.* The Defendants pleaded *Non cul'* to all but ten Cart-loads, and to them, that the Place where, *&c.* contained an Acre of Paſture, and that one *W. Palmer* is ſeiſed in Fee of a Meſſuage, and three Quarters of a Yard-land in *C.* aforeſaid, and that he and they whoſe Eſtate he has in the ſaid Meſſuage, *&c.* from Time whereof, *&c.* have had for them their Farmers, *&c.* of the ſaid Meſſuage, *&c.* all the Thorns growing on the ſaid Acre of Paſture to their own Uſe, to be employed and ſpent on the ſaid

Cro. Jac. 256. 1 Brownl. 219. 1 Bulſt. 93. M. 7 Jac. Rot. Treſpaſs. Preſcription to have omnes Spinas.

ſaid Meſſuage, &c. as appurtenant; and becauſe the ten Cart-loads *fuer' creſcen' & minus rite* cut down by the Plaintiffs on the ſaid Acre of Waſte, and ready by them to be carried away, the Defendants as Servants to *Palmer*, and by his Command took, carried away and employed them on the Meſſuage, &c. as it was lawful: The Plaintiffs (by Proteſtation that *Palmer*, and they whoſe, &c. have not had from Time whereof, &c. the Thorns growing on the ſaid Acre, as appurtenant to the Meſſuage, &c.) for Plea ſaid, that the ſaid Acre of Paſture is Parcel of the ſaid Place called the *Common Waſte*, and that Sir *Richard Salting ſtone* is ſeiſed of the Manor of *Chippingwarden*, whereof the *Common Waſte* is Parcel, in Fee, and that he 21 *Jan. Anno 6.* gave Licence to the Plaintiffs to cut and carry away 30 Cart-loads of Thorns growing on the Waſte, by Virtue whereof they the 30 Cart-loads of Thorns, mentioned in the Bar, growing on the Waſte, cut down and made ready to be carried away, by Reaſon whereof they were poſſeſſed, till the Defendants took them, &c. And on this Replication the Defendants demurred: And it was adjudged againſt the Plaintiffs. And a Difference was taken *per Cur'*, where a Man claims reaſonable Eſtovers in another's Soil, and where he claims all the Thorns or Trees in another's Soil; in the firſt Caſe, if the Owner of the Soil cuts the Thorns firſt, he who has Title of Eſtovers cannot take them; for the Property and Intereſt of all the Thorns continues in the Owner of the Soil, and the other has but Common there; and if the Owner in ſuch Caſe cuts * all the Wood, he who ought to have the Eſtovers ſhall have an Action on the Caſe only, and not Aſſiſe; for when the whole is deſtroyed he cannot be put in Seiſin, as *Abridgment* of *Aſſiſe*, *fol.* 21. is. So it appears by Sir *Tho.* † *Palmer*'s Caſe 5 *Co.* 25. *a.* if one grants 100 Cords of Wood to be taken at the Election of the Grantee, if the Grantor or a Stranger fells any Trees, the Grantee cannot take them, but ought to ſupply his Grant out of the Reſidue; for the Grantee has but a ſpecial Intereſt in Part of the Wood, and not in the whole, and that in a Place incertain till he himſelf has cut them: But now in this Caſe the Defendants in the Right of *Palmer* claim all the Thorns, by Name (*omnes Spinas*) on the ſaid Acre of Paſture; and if he has all, Sir *Rich. Salting ſtone* can have none, and by Conſequence cannot licenſe the Plaintiffs to cut any, ſo that the whole Intereſt is in *Palmer*; and this is not in Nature of Eſtovers; for Eſtovers are but Parcel of the Wood, and that to be taken to a ſpecial Purpoſe. But here it was agreed *per Curiam*, that although the Defendants have alledged an Employment; yet, where the Defendants claim to have *omnes Spinas & Arbores*, the Employment is not traverſable; for he who has the general Intereſt and Property in Trees by Cuſtom or Preſcription

Eſtovers.

* Vide F. N. B. 58. J. Hob. 43. 9 Co. 112. b.

† Cro. El. 820. Noy 32. Mo. 692. p. 955.

Preſcription cannot be reſtrained, but may uſe them at his Pleaſure. *Vide* according to this Difference taken *per Cur'*, 10 *E.* 4. 2. *b.* and adjudg'd accordingly. *Yelverton* of Counſel with the Plaintiff.

Tho. Smith *verſus* Newſam *and his* Wife.

THE Plaintiff as Son and Heir of *George Smith* his Father, demanded 20 Marks, and declared that his Father 27 *Apr'* 35 *El.* demiſed to the Defendant a Meſſuage, *&c. in B. in Com' Bedf.* from *Mich.* next for 21 Years, yielding during the Term, if the Father ſhould ſo long live, 30*l.* at the *Annunciation* and *Mich.* by equal Portions, and yielding *Hæredibus & Aſſignat'* of the Father after his Death 20 Marks *ad Terminos prædictos*; by Virtue whereof the Defendant enter'd and occupied from *Mich.* 35 *Eliz. hucuſque*, afterwards *George* the Father 4 *Maii* 7. at *B.* died, and becauſe 20 Marks for half a Year from *Mich.* 7. were arrear, he brought his Action. And thereupon the Defendants demurred: And it was adjudged againſt the Plaintiff; for the Clauſe, by which the Rent is reſerved to the Heirs, gives but 20 Marks for the whole Year, and not every half Year 20 Marks; and therefore the Plaintiff has miſtaken his Demand, who ſues for 20 Marks for half a Year; for theſe Words, *ad Terminos præd'*, limit only the Time of the Payment of the 20 Marks, which he intended to be paid as the firſt 30*l.* were; and altho' in this Clauſe which reſerves the Rent to the Heirs, theſe Words (*per æquales portiones*) are omitted, yet the Law ſupplies them, as 13 *H.* 4. *Avowry* 240. Rent granted *percipiend' ad duos anni terminos*, naming them, ſhall be intended by equal Portions, altho' the Deed does not mention it, for the Reſervation being the Act of the Leſſor ſhall be taken moſt ſtrong againſt him and his Heirs, wherefore he ſhall have but 20 Marks in all, for the whole Year, no more than *Perk.* 22. two Tenants in Common demiſe yielding 10*s.* it ſhall be but 5*s.* to each of them 3 *Mar.* 171. accordingly. The ſecond Reaſon of the Judgment was, becauſe the Plaintiff brings this Action as Heir to his Father, and does not ſhew in his Declaration that the Reverſion deſcended to him, and the Rent demanded is incident to the Reverſion deſcended, ſo the Plaintiff does not make to himſelf any Title to have the Rent. *Quod nota bene. Per Cur'.* And Judgment given, *Quod nil capiat per billam. Yelverton* of Counſel with the Defendant.

1 Brownl. 108. 1 Bulſt. 48. P. 8 Jac. Rot. Debt on Leaſe.

Conſtruction of Reſervation of Rent.

1 Inſt. 197. a.

Maſſam *verſus* Hunter.

A Copyholder of a Meſſuage and two Acres of Land in Fee, the Lord grants and confirms the Meſſuage and Land *cum pertin'* to the Copyholder in Fee; if he to whom the Confirmation

1 Bulſt. 2. Noy 136. 1 Brownl. 220. 2 Brownl. 209. Was Cro. Jac 253.

was made had by Uſage, as Copyholder, Common in the Waſtes of the Lord, yet the Copyhold being by this Confirmation extinct and enfranchiſed, he ſhall not have the Common there now: For the Words *cum pertinentiis* will not create a Common; for the Common firſt uſed was gained by Cuſtom, and annexed to the cuſtomary Eſtate, and is loſt with it, the Common not being of its proper Nature incident to the Copyhold Eſtate, but a collateral Intereſt gained by Uſage. *Quod Nota. per tot' Cur'* on a Demurrer in Treſpaſs, where the Defendant juſtified the Treſpaſs by uſing the Common by Reaſon of the Confirmation. *Yelverton* of Counſel with the Defendant.

Mo. 667. Salk. 366.

Dominus Rex *verſus* Staverton.

Cro. Jac. 259. 1 Bulſt. 54. Quo Warranto to hold Courts.

QUO Warranto by the King againſt *Rich. Staverton* for holding a Court-Leet and Court-Baron within the Hundred and Manor of *Warfield in Com' Berks, &c.* The Defendant diſclaimed as to the Court-Leet, and as to the Court-Baron pleaded, that Sir *H. Nevill* is ſeiſed in Fee of the Manor of *Warfield* within the Hundred of *Wargrave*, whereof the Manor of *Newnams* within the Manor of *Warfield, &c.* is Parcel, and Copyhold *dimiſſ' & dimiſibile, &c.* by the Lord of the Manor of *Warfield*, or his Steward in Fee, *&c.* and that the Manor of *Newnams* is known *tam* by that Name, *quam* by the Name of one *Meſſuage, ſeven Yard-Lands cuſtomary, &c.* and 20*s.* Rent; and by that Name has been demiſed by Copy according to the Cuſtom of the Manor of *Warfield*; he ſhewed that Sir *H. Nevill An.* 18 *Eliz.* demiſed by Copy the ſaid Manor of *Newnams* to the Defendant by the Name of one *Meſſuage, ſeven Yard-Lands, &c.* and 20*s.* Rent in Fee, by Virtue whereof he enter'd, *&c. & ratione & virtute Conceſſionis prædictæ* he held a Court-Baron within the Manor of *Newnams, &c.* (*Nota*, the Defendant pleaded the ſame Plea for the Court-Baron held within a Manor of *Lakes*, and Manor of *Aylewards*, the *Quo Warranto* being for holding three Court-Barons, *&c.*) and upon this Plea the King demurred in Law: And it was adjudged *pro Domino Rege* for ſeveral Reaſons. 1. It was agreed, that one Manor might be Parcel of another Manor, and held of another Manor; as 32 *H.* 6. 9. 13 *H.* 7. 19. *b.* & 6 *E.* 3. *Q. Imp.* 34. and that by the Eſcheat of the Manor it is become Parcel of the other Manor, and then it ceaſes to be a Manor; for by the Eſcheat the Services are extinct, and by Conſequence the Manor eſcheated remains only to be a Manor: But two Court-Barons cannot be held after the Eſcheat, but one Court only, for as without

One Manor Parcel of another. 1 Inſt. 58. b. 11 Co. 17. b. Cro. Jac. 327.

two Free Tenants it ceaſes to be a Manor, by 33 *H.* 8. *Compriſe Br.* 31. So alſo if it wants Services it cannot be a Manor; for it ought to be Parcel in Demeſne, and Parcel in Service; but altho' one Manor may be held of another; yet it was agreed, that one Manor cannot be Parcel of another Manor, and both to be *in eſſe* at one Time; for being Liberties and Franchiſes of one and the ſame Nature *non poſſunt ſtare inſimul*; *a fortiori* this Manor of *Newnams*, which by the Defendant's Confeſſion is Parcel of the Manor of *Warfield*, and held by Copy of it, cannot be a Manor to hold a Court-Baron, for it cannot have any Freeholders, who can hold of it; for a Copyhold Manor is not capable of an Eſcheat of a Freehold, becauſe that which comes in Lieu of another ought to be of the ſame Nature, and then the Freehold eſcheated would be Copyhold, which is repugnant and impoſſible. Alſo the Rent of 20*s.* cannot be intended Rent-Service; for it cannot accrue to be Rent-Service by any Eſtates made by the Lord of the ſuppoſed Copyhold Manor; for it is contrary to the Preſcription alledg'd by the Defendant, that the Manor of *Newnams* has been alway demiſeable, *&c.* within the Manor of *Warfield*, and not within the Manor of *Newnams*: And if the Lord of the Manor had at firſt granted by Copy the 20*s.* Rent of his Tenants, it is a void Grant, becauſe it does not appear how much he ſhall have of the one, and how much of the other, *&c.* by 9 *H.* 6. 12. and *F. N. B.* Alſo here the Defendant does not maintain his Manor of *Newnams* but in Reputation only, *viz.* that it has been known *tam* by the Name of a Meſſuage, *&c.* *quam* by the Name of the Manor, *&c.* but does not ſhew that it was ever granted as Copyhold by the Name of a Manor, and altho', as Sir *Moile Finche*'s Caſe 6 *Co.* is, Reputation is ſufficient to paſs a Thing in a Conveyance by the Name of a Manor, which in Truth is not a Manor, yet there muſt be Truth and not Reputation to challenge and hold the Privilege of a Manor, as to have a Court-Baron, *&c.* Alſo this *Quo Warranto* is a Writ of Right in its Nature, which ought to be anſwer'd in Chief, which this Defendant for the Smallneſs and Baſeneſs of his Eſtate cannot do; for, as 14 *E.* 4. 7. is, Tenant at Will of a Manor cannot plead in Diſability of a Villein, *multo minus* can he enable himſelf in his own Right to hold a Court-Baron, which is a Court of Juſtice. And, by the Book of *Crook* Juſtice, a Franchiſe ſhall be ſeiſed, if it is claimed by other than by him who has the Freehold, and here the Defendant claims Part of the King's Juſtice, and the Diſtribution of it among his Subjects and therefore it ought to be in the Name and Right

6 Co. 64. a.

of

of him who has the Freehold at leaſt; for in a *Quo Warranto* againſt him who has for Years in a Manor to ſhew *Quo Warranto* he holds a Court-Baron, he ought to pray Aid of his Leſſor; otherwiſe, if he pleads in Defence, he ſhall be ouſted of the Liberty by Judgment. *Br. Quo War.* 1. *& Crooke, f.* —*Quod Nota*, by *Yelverton*, *Williams* and *Crooke*, and Judgment was given that the Defendant ſhould be ouſted from holding Court; for by 15 *E.* 4. 7. if the Party has continued Poſſeſſion of the Liberty by Wrong, the Judgment is that he ſhall be ouſted; but if he had once Title and loſes it, the Judgment is, that the Liberty ſhall be ſeiſed. *Quod Nota. Fleming* Chief Juſtice and *Fenner* agreed, that the Plea in Bar is not good; but they doubted, whether a *Quo Warranto* lay of a Court-Baron, becauſe it is a Court created by Law, as incident to a Manor, and is not derived by any Grant out of the Crown. But that this Writ lies of a Court-Baron, *vide* 17 *E.* 2. *Quo War. Br.* 4. In *Quo Warranto* he claimed to hold a Court of his own Tenants in his Manor of *D.* and *vide* there, that it is a good Plea, to ſay, that he has a Manor there. And *Old N. B.* in the Giſt of the Writ *Quo Warranto*, ſhews expreſly that it lies where a Man claims a Court-Baron. *Yelverton* was of Counſel with the King in the Right of Sir *H. Nevill.*

Neale *verſus* Sheffeild.

T. 8 Jac. Rot. 742. Cro. Jac. 254. 1 Brownl. 109. 1 Bulſt. 66.

DEBT on Bond, and demanded 14*l.* The Condition was, that if the Defendant paid 7*l.* to the Plaintiff *upon the Birth-Day of the Child of* Jo. Living, *which God ſhould ſend after the Date of the Bond*, that then, *&c.* The Defendant pleaded, that the Plaintiff, after the Making of the Bond, and before the Birth of any Child of the ſaid *Jo. Living*, *viz.* 1 *Sept'* 7. was indebted to the Defendant in a Load of Lime to be deliver'd on Requeſt; and the ſame Day it was agreed between them *apud L.* that if the Defendant would diſcharge the Plaintiff of the ſaid Load of Lime, that then *in Conſideratione inde* the Plaintiff would diſcharge the Defendant of the ſaid Bond, and would accept the ſaid Load of Lime in full Satisfaction of the ſaid Bond; and alledged *in facto*, that he diſcharged *adtunc & ibid'* the Plaintiff of the ſaid Load of Lime, which the Plaintiff accepted in Diſcharge of the Bond, and then acquitted the Defendant of the ſaid Bond; and demanded Judgment of the Action; upon which the Plaintiff demurred. And it was adjudged for the Plaintiff for two Reaſons; 1. Becauſe the Defendant has pleaded his Bar in Diſcharge of the Bond, whereas he ought to have pleaded it in Diſcharge of the Sum contained in the Condition of the Bond; for it is not a Debt ſimply by the Bond, but the Performance or Breach of the Condition makes it a Debt,

A Bar ſhould be pleaded in Diſcharge of the Condition, not of the Bond.

Palm. 111. 2 Ro. Rep. 188.

for the Bond is guided by the Condition, ſo that if the Condition is not diſcharged, the Bond remains in Force, and the Matter of the Bar is not pleaded in Diſcharge of the Condition but of the Bond, and therefore it is not good. *Quod Nota*; a good Reaſon. 2. It appears that the Condition itſelf cannot be diſcharged; for the 7*l.* are not due nor payable till the Birth of the Child of *Jo. Living*, which is a mere contingent and remote Poſſibility, whether he will ever have any Child or not; and therefore it reſting in Contingency, whether it will ever become a Debt or not, cannot be diſcharg'd; for a Poſſibility cannot be releaſed, as it has been adjudg'd in *Carter*'s Caſe; and it is not like, where the Condition is to pay Money at a Day to come, that may be diſcharged preſently; for it is a Duty immediately, though it is not demandable till the Day; but here it cannot be known, whether ſuch Day will ever come, that *Jo. Living* ſhall have a Child; and therefore it is no Debt or Duty, and by Conſequence cannot be diſcharged. *Quod Nota. Per totam Curiam* on good Advice. *Yelverton* was of Counſel with the Plaintiff.

Poſt 214. 215.

A contingent Debt cannot be diſcharged.

Dodſon *verſus* Kayes.

DEBT, and demanded 10*l.* becauſe the Defendant 23 *Oct.* 1608. at *M. in Com' Not. per ſcriptum ſuum Obligatorium* acknowledged *ſe debere* to the Plaintiff 10*l. &c.* to be paid upon Requeſt; yet the Defendant had not paid, *&c.* The Defendant craved Oyer of the Bond, which was enter'd *in hæc Verba: Noverint univerſæ per preſents me* Tho. Kayes *de* H. *in Perochie* W. *in Com'* Darbie *generoſoe Tenerie & firmiter obligarie* Ed. Dodſon *de* M. *in* S. *in Com'* Not. *gen' in decem libris bonæ & legal' monet' Ang. ſolvend' eid'* Ed' *aut ſuo certo Att' vel Hæredibus ſuis. Ad quam quidem ſolutionem bene & fideliter faciend' obligamus me Heredes, Executor' vel aſſignat' meos per præſentes. Sigillo meo ſigillato, dat' tres viginti die Octob. an' Regni Reginæ Domini noſtri Jacobie Dei gratia Angliæ, Scotiæ, Franciæ & Hiberniæ, &c. Rexe defenſoris ſuis de Scotiæ ſexto, de Angliæ quadrageſimo ſecundo*, 1608. And thereupon the Defendant demurred; and it was adjudged for the Plaintiff; for there are two principal Things to be contained in a Bond; 1. Parties to it: 2. The Sum in which the one Party is bound: And both theſe are expreſſed ſufficiently to the Knowledge of the Judges; for both the Obligor and the Obligee are well named, the Sum likewiſe is well expreſſed to be 10*l.* then any Words, whereby it may be collected, that the Party intended to bind himſelf, will ſerve, and

Cro. Jac. 261. 1 Brownl. 110. T. 7 Jac. Rot. Debt on Bond. Falſe Latin.

10 Co. 133. a. Mo. 864. Cro. Jac. 203, 208, 290, 338, 607. Cro. Car. 416, 418. Hob. 19, 116, 119. Lutw. 423. Salk. 462. Comb. 60.

they are wrote here, altho' in falſe *Latin*, *viz. tenerie & obligarie*, which Words have but the Letter (*e*) of Abundance, and falſe *Latin*, as 10 *H.* 7.—is, abates a Writ, becauſe the Party may purchaſe a new Writ, but it will not deſtroy a Bond; for the Party cannot have a new Bond when he will: And altho' there is not any ſuch Year of the King's Reign, as *Angliæ* 42. or *Scotiæ* 6. that is not material; for it is good, altho' it has no Date, as 13 *H.* 7.—*Crooke* is, and the Party may ſurmiſe a Date in his Declaration, and it is good, and the Party muſt anſwer to the Deed, and not to the Date. The ſame Law, if it has an impoſſible Date, as 30 *Febr'*, where there are but twenty-eight Days in *Febr'*, yet it is good; and here alſo it is aided *per Annum Domini* 1608. and that is a Time certain and ſufficient, and the Declaration is good, which has omitted the Year of the King, and inſerted the *Annum Domini*. *Quod Nota*. *Per totam Curiam*. *Yelverton* of Counſel with the Plaintiff.

Gomerſall *verſus* Medgate.

Cro. Jac. 255. 1 Bulſt. 52. Trover.

TRover for ſeveral Goods *in Specie*; the Defendant ſhewed that he was Bailiff of the Manor of *Dunſtable*, whereof the King is ſeiſed, and that a Plaint of Debt was there affirmed by *J. S.* againſt the Plaintiff, wherefore Proceſs iſſued to the Defendant being then Bailiff, to diſtrain the now Plaintiff to be at the next Court to anſwer to the Plaint aforeſaid, wherefore he by Virtue of the Proceſs diſtrained the Plaintiff by the Goods in Queſtion, which, becauſe he did not come to the ſaid Court, were forfeited to the King, as Lord of the Manor, and the Defendant had accounted for them to the King, *&c.* and thereupon the Plaintiff demurred. And it was adjudged for the Plaintiff, for in a Court-Baron no Goods can be forfeited for Default of Appearance on the Diſtreſs, for a Diſtreſs is but in the Nature of a Pledge to be ſafely kept; and in a Court-Baron a Diſtreſs infinite only lies, and not an Attachment; for where a Man is attached by Courſe of the Common Law by his Goods, there for Non-appearance they are forfeited, as 7 *H.* 6.—is, but no Attachment lies in a Court-Baron, but a Diſtreſs only, by 33, 34 *H.* 6. therefore the Defendant confeſſing an Intermedling with the Goods, which is not juſtifiable, it is a Converſion. *Quod Nota*. *Yelverton* was of Counſel with the Plaintiff.

Diſtreſs in a Court-Baron.

Vide 2 Ro. Rep. 493.

Converſion, what.

Tatem & Poulter *verſus* Perient.

THE Defendant granted to the Plaintiffs 1000 Trees in ſuch a Wood to be cut down within 3 Years after the Grant; and afterwards they agreed, when the Plaintiffs had cut down ſome of the Trees, that they ſhould not fell any more during the three Years, and that the Defendant would licence them after the three Years to fell as many Trees as amounted to the full Number of 1000, and becauſe the Defendant hinder'd them after the three Years from felling the Trees they brought *Aſſumpſit*, and declared, and ſhewed the Grant aforeſaid: And that in Conſideration they would forbear the felling any more Trees till after the three Years, the Defendant promiſed to give Licence to the Plaintiffs to fell as many Trees there after the three Years as amounted to 1000, and alledged *in facto*, that at the Time of the Promiſe they had cut down but 800 Trees, and *non amplius*, and that they relying on the Promiſe had forborn to fell any more within the 3 Years, and that after the 3 Years the Def. hinder'd them from felling the Reſidue, which made 1000 Trees, to their Damage, *&c.* The Def. pleaded, that before the Promiſe ſuppoſed to be made by the Def. the Plaintiffs had felled 1000 Trees, *abſque hoc*, that at the Time of the Promiſe they had felled but 800 Trees only, *&c.* and thereupon the Plaintiffs demurred. And it was adjudged againſt the Plaintiffs; yet it was objected, that the Traverſe was inſufficient and idle, for the Defendant's Plea had been good without any Traverſe at all; for it was a full Anſwer, to ſay, that they had felled 1000 Trees, without more, and that would make an Iſſue. 2. The Traverſe ought to have been, *abſque hoc*, that the Plaintiffs at the Time of the Promiſe had felled but 800 Trees, omitting the (only) for the alledging of that in the Declaration was but to increaſe Damage, and not Matter of Subſtance as to the Action. But, *per totam Curiam* the Traverſe is good, for the Plaintiffs by alledging the Felling of 800 Trees only in their Declaration, which is a Matter iſſuable, have given the Defendant Advantage to traverſe in the Manner as he hath done; for every Matter in Fact alledged by the Plaintiffs may be traverſed by the Defendant, and the Defendant by Way of Traverſe may anſwer the Matter alledged in the ſame Words the Plaintiffs alledge them, and then the Plaintiffs have by their Demurrer on the Bar confeſſed the Felling of 1000 Trees, which was their full Bargain at firſt, and by Conſequence there is no Conſideration on which to ground the Promiſe. *Quod Nota.* By all the Juſtices. *Yelverton* was of Counſel with the Defendant.

Aſſumpſit. What ſhall be a good Conſideration.

Dy. 225. pl. 6. 365. a. b. vide 2 Sand. 206.

Hill.

Hill. 8 Jac. B. R.

Hawes *verſus* Loader *Adminiſtrator of* Cookſon.

1 Brownl. 111. Cro. Jac. 270.

Thomas Cookſon the Inteſtate 19 *Febr'* 2 *Jac.* for 20*l.* paid before-hand by the Plaintiff granted all his Goods mention'd in a Schedule annexed to the Deed, and gave him Poſſeſſion by a Platter, and covenanted that they ſhould remain as they were before in his Houſe, on Demand to be carried away by the Plaintiff, and that the Inteſtate, his Adminiſtrators, *&c.* them ſafely ſhould keep and quietly deliver, *&c.* and to perform this Covenant the Inteſtate bound himſelf in 40*l.* to the Plaintiff: *Cookſon* died, the Plaintiff 16 *Martii Anno* 6. demanded the Goods of the Defendant being Adminiſtrator, and he did not deliver them, wherefore the Plaintiff brought the Action, and in his Declaration ſhewed *in Specie* what Goods were in the Schedule. The Defendant pleaded the Statute 13 *Eliz.* of fraudulent Deeds of Gift, *&c.* and further ſaid, that *Cookſon* the Inteſtate, 12 *Febr' Anno* 3. was indebted to ſeveral Perſons, and named them, in ſeveral Sums amounting to 190*l.* and ſo being indebted 19 *Febr' An.* 2. made the Deed of Gift, *ut ſupra*, being of them and of other Goods poſſeſſed, amounting to 80*l.* *& non ultra*; and that by Fraud and Covin between the Plaintiff and him, and to the Intent to deceive the Creditors named; and ſhewed how, notwithſtanding the Deed of Gift, *Cookſon* occupied the Goods all his Life, and afterwards died, and the Adminiſtration was committed to the Defendant. The Plaintiff replied that the Defendant had Aſſets in his Hands to ſatisfy the Debt demanded; and further, that the Deed of Gift was made for a good Conſideration, *&c.* upon which they were at Iſſue. And at the Trial at *Huntington* Aſſiſes before the Lord *Coke*, he rejected the Trial, becauſe no good Iſſue was joined: Wherefore, on Motion, the King's Bench awarded a Repleader, upon which the Defendant pleaded *ut prius*, and the Plaintiff demurred thereon. And it was adjudged for the Plaintiff: 1. Becauſe the Defendant did not aver in his Bar that the Debts yet continued unpaid to the Creditors named; for there were four Years between the Deed of Gift to the Plaintiff and the Death of the Inteſtate who made it, in which Time the Debts may well be preſumed to be ſatisfied. 2. The Defendant does not ſhew, that the Debts due to the ſuppoſed Creditors were by Specialty, and then the Matter of his Plea is not good; for the Defendant cannot plead this Plea, but in Excuſe of himſelf, to free him from a *Devaſtavit*, and that cannot be in this Caſe, for he being

13 El. c. 5. Fraudulent Deeds.

Repleader after Iſſue.

Adminiſtrator is not chargeable with the Debts, unleſs they be due by Specialty. 3. The Defendant pretends, as it ſeems, that there would be a *Devaſtavit* in him, if he ſhould deliver the Goods contained in the Deed to the Plaintiff; and that it cannot be, for thoſe Goods, as to Creditors, are liable in the Hands of the Plaintiff, as Executor *de ſon Tort*, if the Deed of Gift be fraudulent. 4. Perhaps the Creditors named will never ſue for their Debts, and by that Means the Defendant will juſtify the Detaining of the Goods for ever, which will be inconvenient; but if the Defendant had pleaded a Recovery by any of the Creditors, and thoſe Goods to the Value to be taken in Execution, that had been a good Plea. 5. The Defendant is not ſuch Perſon as is enabled by the Statute 13 *Eliz.* to plead this Plea; for the Deed is made void againſt all Creditors, *&c.* but it is not made void againſt the Party himſelf, his Executors and Adminiſtrators, but againſt them it remains a good Deed of Gift. *Quod Nota. Per totam Curiam. Telverton* of Counſel with the Defendant.

Where a fraudulent Deed ſhall not be pleaded in Bar. 3 Co. 81. a. Mo. 638.

Martyn *verſus* Blithman.

D. Holman was in Execution in *Plimouth* for 31 *l.* at the Suit of *D.* which was recover'd there before the Mayor, *&c. Blithman* came to the Gaoler *Martyn*, and promiſed, that in Conſideration he would ſet and ſuffer *Holman* to go at large, that the 31 *l.* ſhould be brought into Court there by *Holman* by ſuch a Day to ſatisfy *D.* and that he would ſave *Martyn* the Gaoler harmleſs from this Enlargement, *D.* recover'd againſt *Martyn* on the Eſcape, and afterwards *Martyn* brought *Aſſumpſit* againſt *Blithman* on the Promiſe, and declared all *ut ſupra*: And it was adjudged againſt the Plaintiff; for the Conſideration is againſt Law, *viz.* to ſuffer one in Execution to eſcape, like 19 *Eliz. Dy. Only*'s Caſe; a Promiſe to pay ſo much to *J. S.* for his Labour and Pains about the Buſineſs of the Lady *Darby*, is not good, for it is Maintenance; the ſame Law, *per Curiam*, if it had been a Condition on a Bond to ſave the Gaoler harmleſs from an Eſcape, it makes the Bond void, becauſe it is a Condition againſt Law. *Per totam Curiam. Telverton* of Counſel with the Defendant.

2 Bulſt. 213. Godb. 250. Aſſumpſit. Conſideration againſt Law.

3 Leon. 208. Cro. El. 199. Hetley 175. Dy. 356. a.

Berisford *verſus* Preſſe.

MR. Berisford *hath ſpoken Treaſon, and that I can prove:* And it was adjudged that the Words are actionable: For Treaſon may be committed as well by Speech, as by Act; for any Thing that diſcovers the Mind of a Man to be traiterous to his Sovereign is capital to the Party,

Cro. Jac. 275. 1 Bulſt. 147. Winch 123. Hutt. 75. Ante 107.

and therefore ſcandalous to be affirmed of him by any other. *Per Curiam.* *Yelverton* of Counſel with the Defendant.

Tuerloote *verſus* Morriſon.

1 Bulſt. 134. Words.

THE Plaintiff declared, that whereas 19 *Maii Anno* 8 *Jac.* and for ten Years paſt he *fuit & adhuc eſt Mercator* in *England* and *præcipue in London*, and had made true Payment of all his Debts to his Creditors, yet the Defendant 19 *Maii Anno* 8. having Communication with one *Roger Twiford* of the Plaintiff, ſpoke of the Plaintiff theſe Words, *viz.* *He innuendo* the Plaintiff) *is a Bankrupt, and he* (*innuendo* the Plaintiff) *is fled beyond the Seas for much Money*, to his Damage 500 *l.* The Defendant pleaded that the Plaintiff at the Time of the Speaking of the Words was an Alien, and born *in Villa de Courtrick in Brabant in Partibus tranſmarin'* under the Obedience of the Duke of *Brabant*, *& extra ligeantiam Domini Regis*; *Et hoc paratus eſt verificare*, *&c.* upon which the Plaintiff demurred. And it was adjudged for the Plaintiff; for Traffick between Merchants Strangers and domeſtick Merchants is warranted, both by the Law of Nations, and by the Law of the Land; and the Common Law in all Things which merely concern his Trade of Merchandize protects him, and this Protection extends both to his Goods and to his Perſon; for the Law allows him ſafe Conduct with his Goods, becauſe it is beneficial to the King in his Cuſtoms; and enables him likewiſe to have within this Realm an Habitation by Leaſe from any Stranger, and alſo to have a perſonal Action as to demand Debt for his Merchandizes, with Damages for them, if they are wrongfully taken. And this Slander here, although it concerns the Plaintiff only in his Perſon, yet becauſe it impairs his Credit in his Trade by which he is to live, and by which other Subjects of the King have Benefit by their Commerce with him; therefore it is actionable. *Vide Dyer* 6 *H.* 8. 2. Adjudged *per totam Curiam.* *Yelverton* was of Counſel with the Plaintiff.

What Actions an Alien ſhall have.

1 And. 25. Mo. 431. Lutw. 35. Salk. 46.

Kenicot *verſus* Bogan.

2 Bulſt. 250. 4 Inſt. 30. Trover

TRover and Converſion of two Ton of Wine: The Defendant pleaded that the King was ſeiſed in Fee in the Right of his Crown of the Priſage of all Wines imported by any Perſon, as well Subject as Alien *a Partibus tranſmarinis*, and that the Priſage of the ſaid Wines from Time whereof, *&c.* was anſwer'd to the King and his Progenitors, their Farmers or Deputies, in Manner following, *viz.* out of every Ship or Veſſel importing into any Port or other Place of this Kingdom ten Ton of Wine for any Perſon *a Partibus tranſmarinis*, and thereof, or *de aliquo Vaſe inde vini prædicti*

unladen one Ton; and out of every Ship or Veſſel ſo importing twenty Ton of Wine for any Perſon *a Partibus tranſmarinis* into any Haven or other Place of this Kingdom, *& inde ſeu de aliquo inde Vaſe Vini prædicti diſonerat'* two Ton of Wine, *viz.* one Ton of Wine thereof before the Maſt of ſuch Ship or Veſſel, and the other Ton *vini inde* behind the Maſt *ejuſdem Navis ſive Vaſis*; and the King ſo ſeiſed of the ſaid Priſage, before the Time of the Coming of the two Tons to the Hands of the Defendant ſuppoſed by the Plaintiff, *viz.* 21 *Sept' An.* 5. the King by his Letters Patent, *&c.* ſhewn to the Court, *&c.* granted to Sir *Thomas Waller* the Office of Chief Butlerage of him, his Heirs and Succeſſors *Regni ſui Angliæ*, with all Fees, *&c.* and him made and conſtituted Chief Butler, *Habendum*, *&c.* for Life, to be executed by him, or his Deputy; and further the Defendant ſaid, that the Chief Butler for the Time being had uſed, and been accuſtomed by himſelf, or his Deputy to collect and receive to the Uſe of the King, *&c.* the ſaid Priſage due; and further, that the ſaid 13 *Apr' Anno* 7. *quædam Navis* with twenty Ton of Wine *onerat'* arrived at the City of *Exon* aforeſaid *a Partibus tranſmarinis*, *viz. a Villa de Burdeaux* in *France*; and that at the ſaid City nine Tons and a half of the ſaid twenty Tons, being the Wines of the Plaintiff, *adtunc exonerat' fuerunt ex Navi prad'*, whereby two Tons of the Wine aforeſaid were due to the King *pro Priſagio* of the ſaid twenty Tons, by Reaſon whereof the Defendant *Tempore quo*, *&c.* being lawful Deputy of Sir *Thomas adtunc & adhuc* Chief Butler, *&c.* *& per ejus præceptum* the ſaid two Tons *Vini prædicti pro Priſagio* the ſaid 13 *Apr' Anno* 7 *ſupradicto* at the City of *Exon* to the Uſe of the King took and carried away, and them to the Uſe of the King converted and diſpoſed, as he lawfully might, which is the ſame Converſion, *&c.* to the Uſe of the Defendant as the Plaintiff ſuppoſed, *& hoc paratus*, *&c.* on which the Plaintiff demurred. And four Exceptions were moved to the Plea in Bar. 1. The Defendant ſhews that the Plaintiff unloaded but nine Ton and a half, and the Defendant pretends the Cuſtom of Priſage to be out of every ten Ton unladen to have one to the Uſe of the King; therefore of his own Shewing he cannot juſtify the Taking of two Tons, becauſe he does not ſhew that twenty Tons were unladen. 2. The Defendant does not ſhew, that he took one Ton before the Maſt, and the other Ton behind the Maſt; yet he ſhews the King's Duty for Priſage to be in ſuch ſpecial Manner; and where a Cuſtom preſcribes an Order and Form of any Thing to be due to the King, he ought to juſtify accordingly, otherwiſe it is not good. 3. The Defendant does not traverſe the Converſion ſuppoſed by the Plaintiff, for that is a Converſion in the Defendant himſelf, and he juſtifies a Converſion to the Uſe of the King, which is another Converſion than that with which the Def. is charged. Cro. El. 694.

4. The

4. The Defendant does not ſhew this Office of Chief Butler to be an antient Office, to which an Uſage or Cuſtom may be annexed by Continuance of Time, but ſhews only the King's Grant of ſuch Office to Sir *Tho. Waller*, which ſhall be intended a new Office, to which no Cuſtom to collect Priſage can belong; and alſo the Defendant does not ſhew how he is made Deputy: But yet it was reſolved *per tot' Cur'* that the Plea in Bar was good, and Judgment was given againſt the Plaintiff; and as to the firſt and ſecond Exceptions it was anſwer'd by the Court, that if a Merchant imports Wines, as twenty Tons, tho' he unloads but Part, as nine Tons, or four Tons, yet the King ſhall have his whole Priſage, *viz.* two Tons of the twenty Tons imported; for if the Bulk (as *Fleming* Chief Juſtice termed it) be once broke, it is ſufficient for the King to take his whole Priſage: And ſo it appears to be by infinite Precedents in the Exchequer. It was likewiſe held *per Cur'*, that altho' in Point of Prerogative there is due to the King one Ton before the Maſt, and another behind the Maſt, yet it is not of Neceſſity that the King ſhall take his Duty in ſuch Form, but he may take which two Tons he pleaſes; for two Tons are due by Law, and that is the Subſtance, otherwiſe it would be miſchievous; for that Ton, which is this Day before the Maſt, may by the Subtilty of the Merchant be tranſpoſed to be the third or tenth, or the laſt Ton in the Ship: And therefore, if the Merchant at one Haven unloads but one Ton, the King by his Officer ſhall there immediately ſeiſe his Priſage, otherwiſe the Merchant might by Fraud oblige the King's Officer to follow him from Port to Port throughout *England*, which would be inconvenient. As to the third Exception, it was held *per Curiam*, that he need not traverſe the Converſion, nor plead to it in other Manner than he has done. 1. Becauſe the coming to the Hands, and intermeddling with the two Tons ſuppoſed by the Plaintiff, is confeſſed by the Defendant to be to the Uſe of the King, and that is the Matter in Law on the Plea in Bar, which the Court is to adjudge, and the Matter in Law ſhall never be traverſed. 2. If the Seiſure to the Uſe of the King ſhall not be adjudged lawful by the Defendant, then he himſelf ſhall be adjudged guilty of the Converſion, becauſe he has acknowledged in Point of Judgment a Poſſeſſion of the Goods, and an Intermeddling with them. As to the fourth Exception, it was reſolved, that although it is not ſhewn, that the Office of the Butlerage is an antient Office, yet it is ſufficient, for the Defendant has alledg'd the King's Seiſin of the Priſage of Wines to be an Eſtate in Fee *in Jure Coronæ*, and then *ex Neceſſitate* as antient as the Duty is, ſo antient ſhall the Office to collect it be intended; for it does not conſiſt

Salk. 654.

Matter in Law not traverſable.

Matter in Law pleaded, and not by Way of Title.

4 Inſt. 30.

with the Royal Dignity to collect it himſelf; and alſo in this Caſe the Title of the Office is not in Queſtion, but an Excuſe of the Seiſure of another's Goods for the King's Duty: And it is not neceſſary to ſhew that the Defendant is made Deputy, *viz.* by Parol or by Deed, becauſe 1. The Defendant does not claim any Intereſt, but juſtifies all in another's Right, *viz.* in the Right of Sir *Tho. Waller*; and alſo he has ſaid, that he was *legit' deputat'*, which is ſufficient to inform the Court, that the Defendant had a ſufficient Privity and Authority to take and ſeiſe the Priſage. *Quod vide* in the Reaſon of *Boiton's* Caſe 3 *Co.* 44. *b.* *Yelverton* was of Counſel with the Defendant.

Farmer *verſus* Hunt.

TReſpaſs for Chaſing of Cattle in ſuch a Cloſe: The Defendant juſtified Damage-feaſant in his Freehold: The Plaintiff replied and ſhewed a Grant of Common in the Place where, *&c.* by the Defendant to the Plaintiff; and that the Defendant erected there after the Grant a Stack of Corn, and the Plaintiff put in his Sheep to uſe the Common, and the Defendant chaſed them out, *&c.* But *Nota*, the Plaintiff did not ſay in his Replication (in Pleading the Grant of the Common by Indenture) *prolat' hic in Cur'*. And by all the Juſtices the Chaſing of the Sheep by the Defendant is not lawful, for by ſuch Means he might defeat his own Grant; for by the Grant of the Common in ſuch Place, the Grantee may uſe the whole Place for Common; and then, when the Grantor erects a Stack of Hay on Part of that Place, now that tends to the Diminution and Weakening of his own Grant, which ought not to be; but the Cattle may range over the whole Place, and eat the Hay without doing any Wrong; for the Wrong began in the Grantor, who is the Defendant, of which he ſhall not have Advantage, and as well as he erected one Stack of Corn, he may erect twenty, and ſo the Cattle will have no Liberty to feed there; but becauſe the Plaintiff did not ſhew to the Court the Indenture of the Grant, which is the Ground of his Title, for that Reaſon Judgment was given againſt the Plaintiff.

Cro. Jac. 271. 1 Brownl. 220. Treſpaſs.

10 Co. 94. a. What Thing a Commoner may do.

4, 5 Anne, c. 16.

Sadock *verſus* Burton.

1 Bulſt. 103. Account. Factor, and what he may do.

THE Plaintiff demanded an Account of the Defendant *ex quo fuit Receptor* of ſuch a Jewel *in Specie*, *ad Merchandizandum* to the Profit of the Plaintiff, and an Account *inde reddend'*, and on Iſſue, never his Receiver, it was found for the Plaintiff, and Auditors aſſigned, and the Defendant pleaded in Diſcharge of the Account, that he *apud Barbary in Partibus tranſmarinis* ſold it to one *J. S.* for 40*l.* (whereas the Plaintiff ſuppoſed the Value of it 100*l.*) and upon this Plea the Plaintiff demurred: And it was adjudged for him; for firſt, when Goods are deliver'd to merchandize, he who receives them ought not only to anſwer the Value of the Goods, but the Increaſe and Profit, which might ariſe thereby, as 21 *H.* 6. 55. is; and here he does not anſwer for any Increaſe and Profit of the 40*l.* Alſo it is not ſufficient for a Factor to ſay, that he ſold the Goods and Jewels to *J. S.* for 40*l.* generally, but he ought to ſhew by what Means the Plaintiff can come at the 40*l.* *viz.* that he took a Bond or other Se-
2 Mod. 100. curity of *J. S.* for the Money; for it would be miſchievous to ſend the Plaintiff beyond Sea to ſeek *J. S.* it is likewiſe contrary to the Truſt and Privity repoſed between the Merchant and his Factor; for if the Factor ſells them to one who is worth nothing, or cannot give Security for them, it ſhall reſt on his Loſs, and not in Diſadvantage of the Maſter. Another Reaſon here was, becauſe he has pleaded ſuch a Plea as is not triable; for he has ſuppoſed the Sale to be *apud Barbary in partibus tranſmarinis*; and if the Plaintiff would traverſe this Sale to *J. S.* the Jury here cannot try it, becauſe the whole Fact is laid to be beyond Sea. *Quod Nota.* *Yelverton* was of Counſel with the Plaintiff.

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Paſch. 9 Jac. B. R.

Sallowes *verſus* Girling.

DEBT on a Bond, the Condition was to ſtand to the Award of *A. B. C.* and *D.* of all Actions, Quarrels and Demands, *&c. Ita quod* the ſaid Award be made in Writing before ſuch a Day by the ſaid *A. B. C.* and *D.* or by any two of them under their Hands, *&c.* The Defendant pleaded that the ſaid *A. B. C. D.* or any two of them *nullum fecerunt Arbitrium.* The Plaintiff replied, that *A.* and *B.* two of the Arbitrators before the Day by Writing under their Hands, *&c.* made an Award, and ſhewed it to the Court in Certain, and aſſigned a Breach in the Defendant for Non-payment of 3 *l.* at a Day paſt limited by the Award. Upon which the Defendant demurred. And it was adjudged for the Plaintiff; in which the ſole Queſtion was, whether the Award made by *A.* and *B.* only, without the others, be good or not; foraſmuch as the Submiſſion was to four by Name, and in the Premiſſes of the Condition the Defendant is bound to ſtand to the Award of four alſo: But it was adjudged *per totam Curiam*, that on Conſideration had of every Part of the Condition the Award made by two only is good; for Arbitrators are made Judges by the Conſent and Election of the Parties, and here it appears, that the Parties fixed their Truſt not in all four jointly, but *conjunctim & diviſim*; ſo that the *ita quod, &c.* is an Explanation of the whole Condition, that they four or any two of them might arbitrate all Things between them; and ſo much appears 2 *R.* 3. 18. *b.* where two of the one Part, and one of the other Part ſubmit themſelves to the Award of *J. S.* by this Submiſſion *J. S.* may as well arbitrate any Cauſes between the two Parties of the one Part, as between them and the third, becauſe in the Intent of the Parties the End of their Submiſſion was to have Peace and Quiet. And 4 *E.* 4. 40. *a.* the Condition of a Recogniſance was, *Si T. Acton ſtaret & obediret* the Award of four by Name, three or two of them *de omnibus, &c.* that then; and it is all one where the Diviſion of their Power comes altogether, and where it follows the *Ita quod*; for till the *Ita quod, &c.* comes, the Condition is not perfect, for the whole Condition is but one Sentence. *Quod Nota.* *Yelverton* was of Counſel with the Plaintiff.

Cro. Jac. 277. 1 Brownl. 112. 1 Bulſt. 123. Debt on an Award.

Where the Power of the Arbitrators may be divided.

Vide 1 Lev. 139. 1 Keb. 790, 832, 837.

Bradley

Bradley *verſus* Banks.

Cro. Jac. 283. 1 Bulſt. 141. Appeal. Diſcontinuance in Appeal not aided by Appearance after.

IN an Appeal brought by *Eliz. Bradley* the Wife of *Fr' Bradley* of the Death of her Husband againſt *R. Banks*, who came in on the Exigent, the Defendant appear'd and crav'd Oyer of the Writ and of all the mean Proceſs, which was enter'd on Record *in hæc Verba:* Where it appear'd that the Wound and Death of *Fr. Bradley* were 25 *Octobr' Anno* 6. *&* 29 *Junii* 7. the Writ of Appeal was brought returnable *Quind' Mich'* after, where in Fact it ſhould be returned *a Die Sancti Mich' in* 15 *Dies*, which is 16 *Octobr'* 7. the *Capias* on this Writ bore *Teſte* 23 *Octobr'* 7. where it ought to have the *Teſte* of the firſt Writ returned, *viz.* 16 *Octobr'* 7. And this *Capias* was returned *Oct' Hill'* after, which was 23 *Jan.* 7. the firſt Day of *Hill'* Term, and the Exigent on this *Capias* bore *Teſte* 24 *Jan'* which ought to have been 23 *Jan'*, *viz.* the ſame Day of the *Capias* return'd. Alſo the Exigent was returned *a Die Sanctæ Trin' in* 15 *Dies*, which is 20 *Junii* after, and the *Allocat' Com'*, which iſſued thereon bore *Teſte* 21 *Junii*, where it ought to have been the *Teſte* of the Exigent returned. Then the Plaintiff having declared in her Appeal, the Defendant pleaded that at the general Gaol-Delivery at *York* before Commiſſioners aſſigned he was indicted of the Felony compriſed in the Appeal, and arraigned and found guilty of Manſlaughter, and had his Clergy, *prout patet* by the Record: And further ſaid, that *nullum Judicium* was given on the Premiſſes, and took all the material Averments, *&c. Et quoad Feloniam & Murdrum præd'* the Defendant ſaid that he was not guilty, and thereof he put himſelf on the Country, *&c.* upon which the Plaintiff demurred. And it was adjudged *per tot' Cur' pro Def.* In which it was firſt agreed, that no Appearance by the Defendant in Appeal will aid any Diſcontinuance of the Suit, but Error in the mean Proceſs is ſalved by an Appearance after, as 9 *H.* 5. 2. in Appeal the Sheriff returned on the Exigent *Cepi Corpus*, where it ſhould be *exigi feci*; and the Defendant appeared, and was acquitted, and prayed Damage; and it was moved that he ſhould not have it, becauſe he was not lawfully acquitted by Reaſon of the Error in the Return of the Sheriff *ſupra*; yet it was adjudged, that he ſhould have Damage, becauſe the Foundation of the Suit, *viz.* the Writ of Appeal, and all the Proceſs which iſſued at the Suit of the Party, was good and right. But in the Caſe *ſupra* ſeveral Diſcontinuances appear on the Record; for although the Law gives this Writ of Appeal, as a Means to be juſtly revenged for the Death of the Husband, yet it ought to be inſtantly purſued, without any Negligence in the Plaintiff; for becauſe this Suit threatens Death to the Party, therefore it ought to be in all Points

ſtrictly purſued, and by the Law there ought to be no mean Time nor Space in an Appeal between the Return of the Writ and the Iſſuing of the *Capias*, nor between the Return of the *Capias* and the Iſſuing of the Exigent: Wherefore it appears otherwiſe here; for there is 7 Days Space between the Return of the Writ and the Exigent awarded, the one being 16 *Oct. an.* 7. and the *Capias* being 23 *Oct.* the ſame Year, where the *Teſte* of the *Capias* ought to have been the ſame 16 *Oct.* that the firſt Writ was returned, and where the *Capias* is returned *Oct. Hill.* 7. which is 23 *Jan.* the Exigent thereon did not iſſue 'till 24 *Jan.* the ſame Year; ſo that there is a Day omitted, for the Exigent ought to have the *Teſte* 23 *Jan.* the ſame Fault appears in the *Allocat' Com'* which iſſued on the Exigent return'd, for it bears *Teſte* 21 *Junii anno* 8. where the Exigent was return'd 20 *Junii* the ſame Year, ſo that there appears the Negligence of a Day; for all which Reaſons the Court agreed that the Appeal was diſcontinued, for there was Lacheſs in the Plaintiff in ſuing forth every mean Proceſs by skipping of Days, where every Proceſs ought inſtantly, and without any mean Time, to iſſue the one after the other, and ſo is Mr. *Stamford*, and all the Precedents in the King's Bench. Then the Plaintiff moved, that the Defendant's Plea was not good, becauſe after the Conviction pleaded on the Indictment, he pleads to the Felony and Murder aforeſaid *non cul'*, which is no Anſwer to the Plaintiff's Declaration, which has ſuppoſed the Defendant's Fact to be Homicide only and not Murder; but *per Curiam* the Plea was reſolved to be good for three Reaſons. 1. Becauſe *ex neceſſitate Juris* the Defendant need not plead at all to the Country, where he has pleaded a good Special Plea before, for this Plea to the Country added to the other Plea is but *in Favorem Vitæ*, and the Defendant may hazard his Life on the firſt Plea if he will. *Quod vide* 7 *E.* 4. 15. & 14 *E.* 4. 7. and here the Pleading of the Conviction with the Clergy allow'd is a good Bar in this Appeal, as it was adjudged in the like Caſe 33 *El.* in an Appeal between *Wrot* and *Wigs*; and 20 *El.* in an Appeal between *Burgh* and *Holcroft*, *quod vide* 4 *Co.* 45, 46. and then the Pleading over to the Felony is mere Trifling. 2. The Word [*Murdrum* in the Plea is idle, and the Word (*Feloniam*) is the principal Word, which will make his Plea refer to ſuch Manner of Felony, as the Plaintiff ſuppoſes in him. 3. The Word (*Murdrum*) here cannot be taken but for Homicide; for if there be not Malice prepenſe in the Fact committed by the Defendant, altho' the Indictment or the Appeal ſays, that the Defendant *murdravit* ſuch a Man, if it does not ſay *Malitia præcogitata*, it is but Manſlaughter, ſo that the Word (*murdravit*) is indifferent to expreſs Manſlaughter, as well as Murder, if it has not other Words joined with it. *Quod Nota. Yelverton* was of Counſel with the Defendant.

Not guilty to the Murder is a good Plea in an Appeal.

Co. Entr. 53. b. 1 And. 68. Salk. 63. Comb. 410. Kel. 89.

Trin. 9 Jac. B. R.

Briſtoe *verſus* Knipe.

Cro. Jac. 281. 1 Brownl. 113. 1 Bulſt. 156. Debt. Condition to perform Covenants, Payments, &c.

DEBT on a Bond of 300*l.* the Condition was to perform all Covenants, Clauſes, Payments and Agreements contained in a Deed Poll of the ſame Date, made by the Plaintiff to the Defendant. The Defendant ſhewed to the Court the Deed Poll *in hæc Verba*, in which was contained a Grant, and Bargain and Sale of certain Land made by the Plaintiff to the Defendant for 100*l.* paid, and 200*l.* to be paid afterwards; in which Deed there was a Proviſo, that if the Defendant did not pay for the Plaintiff to *J. S.* 40*l.* to *J. D.* 40*l.* *&c.* at ſuch a Day, that then the Grant, Bargain and Sale ſhould be void, *&c.* and on a Plea by the Defendant that he had performed all Covenants, *&c.* contained in the Deed, the Plaintiff aſſigned the Breach in Non-payment of 40*l.* at a Day according to the Proviſo; on which the Defendant demurred, and it was adjudged *pro Defend' per totam Curiam:* For the Condition of the Bond does not oblige the Defendant to perform other Payments than ſuch which the Defendant is bound by the Deed to perform; for the Bond was made but for the Strengthening of the Deed, and the Deed does not require any compulſory Payment to be made, but leaves it to the Will of the Defendant either to make ſuch Payments compriſed in the Proviſo, or in Default thereof to forfeit the Land to the Plaintiff; ſo that the Intent of the Parties was not to make the Bond and the Condition of it repugnant, and contrary to the Deed Poll of Bargain and Sale, as that the Payment of the 40*l.* to *J. S.* which is made voluntary by the Deed Poll, ſhould be made compulſory on the Bond, but the Word (Payments) in the Condition of the Bond ſhall have Relation only to ſuch Payments compriſed in the Deed Poll, which will be compulſory to the Defendant and not otherwiſe: And becauſe Neglect of Payment of the 40*l.* to *J. S.* which is aſſigned for Breach, is in its own Nature voluntary, to be paid by the Defendant or not, to which the Condition of the Bond cannot in any reaſonable Conſtruction extend; therefore it was adjudged againſt the Plaintiff. *Quod Nota. Yelverton* was of Counſel with the Plaintiff.

2 Mod. 36, 37. 2 Lev. 116.

Roſſe

Roſſe *verſus* Pye.

THE Plaintiff alledged the Conſideration to be, that in Conſideration the Plaintiff had enter'd into a Recogniſance of ſuch a Sum with the Defendant, on Condition, that the Defendant ſhould make his Appearance, *&c.* at the next Aſſiſes to be held before the Juſtices of Gaol-Delivery for the County of *Suff. &c.* the Defendant promiſed to appear at the ſaid general Gaol-Delivery, *&c.* and to ſave the Plaintiff harmleſs from his Recogniſance, *&c.* and ſhewed that the Defendant did not appear, *&c.* nor had ſaved the Plaintiff harmleſs, to his Damage, *&c.* The Defendant pleaded, that before the next general Gaol-Delivery after the Recogniſance made, *viz.* 12 *Febr'* ſuch a Year, he ſued out of the King's Bench, *&c.* a *Certiorari* directed to the Juſtices of Aſſiſe in the County of *Suff.* by the Name of Juſtices of the Gaol-Delivery to remove the ſaid Recogniſance, and ſhewed that at the Aſſiſes held in ſuch a County, *viz. Suff.* ſuch a Day and Year, he deliver'd the *Certiorari* to the Lord *Coke adtunc* one of the Juſtices of Aſſiſe; and further ſhewed, that the Plaintiff had not been damnified by the ſaid Recogniſance, *&c.* upon which the Plaintiff demurred in Law: And it was adjudged for the Plaintiff for two Reaſons: 1. Becauſe the Defendant does not ſhew in his Bar, in what Place the Aſſiſes for the County of *Suff.* were held, and that is iſſuable; for if the Plaintiff would reply, that the Defendant did not deliver the *Certiorari* to the Lord *Coke*, it could not be tried for Want of alledging the Place from whence the Venue to try it ſhould come. 2. The Defendant ought to have ſhewn expreſly, that he did appear at the Aſſiſes; for otherwiſe the Recogniſance is forfeited, and the Removal of the Recogniſance by a *Certiorari* does not diſpenſe with the Appearance of the Party; for altho' the Writ, by which the Recogniſance is to be removed, is the Command of the King, yet the Purchaſe of ſuch Writ is the Act of the Defendant, and he by no ſuch Slight can ſave his Recogniſance; for if a Man is bound to appear at *Utas Sancti Mich. coram Domino Rege*, altho' at the Day the Term is adjourn'd by the King's Writ, yet the Party at his Peril, in Salvation of his Bond, muſt appear and procure his Appearance to be recorded, otherwiſe he forfeits his Bond, 4 *E.* 4. 21. *a. à fortiori* here, becauſe the Defendant ſhall not take Advantage of his Subterfuge of Juſtice: Then *a conſequenti ſequitur*, that the Recogniſance being forfeited, the Plaintiff has Cauſe of Action; for altho' the Recogniſance is never ſued, yet the Plaintiff is ſubject every Hour to be ſued thereon: And this was the Opinion of the whole Court. *Yelverton* was of Counſel with the Plaintiff.

Cro. Jac. 281. 1 Bulſt. 155. Aſſumpſit.

The Condition to appear is not ſaved by removing the Recogniſance by Certiorari.

18 E. 4. 27. b. Br. Condit. 165.

Lucas

Lucas *verſus* Fulwood.

1 Bulſt. 151. Debt. Declaration in Nature of an Action of Annuity is ill.

THE Plaintiff enter'd his Suit *in Placito Debiti*, and declared that the Defendant *reddat ei* 50 *l. de annuali redditu quas ei debet & injuſte detinet*, and ſhewed in his Declaration the Deed of the Grant of the ſaid Rent for Years, payable at ſeveral Days out of the Land, with a Clauſe of Diſtreſs; and concluded, *quod Def. ſubſtraxit* at ſeveral Days *annualem Redditum prædictum*; and upon *Nil debet* pleaded, the Plaintiff took his *Venire facias in placito Debiti*, and had a Verdict: But it was adjudged, *Quod quer' nil capiat per Billam*; for the Plaintiff's Declaration ſhews, that he demands an Annuity, which is contrary to the Entry of his Plaint *in placito Debiti*; for in Debt a Man can never declare, *Quod Def. ſubſtraxit annualem Redditum*, but this Word (*ſubſtraxit*) manifeſts to the Court, that the Plaintiff does not demand the Rent as a Debt, but as an Annuity, ſo that he enters his Plaint in Nature of a Debt, and declares in Nature of an Annuity, which is repugnant *in ſe*; for he ought to have in a Writ of Annuity a ſeveral and diſtinct Judgment otherwiſe, and in another Sort, than he ſhall have in a Writ of Debt; for in the Annuity he ſhall have Judgment of the Arrearages pending the Writ, but in Debt he ſhall not have ſuch Judgment, but only for the Sum demanded. *Quod Nota. Per totam Curiam. Yelverton* of Counſel with the Defendant.

Cro. El. 3.

Mich. 9 Jac. B. R.

Spenſer & Woodward *verſus the Earl of* Rutland.

Error.

THE Earl of *Rutland* recover'd againſt *Spenſer* and *Woodward* in the Common Pleas in an Action on the Caſe for diſturbing the Earl to hold a Court in ſuch a Manor, *&c.* upon which they brought Error in the King's Bench, and before the Errors diſcuſſed *Woodward* died: And the Queſtion was, whether by the Death of one of the Plaintiffs in the Writ of Error the Writ be abated? For the Earl pray'd Execution of the firſt Judgment. And it was adjudged, that the Writ of Error is abated, and that the Earl is put to his *Scire fac.* againſt the Executor of him that is dead. And that for four Reaſons; 1. There is a Difference between Death before Judgment

10 Co. 135. a. 2 Keb. 520, 594. Comb. 263, 44'. Ante 113.

and after Judgment; as in Treſpaſs againſt two or three, one dies pending the Writ, yet the Writ ſhall not abate, as 4 *H.* 7. 2. 2 *H.* 6. 15. 44 *E.* 3. & 47 *E.* 3. are; for the Treſpaſs in itſelf is ſeveral, and their Plea of *Non cul'* is ſeveral, for the one may be acquitted, and the other may be condemned; otherwiſe where one of the Defendants dies after Judgment, and a Writ of Error brought, for now by the Judgment, that which was ſeveral is made joint; and the Judgment of Reſtitution ought to be according to the Loſs, *viz.* that both ſhall be reſtored to that which they loſt, and ſuch Judgment of Reſtitution cannot be to a dead Perſon. 2. The Writ of Error is but a Commiſſion between two of the one Part, and the Earl of the other Part; and therefore by the Death of one the Power is determin'd, *quod vide* 2 *R.* 3. 1. 3. Altho' the Writ of Error is but to diſcharge the Plaintiffs, yet if the Judgment be affirmed, the Charge will fall on the Executor of him that is dead, and does not ſurvive to the other; and therefore the Executor of *Woodward* muſt be made Party, that he may plead in Salvation of the Teſtator's Goods. 4. The Law compels the Defendants to join in the Writ of Error, for the one alone cannot have Error, altho' *Forteſcue* 35 *H.* 6. 19. is to the contrary; then the Law, which obliges their Joining in the Suit, cannot conſtrue, but that by the Death of the one there is an Alteration, and the Difference is between the Death of the one after Error brought, and the Releaſe of the one after Error brought; *quod vide Ruddock*'s Caſe 6 *Co.* 25. *a.* but as 11 *R.* 2. *Brief* 638. *in Audita querela* by two, the one dies, yet the Writ ſhall not abate; for 1. This Suit does not touch the firſt Judgment, but is founded on Matter of a later Time. 2. The End of the Suit is to diſcharge their Bodies, and the Body of the one is not the Body of the other; and therefore his Death will not abate it. *Quod Nota. Per totam Curiam, præter Yelverton* Juſtice. *Yelverton* was of Counſel with the Plaintiffs againſt the Earl.

Where the Death of one of the Plaintiffs in Error ſhall abate the Writ.

Acts 3, 4.

Cro. Jac. 19.

Wallop *verſus* Darby.

ON *Non cul'* pleaded the Jury gave a ſpecial Verdict, *viz.* that *Jo. Browne* was ſeiſed in Fee of the Place where, &c. and held it in Socage, and deviſed all his Lands *in Anglia* to *J.* his Son and his Heirs; and if he died without Heir of his Body, then his Lands *in Culver*, &c. ſhould be to *J. B.* his Nephew in Tail; *Item I give my Land in* F. *to* S. *my Nephew in Fee*, the Deviſor died, *S.* died, and *Jo.* the Son ſurvived, and died without Iſſue; and the Queſtion was between the Heir of *J. B.* and the Heir of *S.* And it was adjudged that the Heir of *S.* ſhould have the Land; for when the Deviſor gave all to *J.* his Son

Cro. Jac. 190. Treſpaſs.

Conſtruction of a Deviſe.

in Tail, and afterwards by another Clauſe in the Will gave the Land in one Vill to *S.* that is an Explanation of his Intent, that *Jo.* ſhould have all *præter* the Land in the Vill appointed to *S.* and in this Caſe by *Williams* Juſtice, they are not Jointenants, but ſeveral Tenants; but if it had been all given to *J.* and by another Clauſe in the ſame Will all had been given to *S.* there they are Jointenants by the Intent of the Deviſor; *Quod fuit conceſſum.* But in this Caſe by the better Opinion of the Court, *S.* took but by Way of Remainder after the Death of *J.* without Iſſue; for the Word [*Item*] *I give, &c.* depends on the precedent Words; and *S.* ſhall be in the ſame Condition as *J. B.* the Nephew would be; for the Eſtates limited to *J. B.* and *S.* are intirely conjoined to the Limitation of the Eſtate of *J.* the Son, *viz.* after his Death without Iſſue. *Quod Nota.*

Vide 1 Inſt. 112. b. Cr. El. 9. Cr. Jac. 49. Pl. Com. 541.

Tampian *verſus* Newſam *and his Wife.*

IN *Aſſumpſit* by the Plaintiff againſt *Newſam* and *Bridget* his Wife, after an Imparlance taken by both the Defendants, the Record was *ad quem Diem tam prædictus* the Plaintiff by his Attorney, *quam prædicti Jo. & Bridgetta* by their Attorney *veniunt, & prædicta Bridgetta dicit, quod ipſa non aſſumpſit*; and thereupon they were at Iſſue, and it was found for the Plaintiff, but he could not have Judgment, but a Repleader was awarded *per totam Curiam:* 1. Becauſe the Defendants do not make any Defence, for the Record ought to have been, *quod prædicti Jo. & Bridgetta veniunt & defendunt vim & Injur' quando, &c.* for by the Courſe of Law, before the Party pleads in Bar, he ought to defend the Tort ſuppoſed by the Plaintiff; and this is not a Miſpriſion of the Clerk, but a Failure in Point of Subſtance. 2. It appears that the Plea pleaded is the Plea of the Wife only, and ſhe alone cannot plead without her Husband, but both of them ought to join in Plea; and therefore the Record ought to be, *Quod prædicti Jo. & Bridgetta dicunt, quod ipſa Bridgetta non aſſumpſit*; the like Caſe was between *Chomley* Plaintiff againſt *Apſley* and his Wife in an Action for Words ſpoke by the Wife, where the Wife only pleaded *Non cul'*, and the Plaintiff had a Verdict, but he could not have Judgment, but a Repleader was awarded for the Reaſon aforeſaid. *Yelverton* was of Counſel with the Defendants.

Cr. Jac. 288. Aſſumpſit. Repleader after Verdict. Salk. 217. 1 Show. 386. Lutw. 9, 1594.

Cr. Jac. 530. 2 Ro. Rep. 90. Cr. Jac. 239. Heth. 10.

3

Lilburn

Lilburn *verſus* Hern.

IN a Writ of Error to remove the Record out of *Durham*, where Judgment final was given in a Writ of Right, it appear'd that the Demandant in the Writ of Right counted of his own Poſſeſſion *capiend' expletias Temp' Dom' El' Reg'*; and one Error aſſigned was, becauſe the Demandant did not ſay in his Count, within thirty Years laſt paſt; for in that the Statute 32 *H.* 8. of Limitations makes the Law, which limits that a Man ſhall not demand higher of his own Poſſeſſion than for thirty Years before; otherwiſe if he had counted of the Poſſeſſion of his Anceſtors, for the Time limited for that is ſixty Years; and the ſame Law would be, if the Demandant had counted of his own Poſſeſſion in the Time of this King generally, it had been good; for it appears to the Court judicially, that it is within thirty Years, foraſmuch as the King has not reigned ſo long: But Q. *Eliz.* reigned forty Years and more, and therefore a Difference. The ſecond Error aſſigned was, becauſe Judgment final was given on the Tenant's Default on an Imparlance taken to a Day certain, where a *Petit cape* only ought to have been awarded; otherwiſe it is where the Tenant takes a general Imparlance and not to a Day prefixed, for there on his Default Judgment final ſhall be given, *quia Tenens receſſit in Contemptum Curiæ*; for on a general Imparlance the Tenant has taken upon him to be always ready to defend his Right, ſo are the Precedents in the Book of Entries: But on a ſpecial Imparlance to a Day certain, there the Tenant is not bound to appear till the Day; and there may be Reaſon why he may excuſe his Default, and then no Laches in him, and by Conſequence no Reaſon that he ſhould loſe his Land peremptorily, where the Right does not appear to the Court, and where the Tenant has not committed any Contempt. *Quod Nota. Per tot' Cur'. Yelverton* was of Counſel with the Plaintiff.

1 Bulſt. 159. Cro. Jac. 292. Error on a Writ of Right.

1 Show. 20. 65. Lutw. 860. 1 Lev. 105.

Orde *verſus* Moreton.

ERror on a Recovery *in Eject' firmæ* out of the Court of *Durham*; and the Error aſſign'd was the Infancy of the Plaintiff in the Ejectment, who appear'd by Attorney, where he ought to have appear'd by Guardian; and upon Iſſue joined on the Infancy it was found for the Plaintiff in Error, *viz.* the Infancy was found; upon which the Plaintiff pray'd that the Judgment might be reverſed. To which it was objected, that the Writ of Error brought was not a ſufficient Warrant to the Court to proceed to the Reverſal; 1. Becauſe the Writ of Error is directed to the Biſhop of *Durham* and others by Name.

Cro. Jac. 254. 1 Brownl. 150. 1 Bulſt. 105, 129. Hob. 138. Error in Ejectment.

Name, to remove a Record of an Ejectment between ſuch and ſuch, which was *coram* the ſaid Biſhop and ſeven others by Name, and the Record which is removed appears to be a
5 Geo. c. 13. Record of an Ejectment before the Biſhop and eight others, ſo it is not the ſame Record ſpecified in the Writ; for a Record before eight, and a Record before nine cannot be intended the ſame Record, but ſeveral; for at *Durham* all that are named in the Commiſſion are joint, and not joint and ſeveral; according to the Caſe 2 *Aſſ. p.* 5. Attaint was brought on a Verdict which paſt on Oyer and Terminer, and the Writ ſuppoſed that the Verdict paſſed before four Juſtices, and the Record removed prov'd that it paſt but before two; and it was held that they had no Power nor Warrant to take the Attaint, for the Writ is not warranted by the Record; ſo in Error; for theſe Suits are to defeat the firſt Record, and therefore ought to agree, *viz.* the Writ and the Record; but where the Suit is on another collateral Matter foreign, and does not trench to the Annihilation of the Record, there ſuch Miſpriſion ſhall not be peremptory; as 31 *E.* 3. *Procedendo* 3. Aſſiſe of Rent, on Aid prier of the King there iſſued a *Procedendo*, which made Mention, that the Aſſiſe was arraigned before two Juſtices, where in Fact it was arraigned before three, and yet awarded good; for the Aid prier is but collateral to the Demand in the Aſſiſe. *Quod fuit conceſſum per Curiam.* 2. This Writ of Error is directed to the Biſhop of *Durham* and ſix others by Name, and the Return of the Writ, *viz.* *Reſponſio* of the Commiſſioners is by the Biſhop and five others only, without making any Mention of the ſixth Commiſſioner; ſo the Anſwer is not ſo full as is commanded by the Writ, and therefore ill: For the King by his Writ makes their Power to return the Record joint, and puts equal Confidence in them all, and therefore the Anſwer ought to be by all, unleſs ſome of them are dead after the Writ awarded, and then that ought to appear by the Anſwer of thoſe that are alive: *Quod fuit etiam conceſſum per totam Curiam*, and the Plaintiff put to his new Writ of Error *de Recordo quod coram nobis reſidet*; for it was agreed on all Sides, that the Record is well removed, and remains here, notwithſtanding the former Miſpriſion; as it hath been often adjudged, where a Writ of Error iſſues to remove a Record between ſuch Parties, which was *in Curia noſtra coram Juſticiariis noſtris*, although the Record removed was *in Curia Dominæ Eliz.* and *& coram Juſtic' ſuis*, yet being brought into the King's Bench, 'tis well removed, and remains there. *Quod Nota.* *Yelverton* was of Counſel with the Defendant.

Woolby *verſus* Pirley.

DEBT on a Leaſe for Years; the Plaintiff derived his Title by Grant of the Reverſion by Way of Bargain and Sale in Fee, mean from the firſt Leſſor; and declared that by Indenture of ſuch a Date ſuch a Perſon granted, bargained and ſold for Money the Reverſion to him in Fee, which Indenture was inrolled ſuch a Day according to the Form of the Statute, and becauſe he did not ſhew in what Court it was inrolled, and the Statute 27 *H.* 8. ſpeaks of ſome ſpecial Courts, and there is no Reaſon to put the Leſſee to ſuch infinite Labour to ſearch in all Courts, as well at *Weſtminſter*, as in the Country with the Clerk of the Peace; therefore after Verdict, *Nil capiat per Billam* was enter'd. *Yelverton* was of Counſel with the Defendant.

Cr. Jac. 291. 1 Brownl. 114. Bargain and Sale, and does not ſhew in what Court inroll'd.

5 Geo. c. 16.

Hill. 9 Jac. B. R.

Sir George Savill *verſus the Lord* Candiſh.

THE Counteſs of *Shrewsbury* recover'd by Verdict againſt Sir *George Savill*, and on a Challenge *ex parte* of the Plaintiff to the Sheriff *de Com' Derb'*, the *Venire facias*, *&c.* iſſued to the Coroners, who returned all the Writs, and at the Aſſiſes at the Trial a *Tales* was awarded, the Name of one of which *Tales* was *Gregory Griſſon*, *&c.* and on the *Poſtea* returned by the Clerk of Aſſiſe *in Com' B.* the *Tales* was returned to be by the Sheriff, but in the Entring up of the Judgment it was made *per Coronatores*, and the Name of the Juror on the *Tales*, which was *Gregory*, was returned by the Clerk of Aſſiſe accordingly by his true Name, but in the Roll of the Judgment he was named *George G.* And on this Judgment Sir *George Savill* brought a Writ of Error, which depended ten Years and more, and the firſt Plaintiff, which was the Counteſs of *Shrewsbury* died, this Matter being undetermin'd: And the Lord *Candiſh*, as Executor of the Counteſs, revived all by *Scire facias quare Executionem habere non debet.* And after Debate ſeveral Days, the Judgment was reverſed for three Reaſons: 1. Becauſe on the Panel of the *Nomina Jurat'*, after the twenty-four Jurors named, at the Foot of the Panel two Names were added

1 Brownl. 114. Challenge to the Sheriff.

Tales miſnamed.

Error.

Cr. Jac. 207. Nomina Jur' de novo appoſit' omitted.

of the Jurors, which really were of the *Tales*, but no Mention made that they were *Nomina Jurat' de novo appoſit' ſecundum formam Statuti*; and that ought to be; for at the Common Law the Juſtices of Aſſiſe could not grant any *Tales* to ſupply the Defaults of the firſt Jurors, but it is merely by the Statute 35 *H.* 8. which ordains, that their Names ſhall be added to the firſt Panel; and it cannot be diſcerned to be accordingly, unleſs ſuch Stile and Title be made *ut ſupra*, *Nomina Jurat' de novo appoſit' ſecundum formam Statuti*, to diſtinguiſh what is done by the Common Law, and what by the Aid of the Statute. Alſo the Names of the Coroners ought to be added to the *Tales* in the Foot of the Panel, and in this Caſe their Names were only *in dorſo*, which was on the Return of the firſt Panel: And altho' ſeveral Precedents were ſhewn, where the *Nomina Jurat' de novo*, *&c.* was omitted on the Panel, yet the Court did not regard them, becauſe, as it ſeem'd, they paſt *ſub Silentio*, without Exception. The ſecond Reaſon was, becauſe it appear'd by the Return of the *Poſtea*, that the *Tales* were returned by the Sheriff, which is Error, where the firſt Proceſs iſſued to the Coroners; and although in the Entry of the Judgment in the Common Pleas it is ſaid to be by the Coroners, yet that does not aid in this Caſe; for the Warrant of the Roll is the Certificate of the Clerk of Aſſiſe, and that is, that the *Tales* were returned by the Sheriff, and the Court cannot intend otherwiſe than is certified: 3. The Name of the Juror on the *Tales*, which is *Gregory*, is made in the Entry of the Judgment to be *George*; and if the Roll ſhould be amended in this Point according to the Certificate of the *Poſtea*, then in the other Point before, of the Return of the *Tales* by the Sheriff, it is not amendable; and ſo every Way it was Error. *Per totam Curiam.* And the Judgment was at laſt reverſt. *Yelverton* was of Counſel with the Plaintiff in Error.

Ante 15.

Certificate of the Clerk of Aſſiſe.

Bridges *verſus* Einon.

1 Brownl. 115. 1 Bulſt. 178. Cr. Jac. 300. Debt on an Award.

THE Plaintiff declared, that he and the Defendant 10 *Febr' Anno* 7. ſubmitted themſelves to the Award of Sir *Roger Bodenham*, who awarded they ſhould be Friends, and that the Defendant ſhould pay to the Plaintiff 100*l.* at Midſummer following at ſuch a Place, and for 10*l.* unpaid he brought the Action. The Defendant pleaded in Bar a Releaſe made by the Plaintiff to him of all Demands, which was made 10 *Apr'* before Midſummer, when the Debt was to be paid, and it was of all Demands *ab Initio Mundi uſq;* 10 *Apr'*, and ſhewed the Releaſe to the Court; upon which the Plt. demurred. And it was adjudg'd againſt the Plt. for alth' o' the Sum of Money given by the Award is not grounded on any precedent Debt or Contract between

the Parties, yet, *per Curiam*, it lies in Demand immediately, and may be aſſigned by the Plaintiff's Will to another, and the Executors ſhall have it, and in the Spiritual Law it is Credit immediately, whereof Adminiſtration may be granted before the Day of Payment, if the Plaintiff dies before; although no Action is given for it before Midſummer; for *revera* it is not recoverable before Midſummer, but yet it is a Duty immediately by the Award; and as the Award is perfect immediately when it is pronounced, ſo are all Things contained in the Award, unleſs they are made payable on a Condition precedent on the Part of one of the Parties; as if the Award had been, that if the Plaintiff gave the Defendant at Midſummer a Load of Hay, that then on the Delivery thereof the Defendant ſhould pay the Plaintiff 10*l.* in that Caſe the 10*l.* cannot be releaſed before the Day; for it reſts merely in Poſſibility and Contingency, whether it will ever be paid; for it grows to be a Duty on the Delivery of the Hay only, and not before: And therefore it is like the Caſe 5 *E.* 4. 42. of the *Nomine pœnæ* waiting on the Rent, which cannot be releaſed before the Rent is arrear; for the Non-payment of the Rent makes the *Nomine pœnæ* become a Duty: But the Caſe in Queſtion is like the Caſe *Lit.* 117. where a Man is bound to pay Money at a Day to come, a Releaſe of Actions before the Day cuts off the Duty, becauſe by 7 *H.* 7. 6. it is a Duty immediately; *a fortiori* here, becauſe the Releaſe is of all Demands. *Quod Nota. Per tot' Cur'.* *Yelverton* was of Counſel with the Plaintiff.

Poph. 136. Cr. Jac. 171.

Ante 193. Cr. Jac. 623. Cro. El. 580. 5 Co. 70. b.

Releaſe of all Demands. 1 Inſt. 292. b.

Hughes *verſus* Keme.

THE Plaintiff declares, that he is poſſeſſed of an Houſe in *London* by Leaſe from ſuch a Perſon, in which Houſe there had been three Lights from Time whereof, *&c.* by which wholſome Air had been receiv'd; and that the Defendant is poſſeſſed of an Houſe, and of a void Piece of Land or Yard, which void Piece *contigue adjacet & conjungit* to the Plaintiff's Houſe on that Side of the Houſe where the three Lights are, which Lights are towards the Defendant's Yard, and ſo have been of antient Time, and that the Defendant had built a new Houſe ſo much on the void Piece of Ground, *quod totaliter obſcuravit* the Plaintiff's antient Lights, to his Damage, *&c.* The Defendant confeſſes, that he is poſſeſſed of an Houſe for Years, and ſhews by whoſe Leaſe, and that he is bound by Covenant to pull it down and rebuild it, and ſhews that that Part of the Plaintiff's Houſe, in which the Lights are, *contigue adjacet* to the Soil and Houſe of the Defendant, and pleads a Cuſtom in *London* which warrants the Rebuilding of any Houſe on the ſame Foundation, where the antient Houſe ſtood

Co. Entr. 20. 1 Bulſtr. 115. Godb. 183. Calth. 1.

Action on the Caſe for ſtopping Lights.

in

in Height at the Pleaſure of the Party, and that it is lawful by the Cuſtom, though by the Rebuilding his Neighbour's Lights are ſtopped, unleſs there be ſome Writing to the contrary; and ſo juſtifies the Rebuilding of his Houſe on the ſame Foundation higher than before, whereby the Plaintiff's Lights were ſtopped, as he well might; upon which the Plaintiff demurred. And it was adjudged that the Cuſtom pleaded by the Defendant is a good Cuſtom, for it might ariſe on a lawful Commencement or Reaſon in Cities or Burroughs; for if a Tradeſman has ſettled himſelf in a commodious Part of the City, where he increaſes in his Trade, and his Houſe becomes too ſmall for his Company, he may build it higher for his better Habitation, and it is well allowable, for it tends to the Peopling of Cities, and to the Encouragement of Tradeſmen in ſuch Places, and as well allowable as the Cuſtom of *London* 27 *H.* 6. 10. which allows Covenant to be brought by the Leſſee againſt the Leſſor for not repairing the Houſe demiſed, altho the Leaſe be not by Indenture or other Writing; for it will encourage Tradeſmen to take Houſes in Leaſe, when they know they ſhall be repaired by the Leſſors; and by Intendment, by this Cuſtom the Rents reſerved in *London* are the higher by Reaſon of ſuch Burden and Charge which falls on the Leſſors: But the Cuſtom of a City which enables Men to build on a void Piece of Land, where there was no Houſe before, and thereby to ſtop up his Neighbour's Lights, was held void *per totam Curiam*; for by that Means Men may loſe all their Lights, which any Way come into their Houſes, if they may be environ'd on every Side with new Houſes, and by this Strategem live *in tenebris*, which the Law will not allow.

9 Co. 58. a. And ſo it was adjudged 39 *Eliz.* between *Moſely* and *Ball*, that ſuch Cuſtom alledg'd in the City of *York* to ſtop Lights by Building on new Foundations, where no Houſe was before, was adjudged void. But in this Caſe Judgment was given againſt the Defendant by Reaſon he did not anſwer the Offence laid to his Charge, which is the Building on the void Piece of Ground, and by that Means ſtopping the Plaintiff's Lights; for the Defendant juſtifies only by Building on the old Foundation, and thereby ſtopping the Plaintiff's Lights, which is not the Matter wherewith the Plaintiff charges him, but merely another Matter; ſo the Point of the Plaintiff's Action not anſwer'd. *Quod Nota. Per totam Curiam. Yelverton* was of Counſel with the Defendant.

2

Durrant

Durrant *verſus* Child.

TReſpaſs for Chaſing his Cattle, and ſhews what, *apud B.* to his Damage, *&c.* The Defendant juſtifies the Chaſing in a Cloſe call'd *M.* in *S.* which is his Freehold, and the Cattle Damage-feaſant: The Plaintiff replies and ſhews that one *B.* is ſeiſed of a Cloſe call'd *Catley* in *D.* in Fee, and demiſed it to the Plaintiff for Years, and that the Defendant is ſeiſed of a Cloſe called *Furſy* in Fee, which *contigue adjacet* to the Cloſe call'd *Catley*, and that the Defendant and all they whoſe Eſtate he has in *Furſy Cloſe*, have uſed from Time whereof, *&c.* to repair the Fence and Hedges *inter Catley Cloſe & Furſy Cloſe*, which *Furſy Cloſe proxime adjungit* to the Cloſe call'd *M.* where the Cattle were chaſed; and ſhews that the Plaintiff put his Cattle into *Catley Cloſe* to feed, which for Want of Encloſure eſcaped into *Furſy Cloſe*, *& abinde* into the Cloſe called *M. &c.* The Defendant rejoins, and confeſſes the Plaintiff to be poſſeſſed of *Catley Cloſe*, *ut ſupra*; and he himſelf to be ſeiſed of *Furſy Cloſe*, *ut ſupra*; but ſays that between *Catley Cloſe* and *Furſy Cloſe* there is a ſmall Brook, which Brook at the Side of *Catley Cloſe* hath a Bank *contigue adjacen'* to it, which Bank the Leſſor of the Plaintiff, and they whoſe Eſtate, *&c.* have uſed Time whereof, *&c.* to repair; and that the Brook at the Side of *Furſy Cloſe* hath another Bank *contigue adjacen'*, which the Defendant, *&c.* have uſed, *&c.* to repair; and becauſe the Plaintiff had not repaired the Bank on the Side of *Catley Cloſe*, the Cattle eſcaped into *Furſy Cloſe*, and *abinde* into the Cloſe called *M.* wherefore the Defendant chaſed them, as he lawfully might, *&c.* upon which the Plaintiff demurred. And it was adjudged *pro Quer'*; for the Defendant has made a good Bar, and the Plaintiff a good Replication, whereby the Plaintiff has removed the Fault from himſelf, and laid it upon the Defendant for his Neglect of Encloſing between *Catley & Furſy*; and now the Rejoinder does not confeſs and avoid the Replication, but perplexes the Matter by adding a Point of Preſcription on the Plaintiff's Part, that he ought to repair a Bank between *Catley* and *Furſy* on which Iſſue cannot be taken; for then two Preſcriptions will be at Iſſue together, which cannot be any more than two Affirmatives; as 5 *H.* 7. 12. and alſo the Matter contained in the Rejoinder does not anſwer the Matter compriſed in the Replication but only by Way of Argument; and if it be true, it is good Matter in Evidence againſt the Plaintiff, who is bound to prove his Replication true; for the Plaintiff ſays, that *Catley & Furſy contig' adjac'*, *id eſt*, without any mean Space between them, and the Defendant in his Rejoinder ſays, that there is a Brook between *Catley & Furſy*; and if ſo, then *non contigue*

1 Brownl. 221. Treſpaſs.

Two Preſcriptions ſhall not be in Iſſue.

adjacent. But the Defendant ought to have traverſt the Preſcription alledged by the Plaintiff, and that would make an End of the whole. *Quod Nota. Per totam Curiam. Yelverton* of Counſel with the Plaintiff.

Muſgrave *verſus* Wharton *Admin. of* L. Muſgrave.

Scire facias. Scire facias in one County on a Judgment in Debt in another.

THE Plaintiff Sir *Ed. Muſgrave* recover'd on a Bond of 200*l.* againſt *Leonard Muſgrave*, and the Action of Debt was laid *in Com' Cumberland*, afterwards *Leonard* the Defendant died inteſtate, and *Wharton* took Adminiſtration, and afterwards Sir *Ed'* the firſt Plaintiff ſued a *Scire fac'* to execute the Judgment againſt *Wharton*, and laid this Action *in Com' Weſtmerl'*, and upon *plene adminiſtravit* pleaded, the Jury found 160*l.* Aſſets in the Hands of *Wharton*: And *Yelverton* moved in Arreſt of Judgment that this *Scire fac'* ought to have purſued its Original; foraſmuch as he demands Execution of the firſt Judgment on the Action laid in *Cumberland*; and foraſmuch as the *Scire fac'* was brought in *Weſtmerland*; for this Reaſon the Action is miſconceived, for it ought alſo to be brought in *Cumberland*, according to the Book 18 *E.* 4. 5. and it was lately adjudg'd in *Rolls*'s Caſe, where *H.* recover'd againſt him 300*l.* by Action of Debt brought in *Middleſex*, and afterwards he brought Debt on the Record, and laid the Action in *Cornwall*, and Iſſue was joined, and found againſt *Rolls*; yet for the Reaſon aforeſaid the Judgment was reverſed; for Debt on the Record ought to have been brought in *Middleſex* where the Record is, and where the firſt Recovery was; which was adjudged *Mich. Anno* 7. But, *per Cur'*, there is a Difference between Debt on the Record and *Scire fac'* on the Record; for Debt on the Record recites the former Action and Place where the Recovery was, *viz. cum A. nuper in Cur' Dom' Reg', &c. apud Weſtm' in Com' Midd', &c.* So that there appears within the Record a material Variance in the Proceedings: But the *Scire fac'* recites only, *quod cum A. recuperaſſet* ſuch a Debt, *quod quidem Judicium adhuc reſtat, &c.* So that no Place, where the firſt Recovery is, appears; and the Court cannot take Notice that the *Scire fac'* is grounded on the Record of the Judgment in *Cumberland*, becauſe the *Scire fac'* is a diſtinct Record of itſelf, not yet annexed to the firſt Judgment; and the Truth being, that this *Scire facias* was to execute the firſt Judgment, the Defendant ought not to have pleaded *Plene adminiſtravit*; for he has thereby admitted the *Scire fac'* good, but he ought to have pleaded in Abatement of it, by ſhewing the firſt Action to have been brought in *Cumberland.* Wherefore they gave Judgment for the Plaintiff, and adviſed the ſaid *Wharton* to bring Error, and ſhewed their Opinions clearly, that it would be

Error;

* Error; becauſe now after Judgment in the *Scire fac'*, the firſt Judgment, and this Execution on the *Scire fac'*, make but one Record, whereof the Judges in the Exchequer-Chamber muſt take Notice. *Quod Nota.* A good Caſe of Experience. * Cro. Jac. 331. Hob. 4

Paſch. 10 Jac. B. R.

Morgan *verſus* Sock.

SOCK brought Debt on a Bond of 14*l.* made by *Arthur Morgan Anno* 1. to him, againſt *Tho. Morgan* his Adminiſtrator; the Defendant pleaded, that after the Death of *Arthur*, and after Adminiſtration committed, *viz.* 16 *Septembr' Anno* 6. the Plaintiff ſued this Original againſt him, of which he had not Notice till 24 *Febr' Anno* 6. before, which Day the Defendant was put to *Exigent* for Non-appearance, which *Exigent* was returnable *a Die Paſchæ in* 3 *Sept'* after; and that 17 *Febr' Anno* 6. which was before the Notice, his Letters of Adminiſtration were revoked *legitime* by the Archbiſhop, and granted to *Rich. Morgan* Brother of *Arthur*, which *Rich.* is yet Adminiſtrator; and ſaid that he at the Time of the Letters revoked had ſeveral of the Goods of the Inteſtate in his Hands, and ſhewed what *in Specie*, to the Value of 200*l.* and that he after the Adminiſtration revoked, and before Notice of this Suit, had † deliver'd them over to *Richard*, *viz.* 22 *Febr' Anno* 6. and that he at the Time of the Letters revoked had fully adminiſter'd all the Goods of the Inteſtate *præter* the Goods deliver'd to *Richard*, *&c.* The Plaintiff replied, that this Adminiſtration was revoked by Covin between the Defendant and *Richard*. And upon that Iſſue was joined, and it was found to be by Covin; wherefore the Plaintiff had Judgment to recover the Debt and Damages *de bonis & catallis prædicti Arthuri tempore Mortis ſuæ in manibus prædicti* the Defendant *levand' exiſten'*, *&c.* and upon this Judgment a Writ of Error was brought, and it was aſſigned for Error, that the Judgment ought to be conditional, (*viz.*) to recover the Debt of the Goods of the Inteſtate (*ſi tanta in Manibus* of the Defendant *exiſtunt*, *&c.*) and not abſolutely. But the Judgment was affirmed *per tot' Cur'*; for where the Judgment may be final and certain, it ſhall never be conditional; and becauſe it appears here by the Defendant's Plea, that he has 200*l.* in his Hands of the Inteſtate's Goods, it will be in vain to give Judgment againſt

1 Brownl. 116. 1 Bulſt. 183. Error on Debt.

† Vide Cro. El. 565. Cro. Car. 88, 89. Salk. 313.

Dy. 210. a.

Where Judgment againſt Adminiſtrator ſhall be conditional. Ante 138.

againſt him (if he has in his Hands) when he himſelf has confeſſed, that he has more in his Hands than will ſatisfy this Debt; and in that Caſe if the Sheriff could not levy the Debt in the Hands of the Defendant, he might on the Defendant's own Shewing, without any Danger, return a *Devaſtavit*. *Quod Nota. Per tot' Cur'*. And *Yelverton* ſhew'd them a Precedent 1 *Jac. C. B.* to the ſame Purpoſe. And he was of Counſel for the Defendant in the Writ of Error.

Coveney *verſus* Wooden.

2 Bulſt. 37. Aſſumpſit.

THE Plaintiff declared, that in Conſideration he would ſuffer the Defendant to occupy ſuch an Houſe of his from ſuch a Day till *Mich.* following, the Defendant promis'd to ſave the Plaintiff harmleſs from all Loſſes which he ſhould ſuſtain by his Habitation there in the ſaid Houſe, and alſo that for every Farthing-worth of Damage which the Plaintiff ſhould ſuſtain by ſuch Habitation of the Defendant there, the Defendant would give the Plaintiff 2 *d.* on Requeſt. The Plaintiff alledged that the Defendant occupied and inhabited in the Houſe by his Permiſſion, and that the ſaid Houſe during the Time that the Defendant inhabited there, and before *Mich.* after, was burnt by Fire by the Defendant's Negligence, and yet the Defendant had not ſaved the Plaintiff harmleſs from the Damage which he had ſuſtain'd by Reaſon of the Defendant's Dwelling there, nor paid the Plaintiff 2 *d.* for every Farthing-worth of Loſs which he had ſuſtained, to his Damage 40 *l.* The Defendant pleaded *Non Aſſumpſit*, and it was found for the Plaintiff, to his Damage 40 *l.* and yet *Nil capiat per Billam* was enter'd, becauſe the Plaintiff did not ſhew in his Declaration, *how many Farthings Loſs he ſuſtained* by the Burning of the Houſe, and that is material; for the Court cannot intend but that the Jury have given Damage, as well for not ſaving the Plaintiff harmleſs, as for the Farthing-worths of Loſs which the Plaintiff ſuſtained; and that the Jury ought not to do without the Plaintiff ſhew'd to *how many Farthings* his Loſs amounted. *Quod Nota. Per tot' Cur'*. *Yelverton* was of Counſel with the Defendant.

Sir Walter Chetwynd *verſus* Meeſon.

Cr. Jac. 308. Words.

THE Plaintiff ſhewed, that by the King's Letters Patent *Anno* 8. he was made Juſtice of Peace *in Com' Staff'*, and that at ſuch Seſſions, *&c.* held before him and other Juſtices by Name, the Defendant was call'd on his Recogniſance to the King, and appear'd, and one *Hickman adtunc* complain'd to the Juſtices of the Defendant's ill Behaviour, and on his Oath voluntarily, without any Subornation or Procurement of the Plt. ſwore that the Def. againſt his Will had taken his Wife, and pray'd Remedy againſt the Def. which Thing the Def.

not excuſing, he was by the Juſtices *adtunc* bound *de ſe bene gerendo*, and to appear at the next Seſſions, yet the Defendant *machinans* to ſlander the Plaintiff in his Office, as Juſtice of Peace, and to make the Plaintiff incur the Penalty of the Statute 5 *Eliz.* for Subornation of Perjury ſpoke of the Plaintiff, being Juſtice of Peace, theſe Words 2 *Apr'* 9. *By your Means I had Wrong at the Seſſions, and there you did cauſe* Hickman *to ſwear that which was untrue againſt me*, to his Damage 100 *l.* And upon *Non cul'* pleaded, it was found for the Plaintiff, and 30 *l.* Damage aſſeſſed by the Jury: And *per Cur'* the Plaintiff had Judgment; for the Words tend to a direct Scandal of the Plaintiff in his Office, as Juſtice of Peace; for to cauſe *Hickman*, and to procure *Hickman*, to ſwear falſly, is all one, and a great Imputation to the Plaintiff, and puniſhable, if it be true. *Quod Nota. Yelverton* was of Counſel with the Plaintiff.

Rice *verſus* Harriſon.

THE Plaintiff declar'd on a Leaſe from *Jo. Bull, &c.* The Defendant pleaded that the Land is Copyhold, Parcel of ſuch a Manor, whereof the King is ſeiſed, and was ſeiſed, and that the King by his Steward at ſuch a Court granted the Land in Queſtion to him in Fee, to hold at Will according to the Cuſtom, by Virtue whereof he was admitted, and enter'd, and was ſeiſed till the Leſſor enter'd upon him, and ouſted him and demiſed to the Plaintiff, upon whom he re-enter'd and ejected him, *&c.* The Plaintiff replied, that before the King had any Thing in the Manor, Q. *Eliz.* was ſeiſed thereof in Fee *in Jure Coronæ*, and, before the Ejectment ſuppoſed by the Defendant, by her Steward at ſuch a Court granted the Land in Queſtion by Copy to the Leſſor in Fee, to hold at Will according to the Cuſtom, who was admitted and enter'd, and ſhewed the Diſcent of the Manor to the King, and that the Leſſor enter'd and demiſed to the Plaintiff, who enter'd and was poſſeſſ'd, till ejected by the Defendant: Upon which the Defendant demurred, becauſe he ſuppoſed that the Plaintiff ought to traverſe the Grant by Copy alledg'd by the Defendant in the Bar: But, *per Curiam*, the Replication is good, for the Plaintiff has confeſſed and avoided the Defendant's Title by a former Copy granted by Q. *Eliz.* under whom the King that now is claims, and then the Plaintiff ought not to traverſe the Grant to the Defendant, for ſuch Traverſe would make the Plea vitious; *quod vide* * *Hilliar's* Caſe, 6 *Rep.* & 14 *H.* 8. *Perkin's* Caſe, & 2 *E.* 6. *Dy.* & *Br. Tit.* † *confeſs and avoid*; for as no Man can have a Leaſe for Years without Aſſignment, no more can a Man have a Copy without a Grant made in Court. *Quod Nota. Per totam Curiam. Yelverton* was of Counſel with the Plaintiff.

1 Brownl. 147. Cr. Jac. 299. 2 Bulſt. 1. Trover.

Where a Man ſhall not traverſe, and alſo confeſs and avoid.

Cro. Car. 581.

* Cro. El. 650. Mo. 551. 6 Co. 24 b.

† Pl. ult.

Slocomb *verſus* Hawkins.

Cr. Jac. 318. 1 Brownl. 148. Ejectment.

IN Ejectment on a Special Verdict, the Caſe was; Mrs. *Lutterel* Tenant in Fee of the Manor of *D.* levied a Fine to the Uſe of herſelf for Life, and after to the Uſe of *J.* the elder Son in Tail, *&c.* with Power for herſelf *at any Time* to make Leaſes for twenty-one Years, or for three Lifes, rendring the antient Rent, *&c.* and demiſed two Parts to *B.* for twenty-one Years, and before that Leaſe expir'd ſhe made another Leaſe to *B.* for twenty-one Years, to commence after the former determin'd; and as to the third Part of the Land, ſhe made a Leaſe of that for twenty-one Years after the Death of one *Carne* (who in Fact never had any Eſtate in the Land) and died, the firſt Leaſe expir'd, and *J.* the Son enter'd, and demiſed to the Plaintiff, and the Defendant claimed under *B.* the Leſſee. And it was adjudg'd *pro Quer'*; for on ſuch Power ſhe could not make a Leaſe to commence at a Day to come, but the Leaſe ought to be in Poſſeſſion, and not in Intereſt to commence *in futuro*, nor in Reverſion after another Eſtate ended; but the Law will adjudge on the general Power to make Leaſes, without ſaying more, that they ought to be Leaſes in Poſſeſſion; for if ſhe might by ſuch Power make Leaſe upon Leaſe, ſhe might by making infinite Leaſes detain them in Remainder from the Poſſeſſion for ever, which is contrary to the Intent of the Parties, and contrary to Reaſon. Accordingly adjudged *Trin.* 30 *Eliz.* The Earl of *Suſſex*'s Caſe 6 *Co.* 33. *a.* And *Williams* Juſtice ſaid, when he was Serjeant, it was adjudged accordingly in the Earl of *Eſſex*'s Caſe in *C. B.* on a Power reſerv'd by *Walter* Earl of *Eſſex*. *Quod Nota. Per totam Curiam* thrice adjudged. *Yelverton* was of Counſel with the Plaintiff.

Power to make Leaſes.

Cro. El. 5.

Trin. 10 Jac. B. R.

Braſier *verſus* Beale.

Cr. Jac. 305. 1 Brownl. 149. Ejectment.

ON a Special Verdict in Ejectment, the Caſe was; that a Copyholder in Fee of the Manor of *Blackthorn in Com' Oxon'*, by Licence from the Lord demiſed the Land for ſixty Years to *M.* if he ſhould ſo long live, yielding Rent on Condition of Re-entry: The Copyholder ſurrender'd to the Leſſor of the Plaintiff in Fee, who demanded the Rent on the Land, which was not

paid; wherefore he enter'd and demiſed to the Plaintiff. And without any Argument by the Court, it ſeems the Entry of the Leſſor is not congeable; for Copyhold Land is not within the Statute of Conditions, neither is the Leſſor ſuch an Aſſignee as the Statute means; for at the Common Law a Copyhold Eſtate is but an Eſtate at Will, and Cuſtom has only fixed his Eſtate to endure; which Cuſtom does not trench to ſuch collateral Things, as Entries for Conditions; for ſuch Aſſignee of a Copyhold being in but by Cuſtom only, is not privy to the Leaſe made by the firſt Copyholder, nor in by him, but may plead his Eſtate immediately under the Lord. *Quod Nota.* *Per totam Curiam*, on the firſt Opening of the Matter. *Yelverton* was of Counſel with the Defendant.

32 H. 8. c. 34. Vide 1 Show. 284. 4 Mod. 80. 3 Lev. 326. Salk. 185. Comb. 185.

Sutcliffe *verſus* Conſtable.

Chriſt. Conſtable Anno 32 *Eliz.* ſeiſed in Fee of the Manor of *Eaſt Hatfield in Com' York*, enfeoffed *H. Remington* by Indenture, rendring for certain Cloſes, Parcel of the Manor, 60*l.* at two Feaſts, with Clauſe of Diſtreſs, if arrear by 14 Days; *Chr. Anno* 43. by Indenture bargained and ſold the 60*l.* to the Plaintiff for all his Eſtate; which was enrolled, by Virtue whereof ſhe was ſeiſed of the Rent for the Life of *Chr.* and ſo ſeiſed loſt the Part of the Indenture ſealed by *Remington*, which the ſame Day, *viz.* 24 *Nov. Anno* 44 came to the Hands of the Defendant by Trover, who *Vi & armis teared the Seal* of the ſaid Indenture, *contra Pacem, &c.* to her Damage 400*l.* The Defendant pleaded that *Chr. non conceſſit* the Manor of *E.* to *Remington*, rendring the Rent, *&c. modo & forma*; and thereupon the Plaintiff demurred. And altho' it was objected, that the Bar was good, becauſe it is a direct Traverſe to the Plaintiff's Title, and deſtroys the Ground of the Plaintiff's Action; for if no Rent was granted, then the Indenture whereof the Plaintiff complains does not belong to the Plaintiff; for it paſſes to the Plaintiff but as incident to the ſecond Grant for Neceſſity to make Title, as the Lord *Buckhurſt's* Caſe is, 1 *Co. Rep. &* 7 *E.* 4. 30. in Aſſiſe of Rent, the Demandant made Title by Deed of a Rent-charge, the Tenant may ſay he did not grant by the Deed; becauſe the Iſſue is taken on a Specialty, and not on a Generalty. *Pigot.* But in an Aſſiſe of Office it is no Plea, that there is no ſuch Office, for that amounts to no more than that he did not diſſeiſe him. *Fairfax.* The ſame Law 45 *E.* 3. 1. In Treſpaſs of Charters taken, it is no Plea, that he never had ſuch Charters, but he ought to plead *Non cul'*. So in Treſpaſs of Goods, it is no Plea that the Property was to a Stranger, and not to the Plaintiff, becauſe he does not thereby deny that the Plaintiff was in Poſſeſſion, which is ſufficient for that Action 20 *H.* 6. 28.

1 Brownl. 222. 1 Bulſt. 214. Treſpaſs.

An Action does not lie for the Counterpart of an Indenture without a ſpecial Grant.

1 Co. 1. b.

28. which Books prove, (*per Curiam*) that the Plea in Bar is not good; for the Defendant deſtroys the Plaintiff's Action but by Argument, and the Rent is not demanded by this Action, but Damages for Tearing the Indenture: So that the Title to the Rent is not in Queſtion. Then *Yelverton* took Exceptions to the Declaration; 1. That the Action is brought for Tearing the Counterpart, by which the Rent was not created, and the Indenture is not granted expreſly to the Plaintiff, but the Rent of 60 *l.* only bargained and ſold, then this Counterpart which belong'd to *Remington* did not paſs to the Plaintiff as incident, for it is not the original Deed by which the Rent was at firſt reſerved. *Quod fuit conceſſum* by all but the *Chief Juſtice*; for he ſaid, that this Counterpart waits upon the Intereſt, and is a good Evidence for it. 2. It is not averr'd by the Plaintiff, that *Chriſtopher*, for whoſe Life the Rent was reſerved, was alive at the Time of the Tearing of the Deed; and if *Chriſtopher* was dead the Deed belong'd to the Defendant *de Jure*, as *Chriſtopher*'s Heir, for ſo much appears by the Plaintiff's own Shewing, *quod fuit conceſſum per Curiam*. 3. The Plaintiff does not ſhew any Poſſeſſion in Fact of the Deed but by Way of Argument, *viz.* that ſhe caſually loſt it, which is not ſufficient; for none ſhall have Treſpaſs but he who is in actual Poſſeſſion, *quod fuit conceſſum per Curiam*. 4. The Counterpart whereof the Plaintiff complains contain'd as well a Warranty as the Rent reſerved: And therefore without a ſpecial Gift thereof made by *Chriſtopher* to the Plaintiff, this Deed does not paſs by Law to the Plaintiff, as it is adjudg'd in the Lord *Buckhurſt*'s Caſe. 5. If *Chriſtopher* the Father be dead the Indenture has loſt its Force as to the Rent; for by his Death the Rent is determin'd, and therefore the Plaintiff ought to have averr'd the Life of *Chriſtopher*; for of a Deed determin'd no Action lies. For which Reaſons the Plaintiff diſcontinued her Suit. *Yelverton* was of Counſel with the Defendant.

Mich. 10 Jac. B. R.

Odingſall *verſus* Jackſon, *&c.*

Cr. Jac. 306. 1 Brownl. 149. 2 Bulſt. 35. Ejectment.

EJectment; the Declaration was, that the Defendants *intraverunt, & ejecit, expulit & amovit* the Plaintiff (in the ſingular Number) and after Verdict for the Plaintiff, on *Non cul'* pleaded, the Defendants ſhewed the Matter aforeſaid in Arreſt of Judgment; for the

Declaration is incertain in the Point of the Action, *quia nescitur* which of the Defendants ejected the Plaintiff; for the Ejectment by his own Shewing appears to be but againſt one; and on this Declaration alſo the Jury cannot find all the Defendants guilty; becauſe by the Plaintiff's Suppoſal, one only ejected him. But, *per Cur'*, the Plaintiff ſhall have Judgment, and the Declaration ſhall be mended in this Point, for it is but the Default of the Clerk; and ſo it was. *Quod Nota.* *Yelverton* was of Counſel with the Defendant. Amendment

Newhall *verſus* Barnard.

THE Plaintiff declared for the Stopping of three Lights by a Building in the Yard of the Defendant, *&c.* to his Damage, *&c.* The Defendant by Way of Bar juſtified the total Stopping of two Lights by Reaſon of a Cuſtom in *London* from Time whereof, *&c.* and the Stopping of the third Light in Part, and that alſo by the Cuſtom of *London*; and concluded, *abſque hoc*, that he *eſt cul' aliter vel alio modo*; and thereupon the Plaintiff demurred, and it was adjudged for the Plaintiff; 1. Becauſe the Juſtification in Part of one of the three Lights is incertain, for the Court cannot know in what Part of the Light, (*viz.*) Eaſtward, Weſtward, *&c.* without the Defendant's own Shewing. 2. Becauſe the Plaintiff's Declaration is not anſwer'd as to this third Light; for the Plaintiff has ſuppoſed *totum Lumen & Aer* to be ſtopped in three ſeveral Lights, and the Defendant does not anſwer the Stopping of the third Light but in Part, and ſo for the others he confeſſes himſelf guilty, and his Traverſe is idle, for if he does not juſtify the whole, he is guilty in the whole, as this Caſe is: And therefore he ought to have pleaded *Non cul'* to Part, and ſhewn what Part, and made it certain by Bounds, and to have juſtified for the Reſidue. Wherefore the Plaintiff recovered by the Opinion of the whole Court. *Yelverton* was of Counſel with the Plaintiff. 1 Bulſt. 116. Action on the Caſe. 1 Sand. 26. 2 Sand. 127. Lutw. 1492. 1 Lev. 16.

Loggins *verſus* Titherton.

DEBT; the Bond on which the Plaintiff declared was, that the Defendant acknowledg'd himſelf to owe to the Plaintiff, and to be bound *in trigintatæ libris*, *&c.* but it appear'd on Oyer demanded of the Bond; for the Plaintiff declared for 30*l.* *viz.* *triginta libris*: And, *per Curiam*, *Nil capiat per billam*; foraſmuch as there is no ſuch Word as *trigintatæ*, and *per conſequens* the Party bound in no Sum, and if a Man is bound in a Bond *in* (*Libris*) without ſaying *how many*, it is a void Bond. *Per totam Curiam.* *Quod Nota.* Cr. Jac. 309. con. M. 2 Rot. 626. No Latin Words abound. Vide ſupra 193, 194.

Doughty *verſus* Fawn.

1 Brownl. 117.
2 Bulſt. 19. Debt on Bond.

THE Plaintiff declar'd on a Bond of 120*l.* 2 *Nov.* 43 *El.* the Condition was, that whereas *Ed. Aſh* by his Will in Writing of ſuch Date, had diſpoſed of the Guardianſhip of the Defendant, whereof the Teſtator was poſſeſſed, *viz.* that Tender of a Marriage ſhould be made by ſuch Perſons whereof the Plaintiff was one, which was done accordingly; *if therefore the Defendant, &c. do ſave and keep harmleſs* the Plaintiff, *&c.* from all Charges and Troubles, *&c.* which may happen to the Plaintiff, *&c. for or by Reaſon* of the laſt Will of the ſaid *Ed. Aſh*, or any Thing mentioned in it, *touching or concerning one* Margaret Fawn, *or any Legacy or Bequeſt to her given or bequeathed, or thereby, or otherwiſe from* Ed. Aſh *to her Due*, then the Bond ſhall be void. The Defendant pleaded *Non damnificat'*, *&c.* The Plaintiff replied, that after the Bond made, one *Martha Smith* in the Behalf of *Jo.* and *Ed. Aſh*, Sons of *Ed. Aſh* named in the Condition, exhibited a Bill againſt the Plaintiff, *&c.* as Adminiſtrators of *Ed. Aſh* in Chancery, * for Payment of the Portions of the ſaid Sons; whereupon the Plaintiff, *&c.* by Way of Anſwer pleaded fully adminiſter'd, and in Proof thereof ſhewed ſeveral Payments by them made, and among other Payments that the Plaintiff, *&c.* had paid to *Margaret Fawn* named in the Condition 60*l. pro Legatione* by the Will of *Ed. Aſh* to her Due, the Payment of which 60*l.* was diſallowed by the Judgment of the Court, and by the Order of the Court 65*l.* in Default of Allowance of the firſt 60*l.* the Plaintiff, *&c.* paid to *Ed. Aſh* the Son, which 60*l. &c.* the Defendant had not repaid tho' requeſted, and ſo ſaid *quod damnificat' exiſt', &c.* upon which the Defendant demurred. And the Opinion of the whole Court, after great Debate, was againſt the Plaintiff; for the Plaintiff in his Replication has alledged two Things to inforce his Damnification. 1. That the Plaintiff, *&c.* in his Anſwer in Chancery *allegavit* the Payment of 60*l.* to *Margaret Fawn* for a Legacy due to her by the Will. 2. That this Allegation was rejected by the Judgment of the Court of Chancery: And neither of theſe Matters is certainly alledged, but by Way of Argument and Implication, and not expreſly; for he ought to have ſhewn that a Legacy of 60*l. in facto* was given to *Marg. Fawn* by the Will of *Ed. Aſh*; for altho' in the Condition the Will of *Ed. Aſh* is recited in the Date, † againſt which Recital the Defendant cannot ſay, that he made no Will, yet this ſpecial Legacy to *Margaret Fawn* is not recited in the Condition, but in Generalty, againſt which the Defendant might have taken a Traverſe, *quod* Ed. Aſh *non legavit, &c.* to her the

* The Original is pour Payment des Portions les dit fits-en le Pl', &c. ceant & avoit Subpœna return que fut ſervie, ſur que.

† Mo. 23. 1 Ro. R. 408.

60 *l.* and upon that a good Iſſue might be taken. 2. The Plaintiff ſays, that this Payment of 60 *l.* was rejected by Judgment of the Chancery, and it does not appear in the whole Replication, * where the Chancery at that Time was, *viz.* at *Weſtminſter*, or in another Place, and that likewiſe is iſſuable and triable by Jury, whether there was ſuch Order of Chancery or not; for their Orders are but in Paper, and are not of Record to be tried by the Record, but by Jury, as 38 *H.* 6. is. And therefore the Plaintiff ſeeing the Opinion of the Court againſt him, pray'd that he might diſcontinue the Suit. *Quod fuit conceſſum per Fleming* Chief Juſtice, and the other Juſtices would not croſs him in it. *Yelverton* was of Counſel with the Defendant.

* Theloal. 199. b. Lutw. 305.

Term. Hill. 10 Jac. B. R.

Girling *verſus* Baker.

A Man recover'd in C. *B.* in Debt on an *Inſimul computaſſet*. The Defendant brought a Writ of Error in *B. R.* and he who recover'd pray'd, that he might (according to the Statute 3 *Jac.*) put in Sureties by Recogniſance to pay the Condemnation, if the Judgment ſhould be affirmed. And, *per Curiam*, this Caſe is out of the Statute; becauſe the Debt recover'd did not accrue by any Contract or other Duty certain at firſt, but merely on an Account between the Parties, which Account has reduced ſeveral incertain Sums to a Certainty; ſo that, becauſe the original Cauſe of the Action is founded on the Account, which is wholly incertain, for that Reaſon it is out of the Statute. The ſame Law in Debt on an Award, when the Arbitrators have reduced ſeveral Controverſies to be recompenſed by one Sum, it is a Debt, but not ſuch Debt as is intended by the Statute. *Quod Nota.*

2 Bulſt. 53. What ſhall be a Debt within 3 Jac. c. 8. to find Surety on Error. Vide 1 Show. 14. Comb. 105.

Gill *verſus* Glaſſe.

IN Debt, the Plaintiff declar'd on a Leaſe for Years made to the Defendant of Land in *E.* rendring ſuch Rent, and for ſo much arrear at ſuch Feaſt, he brought the Action. The Defendant (the Leaſe not being by Indenture) pleaded, that the Plaintiff *Tempore Diviſ' nihil habuit in tene-*

Cr. Jac. 312. 2 Bulſt. 41. Error on Debt.

tenementis prædictis, unde Dimiſſionem prædictam facere potuit. The Plaintiff replied and ſaid, *Quod Tempore Dimiſſionis habuit bonum & ſufficientem ſtatum in Tenementis prædictis, unde* he might make the Demiſe, *&c.* And upon that they were at Iſſue, and it was found for the Plaintiff, who had his Judgment accordingly. The Defendant brought Error, and aſſigned a Fault in the Replication; for the Plaintiff ought to have ſhewn ſpecially what Eſtate he had, ſo that it might appear to the Court, that he had ſufficient in the Land, whereof to make the Leaſe. *Quod fuit conceſſum per Cur'.* But yet the Judgment was affirmed; for this Defect is aided by the Verdict by the Statute of Jeofails; for although the Iſſue is not ſo formally joined as it ought, yet it is an Iſſue tried, which may make an End of the Matter; for it is found that the Plaintiff had an Eſtate in the Land, of which he might make the Demiſe. *Quod Nota.*

Any imperfect Iſſue aided by Verdict.

Deuce *verſus* Deuce.

Ejectment. EJectment *de* 8 *Acris terræ*, 4 *Prati*, 4 *Paſturæ in* B. & C. *in Com'* Kantiæ; upon *Non cul'* pleaded, the Jury found the Defendant guilty *in tertia Parte* 4 *Acr' terræ*, and aſſeſſed Damages, *& quoad reſid' non cul.* And it was moved in Arreſt of Judgment, that the Verdict is incertain, becauſe *Non conſtat* in which of the Vills the third Part lies. But *non allocatur per Curiam*, for it ſhall be intended, that every Acre of Land named in the Declaration lies in both Vills; for ſo much is preſumed by the Declaration, and by the *Venire facias* from both Vills. *Quod Nota. Per totam Curiam.* And Judgment accordingly. *Yelverton* was of Counſel with the Plaintiff.

An incertain Verdict aided by Intendment.

3

F I N I S.

A TABLE OF THE PRINCIPAL MATTERS contained in this Book.

ABatement *of the Writ. What Writ ſhall abate by the Demiſe of the King.* Page 52
After Imparlance cannot plead in Abatement. 112
Ought to give the Plaintiff a better Writ. 112
What Plea goes in Abatement. 112
Error in Dower, where it ſhall abate by Death. 113
How the Death of one Plaintiff ſhall abate a Writ of Error. 208
Where the Death of one Defendant doth not abate Treſpaſs. 209
Difference between Death before and after Judgment. 209
Abatement *in Lands confeſſed, avoided and traverſt.* 151
Acceſſary. *Where a Receipt or Sale of ſtolen Goods doth not make an Acceſſary.* 4
Acceſſ' ſequitur ſuum Principale. 68
Account. *Where* Aſſumpſit *or Debt lies on it.* 70
Action. *Many Titles or Actions contained in one.* 63, 67
Plaint entered before Cauſe of Action. 70, 71
Not two Actions for the ſame Thing. 67
Where Actio moritur cum Perſona. 89
No Man puniſhed for bringing a falſe Action. Page 117
Vide *Writ.*
Additions. *Several Additions of the Defendant make Error.* 120
Adminiſtrator *ſatisfies a Recogniſance pending Error on a Judgment.* 29
Second Adminiſtrator ſhall not have Execution of a Judgment by the firſt. 33, 83
There wants Privity between them. 33
Has Judgment, Letters revoked, Execution by him is void. 83
Sues in another Right. 83
How dying Inteſtate ſhall be traverſt in Debt againſt or by Adminiſtrator or Executor. 115
Adminiſtration revoked after Verdict. 125
Debt againſt Adminiſtrator Durante minori ætate *D. if the Plaintiff ought to ſhew that* D. *was within Age at the Time of the Action.* 128
Fraudulent Deed of Gift of Goods made by an Inteſtate ſhall not be pleaded by Adminiſtrator or Executor. 196, 197
With what Debts an Adminiſtrator is chargeable. ib.
An Original taken againſt an Adminiſtrator 16 September, *of which he had*

A TABLE of the Principal Matters.

not Notice till 24 Febr', *Letters revoked* 13 Febr' *by Covin, what ſhall be the Judgment againſt him.* Pag. 219

Admiralty; *its Juriſdiction.* 134, 135

Advowſon; *how deveſted out of the King.* 91

Amendments. *Where a Fault in the Bar is ſhewn for Cauſe of Demurrer, it ſhall not be amended.* 38

Replication, that the Plaintiff *has Aſſets inſtead of the Defendant.* 65

Where a Diſtringas Jur', *which is* album breve *ſhall be amended.* 110

The Bill is of one Meſſuage, the Ejectment, Declaration, Roll, and Record of Niſi prius, *were of two; and the Bill amended before the Record removed.* 164

Appeal; *on a Murder in the Cinque Ports.* 12

Diſcontinuance in an Appeal of Death not aided by the Defendant's Appearance after. 204

How it ought to be inſtantly purſued. ib.

How to plead in Appeal. 205

Appearance; *a Condition that another ſhall appear on Warning, how it ſhall be pleaded.* 53

A Promiſe to ſave harmleſs againſt a Recogniſance to appear, how it ſhall be pleaded. 207

Not ſaved by Removing the Record, &c. ib.

Arbitrament. *Replication on* nullum fecit Arbitrium *pleaded.* 24, 78, 153

An Award to make an Aſſurance on 10 l. *paid, how pleaded.* 25

An Award in the Middle of the Term that A. *ſhall ceaſe his Suit, yet he proceeds to Judgment that Term, (which relates to the firſt Day) it is a void Award; for the Suit by the Judgment is ceaſed before.* 35

Corruption in an Arbitrator ſhall be puniſhed. 62

The Pleading in Debt on a Bond to perform an Award. 78

Awards not conſtrued as Deeds and Wills. 98

An Award void in Part is void in the whole. ib.

Condition to ſtand to the Award of four, ita quod it be made by them, or any two of them before ſuch a Day, if an Award by two be good. Page 203

How the Power of Arbitrators may be divided. 203

Arreſt *within a Liberty.* 51

Aſſault; *what ſhall be an Aſſault?* 172

Aſſignee *of a Leaſe, who?* 36

Condition to repair a Houſe on Warning, where the Notice ſhall be to the Leſſee, and not to the Aſſignee of Part of the Term. 36, 37

Aſſiſe *before Juſtices of Aſſiſe on Removal of the Juſtices and Adjournment in* B. *how it ſhall be recited in Error in* B. R. 3, 6

Aſſumpſit. A. *Promiſes* B. *if he will ſtay a Complaint in the Behalf of the Son of* B. *againſt the Son of* A. *that* A.'s *Son ſhall keep the Peace.* 1

In Conſideration of Wheat deliver'd he promiſes to re-deliver the ſame Wheat, if good. 4, 128

If a bare Cuſtody ſhall be a good Conſideration. 4, 50, 128, 164, 184

Conſideration that the Plaintiff conaretur procurare, &c. 11

Promiſe to ſave the Bail harmleſs; how to declare on the Proceedings of the Suit, &c. 16

A Promiſe to give B. *as much in Marriage as he had before agreed to give* C. *and does not ſay with whom agreed.* 17

Agreed to pay the Debts of B. *without ſhewing with whom, or what Debts.* 17, 18

A Promiſe if the Leſſee ſealed a Leaſe to the Leſſor, &c. *he ought to declare of the Leaſe ſealed by the Leſſor.* 18

In Conſideration the Plaintiff would ſtay the Execution of a Capias utl' *in Debt againſt the Defendant;* J. S. *promiſed,* &c. 19

Conſideration that he would not proſecute an Indictment for Goods ſtolen. ib.

Every Debt implies a Promiſe, and is a good Conſideration. 20

To re-deliver a Horſe, Defendant pleaded a prior Property in another, who took it by Force. 22

Diſcharged by Matter in Law. 22

A TABLE of the Principal Matters.

Conſideration that he would diſcharge him from an illegal Arreſt. Page 25

To ſtand to an Award, if Part is void; whether Damages ſhall be intended to be given for it. 35, 56

To ſhew a ſufficient Record, &c. *how it ſhall be pleaded, and the Breach laid.* 39, 40

Whether a Conſideration paſt and executed before the Promiſe ſhall be good. 40, 41

Where a Requeſt implies a Conſideration. 41

Conſideration to be Bail for his Servant. ib.

Conſideration that the Plaintiff aſportaret ſufficien' Hominem fore obligat'; *how Performance of it ought to be ſhewn.* 49, 50

In Conſideration the Plaintiff lent the Defendant 30 l. *he promiſed to repay* prædict' 30 l. *on Requeſt: An Uſe implied otherwiſe of a Bag ſealed.* 50, 128

Promiſe by the Heir to pay his Father's Debt on ſimple Contract. 55, 56, 184

Conſideration of being permitted to enter, and take Goods attacht by the Plaintiff, and other Goods not, he will pay the Debt. 56

Failure in Part of the Conſideration, the other Part may maintain the Action. 56, 57

On an inſimul computaſſet. 70

A. *Promiſe to deliver a Thing to* B. *to be choſe by* B. *in* Aſſumpſit B. *muſt ſhew his Election: If* A. *diſpoſes of Part, or hinders the Election, the Promiſe is abſolute and broke.* 76

A promiſes to lend 6 l. *Part at one Time, and Part at another, is no Performance, though accepted.* 87

Performance ſhall be in Subſtance, and not in Letter. ib.

If A. *will paſs Lands in* D. *to* B. B. *will pay* A. 100 l. *how he ſhall declare.* 110, 111

A Seller of Sheep warrants and promiſes they are ſound, and worth ſo much, the Pleading of it. 114

Where Requeſt *is Parcel of the Promiſe, it may be alledged by* licet, *as well as in facto.* 121

Where the Defendant ought to have Notice of the Thing done, or which he is to perform. Page 121, 122, 163

Conſideration that one who has no Title to hold will quit Poſſeſſion. 124, 125

Agreement between P. *and* D. *that* D. *ſhall have all the Iron made,* &c. *and that* P. *promiſed he ſhould have all,* &c. *how to plead.* 133, 134

Promiſe againſt Promiſe, a good Conſideration. 133, 134

On a mutual Promiſe, if P. *dies, and his Executor not chargeable, yet the Promiſe of* D. *continues.* 134

A Promiſe to pay ſecundum Ratam 40 s. per Ton, *he ſhall pay for Pounds.* 134

What Releaſe *diſcharges a future Promiſe or Covenant.* 156

Where Notice *ſhall be alledg'd, and where not.* 168

On an Inſimul computaſſet *the Defendant pleaded Security given by Bond before: The Traverſe.* 171

Where the Plaintiff ought to ſhew the preciſe Conſideration. 175, 176

Baron of an Executrix deceaſed promiſed to pay a Legacy, which he was poſſeſſed of in Conſideration to forbear. 184

Conſideration he will forbear *to ſue, not ſaying whom.* ib.

A. *grants* 1000 *Trees to* B. *who fells* 800. A. *in Conſideration he will* forbear *to fell the reſt till after three Years, promiſes,* &c. *the Pleading of it.* 195

Conſideration againſt Law, ill. 197

Promiſe to ſave harmleſs againſt a Recogniſance to appear. 207

Againſt Baron and Feme, the Pleading is quod *the feme* dicit quod ipſa non aſſumpſit. 210

Promiſe to ſave harmleſs, and to pay 2 d. *for every Farthing-worth of Damage, how the Damage ſhall be ſhewn.* 220

Aſſurance. A. *is bound to make an Aſſurance, how a Requeſt ſhall be made, and how* A. *is bound thereby? It does not extend to a Bond or Recogniſance to enjoy, or to collateral Security.* 45

Attainder. *Where the King is in by Attainder of the Tenant in Tail, he ſhall not*

A TABLE of the Principal Matters.

not avoid Leaſes, altho' in of the ſame Eſtate, &c. Page 149, 150

Attaint *at Common Law for a falſe* Depoſition. 22

Attachment *of Goods in* London. 56

Forfeiture of Goods on Attachment. 194

Audita Querela *for omitting Lands out of an Extent on a Recogniſance.* 12

—— *on Tender of Money on a Recogniſance.* 38

—— *to be relieved againſt a Recogniſance by Bail* ad ſtandum Juri, &c. 59

—— *by an Infant to cancel a Recogniſance by him.* 88

On Audita querela. 88

Where an Adminiſtrator has a Verdict in Trover, and his Letters revoked. 125

—— *On a Judgment againſt Bail under Age.* 155

Averment *ſhall not be againſt a Record.* 34

Authority. *A Sheriff makes a Warrant to arreſt,* &c. *to four* & cuilibet; *it ſhall not be taken as another Authority, but two may execute it.* 25, 26

A Letter of Attorney to three conjunctim & diviſim. 26

BAIL *enter into a Recogniſance that* B. *ſhall appear on eight Days Warning,* necnon *to pay the Condemnation, in a Suit againſt the Bail for the Condemnation, how the Warning ſhall be ſhewn.* 53

Only common Bail in Actions on penal Statutes. 53

So for Executors or Adminiſtrators. ib.

Bail enter into a Recogniſance that the Plaintiff ſhall proſecute, and ad ſtandum Juri; *it imports Payment of the Condemnation.* 59

Procedendo *is not deliver'd till after the Return of the* Habeas Corpus, *the taking of Bail by the Chief Juſtice at the Return of the* Habeas Corpus, *diſcharges the Bail in the firſt Action, although it is not filed; otherwiſe if the* Procedendo *was deliver'd before.* 120, 121

Judgment againſt an Infant Bail by Recognizance, how it ſhall be avoided. 155

Bailment *to the Uſe of* A. *he ſhall have Debt for it.* Page 24

A. *indebted to* C. *bails or delivers Goods to* B. *to ſatisfy* C. C. *has an Intereſt and Property.* 164

Bargain and Sale, *A Feoffment before Inrolment hinders it.* 124

In Pleading a Bargain and Sale it ſhall be ſhewn in what Court. 213

Bar. *Where a Recovery and Execution againſt one ſhall bar an Action againſt another.* 67

Barretor. *Conſpiracy to indict him as a Barretor.* 46

Baron and Feme. *Feme beat to Death, Baron ſhall not have an Action.* 89

Letter of Attorney by Baron and Feme to deliver a Leaſe made by them, void as to the Feme. 1

Gift to Baron and Feme before Marriage, and their Heirs, how they take: If ſhe ſhall have by Survivor. 101

How the Action and Verdict ſhall be againſt Baron and Feme on a Battery by the Feme. 106

Trover againſt Baron and Feme, how to declare. 165

The Feme has no Intereſt in Goods. 166

How Baron and Feme ought to join in Plea. 210

Battery. *Treſpaſs of it, and Declaration accordingly; the Defendant ſhews* Title *to the Place where,* &c. *where to reply* de Injuria ſua propria abſque tali Cauſa, *will be good.* 157

How the Action and Verdict ſhall be againſt Baron and Feme for a Battery by the Feme. 106

Bill *of Debt by the Servant, where it ſhall charge the Maſter.* 137, 147

Bona & Catalla. *What ſhall paſs by that Name.* 68

Bribery *in Commiſſioners and Arbitrators puniſhed,* &c. 62

CApias *does not lie on a Recogniſance.* 42

The Uſe of Inferior Courts to have a Capias, *as ſecond Proceſs in Actions on the Caſe.* 158

To commence with a Capias *without Summons or Attachment, if good.* ib.

A TABLE of the Principal Matters.

Capias utlagatum *is the King's Suit.* Page 28

How the King, and how the Party are interested in it? 19

Capias ad ſatisfaciend' *to the Sheriff, who makes a Precept to the Bailiff of the Dutchy* ad capiend' ad reſpond', *and the Sheriff returns* Cepi Corpus; *if the Party can have new Proceſs.* 52

——*On an* Indebitat' Aſſumpſit. 20

——*For Diſceit in the Sale of a Term.* 20

Caſe. *On an* Indebitatus Aſſumpſit. 20

——*For Diſceit in the Sale of a Term.* 20

——*For diſturbing Execution.* 28

——*For Conſpiracy to indict as a Barretor.* 46, 161

——*The Indictment in the Declaration varied from the Indictment certified.* 46

——*Such Action lies although the Indictment was erroneous.* ib.

——*On an Agreement to pay a Debt, where a Requeſt ſhall be ſhewn.* 66

——*For indicting one of a Rape, a good Juſtification.* 105

——*For indicting of a Robbery before Juſtices of Peace.* 116, 117

——*Againſt an Heir for an Erection by the Father continued by the Heir.* 143

By Tenants in Common for Diverting a Water-courſe. 161

Certiorari. *On an Indictment of Forcible Entry, Reſtitution awarded, not executed, a* Certiorari *deliver'd to one of the Juſtices of Peace, who did not open it till Reſtitution made, a Miſdemeanor.* 32

No Proceedings after a Certiorari. ib.

Certiorari *for an Original.* 108

Challenge *to the Sheriff before Iſſue and* Ven. fac' *to the Coroners, the Sheriff* per Mandat' Juſtic' *cannot return the* Tales. 15

A Juror ſhall not be challeng'd for the King who was ſworn at a Day before. 23

Chancery. *One made Party to a Bill by Order* a latere, *if he ſhall be ſaid to be a Party to the Suit.* 22

The Judges of the Common Law do not take Notice of the Courſe and Uſage in Chancery. 42

Where in Pleading a Judgment in Chancery, the Place ſhall be ſhewn where the Chancery then was, which is iſſuable and triable per Pais. Page 227

Their Orders in Paper are not of Record. ib.

Chriſtian Court. *Their Juriſdiction concerning Tithes.* 79

Revocation of Wills. 92

Church. *The Church is full as to the Patron till Notice of the Avoidance.* 7

Where it comprehends every Thing belonging to it. 61

A double Uſurpation puts the King out of Poſſeſſion. 90

How Tempus ſemeſtre *ſhall be computed.* 100

Suit in the Spiritual Court for a Tax for the Repairs of a Church. 173

Church-wardens *ſue for a Tax made by them for the Repairs of the Church, how the Pariſh is concerned.* ib.

They may act for the Advantage, not Diſadvantage of the Church. ib.

Cinque Ports. *Touching their Liberties.* 12

Appeal of Murder in the Cinque Ports. ib.

Civil Law. *How the Judges of the Common Law take Conuſance of it.* 17

Collation *to a Donative exempt.* 60

If the Patron refuſes to collate, what Remedy. 61

Commiſſioners *to examine Witneſſes puniſhed for Corruption.* 62

Commoner *cannot enter to chaſe and kill Conies.* 104

His Remedy on a Surcharge *of the Common by the Lord or a Stranger.* 104, 105, 129

The Lord by Cuſtom may be ſtinted *of Common in his own Soil.* 129

If he exceeds he may be diſtrained by his Tenants, and ſo of a Stranger. ib.

Sowing a ſmall Part of the Field does not ouſt the Commoner in the Reſidue. 185

The Grantor of Common cannot erect a Hay-ſtack on it, nor chaſe the Grantee's Cattle. 201

Caſe againſt the Son of the Lord for erecting Cony-boroughs by the Father,

A TABLE of the Principal Matters.

and Continuance, &c. by him on his Common. Page 143

Where Common is claimed, the Land in which, and to which, &c. ſhall be ſhewn in Certain. 177

Common of Eſtovers in another's Soil, if the Owner cuts the whole, what Remedy. 138

The Lord confirms to the Copyholder his Meſſuage and Land cum pertinen', *he loſes his Common in the Waſtes.* 189

The Common not incident to the Copyhold Eſtate, but gained by Cuſtom. 190

Concord *pleaded in Covenant ought to be certain.* 125

Condition. *A Condition that the Leſſee his Executors and Aſſigns ſhall repair the Houſe on Warning given, how it concerns an Aſſignee of Part.* 37

How the Breach of a Condition on a Recogniſance ſhall be ſhewn. 59

The Condition to appear, &c. is not ſaved by Removal of the Recogniſance. 207

Copyhold Land not within the Statute 32 H. 8. *of Conditions.* 222, 223

Confeſſion *and Avoidance, what ſhall be ſufficient.* 31

Conſideration *in a Patent.* 43, 48

Debt or Aſſumpſit *lies on a Conſideration in Law.* 70

Vide Tit. Aſſumpſit *and* Tit. Conveyance.

Conſpiracy. *Caſe thereon for indicting of Barretry.* 46

For indicting one of, &c. and impriſoning, &c. till, &c. ſecundum Legem, &c. acquietat', *without* inde, *if good.* 161

Contract. A. *covenants with, or binds himſelf to* B. *and* C. *to pay* C. 10 l. *who ſhall ſue for it.* 177

Conveyance. *The Father in Conſideration of the Marriage of his Son covenants to ſtand ſeiſed to the Uſe of himſelf and his Heirs, it is no good Conſideration as to the Father; otherwiſe, if to eſtabliſh the Land in his Name and Blood.* 51

Tenant in Tail covenants without good Conſideration to ſtand ſeiſed to himſelf in Fee, and ſuffers a ſingle Recovery, if it ſhall bind the Remainder. ib.

If a Covenant to ſtand ſeiſed alters the Eſtate Tail as to a Stranger. Page 51

Bargain and Sale 7 Jan. 8 Jan. *he covenants to ſuffer a Recovery,* 9 Jan. *a Writ of Right is brought on which,* &c. 10 Jan. *Livery is made; how the Eſtate paſſes.* 123

Where on ſeveral Conveyances executory, the Grantee ſhall take by either. ib.

How, if one is executed. ib.

Poſſeſſion executed hinders Poſſeſſion executory. 124

Feoffment of a Manor cum pertinen', *the Advowſon appendant does not paſs without Livery.* ib.

An Eſtate for Life in Land or Tithes cannot commence in futuro. 132

If a Grant which enures by Way of Diſcharge or Retainer ſhall commence in futuro. ib.

Where it ſhall be ſaid to enure by Way of Diſcharge, and where in Intereſt. ib.

Copyhold. *A Forfeiture by Copyholder for Life does not forfeit the Remainder.* 1

A Copyholder has an Inheritance. 2

What Thing a Copyholder may do before Admittance. 16

A Copyholder ſurrenders to a Stranger, the Steward refuſes to admit him, in an Ejectment by the Lord he may plead Non cul'. 16

——*Reſtitution to a Copyholder on a Forcible Entry.* 81

Leſſee Copyholder, if he may plead his Eſtate immediate *under the Lord.* 223

——*An Executor ſhall not have Debt for Arrears of Copyhold Rents due in the Life of the Teſtator.* 135

——*A Surrender is not of Effect to a Purchaſer till Admittance, and the Admittance of his Surrendree is of no Avail.* 144

The Lord confirms to the Copyholder his Houſe and Land cum pertinen', *he loſes his Common in the Waſtes.* 189

Common not incident to the Copyhold Eſtate, but gained by Cuſtom. 190

——*Rent granted by Copy.* 190, 191

——*A Copyhold Manor is not capable of an Eſcheat of a Freehold.* 191

A Copyhold Manor Parcel of another Manor granted by Copy. ib.

A TABLE of the Principal Matters.

If the Grantee of ſuch Manor may hold Courts. Page 191

A Diſtreſs for an Appearance at a Court Baron ſhall not be forfeited. 194

Diſtreſs infinite, and not Attachment there. ib.

Copyhold Land is not within the Statute 32 H. 8. *of Conditions, nor the Aſſignees of it.* 222

Cuſtom does not trench to a Thing collateral to the Eſtate. 223

Corruption *in Matters of Reference to Commiſſioners or Arbitrators how puniſhed by Indictment.* 62

Crown. *Receipt of ſtolen Goods, where Felony.* 4

Where Murder in an Indictment or Appeal means Homicide. 205

Covenants. *If the Leaſe is not good, there is no Covenant, nor Breach.* 18, 19

Where they are diſcharged by Eviction, &c. 22, 23

——*In Covenant to enjoy, how the Breach ſhall be aſſigned for a Diſturbance.* 30

Leſſee by Indenture rendring Rent, *Leſſor* concedit dare & reddere *to the Leſſee* 3 s. per Ann', *if Part of the Rent, or to be paid by Way of Covenant.* 43

——*Debt on a Bond to perform Covenants, where a Breach need not be aſſigned.* 78

——*A Concord pleaded in Covenant.* 125

——*A* Warrantia Chartæ *depending is no Bar in Covenant* quia *perſonal.* 139

Covenant lies on a Warranty. ib.

——*On what Eviction a Leſſee for Life or Years ſhall have Covenant.* ib.

——*Where a particular Covenant does not qualify the general.* 175

Counterpart. *An Action does not lie for it without ſpecial Grant.* 223

If the Counterpart of the Leaſe belongs to the Grantee of the Rent reſerved. 223, 224

Court. *Touching the Style of an Inferior Court.* 46

The Return of a Ven' fac' coram nobis *without* ubicunque 60

Curia claudenda. 75

DAmages *and* Coſts. Aſſumpſit *to perform an Award, where it is void in Part, if Damages ſhall be intended to be given for it.* Page 35

The Plaintiff ſhall not recover more Damages than he declares for. 45, 70

——*The different Nature of Damages and Coſts.* 70

——*Damages on three Promiſes, and one not well laid, the Plaintiff ſhall not have Judgment.* 94

The Coſts given by the Jury omitted in the Judgment, ill. 107, 119

Damages to three, two have no Cauſe, the Judgment reverſt. 108

The Juſtices may aſſeſs Damages, if they will, without awarding a Writ of Inquiry. 152

Damages trebled, and Coſts given by the Court. 176

Darraign Continuance. *How a Thing ſhall be pleaded after it.* 141

Day. *Several Acts done at ſeveral Times in one Day ſhall be Parcel of the Iſſue.* 87

Dean, *a Temporal Man.* 61

Dedimus Poteſtatem *to one who has another Addition.* 33

Deeds. *A Preſentation deliver'd to the Biſhop without the Conſent of the Patron.* 7

How the Defendant ought to plead primo deliberat' *at another Day.* 138

A Bond deliver'd after the Condition to be perform'd. ib.

Where falſe Latin, *falſe Date, or Want of a Date will not hurt.* 193, 194

No Action lies for a Deed determin'd. 224

The Counter-part does not paſs unleſs granted. 223, 224

Demand *of Rent, how and to whom to be made.* 36, 37

Demiſe *of the King,* Latitat *not loſt thereby.* 52

Demurrer. *Where a Man joins in Demurrer for Part, and has a Writ of Inquiry for the whole, if Error.* 5

Where it ought to be ſpecial. 35

A TABLE of the Principal Matters.

A Fault in the Bar ſhewn for Cauſe of Demurrer, and adjudg'd, ouſts all Amendments. Page 38

Where it is incertain to which Placitum *a Demurrer refers, if a Diſcontinuance.* 65

On three Pleas pleaded in Covenant how the Demurrer ſhall be. ib.

Confeſſion by Demurrer. 195

Debt. *Miſcaſting in the Declaration, if Error.* 5

Declaration for more than the Plaint. ib.

Declaration on ſeveral Contracts. ib.

——*It lies for one not Party to the Contract, as for* A. *on a Bailment to his Uſe.* 23, 24

By him to whoſe Uſe Money is delivered. 24

——*For Tithes, where ſeveral Titles in one Writ.* 63

——Quod reddat un' Dolium ferri; *the Judgment,* quod recuperet Dolium, vel valorem ejuſdem, *if good.* 71

——*The* Diſtringas *thereon.* ib.

——*For* Flemiſh *Money, how to declare.* 80, 81

——*It does not lie for ſo many Ounces of* Flemiſh *Money, but Detinue.* 81

Foreign *Money demanded by the Name of* Engliſh. 135

——*Bill of Debt by the Servant, where it ſhall bind the Maſter.* 137, 147

——*Debt againſt the Heir.* 169

——*Debt on a Leaſe as Heir, how to declare.* 189

In Debt to declare as for an Annuity, is ill. 208

Departure. 14, 96

Detinue, *how it lies for Foreign Money.* 80, 81

Devaſtavit. *It is none to ſatisfy a Statute pending Error on a Judgment.* 29

Where the Sheriff cannot levy a Debt againſt an Adminiſtrator, he may return a Devaſtavit. 219, 220

Deviſe. *That the Executor ſhall repair the Houſe, and have the Over-ſight of his Lands till the Son's Age; what Intereſt paſſes.* 73

A Deviſe to J. *and* H. *in Tail, and that they ſhall not enter till their Ages, and that his Executor ſhall have till their Ages to perform his Will; the Eſtate of the Executors precedes.* Page 183

A Deviſe to four in Fee, and that one ſhall have the whole for Life, good. ib.

A Deviſe of all his Land to B. *and if he dies without Heir, that* D. *ſhall have in Tail, and by the ſame Will deviſes Part to* C. *in Fee, how* C. *ſhall have it.* 209

A Deviſe of the whole to B. *and after of the whole to* C. *they are Jointenants.* 210

Diſceit. *A Caſe of it in the Sale of a Term.* 20

Diſcharge. *A Leaſe of Tithes taken by Way of Diſcharge.* 132

Diſcontinuance *of Suit, by joining in Demurrer for Part.* 5, 6

——*By Incertainty in Demurrer.* 65

——*Diſcontinuance by a* Ponitur in Reſpectu. 97

——*Diſcontinuance for the Plaintiff's Non Appearance after the firſt Judgment in Trover.* ib.

——*By Want of a Replication or Demurrer.* 117, 118

——*By ill Concluſion of the Plea.* 137

——*Three Plaintiffs, two only appear at the Day given, and a Day given over to all, if a Diſcontinuance not amendable.* 155

—— *Diſcontinuance notwithſtanding a Verdict.* 169

Diſpenſation *by the* A. B. *for a Layman to have a Deanery.* 61

Diſtreſs *illegal: Trover lies for it.* 9, 10

Where the Lord ſhall not be puniſhed by Diſtreſs. 129

Goods diſtrain'd by the Lord ſhall not be forfeited. 194

A Diſtreſs to be ſafely kept. ib.

Diſtringas Jur' *amended in the* Teſte. 64

——Album breve *a good Cauſe for a new Trial.* 110

Where it ſhall be amended. ib.

Donative. 60

If a Layman may be collated to it exempt, &c. 61

The Original of Donatives. ib.

If a Patron refuſes to collate, what Remedy. ib.

A TABLE of the Principal Matters.

Double *Pleas.* Page 13

Dower. *Where Tenant in Tail covenants to ſtand ſeiſed to the Uſe of himſelf for Life, and marries, his Wife ſhall be endowed.* 51

How in Dower the Jury ought to find the Dying ſeiſed, to have Damages. 112

Error againſt the Tenant in Dower, who dies, the Writ ſhall not abate. 113

Dower of a Gorſe. 143

ECcleſiaſtical Court. *If it has Juriſdiction touching the Revocation of a Will, and Legacy.* 92

Ejectment. *A Declaration for forty Acres* in Parochia, *where the Pariſh has three Vills, without ſaying in which of them.* 112

Declaration for one Acre abutting, &c. *the Defendant is found guilty* in dimid' Acræ infraſcriptæ, *ill.* 114

Declaration for Land without expreſſing the Number of Acres, ill. 118

It does not lie de Rivulo ſeu Aquæ Curſu; *otherwiſe* de terra aqua cooperta, *of a Gorſe or Pool.* 143

Of a Copyhold. 144

Where the Servant of the pretended Owner ſhall be a ſufficient Ejector. ib.

The Omiſſion of a Meſſuage in the Bill amended. 164

Where the per Nomen *ſhall deſtroy the Quantity in the Declaration.* 166

Entry into Part after the laſt Continuance. 181

The Ejectment ſuppoſed before the Leaſe. 182

A Declaration that the Defendants intraverunt & ejecit, expulit & amovit, *if amendable.* 224

Election *deſtroyed.* 76

Elegit, *how ſued* in Com' Palat'. 179

Error *to remove a* Quare Impedit. 3

——*To remove a Record of Aſſiſe taken before Juſtices of Aſſiſe, and adjourned in* C. B. *how it ſhall be.* 3, 6

——*Four bring Error on Aſſignment by one, is ill.* 3, 209

Diſcontinuance of a Writ of Error. 4

——*A Record removed by an ill Writ of Error, yet it remains in the Court in which,* &c. Page 6, 212

——*Error ſhall not be aſſigned contrary to the Record.* 33, 34

——*Where on an Aſſignment of Error in Fact you muſt conclude to the Country.* 34, 58, 117

——*What is confeſſed by* in nullo eſt erratum *pleaded.* 57, 58

——*Error in Dower, where it ſhall abate by Death.* 113

——*A* Scire fac' *and two* Nihils *againſt the Executor of the Widow ſhall make him Party to Error in Dower.* 113

——*Error in* Ireland. 117

——*If it lies in the Exchequer-Chamber on a Judgment in a* Scire facias. 157

——B. R. *does not reform Error in Proceſs unleſs in the ſame Term.* ib.

—*Where the Death of one of the Plaintiffs ſhall abate the Writ.* 208

——*The Writ is as a Commiſſion.* 209

——*The Judgment in a Writ of Error.* ib.

——*Error to remove a Judgment before the Biſhop and ſeven others, where it was before the Biſhop and eight.* 212

——*The Writ and Record ought to agree.* ib.

Error in the Certificate of the Clerk of Aſſiſe. 214

Error in the Entry of the Judgment. ib.

What Debts intended by 3 Jac. *the Execution whereof ſhall be ſtayed on Bail found on Error,* &c. 227

Eſcape *by one taken on a* Capias Utlagat', *who ſhall have an Action.* 20

Of one taken by a Capias, *where it does not lie, it is no Eſcape to charge the Sheriff.* 42

A Promiſe or Bond to ſave a Gaoler harmleſs from an Eſcape is void. 197

Eſcheat *of one Manor held of another.* 190, 191

A Copyhold Manor is not capable of an Eſcheat of a Freehold. 191

Eſtoppel *to aſſign Errors contrary to the Record.* 34

A Fine operates by Concluſion. 101

Eſtoppel by Indenture. 201

Eſtray: *The Miſuſer of it.* 96

A TABLE of the Principal Matters.

Eſtovers *claim'd in another's Soil, if the Owner cuts down the whole, what Remedy.* Page 188

Eſtovers are Parcel of the whole. ib.

Eviction *diſcharges Covenants,* &c. 22, 23

Executions. *Error, and a* Superſedeas *to the Sheriff after a* Fieri fac' *deliver'd; Goods taken before the* Superſedeas *deliver'd ſhall be in Execution, and ſubject to a* Venditioni expon'. 6

——*A Statute enter'd into after a Recogniſance, but firſt extended on Part, how Execution ſhall be on the Recogniſance.* 12

—*The Breaking of a Houſe to ſerve an Execution.* 28

——*A Recogniſance ſatisfied pending Error on a Judgment in Debt.* 29

——*The old Sheriff cannot ſell Goods taken by a* Fieri fac'. 44

——*Property of Goods, if alter'd on a Seiſure by* Fieri fac'. 44

The Sheriff cannot ſell without a Venditioni exponas. ib.

——*The* Mandat *to a Bailiff was* Cap' ad reſpond' *for* Cap' ad ſatisfaciend'. 52

Election to charge the Sheriff or the Party on a wrong Service. ib.

——*Where the Extenders cannot refuſe the Land.* 55

——*Execution grounded on a* Teſtatum, *where none is filed.* 179

——*How the Defendant ſhall be reſtored when Execution is avoided.* 180

Executor *is a Name of Purchaſe.* 9

Rent granted to A. *his Executors and Aſſigns during the Life of* B. *the Executors of* A. *ſhall not have it.* ib.

A Promiſe or Agreement by an Executor to pay or receive a Debt of the Teſtator's, makes it his own proper Debt. 10, 11, 55, 56

A Promiſe by an Executor to take 150l. *for* 205l. 10

If Aſſumpſit *lies againſt an Executor on a ſimple Contract by the Teſtator.* 20, 56

If an Executor may pay a Statute pending Error on a Judgment. 29

An Executor who ſues Execution of a Judgment obtain'd by a former ſhall have it to the Uſe of the firſt Teſtator, altho' the Record is general. Page 33

Damages are Aſſets. ib.

An Executor ſhall only file Common Bail. 53

An Executor of Leſſee for Years charged with the Arrears after the Death of the Teſtator, although he did not agree. 103

He cannot waive the Land. ib.

Error againſt a Widow who recover'd in Dower, how her Executors ſhall be made Parties to the Writ as to Damages. 113

All the Executors ſhall be named in an Action, altho' Adminiſtration is committed to one durante minoritate *of the others.* 130

Debt on a Judgment againſt an Executor, if he can plead a Judgment on a Recogniſance ſubſequent, not ſatisfied, &c. 133

Debt againſt an Executor de ſon Tort. 137

If he may retain to ſatisfy himſelf. ib.

The Debtor and another made Executors, it does not extinguiſh the Debt, (altho' the Executor cannot ſue for it) but it ſhall be liable to other Debts and Legacies. 160

Where an Executor ſhall not pay Coſts on the Stat' 4 Jac. 168

The Husband of an Executrix, if chargeable with Legacies, and how. 184

A fraudulent Deed of Gift of Goods made to deceive Creditors ſhall not be pleaded by his Executor or Adminiſtrator, but ſhall be avoided by his Creditors, and the Goods liable to them in the Hands of the Grantee, as Executor de ſon Tort. 196

Exchange *defeated, where an Eſtate for Life or Part is evicted.* 8

Warranties implied. ib.

Of a Reverſion for a Poſſeſſion. ib.

Exemption; *how a Donative exempt from the Ordinary's Juriſdiction may be reſigned,* &c. 60, 61

The Extent of ſuch Exemption. ib.

A TABLE of the Principal Matters.

Expoſition *of* Quilibet. Page 26
Of a Condition to appear on Warning, and anſwer the Condemnation. 52, 53
Of a Grant of Rent out of Lands. 82
Of the Words aut, alibi, necnon, unacum, ſpectan' *or* pertinen'. 82, 83
That which abridges the Common Law ſhall be taken ſtrictly. 92, 93
Poſtea, ſcil' *a Day before, in a Declaration.* 93
An Award to pay 6l. 21 Maii, *and to execute a Releaſe* prædicto 1 Die Maii, *void.* 98
Deeds and Wills conſtrued according to the Intent, Awards not. ib.
An Agreement to leave a Houſe ſhall be intended immediately. 125
Ten Acres more or leſs, *how intended.* 166

FActor. *How he ſhall diſcharge himſelf in Account for Merchandizes.* 202
Falſe Impriſonment *on an illegal Arreſt.* 26
Fieri fac'. Vide *Title Execution.*
Fine. *The Cogniſance taken by* R. M. *Eſq; the* Dedimus *afterwards taken to Sir* R. M. *Knight, and the Return is* Reſpons' infranominati R. M. *if it ſhall be alledg'd for Error.* 33
Error in a Fine ſhall not be aſſigned contrary to the Record. 34
Dedimus *to two, one takes the Cogniſance.* ib.
A Fine by Concluſion. 101
Forcible Entry. *A conditional finding of ſuch Indictment.* 15
——*An Indictment* quod Meſſuagium ingreſſum fecerunt *without* [in] Meſſ. 27
An Indictment without ſaying [adtunc] exiſtens liberum Tenementum, &c. 28
——*One of the Juſtices of Peace refuſes to open the* Superſedeas *till their Award of Reſtitution executed; it is a Miſdemeanor.* 32
——*Where Reſtitution ſhall be awarded to the Tenant againſt the Will of the Freeholder.* 51
——*Reſtitution to a Copyholder on a forcible Entry.* Page 81
——*Where a Pardon of the Force ſhall prevent Reſtitution.* 99
An Indictment returned as to the Entry Ignoramus, *as to the Detainer* Billa vera, *if good.* 99
An Indictment for a forcible Detainer only. 99, 100
——*If the Indictment ought to find the Eviction of the Farmer.* 165
Forgery *puniſhed at Common Law.* 62
Forreign Attachment *in* London. 56
Fraud. *What ſhall be call'd Fraud.* 20
A fraudulent Deed of Gift of Goods made by an Inteſtate ſhall not be pleaded by his Executor or Adminiſtrator, but ſhall be avoided by the Creditors, and the Goods liable to them in the Hands of the Grantee, as Executor de ſon Tort. 196
Freehold. *Where Damages recover'd in Covenant is no Recompence for the Loſs of the Freehold.* 139

GRants. *A Grant of a Rent to* A. *his Executors and Aſſigns during the Life of* B. *if his Executors ſhall have it.* 9
A Grant of 20l. *of his Rents of his Tenants, if good.* 191
If a Grantor may do a Thing to defeat his Grant. 201
Grant *of the King* pro ſeipſo, *if it ſhall bind his Succeſſors.* 14, 15
The King takes by Deed deliver'd of Record. 30
The King deceived in his Leaſe, both in the Rent, and in the Commencement of the Term, viz. *as to take Effect by Parcels.* 43, 48
The Difference where he is deceived in his Intent, and where in his Information. 48
A Grant to the King, which cannot come into Poſſeſſion, is void. 149
A Grant to the King as long as any Iſſue Male of B. *lives, the Intervention of a Daughter who has a Son determines it.* 149

A TABLE of the Principal Matters.

HAbeas Corpus. *A* Procedendo *iſſued the ſame Day with it, but deliver'd after the Return of it, if the firſt Bail is diſcharged.* Page 120

The Cauſe, for aſſiſting on the Land one indicted of Piracy *in the* Admiralty *to eſcape, remanded.* 134, 135

Heralds. *Trial by their Regiſter.* 34

Hire. *A ſpecial Property gained by it.* 172

The Hiring of a Horſe to one Place, and Riding to another. ib.

Hoſtler. *Where he may detain a Horſe till Satisfaction on an Agreement to pay ſo much for Keeping.* 66, 67

Where he may ſell a Horſe to ſatisfy himſelf. 67

Caſe againſt an Hoſtler, where a Perſon's Servant or Friend was robb'd in an Inn. 162

Hue and Cry *on the Statute of* Winton *of Robbery, and declares on the Stat.* 13 E. 1. & 27 El. *and concludes* contra formam Statuti prædicti: *Good.* 116

Knight *or not, how it ſhall be tried.* 34

JEofails. *What Iſſue ſhall be a Jeofail within the Stat'.* 54

Error in the Certificate of the Clerk of Aſſiſe. 214

Error in the Entry of the Judgment. ib.

Where a Diſcontinuance ſhall not be aided after Verdict. 169

Imparlance *admits the Writ to be good.* 112

The Difference between a general and ſpecial Imparlance. 211

Petit Cape *in Dower on a Default on an Imparlance.* ib.

Implication *ſhall not make a Declaration good.* 18

Vide *Title* Ejectment.

Indebitatus Aſſumpſit. *Caſe lies on it.* 20

Indenture. *If the Leſſee ſeals his Part of it, and the Leſſor not,* Nihil operatur. 18, 19

Indictment. *A finding conditionally is not good.* 15

——*Of Murder* dans eidem unam plagam mortalem, &c. *without* adtunc. Page 28

——Inſultum fecit & percuſſit *without* adtunc. ib.

——*Where it ought to be* contra Pacem nuper Reginæ, *as well as* Regis nunc. 66

——*A juſtifiable Proſecution of it.* 105, 116, 117

In Pleading an Indictment the Authority of the Juſtices ſhall be ſhewn. 116, 117

Inducements *in Declarations in* Aſſumpſit *need not be alledged.* 17

Vide *Title* Pleading. Aſſumpſit.

Infant. *His Appearance by Guardian.* 58, 211

——*Where on a Reverſal againſt an Infant for Error he ſhall have an* Audita Querela. 88

——*How a Recogniſance by him ſhall be cancell'd.* 88, 155

Infranchiſement *of a Villain.* 2

Inquiry of Damages *of more than contained in the Declaration.* 5

Taken before one who has no Warrant by the Writ. 69, 70

The Judgment not perfect till the Writ of Inquiry returned. 71, 97

On an Inquiry of Damages how the Plaintiff ought to attend to avoid a Diſcontinuance. 97

How the Jury ought to be continued on an Inquiry. ib.

Where on an Inquiry the Plaintiff need not prove Property, but the Value, and where he muſt. 151, 152

The Juſtices may aſſeſs Damages, if they will, without this Writ. 152

Inrolment. *How the ſix Months ſhall be computed on the Statute of Inrolments.* 100

Intendment. *A Thing mortgaged ſhall not be intended to be redeemed unleſs expreſly alledged.* 25

A Warrant conſtrued according to the Intent. 26

Things done on one Day ſhall be intended at one Time. 87

Vide *Title* Expoſition.

A TABLE of the Principal Matters.

Intruſion *what? It cannot be on an Eſtate of Inheritance.* Page 171
Joinder in Action *by Tenants in Common.* 23
Parſon and Vicar cannot join in Action. 63
A Libel againſt two ſeverally, if they may join in a Prohibition. 128, 129
Jointenants. *A Forfeiture by a joint Surrenderee of a Copyhold.* 1
Jointenancy how pleaded. 75
Execution awarded againſt the Goods of a Jointenant deceas'd, if the Survivor may lock the Houſe againſt the Sheriff. 28
A Deviſe to two to enter when they attain their ſeveral Ages; if the Entry of one at Age deſtroys the Jointenancy. 183
Jointure. *What ſhall be called ſo within the Statute* 11 H. 7. 101
Ireland. *Judgment on Error in* B. R. *there, how reverſt in* B. R. *here.* 117
How the Record ſhall be ſent and remanded. 117, 118
How the Execution ſhall be made on Reverſal. 118
How Error in C. B. *there ſhall be reverſt here.* ib.
Iſſue *ill aided by Verdict.* 228
The Place in Aſſumpſit, *if iſſuable.* 11
Matter iſſuable in Aſſumpſit. 39
Judgment. *Where it ſhall be on* Nihil dicit, *and where not.* 38
——*Judgment not perfect till an Inquiry of Damages.* 97
——*Judgment ought to be full and perfect* in omnibus. 98
——*Where the Defendant appears on the firſt Summons in Debt, how the Judgment ſhall be.* 108
——*Judgment in Treſpaſs after a Pardon.* 126
——Videtur, conceſſum, inconceſſum, liquet Curiæ, *are not Words of Judgment.* 130
——*Debt brought on a Judgment, the Nature of it.* 133
——*If it ſhall hinder Execution on a Statute.* ib.
——*Judgment on a Matter confeſt notwithſtanding ill Pleading.* Page 138
——*Judgment ſhall not be conditional where it may be final.* 219
Juror *ſhall not be challenged for the King at another Day, who was ſworn before.* 23
And how thoſe ſworn before ſhall be ſworn again. ib.
A Jury fin'd and committed for an ill Verdict. ib.
Juriſdiction *of the Cinque Ports and* B. R. 12, 13
——*Of the Court of Requeſts.* 111

LAtin. *In Treſpaſs the* Latin *Word on which he declares has no ſuch Signification as is engliſhed.* 68
Latitat *does not abate by the Demiſe of the King.* 52
It is not an Original, but in Nature of an Execution. ib.
Leaſe. *Eviction of the Poſſeſſion of the Leſſee diſcharges all Rents, Bonds and Covenants.* 18, 19, 23
Leſſee for Life by the Words dedi & demiſi, *how a* Warrantia Chartæ, *or Covenant lies on Eviction.* 139
Leet. *Avowry for an Amerciement for Non-payment of a Leet Fine.* 186
Legacy. *An Executor gives Bond for Payment of a Legacy, the Bond extinguiſhes the Legacy, and it ſhall not be ſued for in the Spiritual Court.* 39
Letter of Attorney *to three* conjunctim & diviſim. 26
Liberties *within Vills in Point of Juriſdiction.* 12, 13
An Arreſt by a Sheriff within a Liberty is good, and the Offence only to the Lord. 51, 52
Licence *in Law miſuſed.* 96, 97
Lights *ſtopped by Building on an antient Foundation in Towns.* 215, 216, 225
London. *Cuſtom there that Land paſſes by Bargain and Sale without Livery or Inrolment.* 124
Concerning Stopping of Lights by Building. 215, 216, 225
Covenant againſt Leſſor to repair Houſes. 216

A TABLE of the Principal Matters.

MAnor. *How it may be Parcel, and held of another Manor.* Page 190

It ceaſes by Eſcheat. 190, 191

A Manor in Reputation how, and what may paſs. 191

Maſter. *Conſideration to be Bail for his Servant.* 40, 41

——*Shall not have an Action for Beating his Servant to Death.* 89, 90

Where a Bill of Debt made by the Servant ſhall bind the Maſter. 137, 147

Servant or Friend robbed in a Common Inn, the Maſter or Owner ſhall have Caſe againſt the Innholder. 162

Merchants. *The Judges ought to take Notice of the Uſage among Merchants.* 135, 136

In what Things the Law protects Merchants Strangers. 200

What Actions they may have. ib.

Miſcaſting *in a Declaration in Debt.* 5

Miſconveying *of Proceſs.* 15

Mortgage *ſhall not be intended to be redeemed, unleſs expreſly ſhewn.* 25

Murder *in an Appeal or Indictment intended Homicide.* 205

NAtivo Habendo. 2

Nihils, *two returned amount to Garniſhment.* 88

Niſi prius. *What Pleas Juſtices of Aſſiſe at* Niſi prius *may receive.* 180, 181

If a Protection. 181

Non-Reſidence. *The Statute of* 13 El. *of Non-Reſidence is a general Law.* 106

Nuſance *in the Time of one King continued in the Time of the Succeſſor, how the Indictment ſhall be.* 66

OBligation *to perform Covenants in a Leaſe, if there is no Leaſe there is no Covenant nor Breach.* 18, 19

——*Three are bound &* quilibet eorum, *an Action ſhall not be brought againſt two.* 26

An Action does not lie on a ſingle Obligation till all the Days incurred. 67

It cannot be demanded by the Words bona & catalla, *nor paſs by thoſe Words.* Page 68

Aſſignment of a Breach on an Obligation to perform Covenants. 78

—*Obligation* in quimquegent' libr'. 95

Quinnque. Quiinque Septuagent'. Septuamgentis. 96
Sexgintis. 105
Trigintatæ. 225

——*Falſe* Latin *will not deſtroy an Obligation.* 193

——*A Word that is not* Latin *will.* 95

The principal Parts requiſite in an Obligation. 193

Want of Date will not hurt. 194

An Obligation firſt deliver'd after the Condition mentioned to be performed is ſingle. 138

An Obligation to three to pay to one who ſhall ſue. 177

An Agreement executed pleaded in Diſcharge of an Obligation. 192

——*If it ought to be in Diſcharge of the Sum in the Condition.* ib.

——*A contingent Condition of an Obligation cannot be diſcharged.* 193

A Grant with a Proviſo to be void on Non-payment of 20 l. &c. 206

A Condition of a Bond to perform Covenants, Payments, &c. *extends only to compulſory Payments, not to a voluntary Sum in the Proviſo.* 206

Debt on an Obligation to ſave harmleſs againſt Legacies. 226

Office of the Court *not to abate a Writ without the Challenge of the Party.* 56

The Judges of the Common Law do not take Notice of the Courſe in Chancery. 42

How of the Civil Law. 17

Of what they do not take Notice without the Allegation of the Party. 141

Office. *Where an Office ſhall be intended antient.* 200

Where in Trover it ſhall not be ſhewn how the Defendant is made Deputy. 201

Touching the Office of Chief Butlerage. 199

A TABLE of the Principal Matters.

Original. *Where on a* Certiorari *an Original certified in any Term is ſufficient.* Page 108
The Original miſtaken in the Defendant's Chriſtian Name. 109
The Difference between an ill Original and no Original. ib.
The Want of an Original is Cauſe of Reverſal. 118
Outlawry. *How the King is concerned in an Outlawry in Debt.* 19
Oxford, *and the Privileges in it.* 16

PAlatine. *An* Elegit *how ſued in the County Palatine.* 179
Pardon. *The firſt Entry in Treſpaſs being pardon'd, all that depends upon it is pardon'd.* 126
Parſon. *If the Parſon and Vicar may join in an Action for Tithes.* 63
Partition. *An Eviction of an Eſtate for Life defeats it.* 8
Paſſagium. *What it is.* 163
Patron *of a Donative refuſes to collate.* 61
If he may collate a Layman. ib.
Pawn. *The Time to redeem it.* 178
The Death of him to whom doth not hinder Redemption. ib.
But the Executor of him who pawn'd cannot redeem. ib.
If he to whom delivers *it over to* J. S. *to whom the Tender ſhall be made.* ib.
Touching the Property of the Thing pawn'd. ib.
Tender and Refuſal. ib.
The Law where a Pawn periſhes. ib.
Penal *Statutes taken ſtrictly.* 22, 53
Perjury. *Where an Action on the Statute* 5 El. *does not lie on a falſe Depoſition in Chancery.* 22
If on an Aid prier. ib.
Concerning Perjury. 27, 72
An Oath in a Court touching a Thing which it hath no Cogniſance of, is not Perjury. 111
The Defendant for an Oath on an Interrogatory in the Star-Chamber ſhall not be indicted on the Statute. 5 El. 120
Piracy. *Aſſiſting one indicted for Piracy in the Admiralty to eſcape.* 134, 135
Place. *Where it ſhall be alledg'd in an* Aſſumpſit. Page 11, 207
Pleading. *Miſcaſting in a Declaration in Debt.* 5
——*Double Plea in an Appeal of Murder.* 12, 13
——*Replication a Departure from the Declaration.* 13, 14
——*The Conveyance to the Action need not be preciſely ſhewn.* 16, 17, 56, 75
——*Declaration made certain by the Replication.* 17
——*In Debt on a Bond to perform Covenants, where a Breach need not be aſſigned,* viz. *where a ſpecial Iſſue requires a ſpecial Replication.* 25, 78
——*The Plaintiff is not obliged to ſhew an Act done between a Stranger and the Defendant to which he is not privy.* 25, 128
——*A Declaration which may have two Intendments is not good.* 36
——*In an* Audita Querela *the Defendant ſays* pro placito quod *J. B.* (*a third Perſon*) dicit, &c. 38
——*The Difference between* nihil dicere *and* inſufficienter dicere *as to Judgment.* ib.
——*In an* Audita Querela *the Plaintiff declares that the Recogniſee was not there* ad exigend' & recipiend' *the Money where it is to be paid without Demand) adjudg'd that the Word* exigend' *is void.* ib.
——*How to ſhew the Condition of a Recogniſance broke.* 59
On Plene adminiſtravit *the Plaintiff replies that he himſelf* (*inſtead of the Defendant*) *has Aſſets, and amended.* 65
In Treſpaſs the Defendant need not ſhew in certain a Thing collateral to the Treſpaſs, which is but a Conveyance to the Matter. 75
In Treſpaſs for Damage-feaſant the Defendant pleads that the Plaintiff debuit reparare, *he need not ſhew by what Title,* &c. 75
It is good for the Defendant to be ſparing in ſetting forth the Plaintiff's Title. 76

——*The*

A TABLE of the Principal Matters.

——*The Declaration aided by the Verdict.* Page 101

A Declaration Et unde idem Quer' (breviter ſcript') per Attornat' ſuum quod, &c. *without* dicit. 103

——Unde idem R. quer' *good.* ib.

——*What Plea goes in Abatement, and where there ſhall be a* Reſpondeas Ouſter. 112

——*Points material in the Declaration ought to be confeſſed and avoided or traverſed.* 122

——*A collateral Matter pleaded in Bar confeſſes the Declaration.* 127

——*In Debt for Rent, how he ought to ſhew the Privity between him and the Defendant by Attornment.* 135

——*A Feoffment may be pleaded without ſhewing Livery or Attornment.* ib.

——*What is confeſſed by* Non eſt factum *pleaded.* 136

——*The Pleading in Debt againſt an Executor* de ſon Tort. 137

——*Where the ill Concluſion of a Plea makes a Diſcontinuance.* ib.

The Number of Acres omitted in the Bar to an Avowry. 146

Where Title is made by the Bar or Replication, it ought to be certain to all Intents. 147, 226

——*A Declaration good to a common Intent.* 148

Why the Avowant in Replevin ought to make a good Title in omnibus: *In Treſpaſs* aliter. ib.

Where an Abatement in Lands is pleaded you ſhall not confeſs and avoid, and alſo traverſe. 151, 221

A Replication which confeſſes and avoids, and traverſes, is ill. 151, 221

In Treſpaſs for a Battery, or taking away his Servant, where a Replication de Injuria ſua propria abſque tali Cauſa, *ſhall be good.* 157, 158

——*The Replication ought to anſwer the Title in the Bar.* 166, 170

In Treſpaſs where the Plaintiff and Defendant agree in the Name of the Place, how the Plaintiff ought to anſwer the Title and reply. 166, 167

If the Replication does not anſwer the Bar, he ſhall not have Judgment for a Defect in the Rejoinder. Page 170, 171

Where in Actions wherein the Plaintiff makes Title to the Thing demanded, &c. *the Defendant ſhall make a better Title and Traverſe, or confeſs and avoid,* &c. 174

——*Words ſhall be void rather than the Declaration vitious.* 182

In Replevin, Variance between the Replication and Rejoinder in the Name of the Place in which, &c. 185

A Writ of Right ſhall be anſwer'd in Chief. 191

A Trial rejected, and a Repleader awarded for Want of a good Iſſue. 196

In Treſpaſs, the Defendant juſtifies Damage-feaſant, the Plaintiff replies for Defect of Incloſure by the Defendant, an inſufficient Rejoinder which neither confeſſes and avoids, nor anſwers the Replication, but perplexes the Matter by adding a Thing on which Iſſue cannot be taken. 217

Two Preſcriptions ſhall not be in Iſſue. ib.

Treſpaſs, a Plea in Bar which does not deſtroy the Plaintiff's Action but by Way of Argument is not good. 223, 224

Caſe for ſtopping three Lights, the Defendant juſtifies for two, and Part of the third without Certainty; *adjudged againſt the Defendant, how it ought to be pleaded.* 225

In Debt on a Bond to ſave harmleſs from a Legacy, on non damnificat' *pleaded, the Plaintiff replied a Judgment againſt him in Chancery; he ought to ſhew where the Chancery was.* 226

Debt on a Leaſe, the Defendant pleads Nihil habuit in Tenementis, &c. *the Plaintiff ought to ſhew what Eſtate he had.* 227, 228

Pledge. *Vide* Pawn.

Pone. 2

Poor. *Damages on the Statute of* 43 El. *for Relief of the Poor, where Treſpaſs is brought againſt the Overſeers.* 176

Poſſeſſion. *The firſt Poſſeſſion intitles to the Profits.* 61

Poſſeſſion executed *hinders Poſſeſſion executory.* 123, 124

A TABLE of the Principal Matters.

Poſtea. *A Miſtake therein in the Name of the Parties.* Page 186

Power *reſerved to him at any Time to make Leaſes for twenty-one Years, this does not extend to Leaſes to commence* in futuro. 222

Præcipe *does not lie* de Rivulo ſeu Aquæ Curſu. 143

—*Otherwiſe* de Terra Aqua cooperta, Gorſe, Pool. ib.

Preſcription. *A Preſcription in two Things on a Prohibition, and a Failure in one, yet good for the other.* 55, 128, 129

——*Otherwiſe of a Preſcription in Defence, and by Way of Plea.* 55

——*To have Eſtovers, and to have* omnes Spinas. 188

Preſentation *by the King where the Patron has not Notice of the Avoidance, is ill.* 7

Precedents. *Their Authority.* 42, 49, 127

Priſage *of Goods how to be taken* 199, 200

Procedendo *iſſued the ſame Day with the* Habeas Corpus, *but not deliver'd till after the Return of the* Habeas Corpus, *if the Bail taken diſcharges the former,* &c. 120

Prohibition. *Preſcription in an Abbot, the Defendant ſhews the Abbey founded* 5 E. 1. *and confeſſes the Unity after.* 31

On a Suit in the Spiritual Court for a Legacy, where a Bond was given by the Executor for it. 39

Where in a Prohibition for a Variance, and for what Variance between the Libel and the Suggeſtion a Conſultation ſhall be awarded, and where double Coſts. 79

——*Where a Prohibition lies when the Eccleſiaſtical Judge does not allow Proof by one Witneſs.* 92, 93

——*A Suggeſtion to pay* 10s. *in Diſcharge of Tithes.* 102

——*Where two Prohibitions ſhall not be in the ſame Suit.* ib.

——*Where a Conſultation ſhall be for Want of Proof within ſix Months.* 102, 119

Where Coſts on Failure. 119

——*Conſultation on a* Modus decimandi, ſtabit Prohibitio pro Reſiduo. 119, 122

——*A Libel againſt divers ſeverally, if they may join in a Prohibition.* Page 128, 129

Such Libel for Wood, &c. *and ſmall Tithes, and a Cuſtom of Tithing is ſuggeſted for the Wood, if there ſhall be a Conſultation.* 129

——*Where a Suit is in the Court Chriſtian for a Thing Spiritual, a Releaſe for it is triable there.* 173

Promiſe *to pay ſo much Day and Night, many Days and Nights joined in one Action.* 67

Vide Aſſumpſit.

Property. *Of the Alteration of the Property by the Sheriff in levying Execution,* &c. 44

——*The Owner of the Soil of a Common, if he has Property of the Conies there.* 104

——*Preſcription to have Eſtovers, in whom the Property.* 188

Protection, quia moratur ſuper Mare, *if allowable.* 143

QUare Impedit. *Error to remove a Record of it.* 3

Where it lies at the Common Law. 91

Quo Warranto *to hold a Court Baron and Leet.* 190, 191

It is a Writ of Right and ſhall be anſwer'd in Chief. ib.

The Judgment on this Writ. ib.

RECital *in a Leaſe not true,* quid operatur. 43

Recogniſance. *Lands omitted in an Extent on a Recogniſance.* 12

——*A* Capias *does not lie on a Recogniſance.* 42

——*A Condition Parcel of a Recogniſance, how a Breach ſhall be ſhewn.* 59

——*How to cancel a Recogniſance acknowledg'd by an Infant.* 88

A Recogniſance to appear at the Aſſiſes, how a Promiſe to ſave harmleſs againſt it ſhall be ſhewn. 207

Record. *Error ſhall not be aſſigned contrary to it.* 33, 34

A Reſpondeas Ouſter *on Failure of the Record.* 36

A TABLE of the Principal Matters.

In Debt the Defendant pleaded Outlawry, the Plaintiff replied Nul tiel Record; *and afterwards it was reverſed before the Day to bring it in; a* Reſpondeas Ouſter *awarded.* Page 36

A Promiſe to ſhew a ſufficient Record to charge, &c. *how the Promiſe and Breach laid and pleaded.* 39, 40

Recovery. *Tenant in Tail covenants to ſtand ſeiſed to the Uſe of himſelf in Fee, and afterwards ſuffers a Recovery, if it ſhall bind the Remainder.* 51

——*Where it bars the Remainder notwithſtanding a Grant to the King.* 149

Relation, *where Judgment has Relation to the firſt Day of the Term.* 35

Relation of a Promiſe to the Requeſt. 41

Releaſe, *if a contingent Debt can be releaſed.* 193, 215

Payment awarded at a Day to come may be releaſed by the Word Demands. 193, 214, 215

What Releaſe diſcharges a Promiſe in futuro. 156

Remainder. *Good although the particular Eſtate determin'd.* 1

——*A Forfeiture by Copyholder for Life doth not forfeit the Remainder.* 1

A Term granted in Remainder on a Contingency. 9

A Leaſe to three for Life, and that it ſhould remain to the Survivor for ninety-nine Years, if a good Intereſt in Remainder paſſes. 85

A Leaſe to A. *for Life, and after to the Executors and Aſſigns of* B. *is but a bare Power in* B. *and his Executors, becauſe he was not a Party.* ib.

A Grant of a Reverſion to the King which cannot come into Poſſeſſion, if good; aliter *of a Remainder.* 149

A Remainder ill, which cannot take Effect in Poſſeſſion at the Time appointed. ib.

Rent *granted to* A. *for the Life of another Remainder to* B. 9, 10

How to declare in Debt for Rent. 135

Replevin. *The Avowant ought to make a good Title* in omnibus. 148

Two make Cogniſance generally, and not as Bailiffs or Servants; Judgment reverſed. Page 108

Requeſt. *In Caſe on an Agreement to pay a Debt where a Requeſt ought to be ſhewn.* 66

Requeſts. *The Court of Requeſts.* 111

Reſervation. *A Rent of* 10 l. *reſerved* 5 l. *at* Michaelmas, *and* 5 l. *at* Lady-day, *is but one Rent.* 24

——*A Leaſe rendring Rent* quandocunque *it ſhall be demanded by the Leſſor, how it may be demanded.* 37

A Leaſe at Michaelmas *for five Years yeilding Rent at* Lady-day *and* Michaelmas *yearly, or within ten Days after, when the Rent ſhall be due, and how the Payment at the laſt* Michaelmas. 167

——*Reſervation taken againſt the Leſſor.* 167, 189

A Leaſe by the Father for Years, rendering during the Term, if the Father liv'd, &c. 30 l. *at* Lady-day *and* Michaelmas *by equal Portions, and rendering* Hæred' 20 l. ad Terminos præd', *it ſhall be* 20 l. *for the whole Year; the Law ſupplies by equal Portions.* 189

Vide *Title* Leaſe.

Reſceit *of Goods ſtolen.* 4

Reſcous. *If the Sheriff returns a Reſcous, it ought to appear by his Return to be within his County.* 51

Return of the Sheriff. *An Averment ſhall not be againſt it.* 34

Concerning the Name of the Sheriff put to Returns. ib.

Reverſion *granted to the King which cannot come into Poſſeſſion, if good.* 149

SCire facias *by the Defendant in Error, how it may become a Record.* 6

D. *extended on a Statute,* H. *extended the ſame Land on a Recogniſance,* (*omitting others*) D. *had Judgment on an* Audita Querela: *If* H. *ought to have a* Scire facias *againſt* D. *before he removes his Poſſeſſion.* 12

How it makes a Man privy to him who was before Party to the Record. 33

——*On a Recogniſance.* 42

A TABLE of the Principal Matters.

Two Nihils *amount to a Garniſhment.* Page 113

——*In one County on a Judgment in another.* 218

Sea. *A Thing done beyond the Sea how pleaded and tried.* 202

Seiſure *of Goods by the Sheriff on a* Fieri facias *does not alter the Property.* 44

Sheriff. *On a Challenge of the Sheriff before Iſſue, and a* Ven' fac' *to the Coroners, the Sheriff* per Mandat' Juſtic' *cannot return the* Tales. 15

The Sheriff of another County returns the Proceſs. ib.

If the Sheriff after his Diſcharge can ſell Goods ſeiſed by Fieri fac'. 44

He ought to turn them over *to the new Sheriff.* ib.

What Return he ought to make. ib.

An Arreſt by the Sheriff within a Liberty is good, and the Offence to the Lord. 51, 52

A Capias ad ſatisfac' *to the Sheriff, who makes a Precept to the Bailiff of the Dutchy* ad capiend' ad reſpond', *who returns the Precept ſerved; and the Sheriff* Cepi Corpus; *the Sheriff is thereby chargeable to the Plaintiff.* 52

Slander. *Actions for Words,* viz. Knave, for thou haſt bought ſtolen Cows, knowing, &c. 4

Perjured Knave, proved by a Stake. 10, 34

Though I cannot prove it. 10

And that I will prove by *J. S.* (*who is not.*) 10

Thy Father ſaid thou murderedſt thy Husband (innuendo J. S. jam defunct'.) 21

The Death of the Husband at the Time of the Speaking ought to be expreſſed. ib.

Thou haſt poiſon'd *J. S.* (*then alive.*) ib.

Words againſt a Juſtice of Peace, &c. *he ought to declare that he was a Juſtice,* &c. *at the Time of Speaking.* 21

Hath burnt my Barn (innuendo full of Corn.) ib.

The Nature of an Innuendo. ib.

Forſworn *will not bear an Action, as equivalent with* perjured, *without ſhewing the Court and Suit in which,* &c. Page 27

Of an Attorney, Thou dealeſt on both Sides, and deceiveſt, *&c.* 32

Thief, and that will be proved by Apples ſtolen off my Trees. 34

A. threw his Dagger at me, and thruſt me through, *&c.* to have killed me, *&c.* by Inſtigation of the Plaintiff. 57

Words not to be conſtrued dividedly but together. 58, 144

An Imputation of a Treſpaſs, no Slander. 58

Matter of Intent. 58, 90

Of a Commiſſioner, *that he is* corrupt. 62

Of an Arbitrator *that he hath taken* Bribes. 62

Touching a Thing which is not puniſhable. 62, 90, 146

He keeps Thieves and Traitors to do Miſchief. 64

Of a Sideſman, Thou haſt perjuredly preſented me at the Viſitation. 72

Thou haſt thieviſhly taken my Money out of my Purſe. ib.

Thou haſt ſuborned *J. S.* to come and commit Perjury before my Lord *Wincheſter.* ib.

For Slandering his Title. 80, 88

Thou art a common Barretor. 90

An Offence fineable only is not Slander. 90, 154

The Difference between Slander and Diſgrace, or Aſperſion. 90, 146

He prepared Poiſon, *&c.* 90

Actionable by Averment. ib.

Thou art no true Subject. 104

He hath ſpoken Words that be High Treaſon. 107, 197

Not ſafe to ſhew what Words they were. 107

Reſpondendo dixit, No Marvel ſhe comes not to Church, for it is thought ſhe is with Child, and I fear it is too true. 113, 144, 154

What Malice and Intent of Slander ought to appear in the Declaration. 113

Bear Witneſs *M.* that he hath ſtolen my Hair-cloth. 126

Slander ſhall be by direct Affirmation. 126, 144, 153, 160

D. picks

A TABLE of the Principal Matters.

D. pickt five Shillings out of *E.*'s Pocket, and her Husband was conſenting. Page 136

Of a Town-Clerk or Steward, Juſtice of Peace, or Clerk of Aſſiſe, He hath taken 40 *s.* for a Bribe. 142

You might have known your own Sheep, and not have ſtolen mine. 144

I met G. &c. (*at ſuch a Day and Place*) and they bid me deliver my Purſe, and I being afraid did, *&c.* 145

J. W. *hath forged the late Queen's Writ.* 146

My Father' Hand, *&c.* ib.

Thou workeſt by Nigromancy (*an improper Word*) and by the Devil. 150

Thou haſt ſtolen Wood and Timber, *&c.* 152

Words found by the Jury more than alledg'd. 152

It would be proved that *A.* contrived the Death of *B.* 153

Healer of Felony, and ſhewed Favour to a Horſe-ſtealer in the Time of his Conſtableſhip. 153

One out of Office ſhall not be ſlander'd with a Thing done in his Office. 153, 158, 159

Diſcourſe touching Concealing of Murder. 154

Difference between Words ſpoken together and at ſeveral Times, as to qualify the firſt Words with the ſubſequent. 154

Where inepta Ratio *which is impertinent will be Slander.* 154

Of a Linen-Draper, *that he is a* Bankrupt. 158

Declaration that he was a Linen-Draper, &c. *for ſeveral Years paſt, without ſaying laſt paſt; if good.* 158, 159

As to that the Difference between an Office and a Trade. 158, 159

Where it ought to be laid preciſely, that the Party ſlander'd was an Officer, *or a* Tradeſman *at the Time of the ſpeaking.* 158

I will prove thee perjured, *imports an Affirmation.* 160

Thou wilt be a Bankrupt within few Days. Page 160

Of a Merchant Stranger that he is a Bankrupt. 198

Of a Juſtice *of* Peace, You cauſed *J. S.* to ſwear that which was untrue againſt me. 220, 221

Standum Juri. *What it imports.* 59, 60

Statutes 28 H. 6. *of Reſumption.* 13
4 H 7. *of Confirmation.* 13
31 H. 8. *of Monaſteries.* 85
13 El. & 21 H. 8. *Of Non-Reſidence are*——
——*General Laws.* 106

Where the Concluſion of a Declaration ſhall be contra formam Statuti, *and not* Statutorum. 116

Statute-Staple. 12, 29, 38

Stranger. *A Recogniſance to pay Money to a Stranger is as a Penalty.* 38, 39

An Act done to him who has Intereſt and a Stranger. 61

Summons *and Severance.* 4
——*Appearance on the firſt Summons in Debt, the Judgment.* 108

Superſedeas *deliver'd to the Sheriff prevents his diſtraining the Jury, or returning the* Habeas Corpora. 57

To proceed after is Error. ib.

Surpluſage *in a Declaration.* 5

TAil. *Tenant in Tail bargains to* B. *who re-bargains to him, he is Tenant in Tail as before.* 51

Tenant in Tail covenants to ſtand ſeiſed, &c. quid operatur. ib.

What Words will make an Eſtate-tail to Husband or Wife, or both. 131

In the Diſcent and Continuance of an Eſtate-tail, it ought to be wholly by Heirs male. 149, 150

Tales. *The Sheriff challeng'd, and yet returned the* Tales. 15
——*Returned on a Panel without adding* Nomina Jur' de novo appoſit'. 213

Tenants in Common. *A Bill to* A. *to pay* 10 l. *to* C. to be divided *between* A. *and* B. *and to their Uſe, they are ſeveral Debts, and they are not Tenants in Common.* 23, 24

A TABLE of the Principal Matters.

In Caſes of Intereſt, as a Leaſe to two to be equally divided, *they are Tenants in Common.* Page 24

——*Ought to join in perſonal Actions.* 24, 161

Tenant at Will. *Determination of the Will.* 73

Term. *Where taken as one Day, having Relation to the firſt Day.* 35

Teſtatum. *An* Elegit *grounded on a* Teſtatum *which is not filed, if the Execution fails.* 179

Time. Tempus occurrit Regi. 7

The Account of a Month in a Statute. 100

Toll. *Caſe for taking Toll of him.* 13

Tort. *A Man ſhall not take Advantage of his own Tort.* 201

Traverſe. *In Avowry for Rent granted by the Reverſioner, if the Traverſe ſhall be on the Seiſin of the Anceſtor.* 54

Where in Ejectment the Day and Place ſhall be traverſed, and where non conceſſit modo & forma. 122, 123

An ill Traverſe is not aided by the Statute of Jeofails. 123

Where in Waſte Seiſin alledged by the Plaintiff ſhall be traverſed. 140

Where a Traverſe ſhall be taken. 151, 195

In Treſpaſs, where a Traverſe of the Title ſhall be expreſs *and not by* Circumſtance. 170

Matter in Law ſhall not be traverſt. 199, 200

Treaſon *in Words.* 107, 197

Treſpaſs *for ſeveral Things.* 5

——*For taking* Equam *without ſaying* ſuam. 36

——*Excuſed for Want of Incloſure by the Plaintiff.* 75

——For ſpoiling his Graſs, *&c. the Defendant may plead* generally *that he was* poſſeſſed, *without ſhewing his Leaſe, or for what Time,* &c. *becauſe* collateral *to the Thing in Queſtion.* 75

Poſſeſſion in the Defendant is ſufficient to juſtify his putting in his Cattle. ib.

Treſpaſſer ab Initio. 96, 97

——*In one Acre abatted, the Jury find him guilty* in dimid' dictæ Acræ; *if good.* 114

What ſhall be the Judgment *in Treſpaſs after a* Pardon. Page 126

The firſt Entry *in Treſpaſs being* pardon'd, *all that depends on it ſhall be pardon'd.* ib.

Of the Continuance *of a Treſpaſs.* 126, 143

Where the Defendant in Treſpaſs ſhall excuſe *a Tort in himſelf by* a Tort done by the Plaintiff. 141, 142

In Treſpaſs, if the Verdict *finds the* Tenure *in Subſtance it is ſufficient,* aliter *in Replevin.* 148

It does not lie againſt the Lord *who* diſtrains *for Rent not due.* ib.

——*Where the Plaintiff's Title ought to be anſwer'd* expreſly. 170, 174.

——*Why Colour ſhall be given in Treſpaſs.* 174

——*An actual Poſſeſſion ought to be* expreſly *alledged in Treſpaſs.* 224

Trover *for a Diſtreſs unlawfully taken.* 9

——*For Tithes.* 42

——*Againſt Baron and Feme, how to declare.* 165

The Point of the Action is the Converſion. 165, 166

——*The Plaintiff's Title ought to be anſwer'd expreſly.* 174

——*On a Seiſure by the King's Officer.* 198, 199

Tythes. *A Preſcription* in non decimando *for a Spiritual Perſon, and for his Copyholders.* 2

——Diſcharge *by* Unity. 31

——*Perpetual* Unity *ſhewn in Diſcharge of Tithes, and preſcribed in the Abbot; the Defendant ſhewed the Abbey founded* 5 E. 1. *within Time,* &c. *a good Bar.* 31

——*A Suggeſtion* de modo decimandi *for Wool and Lambs, and no Proof for the Wool; if good for the Lambs.* 55

——*Demanded on ſeveral* Titles *in one* Action. 63

——*Action on the Statute* 2 E. 6. *the Nature of it.* 63, 127

——*Treſpaſs for Tithes ſevered.* 77

——Preſcription in non decimando. 79

A TABLE of the Principal Matters.

——*The Spiritual Court hath no Juriſdiction on a Preſcription* in non decimando, *otherwiſe* de modo decimandi. Page 79

——*Payment of Tithes to the Parſon is a Diſcharge againſt the Vicar.* 86

——*A Cuſtom to ſet forth* Cocks, &c. *in Satisfaction of all other Tithes ariſing on the ſame Land,* &c. ib.

Of common Right all Tithes belong to the Parſon. ib.

——*Tithe of Hay is a Diſcharge for Agiſtment in the ſame Land: So Tithe of Corn for Halm.* ib.

—— *One Tithe for one Land in one Year.* ib.

——*A Grant of his own Tithes.* 94, 95

The Aſſignee *ſhall not have a* Prohibition. 95

——*A Conveyance of Tithes ſhall follow the Nature of the Land.* 132

——*If an Eſtate in them may commence* in futuro. ib.

——*Tithes are always* in eſſe. 132

——*If a Leaſe of them ſhall enure by Way of Intereſt or Diſcharge.* 132

VEnditioni exponas. *The Sheriff cannot ſell Goods ſeiſed without ſuch Writ.* 44

Venire facias. *Where it ſhall be from the Manor, and where from the Place, and where from both.* 26

——*Words in one County, Matter of Juſtification in another; from whence the Venue.* 49

——*The like, if in a* different *Place in the ſame County.* ib.

——*Where it does not anſwer the Award on the Roll.* 60

——*Amended in the* Teſte. 64

——*In the Name of the Sheriff.* 64, 69

——*Award thereof* general *and* ſpecial. 64

De Novo. 77

——*Miſawarded between a* Vill *and a* Hamlet, *and a* Pariſh. 77, 104, 127

——*Two Defendants, Judgment by* Nihil dicit *againſt one, the other pleads to Iſſue, how the* Ven' fac', *and Writ of Inquiry ſhall be.* 109

——*A Venue from a Ward in a City.* Page 159

——*Where Iſſue is taken on a* Common *the Venue ſhall be from the Land in which, and to which it is appurtenant.* 177

——*Ejectment for Lands in three Vills, the Defendant pleads that the Plaintiff after the laſt Continuance enter'd into eight Acres* parcel' Præmiſſor', *without ſaying in which Vill; where the Venue ſhall be.* 181

——*Treſpaſs laid in* G. *and* W. *the Defendant pleads they are Parcel of the Manor; whence the Venue.* 182

Replevin for taking in B. Conuſance *for a* Leet Fine *of a Leet in* B. *for the Reſiants within the Precinct of the Manor of* B. *Venue from the Vill and Manor.* 186

A Way from one Vill to another ſhall be tried from both. 187

So Land in D. *held of the Manor of* S. ib.

Verdict. *Agreement implied in a Verdict.* 61

The Court regards only the Doubt of the Jury. ib.

A Verdict incertain *aided by* Intendment. 61, 228

In Aſſumpſit, *a Verdict that the Plaintiff has ſuſtained Damages by Non-performance, is not good.* 77

A Verdict which finds the Wife guilty, and nothing as to the Husband is ill. 106

——*Two Matters in Iſſue, and nothing found as to one.* 109

——*Declaration in Treſpaſs in one Acre, found in half the Acre, good;* aliter *in Ejectment.* 114

In Treſpaſs, *a Verdict which finds the Tenure in* Subſtance, *is good;* aliter *in* Replevin. 148

Vicar. *Payment of Tithes to the Parſon is a Diſcharge againſt the Vicar.* 86

The Vicarage derived from the Parſonage. ib.

All Tithes, of Common Right, belong to the Parſon; ergo *the Vicar ought to ſhew a* Title *to Tithes.* 86

A TABLE of the Principal Matters.

Villain. *Proceedings in a* Nativo habendo *to infranchiſe a Villain.* Page 2
Unity *to diſcharge Tithes.* 31
Volenti non fit Injuria. 53
Uſurpation *againſt the King.* 90, 91
The King releaſes to an Uſurper. 91
Uſury. 100 l. *lent for a Year, if he may take* 5 l. *for Intereſt at the End of ſix Months.* 30, 31
Corruption between the Debtor and Surety, to which the Debtee is not privy, will not hurt him. 47

WArrant *of the Sheriff to four &* cuilibet, *ſhall not be taken as another Authority.* 25, 26
Warrantia Chartæ *depending is no Bar in Covenant.* 139
It is a real Action and binds the Land. ib.
Warranty *in Exchange.* 8
——*That a Thing is of ſuch a Value.* 20
——*What Words in a Leaſe make a Warranty.* 139
What warrants the Freehold, and what does not. ib.
Covenant brought on a Warranty. ib.
Waſte. *If it lies againſt the Aſſignee of the Leſſee of Part of the Term.* 37
——*Where the Defendant ought to traverſe the Seiſin.* 140
Way. *The antient Way is ſtopped, to go in the new one is not a Treſpaſs.* Page 141
Caſe for a Diſturbance of a Way. 159
If a Way ſhall be claimed as appurtenant or appendant to a Houſe. ib.
It is an Eaſe and not an Intereſt. ib.
A Preſcription in a Way how laid. 163
Wear. *Indictment for erecting it.* 66
Will. *The Probate thereof belong'd originally to the Common Law.* 92
Wood. *It is not Timber* dum creſcit, *but Wood.* 152
Writ. *If* breve Domini Regis currit *in the* Cinque Ports. 13
Parſon and Vicar make ſeveral Leaſes of Tithes to B. *if he having two Titles may have one Action for them? And if againſt ſeveral Tenants.* 63
——*If one may comprehend two Actions in one Writ.* ib.
——Album breve, *where it ſhall be amended.* 110
Writ of Right. *Of what Poſſeſſion the Demandant ſhall count in this Writ.* 211
How a Petit Capias *to iſſue on a Default on an Imparlance to a Day certain.* ib.
The Judgment on a Default on an Imparlance general and ſpecial. ib.

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