THE

SECOND PART

OF THE

REPORTS

OF

Sir Peyton Ventris Kt.

One of the Justices

OF THE

COMMON PLEAS.

CONTAINING

Select CASES Adjudged in the COURT of **Common Pleas**, in the Reigns of K. *CHARLES* II. and K. *JAMES* II. and in the Three first Years of the Reign of their late Majesties K. *WILLIAM* and Q. *MARY*; while he was a JUDGE in the said COURT.

With the Special PLEADINGS to the same.

ALSO

Several CASES and PLEADINGS thereupon in the **Exchequer-Chamber**, upon Writs of ERROR from the **King's Bench**.

Together with many remarkable and curious Cases in the Court of **Chancery**.

Whereto are added

Three exact TABLES; one of the CASES, another of the PRINCIPAL MATTERS, and the Third of the PLEADINGS.

With the Allowance and Approbation of the LORD KEEPER **and all the** JUDGES.

The Fourth Impression, carefully corrected, with an Addition of several Thousands of References, never before Printed.

In the *SAVOY*:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *E. Sayer*, Esq;) for **D. Browne, J. Walthoe, T. Osborn, W. Mears, T. Ward, T. Woodward,** and **J. Pooke.** MDCCXXVI.

THE NAMES OF THE CASES IN THE SECOND PART.

A.

ADAMS v. *Croſs*, Page 181
Alleſon v. *Marſh*, Ibid.
Anonymus's, 39, 45, 46, 48, 58, 73, 117, 154, 171, 172, 173, 174, 180, 194, 195, 196, 214, 215, 216, 218, 262, 346, 347, 349, 351, 353, 358, 359, 361, 362, 363, 365.

B.

BALL v. *Cock*, 47
Barker v. *Keate*, 35
Bailes v. *Wenman*, 74
Barney v. *Tyſon*, 359
Bathurſt's Caſe, 40
Baynton v. *Bobbet*, 67
Bealy v. *Sampſon*, 90, 93
Beaumont v. *Weldon*, 345
Beverſham's (Sir *William*) Caſe, P. 345
Biddulph v. *Daſhwood*, 261
Bird v. *Bloſſe*, 361
Blake v. *Clattie*, 73
Bland v. *Haſelrig & al'*, 151
Bliſſe v. *Froſt*, 63, 67
Blois (*Charles*) *& al'* v. Dame *Jane Blois*, and *Jane Blois*, Infant, 347
Bockenham v. *Thacker*, 69, 71, 74
Bond v. *Moyle*, 106
Bonham v. *Newcomb*, 364
Bowyer v. *Milner*, 57
Bracton v. *Liſter*, 84
Bright v. *Addy*, 195
Broadhurſt v. *Richardſon & al'*, 349
Brown v. *Rands*, 156
Buckler v. *Milierd*, 107
Burchet v. *Durdant*, 311
Buſh v. *Buckingham*, 80, 83
Butler's (Sir *Oliver*) Caſe, 344

C.

CAge v. *Ruſſel*, Page 352
Carr. v. *Donne*, 189, 193
Chamberlain v. *Cooke*. 75, 78
Chapman v. *Flexman*, 286, 291
Chaſe v. Sir *James Etheridge*, 130
Clarke v. *Peppin*, 97, 99
Clark v. *Tucket*, 182
Clobberie's Caſe, 342
Coghill v. *Freelove*, 209
Collet v. *Collet*, 355
Collet v. *Helyar*, 135
Cornwallis's (the Lord) Caſe, 38
Cooke v. *Romney*, 173
Cramlington v. *Evans* and *Percival*, 296, 307
Craw v. *Ramſey*, 1

D.

DAwney v. *Veſey*, 249
Dawſon v. the Sheriffs of *London*, 84, 89
Denny v. *Mazey*, 210, 212
Dickman v. *Allen*, 136, 138
Dighton (*Chriſtopher*) v. *Bernard Grenvil*, 321
Dod v. *Dawſon*, 143
Dodwell (the Caſe of) and the Univerſity) of *Oxford*, 33
Dowſe v. *Cale*, 117, 126
Draper (Sir *Thomas*) v. Dr. *Crowther*, 362

E.

ELlis v. *Yates*, 153
Every v. *Carter*, 254, 259

F.

FAgg v. *Roberts & al'* Page 195
Fleet's (The Warden of the) Caſe, 154
Fowkes v. *Joyce*, 50

G.

GAwden v. *Draper*, 217
George v. *Butcher*, 140
Godfrey v. *Ward*, 185
Gower's (Sir *Thomas*) Caſe, 90
Goylmer v. *Paddiſton*, 353
Grove v. Dr. *Elliot*, Chancellor of *Sarum*, 41
Guldeford (*Major & probi homines de*) v. *Clarke*, 243, 247

H.

HAnſon (*Judith*) v. *Liverſedge* 239, 242
Harding's (*Patrick*) Caſe, 315
Harris v. *Parker*, 249, 253, 270
Harriſon (*Tho.*) *& Ux'* v. Dr. *Burwell*, 9
Haſlewood v. *Mansfield*, 196
Haymer Vid. v. *Haymer*, 343
Highway v. *Derby*, 174
Hocket & Ux' v. *Stegold & Ux'* 29
Hodges v. *Waddington*, 360
Holland v. *Lancaſter*, 131, 134
Hollis's (my Lord) Caſe, 345
Humphreys v. *Bethily*, 198, 222

K.

K.

Kemp v. *Cory & al'* Page 224, 227, 283
Killigrew v. *Sawyer*, 79
King, of *Gray's Inn* v. Sir *Edward Lake*, 28

L.

Lade v. *Baker* and *Marsh*, 145, 149
Lade v. *Barker*, 260, 266
Lawson v. *Haddock*, 234, 237
Lechmere & al' v. *Toplady & al'*, 156, 169
Leigh v. *Ward*, 72
Lexington (the Lord) v. *Clarke* and his Wife, 223
Littleton's (Sir *Thomas*) Case, 351
Lundy's (Colonel) Case, 314

M.

Marks v. *Nottingham*, 196
Marsh v. *Lee*, 337
Mason v. *Watkins*, 109
Massingburn v. *Durrant*, 49
Morgan v. *Hunt*, 213
Morley v. *Polhill & al'*, 51, 56
Montague (the Earl of) v. The Lord *Preston*, 170
Moore v. *Fursdon*, 214

N.

Newport v. *Godfrey*, 184
Noell v. *Robinson*, 358
Norwood v. *Woodly*, 193

O.

Onslowe's Case, Page 37
Otway's (Sir *John*) Case 31
Oxford's (the City of) Case, 106

P.

Page v. *Kirke*, 36
Pawlet's (the Lord) Case, 366
Perrot's (*Herbert*) Case, 30
Pheasant (*Peter*) v. *Anne Pheasant*, the *Lord Mayor* of *London*, and Sir *Thomas Player*, Chamberlain of *London*, &c. 340
Pinager v. *Gale*, 100
Pretious v. *Robinson*, 173
Prynne v. *Sloughter*, 101, 104
Pyne v. *Wolland*, 176, 179

R.

Ragget (*William*) & *Ux'* v. *William Clarke*, 364
Rashly v. *Williams*, 59, 61
Reeve's (Sir *Robert*) Case, 363
Rogers v. *Bradly*, 143
Rozer v. *Rozer*, 36
Rudyard's (*Thomas*) Case, 22

S.

Salisbury's (the Lord) Case. 365
Samin v. *Jones*, 318
Sarsfield v. *Witherly*, 292
Sayle v. *Freeland & al'*, Infants, 350
Sherborn v. *Colebach*, 175

Shipley v. *Craiſter*, Page 131
Simithſon's (Sir *Jerom*) Caſe, 345
Snode v. *Ward*, 197

T.

Target v. *Lloyd*, 272, 277
Thompſon v. *Leach*, 198
Tovey v. *Pitcher*, 228, 234
Tregonwell (*Jane*) *Vid.* Executrix of *John Tregonwell* v. *Sherwin*, 262
Trethewy v. *Elleſdon*, 141
Trippet v. *Eyres*, 110, 113
Tunſtal v. *Brend*, 174
Turner (*Methuſelah*) v. Sir *Samuel Sterling*, 348
Turner's Caſe, *Ibid.*

W.

Walden (Sir *Lionel*) v. *Mitchel* Page 263, 265
Waldwin v. *Auberry*, 35
Warren v. *Sainthill*, 185, 186
Watmough v. *Holgate & al'*, 219, 221
Web (*Priſcilla*) v. *Moore*, 279, 282
Welbie v. *Phillips*, 129
Weſt v. the Lord *Delaware*, 357
Weſtby's Caſe, 152
Whitaker v. *Thoroughgood*, 130
White v. *Ewer*, 340
Whitmore (*Frances*) *Vid.* v. *Weld & al'*, 367
Williams v. *Bond*, 238
Willows v. *Lydcot*, 285
Woodward & al' v. *Fox*, 187, 213, 267
Wright v. *Wyvell*, 56

A TA-

A TABLE OF THE PLEADINGS IN THE SECOND PART.

A.

Actions upon the Case.

1. IN a Special *Indebitatus Aſſumpſit* againſt an Attorney.

The Plaintiff declares, that whereas *T. S.* was indebted to the Plaintiff in a certain Sum of Money exceeding 12 *l.* and the Defendant was indebted to the ſaid *T. S.* in 12 *l. aut eo circiter*, the Defendant promiſed, that if the Plaintiff would procure an Order under the Hand of the ſaid *T. S.* for Payment of the Money which he owed the ſaid *T. S.* or any Part thereof, that then he would pay the ſame; and avers that he procured ſuch Order, and ſhewed it to the Defendant, and requeſted Payment, which he refuſed, Page 69

After Imparlance the Defendant demurs to the Declaration, 70

The Plaintiff joins in the Demurrer, 71

2. Againſt a Common Carrier, for loſing Goods delivered him to carry, 75

The Plaintiff declares that the Defendant is a Common Carrier, and ſets forth the Cuſtom of *England*, and the particulars of the Goods deliver'd to him to be carried from *B.* to *London* and that he paid him for the Carriage, and the Defendant loſt them, Page 75, 76

Iſſue thereupon, 77

3. Againſt a Sheriff for Returning *Nulla Bona* upon a ſpecial Outlawry, when the Party had Goods, 84

The Declaration ſets forth the Special Matter, 85, 86

Defendant pleads, that a *Prerogative* Writ came out of the *Exchequer*, whereupon the Defendant ſeized the Goods. *Nulla alia bona*, 87

The Plaintiff demurs, 88

4. For not Folding his Sheep upon the Plaintiff's Land, according to Cuſtom, 136

The Declaration ſets forth the ſpecial Cuſtom and Cauſe of Action. Iſſue thereupon, 137

5. For Stopping up a Foot-way, 185

The Plaintiff declares, that he was poſſeſt of, and did inhabit in an ancient

Meſſuage, and that he had and ought to have a Foot-way for himſelf and his Servants over ſuch a Cloſe, *&c.* as belonging to his ſaid Meſſuage; and that the Defendant to diſturb him in his Way dug Ditches and Trenches croſs the Way, and erected Hedges and Fences croſs it, whereby he was hindred and deprived of his Way, Page 186

6. **Indebitatus Aſſumpſit** upon ſeveral Promiſes.

For Money had and received for the Plaintiff's Uſe.

For Money laid out for the Defendant.

For Money borrowed of the Plaintiff, 254

For Money due to the Plaintiff for the Arrearages of an Account. The Defendant hath not paid the ſaid ſeveral Sums, tho' requeſted, *&c.*

As to the firſt and ſecond Promiſes, the Defendant pleads *Non aſſumpſit infra ſex annos*; as to the third and fourth Promiſes, he pleads *Non aſſumpſit*, 255

As to the firſt and ſecond Promiſes, the Plaintiff replies, and ſets forth an Original ſued forth in a *Clauſum fregit* within the ſix Years, *ea intentione* to declare againſt him, and that he promiſed within ſix years next before the Suing out of that Original.

The Defendant craves *Oyer* of the Original, and hath it; and ſays, that the Writ will not warrant the Declaration, 256

And prays Judgment, whether the Plaintiff ſhall be admitted to ſet forth that Writ *ad Warrantizandum Narrac. ſuam.*

The Plaintiff demurs to the Rejoinder:

The Defendant joins in Demurrer, 258

7. **For** Words, (*viz.*) *Papiſt* and *Penſioner*, 263

The Plaintiff declares, that he is a *Proteſtant*, and never profeſſ'd the *Romiſh* Religion; that he hath been a Member of *Parliament*, and did his Duty therein; ſets forth the *Colloquium* of the Plaintiff, and of his being a Member of *Parliament*, the firſt Words; *ex ulteriori malitia* other Words, Page 264

The Defendant pleads *Not guilty*, 265

8. **In** *Aſſumpſit* the Plaintiff declares for a Runlet of Wine.

Another *Indebitatus*, as well for Meat, Drink, Brandy and Tobacco, as for Horſe-Meat.

A *Quantum meruit* for Meat, Drink, Wine, Brandy and Horſe-Meat, found and provided by the Plaintiff as an Inn-keeper, 279

Another *Indebitatus* for Goods ſold.

An *Inſimul computaſſet*; the Plaintiff ſays, that the Defendant hath not paid the ſeveral Sums, *& inde producit ſectam*, 280

The Defendant pleads an *Outlawry* in Bar, and ſhews, that *J. S.* impleaded the Plaintiff in the *Common Pleas* in an Action of *Treſpaſs*, and for not appearing ſhe was waived, and that the *Outlawry* is yet in Force, *& hoc paratus eſt verificare per Recordum.*

Demurrer to the Plea; Joinder in Demurrer, 281

Aſſault, Battery and Wounding.

Vide **Treſpaſs**, 2.

Aſſignees, Action by and againſt them.

Vide **Covenant**, 4, 5.

Aſſumpſit.

Vide **Actions on the Caſe**, 1, 6, 8.

Award. Vid. **Debt**, 2, 4, 6.

B.

Bankrupcy. Vid. Trover, 1, 2.

Bill of Exchange. Vide Error, 2.

By-Law. Vide Debt, 7.

C.

Carrier, Action againſt him.

Vide Action on the Caſe, 2.

Clauſum fregit.

Vide Action on the Caſe, 6.

Covenant.

1. BRought by the Executor of a Biſhop, againſt the Executors of an Aſſignee of the Executor of the Leſſee, Page 51

The Declaration ſets forth the Indenture of Demiſe of a *Rectory*, *&c.* with the Conſideration and Particulars demiſed.

The Covenants to repair, and yield up the Leſſee's Entry, *&c.* 51, 52, 53

And aſſigns the Breach in permitting the *Chancel*, *&c.* to be out of Repair,

Profert in Cur. the Leaſe, 51

And Letters Teſtamentary of the Biſhop, 55

Defendants demur generally, *ibid.*

2. Againſt an Attorney upon Articles of Agreement, for quiet Enjoyment of Lands, 59

The Declaration ſets forth, that the Defendant covenanted *pro & ex parte* of another.

Recites the Articles, avers performance of all Covenants on the Plaintiff's Part, and aſſigns the Breach, that the Plaintiff and his Servants were ſued in an Action of Treſpaſs in the *Common Pleas*, and Damages recovered againſt him, which he was compelled to pay, *& ſic idem*, the Plaintiff, *non quiete & pacifie tenuit*, Page 60

The Defendant pleads *non infregit Conventionem*, and Iſſue thereupon, 61

3. By Executors upon certain ſpecial Covenants, with their Teſtator, for a Demiſe of Land, which they ſet forth, 97

They aver Performance by the Teſtator in his Life-time, and ſince his Death by the Plaintiff, and aſſign a Breach on the Defendant's Part.

Defendant pleads *quod Teſtator nihil habuit in Tenementis.*

The Plaintiffs demur to the Plea, 98

4. By an Aſſignee of an Aſſignee, againſt an Executor, 117

The Declaration ſets forth the Demiſe, and that the Defendant's Teſtator covenanted to pull down three old Houſes, and build three new ones in their Room, and to keep the ſame in good Repair, and ſo deliver them up at the End of his Term, 119

Sets forth the Plaintiff's Title to the Reverſion by Aſſignment from the Leſſor, 119, 120

And that the Tenant for Years Attorned, 121

That the Tenant in Poſſeſſion died, and left the Defendant his Executor, *&c.*

That the Plaintiff hath performed all and ſingular the Covenants on the Part of the Leſſor and his Aſſigns, *Proteſtando* that the Defendant hath not performed thoſe on the Part of his Teſtator, 122

He aſſigns a Breach *in facto*, for permitting one of the new erected Houſes to fall down, before the End of the Term, and other Defaults in not Repairing. *Et ſic* the Defendant *Conventionem non tenuit*, 123

The

The Defendant pleads Performance ſpecially to each Breach aſſign'd, and ſays, that his Teſtator pull'd down the three Houſes, and built other three Houſes in their Room which he kept in Repair, and ſo delivered at the End of his Term, Page 124

The Plaintiff demurs to the Plea, as not being ſufficient as to the leaving one Houſe totally proſtrate and ruined, as the Plaintiff declared.

The Defendant joined in Demurrer, 125

5. Againſt the Aſſignee of an Executrix, 228

The Declaration ſets forth, that the Plaintiff was poſſeſſ'd of a Term for Years yet in Being, by Indenture demiſed to the Teſtator for 21 Years, at the yearly Rent of, *&c.* 229

With a Clauſe of Re-entry and Covenants, 230

That the Leſſee entred, made his Will, made the Aſſignor his Executrix, and died: That ſhe proved the Will, entred and aſſigned to the Defendant, who entred and is ſtill poſſeſſ'd.

The Breach aſſigned was in the Non-payment of Rent, 231

The Defendant pleads, that he aſſigned over before any Rent due, 232

Demurrer to Part of the Plea; Joinder in Demurrer, Judgment for the other Part, 233

Ceſſet executio Brevis de Inquirendo de dampnis quouſque the Demurrer be determined, 234

6. In Covenant, the Plaintiff declares upon an Indenture of Demiſe from the Defendant, 272

Profert in Curia the Demiſe,

Habendum, *Reddendum*; The Covenants on the Plaintiff's Part, 273

Covenants on the Defendant's Part for himſelf and Aſſigns, to permit to make a Drain.

The Plaintiff entred and was poſſeſſ'd, and avers Performance of all Covenants on his Part.

The Breach aſſigned, *Eo quod* the Defendant being poſſeſſ'd of certain Tenements adjoining for a Term of Years, did demiſe Part of the Term to *J. S.* who entred, Page 274

And died poſſeſt: And Adminiſtration granted to his Widow, who entr'd and was poſſeſt, and took Husband.

The Husband and Wife entred and were poſſeſſ'd, and refuſe to ſuffer the Defendant to make the Drain. *Et ſic inde producit ſectam*, 275

The Defendant pleads, that he permitted the Plaintiff to make a Drain according to Covenant; but the Plaintiff refuſed it.

The Plaintiff demurs.

The Defendant joins in Demurrer, 276

D.

Debt.

1. In Debt upon a Bond, the Defendant craves *Oyer* of the Condition, and pleads the Statute of *Uſury*, 80

He ſets forth the Uſurious Contract, the Money lent, and the Bond in queſtion given for it; and that the Money for Forbearance exceeds the rate of *6 l. per Cent.* 81

The Plaintiff replies, that the Bond was made by a Scrivener in his Abſence who miſtook the Condition, and Traverſes the Corrupt Agreement.

The Defendant demurs to the Replication. The Plaintiff joins, 82

2. Debt upon a Bond, to perform an Award, 110

The Defendant craves *Oyer* of the Condition, and pleads that the Arbitrators made no Award; but that they named an Umpire, who made no Award by Writing or Word of Mouth, Page 111

The Plaintiff replies, That true it is that the Arbitrators, nor the Umpire by them firſt choſen, made any Award, but refuſed; whereupon the Arbitrators choſe another Umpire, who made an Award within the Time limited, 112

The Defendant demurs ſpecially, and aſſigns for Cauſe, That it does not appear by the Replication that the Defendant had Notice, that the Arbitrators had named the ſecond Umpire, or that he had any Authority to make any Umpirage.

The Plaintiff joins in Demurrer, 113

3. For Rent againſt an Executrix, upon a Leaſe Parol, 176

The Declaration ſets forth the Demiſe to the Defendant's Teſtator, of the 4th Part of two Corn-Mills and of one Malt-Mill under the ſame Roof, to hold for one Year, *& ſic de anno in annum*, as long as both Parties ſhall pleaſe, paying Monthly for the ſame the Sum of *6 s. 4 d. ob.* ſo long as the ſaid Teſtator ſhould hold the Premiſſes; and ſhews, that he entred and held it for ſo long, and that the Rent is due and unpaid for ſo many Months *per quod actio accrevit*, 176

He alſo ſets forth another Demiſe from Year to Year, ſo long as both Parties ſhall pleaſe, at the yearly Rent of 20*l.* to be paid quarterly by equal Portions, the Tenant's Entry, the Rent arrear, *per quod actio accrevit.*

Another Demiſe at Will laid, Entry, Rent arrear, *Actio accrevit*, 177

Another Demiſe at Will laid, of the 4th Part of another Mill, Entry, Rent arrear, *Actio accrevit*; the Teſtator in his Life-time, nor the Executrix *poſt mortem*, have not paid, Page 178

The Defendant pleads in Abatement, That the Tenant died Inteſtate, and that Adminiſtration was granted to her, and therefore ought to be ſued as Adminiſtratrix, and not as Executrix, *ibid.*

The Plaintiff replies, That the Defendant adminiſtred as Executrix, before the Granting the Adminiſtration to her.

The Defendant demurs to the Replication. The Plaintiff joins, 179

4. Debt upon Bond. The Defendant craves *Oyer* of the Condition, which is to perform an Award, 219

Pleads, That the Arbitrators made no Award.

The Plaintiff replies, and ſets forth the Award made in Writing, and aſſigns a Breach in not paying a certain Sum of Money awarded, 220

The Defendant demurs. The Plaintiff joins, 221

5. Debt upon a Sheriff's Bond, 234

The Defendant prays *Oyer* of the Condition, which was to appear in *Chancery* to anſwer a Contempt.

Pleads the Statute of 23 *H.* 6. That an Attachment iſſued out of *Chancery*, delivered to the Plaintiff, being Sheriff, who cauſed the Defendant to be arreſted, and after took the ſaid Bond for his Appearance, 236

Contra formam Statuti prædicti, & ſic ſcriptum Obligatorium illud, &c. vacuum in lege exiſtit.

The Plaintiff demurs to the Plea. The Defendant joins, 237

6. Debt upon Bond, condition'd to perform an Award, 239

The Defendant pleads, that the Arbitrators made no Award.

The Plaintiff replies, and ſets forth an Award made *ore tenus*, Page 240
Notice of the Award, and Requeſt for the Performance of it.
Demurrer to the Replication.
Joinder in Demurrer, 241
7. Debt upon a By-Law, made by a Corporation by Preſcription, 243
The Declaration ſets forth, That the Town of *G.* is *Antiqua Villa*, a Corporation Time out of Mind.
Power to implead, and be impleaded.
A Cuſtom to make By-Laws for good Government of the Corporation, and to impoſe Penalties.
Cuſtom to elect a Bailiff annually, 243
The By-Law ſet forth, Forfeiture for the Breach.
The Defendant elected Bailiff for the Year then next following, who refuſed to execute the Office, *per quod Actio accrevit.*
The Defendant pleads the Act of 13 *Car.* 2. 244
The Act ſet forth, 245
And alledges that he is, and at the Time aforeſaid was a Proteſtant Diſſenter, and had not received the Sacrament, according to the Rites of the Church of *England*, within a Year before his Election; and that the ſaid Election (by Virtue of the ſaid Act) was void.
The Plaintiff demurs.
The Defendant joins, 246
8. Debt for Rent upon two ſeveral Demiſes by Leaſe Parol, 249
The firſt Demiſe.
Exception, *Habendum*, *Reddendum*, Entry, Rent arrear, *Actio accrevit*, 250
The ſecond Demiſe, Exception, *Habendum*, *Reddendum*, Rent arrear, *Actio accrevit*, 251
The Defendant pleads, That the Plaintiff, *Nihil habuit in tenementis tempore dimiſſionis* (it ſhould have been *temporibus dimiſſionum*) 251
The Plaintiff replies, That before the ſeveral Demiſes, one *J. S.* demiſed to him for forty-one Years, the ſaid *J. S.* having then full Power, Right and Title, to make ſuch Demiſe; by Virtue of which he entred and was poſſeſſed, and demiſed to the Defendant, Page 252
The Defendant demurs.
The Plaintiff joins in Demurrer, 253

Diſtreſs and Avowry.

Vide **Replevin.**

E.

Error.

1. Error, in the *Exchequer-Chamber.*
The Style of the Court, 286
The Writ of Error, 287
The Return of the Writ.
The *Memorandum*, and Declaration in a ſpecial Action of the Caſe, for not Grinding at an antient Mill.
Seiſin of the Manor and Mill.
The Plaintiff farmer of the Mill, *& habuit & habere debuit* the Toll, 288
The Defendant, Occupier of an antient Meſſuage, which ought to grind at his Mill.
That the Defendant erected a Hand-Mill, and ground therewith, *ratione cujus* the Plaintiff loſt his Toll.
The Defendant imparls, and pleads Not guilty, 289
Poſtea, *Tales*, Verdict for the Plaintiff.
The Judgment.
The *Placita* in the *Exchequer-Chamber*, 290
The General Errors aſſigned.
A *Scire facias ad audiendum Errores* prayed, and awarded,

The

The Defendant in the Writ of *Error* appears, and pleads *in nullo eſt Erratum*, Page 291
2. The *Placita* in the *Exchequer Chamber.*
The Writ of *Error*, 296
The Return of the Writ.
The *Placita*, 297
The *Memorandum*, and Declaration upon an Inland Bill of Exchange.
The Cuſtom ſet forth, That any Merchant, or other Perſon, *vel Ordini ſuo, ſuper viſum acceptavit, & ſic per Indorſamentum appunctuaret, pro valore recept', &c.* Upon Refuſal to pay, the Merchant or other Perſon to become chargeable, 298
Avers, That the Defendant being a Merchant at *N.* drew a Bill upon one *J. S.* in *London*, payable to one *P.* or Order, for Value received.
The Bill preſented to *J. S.* and acce ted by him.
P. orders Payment to the Plaintiff.
J. S. had Notice, and the Money demanded of him; but refuſed Payment; of which the Defendant had Notice, 299
And became chargeable, and thereupon promiſed Payment; but tho' after requeſted *non ſolvit*, 300
The Defendant *Proteſtando* that there is no ſuch Cuſtom; for Plea ſays, That one *C.* an Exciſe-man, paid the Defendant the Money in Queſtion, being the King's Money, to the Intent that it ſhould be paid to the King, and the Defendant at *C.*'s Requeſt drew the Bill.
That *C.* was then indebted to the King, *prout per Record' Scaccarii*, 301
That an Extent iſſued out thereupon *ad inquirendum.*
The Writ delivered to the Sheriffs of *London.*
An Inquiſition taken by them, 302
The Money and Bill of Exchange ſeized and returned into the *Exchequer.*
The King became entituled.
An Extent iſſued out to the Sheriff of *N.* for the Levying the Money, and the Money paid thereupon.
Averment of *una & eadem perſona*, Page 304
Et una & eadem Billa; Et una & eadem Summa.
The Plaintiff demurs to the Plea eſpecially, Cauſes of Demurrer.
The Defendant joins in Demurrer, 304
Eleven Continuances, 304, 305, 306
The *Loquela*, and Proceedings revived by Act of Parliament 1 *W. & M.*
Judgment for the Plaintiff upon the Demurrer.
A Writ of *Enquiry* awarded, 306
The Inquiſition return'd.
Damages found, Judgment for the Plaintiff, 307

Leaſe and Releaſe, 119, 120.

Mill and Toll.

Vide **Error**, 1.

Outlawry pleaded.

Vide **Action on the Caſe**, 8.

Prerogative Proceſs.

Vide **Action on the Caſe**, 3.
Error, 2.
Trover, 2.

Preſcription, 130.

Quantum meruit.

Vide **Action on the Caſe**, 8.

R.

Record pleaded at large, 159, 160, 169.

Rent.

Vide **Debt**, 3, 8.

Replevin.

1. THE Plaintiff declares for Taking and Detaining eight Cows, *&c.*

The Defendant acknowledges the Taking as Bailiff to the Dean and Chapter of *Canterbury*, Page 131

Sets forth, that they are Lords of the Manor of *M.*

That *J. S.* was ſeiſed of the *Locus in quo*, Parcel of the ſaid Manor, and held it of the Dean and Chapter by Fealty, Rent and Suit of Court.

Sets forth a Cuſtom for the Lord to have a Year and a Half's Rent upon every Alienation, and Power to diſtrain for it.

Shews the Alienation and the Purchaſer's Entry, and that there was ſo much due for a Fine by Cuſtom; and becauſe the ſame was unpaid the Defendant diſtrained *infra feodum, &c.* 132, 133

The Plaintiff demurs to the Cognizance.

The Defendant joins in Demurrer, 134

2. Againſt two Defendants; One of which avows, the other acknowledges the Taking as Bailiff to the former, 145

They ſet forth, that long before the Taking *R. L.* and *L. L.* were ſeiſed in Fee of the *Locus in quo*, and by Deed granted an Annuity to the Anceſtor of the Avowant and his Heirs, iſſuing out of certain Lands of which the *Locus in quo* was Parcel, with Power of Diſtreſs, conditionally to be void upon Payment of 100*l.* on a certain Day then to come, which was not paid, *&c.* Page 146, 147

And for ſix Years Rent arrear the Diſtreſs was made, which the one Defendant *bene advocat*, and the other *bene cognoſcit*, as in the Lands charged with the Diſtreſs.

The Plaintiff demurs to the Avowry and Cognizance.

The Defendants join, 148

3. The Plaintiff declares for Taking his Colt, *&c.* 210

The Defendant avows for *Damage-feaſant*; and ſets forth, that *E. M.* being ſeiſed in Fee, demiſed the *Locus in quo* to the Avowant, to hold at Will.

That he entred and was poſſeſs'd, and took the Colt *Damage-feaſant*; prays Judgment and a Return, and Coſts and Damages, according to the Statute.

The Plaintiff pleads in Bar to the Avowry, That *E. M.* demiſed the *Locus in quo* to him before the pretended Demiſe to the Defendant, to hold for ſix Years.

That he entred and was poſſeſs'd; and that the Defendant took his Colt there, *abſque hoc* that *E. M.* demiſed to the Avowant *modo & forma*, as he hath ſet forth, 211

The Avowant demurs generally.

The Plaintiff joins, 212

4. The Plaintiffs declare againſt three Defendants, for Taking and Detaining their Cattle, 224

One of the Defendants avows, the other two make Cognizance, as his Bailiffs.

The Avowant ſays, That the Father being ſeiſed in Fee of the third Part of a certain Meſſuage, *&c.* of which the *Locus in quo* was Parcel, demiſed the ſame for ninety-nine Years, if *A. B.* and *C.* or either of them ſhould ſo long live, reſerving Rent.

That

That the Leſſee entred.
That the Father being ſeized of the Reverſion, died ſeized, and a Deſcent to the Avowant as Heir at Law; who diſtrained for Rent arrear, Page 225
Super predictam tertiam partem, &c.
And avers, that *C.* is ſtill living.
In Bar to the Avowry, the Plaintiffs confeſs the Seiſin of the Father of one third, and that *J. S.* was ſeized of the other two Parts, who licenced the Plaintiffs to put in their Cattle upon the *Locus in quo*, which they did, 226
The Defendants demur to the Bar.
The Plaintiffs join in Demurrer, 227

S.

Scire facias.

1. AGainſt a Ter-tenant, 101
The Judgment recited in the Writ to the Sheriffs of *London*.
The Plaintiff *obtulit ſe* at the Return.
The Sheriffs return, that there were no Tenants of any of the Defendant's Lands at the Time of the Judgment, or at any Time ſince, *quibus Scire fac' poſſunt*, *ibid.*
A *Teſtatum Scire fac'* to the Sheriffs of *Norfolk*.
The Plaintiff and a Ter-tenant appear at the Return.
The Sheriff returns, that he had ſummon'd *P. S.* who was then Tenant of Lands which were the Defendant's at the Time of the Judgment, and that there are no other Tenants, to whom, *&c.*
The Ter-tenant, *ſalvis ſibi omnibus exceptionibus, &c.* imparls.
The Plaint revived, continued and adjourn'd, by Act of Parliament, 3 *Febr.* 1 *W. & M.*
A further Imparlance.
The Plaintiff prays Execution, P. 102
The Ter-tenant pleads in Abatement of the Writ, and alledges, that there are other Tenants of other Lands in *Surrey* belonging to the Defendant at the Time of the Judgment, and prays Judgment, and that the Writ may be quaſh'd.
The Plaintiff demurs to the Plea.
The Ter-tenant joins in Demurrer, 103

Sheriff.

Action againſt him.

Vid. Action on the Caſe, 3.

Plea to his Bail-Bond.

Vid. Debt, 5.

Slander.

Vid. Action on the Caſe, 7.

Special Verdict.

Vid. Trover, 2.

T.

Treſpaſs.

1. TReſpaſs againſt the Defendant *ſimul cum G. F.* for taking *Vi & armis*, and Impounding his Cattle *quouſque finem fecit* of 11 *l. &c. contra pacem, &c.*
The Defendant, as to the *Vi & armis*, and *contra pacem*, pleads Not guilty.
And as to the Reſidue of the Treſpaſs, he pleads a Seizure by Virtue of a *Fieri facias* out of the Common Pleas,

and the Sheriff's Warrant thereupon, and that the Cattle were appraiſed at 11 *l.* being the true Value, and detain'd until the ſaid Sum was paid to the Sheriff's Bailiff, for the Uſe of the ſaid Sheriff, *pro deliberatione averiorum, prout bene licuit*, which was the Reſidue of the ſaid Treſpaſs; *abſque hoc* that he is guilty before or after the ſaid Taking, Page 91, 92

The Plaintiff demurs, and aſſigns for Cauſe, that the Traverſe is ill as to Time, and that the 11 *l.* ought not to have been paid to the Uſe of the Sheriff, by the Law of the Land.

The Defendant joins in Demurrer, 93

2. **Treſpaſs** for Aſſault, Battery, Wounding and Impriſonment, 189

As to the *Vi & armis, & vulnerationem* the Defendant pleads Not guilty, and Iſſue thereupon.

As to the Reſidue of the Treſpaſs, he pleads, that he obtained Judgment againſt the Plaintiff in the Common Pleas, in an Action of *Indebitatus Aſſumpſit*; which Judgment was afterwards ſet aſide and vacated; but before it was vacated a *Ca. ſa.* was ſued out thereupon, directed to the Sheriff, who made his Warrant to the Bailiff of the Liberty, 190

The Bailiff takes the now Plaintiff thereupon, and had him in Cuſtody until he paid the Money, *quæ ſunt idem Reſid' Tranſgr', Inſult' & Impriſonat'*, and Traverſes, that he is not guilty of any other Treſpaſs, &c.

The Plaintiff replies, that the now Defendant (then Plaintiff in the Judgment) was an Attorney, whoſe Duty is to enter Judgments fairly and honeſtly, and that he in Deceit of the Court entred the Judgment, when he ought not to have done it, 191

And that afterwards, on the Examination and Conſideration of the ſaid Entry, the ſaid Judgment was by the ſaid Court adjudged void *ab initio*, Page 192

The now Defendant (Plaintiff in the Judgment) confeſſeth the Matter, and ſaith, that he appointed the Judgment to be duly entred; but by Default of the Clerk it was entred irregularly: *Abſque hoc* that it was entred by the ſaid now Defendant *falſo & fraudulenter in deceptionem Curiæ*, ibid.

The Plaintiff demurs.

The Defendant joins, 193

Trover.

1. **Trover** brought by an Aſſignee of Commiſſioners of Bankrupts, 63

The Declaration ſets forth the Bankrupt to be poſſeſs'd of ſuch and ſuch Goods, which came to the Hands of the Defendant, *ibid.*

That the Bankrupt exerciſed the Trade of a Vintner, and became Indebted to ſeveral Perſons.

That he departed from his Dwelling-Houſe, and became a Bankrupt.

That the Creditors petition'd the Lord Chancellor.

The Commiſſion ſued out, 64

The Commiſſioners find him a Bankrupt, and make Aſſignment to the Plaintiff, 65

A Converſion of the ſaid Goods by the Defendant, 66

The Defendant demurs to the Declaration.

The Plaintiff joins in Demurrer, *ibid.*

2. **Againſt** the Sheriffs of *London* and others, for 225 *l.* in Money numbred, and divers Goods, 1-5

The Defendants as to Part of the Goods (which they ſet forth in particular) that the Plaintiff formerly brought an Action of Treſpaſs upon the Caſe in the King's Bench againſt the now Defendants, for taking and carrying away the Goods now ſued for, Page 159
That upon Not guilty pleaded, the Iſſue came to a Trial, and the Jury found a Special Verdict, 160
Which they recite at large.
That the Owner of the Goods became a Bankrupt.
That a Judgment was recovered againſt him for 100*l.* and a *Fieri facias*, iſſued out, which being deliver'd to the Sheriffs of *London*, they ſeized the Goods, in Execution.
That after Seizure, and before Sale, a Prerogative Proceſs iſſued out againſt the Goods, which is recited *in hæc verba*, 161
Their Return of the ſaid Proceſs, 163
The Goods taken by Inquiſition, inventoried, appraiſed and ſold, and the Money delivered to the King's Debtor, 164
A Commiſſion of Bankrupt ſued out.
The Commiſſioners aſſigned to the Plaintiffs.
The Aſſignees poſſeſs'd.
And then they conclude, *Si utrum ſuper tota Materia* the Defendants are guilty, the Jurors know not, if the Court ſhall adjudge them guilty, they find for the Plaintiffs; if not, for the Defendants, Page 165
After ſeveral Continuances, the *Loquela* remaining *ſine die*, was revived and continued by Act of Parliament 1 *W. & M.*
After which Judgment for the Defendants, 166
That the ſaid Defendants ſhall go *ſine die*, and have their Coſts, 167
Averment, that the ſaid Judgment remains in full force.
That the Goods in the ſaid Action of Treſpaſs, and this of Trover, are the ſame.
That the Converſion in this Action, and the Taking in the other, is the ſame,
That the Cauſe of Action was the ſame in both.
And that the Plaintiffs and Defendants are the ſame.
Et hoc parati ſunt verificare unde petunt Judicium ſi prædicti, the Plaintiffs, *Actionem ſuam verſus eos habere debeant, &c.*
Not guilty to the Reſidue of the Goods.
The Plaintiffs demur.
The Defendants join. 168

Uſury pleaded. Vid. **Debt**, 7

Way, Action for ſtopping it.

Vid. **Action on the Caſe**, 5.

WE all knowing the great Learning and Judgment of the Author, do (for the Benefit of the Publick) approve of and allow the Printing and Publiſhing of this Book, Intituled, *The Reports of Sir* Peyton Ventris *Kt. late one of the Juſtices of the Court of Common Pleas.*

April the 20th, 1695.

J. Somers, C.S.
J. Holt,
Geo. Treby,
Ed. Nevill,
Joh. Powell,
W. Gregory,
N. Lechmere,
Tho. Rokeby,
G. Eyre,
Jo. Turton,
John Powell,
Sam. Eyre.

The Second Volume.

TERMINO SANCTI HILLARII,

Anno Viceſimo primo & ſecundo

Caroli Secundi,

IN

COMMUNI BANCO.

Craw *verſus* Ramſey.

IN an Ejectment of Lands and the Rectory of Kingſton upon Thames, in Surrey.

Upon Not guilty pleaded, the Jury found a Special Verdict to this Effect; (viz.)

That Robert Ramſey, born in Scotland before the Acceſſion thereof to the Crown of England, had Iſſue four Sons, Robert, Nicholas, John and George, Antenati; Robert died (they do not find when) leaving Iſſue three Daughters, Margaret, Iſabel and Jane, who were alſo Aliens, and alive 1 Octob. 14 Car. 1. Nicholas had Iſſue Patrick, born in England, 1 May 1618. They alſo find, that at the Parliament holden 10 Car. 1. in Ireland it was enacted, That all Perſons of the Scottiſh Nation ſhould be reputed the King's natural Subjects to all Intents, Conſtructions and Purpoſes of that his Realm of Ireland, as if born there. And they find the Act of Parliament at large.

1 Lev. 59. Chief Juſt. Jones, 10. Vaugh. 274. 1 Vent. 413, and ſee the Caſes there cited.

Nicholas Ramſey was alive at the Making of that Act. John the third Son (afterwards Earl of Holderneſs) was naturalized by Act of Parliament in England 1 Jacobi, and purchaſed the Lands and Rectory in Queſtion; and being ſeiſed 22 Jac. by Indenture Tripartite, between him of the firſt Part, Sir William Cocke and Martha his Daughter of the ſecond Part, and Charles Lord Effingham of the third Part: In Conſideration of a Marriage to be had between him and Martha, did covenaut to levy a Fine to the Uſe of himſelf for Life, and afterwards to Martha for Life, the Remainder to the Heirs Males of his Body, the Remainder to his own right Heirs.

And 29 Sept. 22 Jac. the Marriage was had, and the Michaelmas Term after a Fine was levied accordingly. The 24 of Jan. 1 Car. 1. The Earl died without Iſſue, Martha entred and was ſeiſed for her Life, and died 17 Car. Et eodem anno it was found by Offices That the Earl of Holderneſs died ſeiſed of the Rectory, as before, and without an Heir; and that King Charles (anno decimo) granted that Rectory to one Murray.

George (the fourth Son of Robert) was naturalized by the Parliament here 7 Jac. He had Iſſue John the Defendant, Nicholas died. Patrick his Heir in 1651. bargained and ſold to the Earl of Elgin and one Sydenham, virtute cujus & vigore Statuti, &c. they were ſeiſed prout Lex poſtulat; and in 1662. bargained and ſold for Years to Amabel, Counteſs of Kent, and Jane Hart; and afterwards releaſed to them and their Heirs in 1665. They being ſeiſed, bargained and ſold by Leaſe and Releaſe alſo to Pullen and Neale, who entred, and bargained and ſold to Sir Lionel Talmaſh and Weſt, the Leſſors of the Plaintiff, upon whom John the Defendant entred.

Upon which the Action is brought, and the great Queſtion in the Caſe was, Whether Patrick the Son of Nicholas might claim theſe Lands, as Heir to the Earl of Holderneſs, by Virtue of the Act of Parliament in Ireland, 10 Car. or that they ſhould deſcend to the Defendant the Son of George, naturalized in the 7th of Jac. in England.

Wylde and Archer (who argued firſt) were of Opinion, That however the Point was adjudged, the Plaintiff could not have Judgment upon this Verdict; for they do not find that Patrick entred or was ſeiſed, but that he in 1651. did bargain and ſell, &c. Virtute cujus the Bargainees were ſeiſed prout Lex poſtulat; and then bargained and ſold in 1662. and do not ſo much as find their Bargainees ſeiſed prout Lex poſtulat. But they find the Defendant entred, and ſo the primer Poſſeſſion is in him, which is a good Title againſt the Plaintiff, for whom none is found, it not being found that Patrick entred.

Again, If the Naturalization in Ireland will serve in England, the Title appears for the Daughters, the Heirs of Robert the eldest Son, for 'tis found that he died, but not when, so it might be after the Act of 10 Car. Parliament Cases 79, 80, &c.

But Tyrrel, and Vaughan, Chief Justice, differed in these two Points.

As to the First, They said it would be intended Patrick entred; for a Verdict that leaves all the Matter at large to the Judgment of the Court, will be taken sometimes by Intendment, as well as where the Jury conclude upon a special Point. 2 Cro. 64. find an Incumbent resigned, the Resignation shall be intended accepted. So in 4 Co. Fullwood's Case it was found, That one came before the Record of London and Mayor of the Staple, & recognovit se debere, &c. and did not say, per scriptum suum obligatorium, nec per formam Statuti, yet intended so. Vide Hob. 262. And where they find the Bargainees seised prout lex postulat, that doth not leave it doubtful whether seised or no, but whether by Right or Wrong; for Seisin must be taken as found expressly. Neither do they find any other in Possession, nor that the Defendant made any Claim in twelve Years after, which enforces the Intendment as before: And it is found expressly that Pullen and Neale entred in 1665. so that the Defendant had not the primer Possession however, or if he had, he should not have Judgment, if no other Title were found for him, as is resolved in 1 Cro. 57, 58. Hern and Allen's Case. 2 Saund. 112. Hob. 85.

As to the Second, It shall be intended Robert died before 10 Car. for he is found an Alien, and shall be presumed to have continued so during his Life, unless found to the contrary; then the Descent to the Daughters is obstructed by the Incapacity of their Father. And tho' when the Title is found for the King, the Court shall adjudge for him; because the King's Courts are intrusted with his Rights, 'tis not so of any other Person: But they shall take no Notice of any Title found for a Stranger.

Wherefore they held (notwithstanding these Omissions in the Verdict) that Judgment might be given for the Plaintiff.

And Tyrrel was of Opinion, in the Principal Matter, for the Plaintiff. In his Argument he considered of divers Kinds of Allegiance, natural and acquired, which was either local or legal: As when a Man is sworn in the Leet, denizated by the King's Letters Patents, obtained by Conquest, or naturalized, which Naturalization must be by Act of Parliament, and cannot be limited, 2 Cro. 539. 1 Inst. 129. Who is to all Purposes a natural-born Subject, an Indictment of Treason against such an one is contra naturalem ligeantiam. Neither can it be confined to Place; for 'tis due to the Natural, and not to the Politick Person of the King, Mo. 790. And the Plea of infra ligeantiam Regni sui Angliæ was rejected in

Calvin's Caſe in Co. and ſaid to be never heard of before. Idem eſt naſci, & idem naturalizari. And he argued, That in regard Ireland hath the like Court of Parliament that England hath, it hath alſo the ſame Power, and conceived that the Engliſh Laws were introduced by Parliament in King John's Time: For in the Charter 11 H. 3. it is recited, that Johannes quondam Rex Angliæ duxit ſecum in Hiberniam Viros diſcretos & legis peritos, quorum Communi Concilio & ad inſtantiam Hibernenſium ſtatuit, &c. & ex diuturnitate temporis omnia præſumuntur ſolenniter eſſe acta. In 4 Inſt. 357. it appears, That Parliaments were holden there before 17 E. 3. 2 R. 3. 12. Hibernia habet Parliamentum, & faciunt Leges. And in 4 Inſt. 452. it is ſaid, They may naturalize an Alien; and if they do ſo, he is all one with an Iriſh Man born: As one that purchaſeth his Freedom in a Corporation, hath all Immunities as amply as he that is born a Member of it. Neither doth it follow from hence, that an Act of Parliament in Ireland could bind England; it is the Law of England co-operating with the Act, that gives the Naturalization an Effect here. The Act is but remotio Impedimenti: As if one were attainted by the Parliament there, he ſhould forfeit his Lands here, and if that Act were repealed, he ſhould be reſtored to them again; yet neither Act were obligative to England: The Act of Ireland is cauſa remota, or ſine qua non; the Law of England is cauſa proxima, and this of Naturalization was one of the Wonders of the Powers and Privileges of Parliament; As Legitimation of a Baſtard, and the like.

Parliament Caſes 79. 2 Salk. 411, 510.

The other three Juſtices were of a contrary Opinion, and argued to this Effect: That Ireland was a conquered Kingdom, the Conqueſt compleated, if not begun in King Henry the Second's Time; in whoſe Time there is no Record of any Eſtabliſhment, and being a Chriſtian King they remained governed by their own Laws, until King John (Anno 12 Regni ſui) by Charter (for ſo they conceived it to be, and not by Parliament; for it appears that the Nobles were ſworn, which is not uſual in Acts of Parliament, neither is it Teſte Rege in Parliamento) introduced the Engliſh Laws; yet it ever hath remained a diſtinct Kingdom, (viz.) from the bringing in the Laws by King John, M. Paris Hiſt. 230. and Calvin's Caſe in 7 Co. 22, 23. the Conqueſt brought it infra Dominium Regis, ſed non infra Regnum Angliæ. Orurke committed Treaſon in Ireland, and it was held triable by Commiſſion, by 33 H. 8. as a Treaſon out of the Realm. 20 H. 6. 8. The Judges here are not bound to take Notice of the Laws of Ireland. Fitzh. Tit. Voucher 239. A Man in Ireland cannot be vouched. Anderſ. 262, 263. 2 Inſt. 2. it is ſaid, Magna Charta, nor the Stat. Laws here did not extend to Ireland until Poining's Law, 10 H. 7. tho' in Truth it appears to be before by 8 E. 4. cap. 10. neither are they

2 Salk. 411, 412, &c. 510, 666.

obliged by any Statute ſince unleſs named, Dyer 303. It is ſaid of Lands holden in Capite in England and Ireland, that there ought to be ſeveral Liveries and by ſeveral Seals. 11 Ed. 4. 7. When the King went into Ireland it was held to be a Voyage Royal. And Wylde ſaid, Two Kingdoms could not be united but by Act of Parliament; and there ought to be reciprocal Acts; and ſo is my Lord Coke, 4 Inſt. cap. Scotland. But this the Chief Juſtice ſaid in his Argument, was not requiſite in Caſe of a conquered Nation, which hereby had loſt its original Right of holding Parliaments, but he agreed in Caſe of Kingdoms independent one upon the other. He ſaid he had a Charter whereby Gaſcoigne, Guyenne and Calais were united to England in Ed. the 3d's Time, and recited to be by mutual Pact upon a Peace concluded, that Wales was fully conquered in Ed. the 1ſt's Time; whereupon they all ſubmitted de alto & baſſo to the King; and it appears he abrogates ſome Laws, makes ſome new, and continues others, and Wales was united and conſolidated with England, in H. 8's Time by Act of Parliament here, but there was no Act on their Part; neither is Ireland only a diſtinct Kingdom, but alſo ſubordinate. A Law enacted here to extend to all the King's Dominions ſhall bind Ireland; Writs of Error have always been brought here to reverſe Judgments in Ireland; and they naturally lie, as the Chief Juſtice ſaid, into all ſubordinate Kingdoms, Fitz. Tit. Aſſ. 562. A Writ of Error to reverſe a Judgment given in an Aſſize in the County of Glamorgan, and 21 H. 7. 31. B. it is ſaid many Writs of Error have been brought to reverſe Judgments given in Calais, tho' it was alledged the Civil Law there was in Uſe.

So the Romans allowed Appeals out of every Province ſubordinate unto them, as appears by the Caſe of St. Paul in the Acts, and 'tis againſt Nature that the Inferior ſhould have any Influence upon the Superior; ſuppoſe a Bill of Naturalization were brought into Parliament here and rejected, and after it ſhould paſs in Ireland, ſhould it have the ſame Effect as if it had paſſed here? If this might have been, what needed the Endeavours in the Beginning of King James's Reign to obtain an Act for the Naturalization of all Scots, and the Union of both Kingdoms, when an Act in Ireland would have been as effectual, and procured with much greater Facility? Neither is the Parliament of Ireland equal to that of England, for that might be alienated by an Act of Parliament, as Gaſcoigne and Guyenne were by mutual Conſent, tho' the King cannot do it alone; therefore King John's Grant to the Pope was held abſolutely Void; but Ireland could not be transferred from the Sovereignty of England by any Act there, for they cannot diſcharge themſelves of their Subordination to England. H. 3. granted to Ed. 1. Terram Hibernicam, and it was held to be void,

4 *

40 Ed. 3. 4 Inſt. 357. And if they ſhould make an Act there, That no Writ of Error ſhould lie into England, the Chief Juſtice ſaid it would be void, for their Power is meerly precarious as to the Parliament of England, tho' not to the King in regard of his Charter: Wherefore he ſaid it might be queſtioned whether they could naturalize at all, for the King cannot alone, and their Power is wholly derived from this Charter, neither hath it been attempted by them until 10 Car. 1. when the Earl of Strafford was Lieutenant there: Whereas it was ſaid on the other Side, That to be naturalized in Ireland was the ſame Thing as to be born in Ireland; he denied it, unleſs they added by the Laws of Ireland, i. e. the Law gives him there all the Privileges a Native hath; but this was not ligeantia nata, ſed data, and therefore can extend no further than the Power of them that gave it; and tho' it be ſaid, An Act of Parliament can do any Thing, that muſt be underſtood as to Civil Things, which are but the Creatures of Men, therefore may be altered and diſpoſed at the Will of the ſupream Authority; but natural Things are not within its Power: For an Act of Parliament cannot make a Man a Woman, or a Man to be born in any other Place than where he was really born, tho' it may give him ſuch Privileges as one hath that is born there, viz. ſuch as are within their Power and none elſe; and 7 Co. 18. B. The Time of the Birth is of the Eſſence of a Subject born, and after in Calvin's Caſe 27. it is ſaid, natural Ligeance reſpecteth the Time of the Birth, and he cannot be a natural Subject who was born under the Allegiance of another King, for a natural Subject is the Correlative to a natural Prince, and one naturalized there, might in all Reſpects be compared to an antenatus, who differed from a Poſtnatus in theſe two Things.

Firſt, He was another Prince's Subject before a Subject to the King of England.

Secondly, Such an one might have been an Enemy, whereas a born Subject may be a Traitor, but can never be an Enemy. Now the Subjects of a Prince that conquers another Kingdom become immediately Denizens of that Kingdom. But not è converſo, as was held in Calvin's Caſe, of the Antenati in Scotland: But the Subjects of a King who is Homager to that King, ſhall not be Aliens in any of his Dominions, as in Wales before the Conqueſt of it in Edward the Firſt's Time, the like in Scotland, as appears, Dyer 304. Pl. 57. A Scot was indicted of a Rape, who pleaded Not guilty, and prayed a Trial per medietat' Linguæ, and it was denied, for that a Scot was never accounted an Alien, ſed potius Subject', tho' the Chief Juſtice was of Opinion they ought not to have judged ſo there, becauſe the Homage of Scotland had been loſt ſo long before: The Statute of 5 Eliz. is, That none ſhall ſet up a Trade unleſs he hath been an Apprentice to it by the Space of ſeven Years. Suppoſe an Act were

made in Ireland, that it should be lawful for J. S. to set up a Trade tho' he had never been an Apprentice; this would enable him there, but no Man would say that thereby he should have Liberty to set up here: No, tho' the Words of the Act were as if he had served seven Years. So the Law is, That no Man can be naturalized here but by Act of Parliament; here Naturalization is a great Point of State-Interest, therefore the King cannot do it by his Charter. And the Inconvenience would be very great if Naturalization in Ireland should extend hither; for tho' it was objected we might obviate it if found to be so, by disallowing their Acts, which before they pass there, are sent hither and remitted under the Great Seal, and so we may repeal their Acts; yet it was said the like Power, by Consequence, must be yielded to Scotland, and we cannot disannul their Acts; so they shall introduce what Aliens they please amongst us without Controul. And tho' it was said a Naturalization there would do us no Harm, for it could never be made appear, because no Certiorari could be awarded from hence thither; yet it is manifest there are Ways of Making it appear. In 42 Ed. 3. 2. Lord Beaumont's Case, it is said that Part of Scotland was within the King's Ligeance and Part without, and that the King kept a Roll of such Places as he had under his Subjection and the Party was directed to petition the King to certify whether Rosse were so or no; so the King must be Party to their Acts there, and therefore may certify them, or they may be given in Evidence as Foreign Laws, or the Sentences in the Ecclesiastical or Civil Law Courts. Now we must not always conclude a Thing not to be Law, because it is inconvenient; but that for which there is neither practical Custom, judicial Precedent, or Act of Parliament to warrant, may be well judged to be so.

Vide 2 Cro. 484. a Certiorari to remove a Record taken at Calais.

Wylde and Archer in their Arguments did much insist upon the particular Penning of this Act, where the Makers did seem to intend that the Effect of this Naturalization should be confined to Ireland; for the Preamble recites this, Your Majesty's Realm of Ireland will be much impaired for Want of Scottish Planters, and that 100000 were planted in the Province of Ulster; there it enacts, That they and all Scottish shall be deemed your Majesty's liege Subjects of this Your Realm of Ireland, and (This your Realm) repeated almost in every Clause, which would lose its Force if the Naturalization should be construed to have a larger Extent. They also took Notice of the Proviso of the Act, That it should not extend unto any Lands whereof any Office was found for the King, and seised into his Hands: And here was an Office found 17 Jacobi; they also mentioned the Statute of 7 Jacobi c. 2. which enacts, That the Bill of Naturalization shall be twice read, unless the Person hath received the Sacrament within a Month before, and also taken the Oaths of Allegiance and Supremacy.

To

To the first Tyrril answered.

First, That Naturalization could not be restrained, at least, not by affirmative Words, for it doth not say, (your Realm of England and not elsewhere) The Act hath also these Words, (as born of Irish Parents, as natural-born Subjects) and other Words as full as may be; also the Act of Naturalization of John and George in England hath the same Words mutatis mutandis, viz. (of this your Realm) and in others they are more restrictive, viz. (from henceforth shall be deemed, &c.) the Irish Act is that they shall be deemed natural Subjects; that they shall inherit such Lands as have descended after the first Day of King James's Coming to the Crown of England; this hath no such Restraint.

As to the Second he answered, It was the Rectory only which was found in the Office. The Countess also was alive at that Time, and so could not be seised into the King's Hands. And as to the Statute of 7 Jacobi it is plain, that it means a Naturalization by Parliament here; for it appoints the Lord Chancellor or Keeper to administer the Oaths, if the Bill begin in the House of Lords; and the Speaker to do it, if it begin in the House of Commons. And of this Opinion was Vaughan in these three last Things, tho' in the principal Matter he agreed with the other Two.

Termino Sanctæ Trinitatis, Anno 22 Car. II.

In Communi Banco.

Thomas Harriſon & Ux' *verſus* Dr. Burwell.

S.C. Vaugh. 206. 2 Jon. 118. Raym. 464. N. Lutw. 343. 3 Lev. 364. 3 Keb. 620, and 660. 2 Show. pl. 56. 2 Lev. 254, 255. 1 Mod. 25. Hob. 181. Mo. 907. and Vaugh. 206 to 220. 302 to 330.

IN an Action for Suing in the Spiritual Court after a Prohibition ſued out and delivered, the Plaintiff ſets forth, That by an Act of Parliament, made in 32 H. 8. c. 38. it was enacted, &c. That from the firſt Day, &c. all and every ſuch Marriages as within this Church of England ſhould be contracted between lawful Perſons (as by this Act they declared all Perſons to be lawful that be not prohibited by God's Law to marry) ſuch Marriages being contracted and ſolemnized in the Face of the Church, and conſummate with bodily Knowledge, &c. ſhould be, &c. deemed, judged and taken to be lawful, good, juſt and indiſſoluble, notwithſtanding any Precontract, &c. and notwithſtanding any Diſpenſation, Preſcription, Law, or other Thing granted or confirmed by Act or otherwiſe, and that no Reſervation or Prohibition, (God's Law except) ſhould trouble or impeach any Marriage without the Levitical Degrees; and that no Perſon of what Eſtate, Condition or Degree whatſoever he or ſhe be, ſhould, &c. be admitted to any of the Spiritual Courts within this the King's Realm, or any his Grace's other Lands and Dominions, to any Proceſs, Plea or Allegation contrary to this aforeſaid Act.

And ſets forth further, That one Abbot had Iſſue Robert and Bartholomew; that Robert had Iſſue Mary, who married Robert Harriſon, and by him had Iſſue Thomas the Plaintiff; that Bartholomew took to Wife Jane Brown, who is now the other Plaintiff, and that Bartholomew died without Iſſue, and that then the Plaintiffs intermarried; they ſay that he and ſhe were free from any Marriage or Contract with any other Perſon, and the Marriage was ſolemnized according to the Orders and Rules of the Church, and that this is a good Marriage by the Laws of God and Man; and that A. B. a Notary, intending to diſſolve this Marriage (contrary to the ſaid Act) cited the Plaintiffs before Dr. Burwell, and articled againſt them in this Manner, That within the Juriſdiction, &c. (reciting the Alliance, &c.) and that the ſaid T. H. took the ſaid Jane Abbot to Wife, de facto, cum de jure non potuit nec debuit, and ſo they committed Inceſt, &c. Hereupon Dr. Burwell demurs and prays a Conſultation. It had been divers Times argued at the Bar, and now Vaughan Chief Juſtice delivered the Opinion of the Court in this Manner:

Vaughan. 'Tis the Pleaſure of my Brothers, that I deliver their Opinion in this Caſe; and what I do deliver, I do not deliver as their Opinion only, but as the Opinion of all the Judges of England; for they have met together by the King's Command ſeveral Times to debate and conſider of this Caſe, and they all agree that no Conſultation be granted: This is a Caſe of great Expectation, and perhaps the only Caſe which has been ſolemnly reſolved ſince the Statute of 32 H. 8. was made; there are but three Caſes concerning it, Man's Caſe, 1 Co. 228. Mo. 907. Parſon's Caſe, 1 Inſt. 235. and Remington's Caſe, Hob. 181.

I muſt in the firſt Place premiſe, That perhaps if we the Judges had been Makers of the Law, this Queſtion had not been; but we are to proceed upon the Laws as made, and cannot alter them: This is not a Thing of our Promotion, and this I ſpeak to ſatisfy ſuch as might object againſt us. This Stat. was made in a Time when the Pope's Power was warmly purſued, and the Laws were then made, which in the Circumſtances of another Time would not have been made. I will firſt give the Reaſons the Judges went upon in their Reſolution; and then I will alſo give ſome Reaſons to ſatisfy People abroad, for I know the Caſe will meet with many Cenſures.

Firſt, Of the former. Antiently the King's Temporal Courts had nothing to do with the Lawfulneſs or Unlawfulneſs of Marriage, it was wholly of Eccleſiaſtical Cognizance; the Statute de Circumſpecte agatis is, That the Temporal Judges ſhould not puniſh the Spiritual Courts for holding Pleas of thoſe Things quæ mere ſunt ſpiritualia, viz. pro Fornicatione, Adulterio & hujuſmodi; and Sir Ed. Coke, 2 Inſt. 488. expounding theſe Words, Et hujuſmodi, he ſays, and he ſays very Right, That theſe are to be taken for Offences of like Nature, as the two Offences here particularly expreſſed, be, viz. as Solicitation of any Woman's Chaſtity, which is leſſer than theſe, and for Inceſt which is greater: Here is an undoubted Evidence, that the Temporal Courts uſed to prohibit, &c. and the Antientneſs of that is unqueſtioned; but it ſeems they did border in their Prohibitions, ſometimes upon Things which were Spiritual, which they ought not to have done: There was no Time but in which ſome Marriages were lawful and ſome unlawful; but if a Man were formerly queſtioned about ſuch a Matter, he had no Relief from the Temporal Courts. By the antient Common Law, Marriages were unlawful as far as they had Names of Kindred, (viz.) to the fourth Degree from Couſin Germans inclusively, and therein it irritated the Civil Law; but in the Council of Lateran, under Pope Innocent III. it was ordained thus, Sancitum eſt prohibitionem copulationis conjugalis quartum gradum non excedere, and ſo it ſtands in all Places under the Common Law at this Day in Popiſh Countries;

tries; with us it has received Alteration by this Statute, in this Matter there is a Reason very much sticks with many, (viz.) That the Temporal Courts are not skilled in the Laws by which this is to be judged, and therefore that it is not fit that they should determine concerning it: 'Tis true, the Word Cognitio signifies both, but yet there is a great Difference between Skill and Cognizance. But I say further, That the Temporal Judges may well enough have both; for though the Knowledge of the Canon Law be not adæquatum subjectum to a Common Lawyer, yet 'tis commune subjectum.

There are four Statutes which have made great Alteration in the Cognizance of this Matter. 25 H. 8. c. 22. 28 H. 8. c. 7. 28 H. 8. c. 16. and this of 32 H. c. 38.

The First indeed is repealed, because it was interwoven with Matter of Succession of the Crown, &c. which was set aside. But the Second, (viz.) 28 H. 8. cap. 7. is syllabically the same as to this Purpose; the Words are, Since many Inconveniencies have faln, &c. by Reason of Marriages within the Degrees of Marriages prohibited by God's Laws, that is to say, The Son to marry the Mother, or the Stepmother, carnally known by his Father, the Brother the Sister, the Father his Son's Daughter, or his Daughter's Daughter, or the Son to marry the Daughter of his Father, procreate and born by his Stepmother, or the Son to marry his Aunt, being his Father's or Mother's Sister, or to marry his Uncle's Wife, carnally known by his Uncle, or the Father to marry the Son's Wife, carnally known by his Son, or the Brother to marry the Brother's Wife, carnally known by his Brother, or any Man married, and carnally knowing his Wife, to marry his Wife's Daughter, or his Wife's Son's Daughter, or his Wife's Daughter's Daughter, or his Wife's Sister. So these Marriages are declared to be plainly prohibited and detested by the Laws of God, and not to be dispensable with by any Man; and therefore 'tis enacted that no Person shall thenceforth marry within these Degrees, what Pretence soever shall be made to the contrary thereof: And in Case any Person have married within these Degrees, and by any the Archbishops or Ministers of the Church of England be separate from the Bond of such unlawful Marriage, that every such Separation shall be good, &c. And in Case there be any Person thus married, and be not yet separate, that every such Person shall be separate by the definitive Sentence and Judgment of the Archbishops, Bishops and other Ministers of the Church of England, &c. and by no other Power or Authority; and that all Sentences and Judgments given, and to be given by any Archbishop, Bishop or other Minister of the Church of England, &c. shall be definitively firm, good and effectual to all Intents, and observed and obeyed without Suing any Provocations, Appeals, Prohibitions or other Process from, or to the

Court of Rome, to the Derogation thereof, or contrary to the 24 H. 6. c. 12. 'Tis very observable, and perhaps it has not been observed before, That the Words of the Statute do not run so as commonly it seems; for if the Words had been by Reason of Marrying within (or against) the Prohibition of Marriage by God's Laws, there had been little Question that there had been any other Marriage against God's Law (in the Intention of this Parliament) but those reckoned up; but the Words are, (Marrying within the Degrees of Marriage prohibited, &c.) Every Man apprehends that for the Son to marry the Mother is forbidden, and that for the Father to marry the Daughter is within the same Degree, tho' not expressed; so for a Grandson to marry his Grandmother is within the same Degree of what is there forbidden: So whereas the Text, Leviticus 18. v. 14. forbids a Man to marry his Father's Brother's Wife, (for so the Text is) tho' the Statute expresses it his Uncle's Wife, to marry the Mother's Brother's Wife is within the same Degree, tho' not mentioned in Leviticus, &c. The Judges did observe this only, but did give no Opinion concerning Marriages within the Degrees, (viz.) which are within the Degrees paritate rationis only, and are not expressed; such as Parsons and Manus, and Remington's Case; in all which the Case was, A Man married his first Wife's Niece, which by Equity and Parity of Reason was perhaps within the Prohibition, ver. 12, 13. that a Man should not marry his Aunt, or rather the Prohibition, ver. 14. that a Man should not marry his Father's Brother's Wife, &c. but only in one particular, viz. That in the ascending and descending parental Line, the
Vaugh. 242. Marriages are prohibited in infinitum; but for the rest, which are in pari gradu to the Degrees there mentioned, they have not given any Resolution at this Time.

Now as to this Case, in the second Statute there is observed this Difference, that the Words (carnally known) are added, where the Prohibition is in respect of a former Marriage of one of the Parties, as the Son to marry the Stepmother, carnally known by his Father, or to marry his Uncle's Wife, carnally known by his Uncle, &c. This indeed is not particularly expressed and applied to every individual Prohibition, to which 'tis applicable in the first Statute; but methinks 'tis intended and as fully provided for (tho' in general) in the last Clause of the said first Statute, which is this, Provided always, That the Article in this Act contained concerning Prohibition of Marriages within the Degree afore-mentioned in this Act, shall always be taken, interpreted and expounded of such Marriages, (i. e. I suppose, former Marriages) where Marriages were solemnized and carnal Knowledge was had.

In neither of these two Acts is there any Power given to the Temporal Courts, to make any Alteration as to the Canon Law, or God's Law; but it was referred to the Canon Law, and the Power of Dispensing de facto left in the same State as before: And Dispensations were granted in these very Particulars, which the Statute says ought not to be done.

The third Law which concerns this Case is 28 H. 8. cap. 16. against Dispensations, &c. from Rome, by which all Marriages which stood upon these Dispensations became absolutely unlawful; for the Dispensations are made thereby clearly void, &c. and therefore there is a provisional Clause in it, That yet notwithstanding at the most humble Petitions of the Lords and Commons, &c. all Marriages had and solemnized before the 30th of November, Anno 26 of the King's Reign, &c. whereof there is no Divorce or Separation had by the Ecclesiastical Laws of this Realm, and which Marriages be not prohibited by God's Laws, limited and declared in the Act made in this present Parliament, for the Establishing the King's Succession, (viz. 28 H. 8. cap. 7. afore-mentioned) or otherwise by Holy Scripture, shall be, &c. good, &c. and reputed, taken and adjudged, &c. as good, &c. if no Impediment of Matrimony had ever been between them that have contracted and solemnized such Marriages.

If the Act had gone no further than these Words, (for the Establishment of the King's Succession) it had clearly brought the Cognizance of these Marriages to the Temporal Courts.

But 'tis objected, That this Law made no other Alteration because of the Words which are added, (or otherwise by Holy Scripture) for this 'tis said makes it directly of the Cognizance of the Ecclesiastical Courts, so that it leaves it to them who know what is lawful or unlawful by Holy Scripture.

I shall forbear to answer this until I come to the other Act, where indeed the very same Exception is; (for the Words, God's Law except, in that, is tantamount to these Words) and then I will answer both.

The Fourth and last Law is 32 H. 8. c. 38. on which the Question is. This is Cardo Questionis; the Mischief before the Statute was, that the Bishop of Rome had entangled and troubled the King's Jurisdiction, and unquieted his Subjects by his usurped Power in making that unlawful which by God's Word is lawful in Marriages, &c. Therefore (as the Statute says) it was thought convenient that two Things especially for that Time should be with Diligence provided for.

First, Whereas divers Marriages had been dissolved upon Pretence of Precontracts not consummate by carnal Knowledge, that such Marriages should be good and indissolvable notwithstanding any such Precontract. But this Point is repealed by 2 Ed. 6. cap. 23.

Secondly,

Secondly, And this concerns also the present Case, Whereas also Marriages were often dissolved and brought into great Incertainty, by Reason of other Prohibitions than God's Law admitteth. For the Court of the Bishop of Rome for their Lucre invented Dispensations, the Granting whereof they always reserved to themselves, as in Kindred and Affinity between Cousin Germans, and so to fourth and fifth Degrees, &c. which else were lawful, and be not prohibited by God's Law; and all, because they would get Money by it, &c. It was enacted, &c. That from the first Day, &c. ut supra, it does declare all Persons to be lawful to marry who are not prohibited by God's Laws. If it had gone no further, or if the following Words had not added or given something more, it had been the same with the former Statutes, and liable to the same Objections, and the Temporal Courts would have had no Cognizance of the Matter. But the contrary is manifest; for had it been so, the Statute would have been of no Use as the Time then was: for the Pope or the Popish Clergy must have judged of it, and that they would have done by the Canon Law. For the Decretals (Gratian and Gregory's) in which the Sum of the Canon Law consists, (there is some little more, but they are the Sum) are nothing but the Determinations of the Pope and his Ministers upon God's Law.

Now what Provision had this been according to the Evil to be remedied? The Words of Kindred were as far as the seventh Degree, and so far by the antient Canon Law was the Prohibition of Marriage; and they grounded themselves upon Levit. 18. ver. 6. None of you shall approach to any that is near of Kin to him, to uncover their Nakedness: And if they had had Words as far as the seventeenth Degree, they might have done the same. But that was corrected, as I said, by the Council of Lateran: And so it stood with us till this Statute.

Now if this Statute gave no other Direction or Alteration in this Matter, there was no other Restraint or Probability, but that they might and would extend the Prohibition of Marriage as far as the Canon Law. Also if the Meaning of the Statute had been to prohibit in general Marriages against God's Law, it had been to no Purpose to express the Levitical Degrees: For they who are prohibited by the Levitical Degrees, are but a Part of those who are prohibited by God's Law, and the general Expression would have served the Turn. 'Tis certain, the Statute meant to make all Marriages without the Levitical Degrees lawful, except some few which are excepted here by the Words, God's Law except; and in the former Statute by the Words, Or otherwise by the Holy Scripture. For who will say now, taking the Words strainedly and literally, That no Marriage shall be set aside for Impotency of Generation, or Plurality of Husbands and Wives, or perhaps Adultery?

There has been an Opinion in our Books, That if a Woman take two Husbands the Marriage is void, and there needs no Separation by Sentence; but if a Man take two Wives there has been some Doubt. The first, that of the Woman is clear, the Words, (God's Law except) did intend such Marriages; and the same Answer would serve to answer the same Consequence that would follow out of the Words in the former Act, by Reason of the Words, (or otherwise by Holy Scripture.) I give this as an Interpretation at present, tho' I shall give a fuller Answer presently.

It was intended that no Marriage, as to Kindred or Affinity, should be set aside, but according to the Levitical Degrees, and that is the Scope of the Statute; for it had no Aspect to any other Sort of Impediment; if it had (as I observed) the general Words would have done it more clearly.

But take this Statute in the largest Sense, it has given the Temporal Courts an undoubted Cognizance. Since the Making of this Statute there has been no Question but that a Prohibition would lie in Case of Cousin Germans Marriage, and so on, 6 Inst. 684. This is manifest indeed, because the Statute does expressly declare that such Marriages are lawful and not prohibited by God's Law: But this our Case is not so clear. 1 Ven. 218. Hob. 84.

'Tis true, the plain Sense is, That all Marriages are and shall be lawful and good, which are not prohibited by the Levitical or other Part of God's Law, (and this, as other Statutes, the Temporal Courts are Conservators of) the former Statutes were only directory to the Ecclesiastical Courts, (viz.) That they should divorce, and not admit of Dispensations, &c.

This being made clear, that the Judges may grant Prohibitions, then the first Question is, Whether any Marriages without the Levitical Degree be unlawful or impeachable? And for that the Authority is in the Negative. 1 Inst. 235. a. By the Statute of 32 H. 8. c. 8. 'tis declared, That all Persons be lawful; that is, may lawfully marry, that be not prohibited by the Levitical Degrees. But this is not intended to extend to Persons which upon other Accounts are prohibited by God's Law to marry, as (at this Time Persons precontracted) Persons under a perpetual Impotence, (whereof we have two Instances. Dyer 178, 9, 40.) And the Truth is, as my Lord Coke says expressly in 2 Inst. 687. These Marriages (says he) are said to be prohibited by God's Law, otherwise the Statute of 32 H. 8. would extend to them. Vaugh. 208, to 220, 304.

We come now to this particular Case. Some would have this Marriage prohibited not by Leviticus 18. ver. 14. where the Words are, Thou shalt not uncover the Nakedness of thy Father's Brother: Thou shalt not approach to his Wife, she is thine Aunt. But by Levit. 20. ver. 20. where the Words are, And if a Man shall lie with his Uncle's Wife, he hath uncovered his Uncle's Nakedness.

But

But certainly this Case is no Prohibition, it serves only to declare the Punishment; for the immediate next Words are, (They shall die Childless.) This last Text is expressed vice versa in respect to the First; but 'tis the same.

Now the Reason the Judges went upon in this Case, in determining this Marriage to be lawful is, because 'tis neither within an express Prohibition, nor within any Degree there. If we shall admit any Thing against this, there is no Repagulum or Stay, we shall not know where to rest, but it would go on as far as the Canon Law.

Object. A Great Uncle is an Uncle as well as an immediate Uncle; and a Man is forbid to uncover his Uncle's Nakedness, Lev. 20. ver. 20.

Answ. There is no such Prohibition; that Expression is but as a Consequent of lying with his Uncle's Wife.

But read the Words as you will, 'tis plain no other Person is meant here, but the Father's Brother's Wife, even the same as is mentioned Levit. 18. ver. 14. and this 20th Verse only meant to declare the Punishment.

First, Because there is no other Prohibition in this 20th Chapter, and why should this be taken for one?

Secondly, In the Latin they have distinct Words, as Patruus and Avunculus to express Uncles by; but in the Hebrew they say, (for I will not pretend Skill in what I have none) they have no such distinct Words, nor has the Septuagint any such; the Words are, Ὃς ἂν κοιμηθῇ μετὰ τῆς συγγενοῦς αὐτοῦ κατατιμοσύνην, τῆς συγγενείας αὐτοῦ ἀπεκάλυψεν ἄτεχνοι ἀποκθανοῦνται. I have looked upon the last and best, the Paris Edition; the Words run thus: Qui cubaverit cum Cognata sua retexit pubertatem Cognatæ suæ: But I rely upon Junius and Tremelius, whose Translation is done with great Care, they have the same Words in both Places, (viz.) Nuditatem Patrui; and the whole Current of Translations run so. The Word Uncle is an equivocal Word; in our * Language (the British Language) a Grandfather, or Great Grandfather's Cousin German is called an Uncle.

* Welsh.

As to the Argument a fortiori, whether or how far Nata is to be received, I shall take Notice presently.

There is one Thing I must observe, (viz.) That Churchmen should not object to us, that this is Falcem immittere in alienam Messem; because were it not for the Statute, it would be hard to make out by Persons of what Learning soever, that we are obliged to the Levitical Degrees: For we are not bound by the Judaical Law, and how comes this Part of it to be distinguished from the rest, I mean those of the Levitical Degrees, which are of the Judaical positive Law only? For there are some of these Degrees

grees such, as that Marriages within them were prohibited from the Beginning of Time: But the Law of the Land (viz.) 28 H. 8. cap. 7. has declared, that all Marriages within those Degrees are prohibited by the Laws of God; indeed the Statute in its Declaration does include all that is prohibited in Leviticus: But I must observe too, that the Statute does in this Particular declare more and otherwise than is declared in the Scripture, (viz.) the Statute declares generally Marriage with a Man's Brother's Wife to be prohibited by God's Law; but 'tis certain that was not so generally prohibited, for it was with this Circumstance, if the Brother had issue; for if he had none, the Brother was commanded to take her to Wife and raise up Seed to his Brother, Deut. 25. ver. 5. Matt. 22. ver. 24. Mark 12. ver. 19. Luke 20. ver. 28. But now this is absolutely prohibited by our Law, though but qualified by theirs.

Another is said to be prohibited, (viz.) To marry a Man's Wife's Sister: But that was not so amongst the Jews, where this was the Law of the Forum, the Practical Law; but it was only during her Life, and so is the Text, Lev. 18. ver. 18. Neither shalt thou take a Wife to her Sister to vex her, to uncover her Nakedness, besides the other in her Life-time. For Bigamy and Poligamy with non-prohibited Persons were allowed there.

So that these Things are not so truly of Ecclesiastical Cognizance, because there are Things declared to be prohibited here, which are not by God's Law (otherwise). Now to consider how this Law in Leviticus shall be extended and expounded, the clearest way how to understand any Law is by what was the Story and Judgment of those People, and the Times in which it was practical. To examine this Law by the Civil Law or Canon Law, is as wide and as bad as to examine it by the Indian Law, or Persian Law; therefore the Judges have considered what was the Opinion and Judgment of the Jews, (this I observe to shew the Care of the Judges) and especially they have consulted Mr. Selden's Uxor Hebraica, the six first Chapters; there it appears that the Scribes and Pharisees interpreted this Law literally; but the Prudents and the Sanhedrim did make other Prohibitions, tanquam sepimenta Legis: But this Degree in this Case is not even amongst those. Then there were others, the Karmites, who held that these Degrees were mentioned only for Instance, and that several others are within the Prohibition paritate rationis; and what they say (save in two or three Particulars) is the same with our parochial Tables, and probably at the first this Table came thence from that Example into the Christian Churches. Now the first is of incomparable Authority above the later, for they had Moses's Authority, Matt. 23. ver. 23. but the others were a Sect.

Vaugh. 222. It was agreed, as I said, that Marriages in the ascending and descending Line, i. e. of Children with their Father, Grandfather, their Mother, Grandmother, and so upwards, are prohibited without Limit: But the Prohibition of Marriage, which is in question here, (viz.) with an Uncle's Relict, is not to be extended beyond the Degree which is expressed. The Reason of the Difference between these I will shew.

First, the Reason of the Prohibition to marry a Man's Parent is, because they are the Cause of his Being; the Father and Mother indeed are the immediate Cause, but the Grandfather and Grandmother, &c. are the Cause too tho' mediate; he could not be that which he is without them, and if he be obliged to the one, he is to the other: But a Man is no more obliged to his Uncle for his Being, than if the Uncle had never been. The Reason why a Man is prohibited to marry his Uncle's Wife is because 'tis expressly named.

Secondly, Another Reason of the Prohibition in the first Case is, that such a Marriage is against Nature; but not as 'tis commonly taken. For as we commonly talk of the Law of Nature, it is Pons Stultorum, when Fools can't tell which way to go further they go there; for by Nature 'tis not possible for a Child to know his Parent; he comes to that Knowledge by Laws and Reputation: And therefore the Theban Story might well be true, (viz.) That Oedipus being bred from his Parents, might unwittingly kill his Father Laius and marry his Mother Jocasta. He is a wise Son that knows his Father, our Proverb says: So neither can the Father know his Son, though the Mother may, (at least better than the Father) but with another thing supposed, 'tis naturally unlawfull; one that knows his Relation, ought not to marry his Parent or Child; it is against Nature. There is neither Servant or Master in Nature, but those Obligations are induced thereupon by Contract, &c. But supposing a Man cannot be Master and Servant to the same Person at the same Time, because there is a Repugnancy in it; so a Man cannot be Child and Husband, &c. because there is a Repugnancy in the Offices. A Parent cannot obey a Child, and therefore 'tis unnatural a Parent should be Wife to a Child. A Parent, as a Parent, may command and correct a Child, and that a Child, as Husband should command and correct the same Parent, is utterly repugnant.

Under the Law, the Son that cursed his Father or Mother, Levit. 20. vers. 9. and also he that was disobedient to either of them, Deut. 21. vers. 18, 19, 20, 21. was to be put to Death. And as there is a Reverence and Obedience due to the Immediate Parents, so there is to Grand Parents; if the immediate Parent have an absolute or qualified Power over the Son, the Grand Parent

Parent has the like over the Son too; because the Grand Parent hath it over the immediate Parent.

Now I will cite a Case in our Law somewhat to the Purpose I have been speaking, 'tis in Platt's Case, Pl. Com. 37. a. If a Woman be Warden of the Fleet, and one that is in Prison there marry her, he is thereby out of Prison, and the Law does adjudge him to be enlarged; because 'tis repugnant that he as Husband should have the Custody of her, and she as Gaoler the Custody of him. And the like Reason, at least in some Degree, is against Parents marrying their Daughters, &c.

And now as to all this, I will cite one of the greatest Human Authorities. It is the Opinion of Hugo Grotius, the learnedest Man of his Time, De jure Belli ac Pacis, lib. 2. cap. 5. & 12. Ab hac generalite (says he) eximo matrimonia parentum cujuscunque gradus cum liberis, quæ quo minus licita sunt rati (ni fallor) satis apparet; nam nec maritus qui superior est lege matrimonii eam reverentiam potest præstare matri quam natura exigit, nec patri filia: quia quanquam inferior est in matrimonio, ipsum tamen matrimonium talem inducit societatem quæ illius necessitudinis reverentiam excludit. The Reverence on each side is inconsistent. But this Reason holds not against the Marriage of a Man's Uncle's Wife; and the same very Great Person gives his Opinion to this Purpose a little before, De conjugiis eorum qui sanguine aut affinitate junguntur satis gravis est quæstio, & non raro magnis motibus agitata; nam causas certas ac naturales cur talia conjugia, ita ut legibus aut moribus vetantur, illicita sint, assignare qui voluerit, experiendo discet, quam id sit difficile, imo præstari non possit.

Thirdly, Another Reason of the Unlawfulness or Prohibition of Marriages of the first Kind (which holds not in this Case) is the Inconsistence, Absurdity and Monstrousness of the Relations to be begotten by them, the Son would be his Father's Brother, his Mother's Grandson, his own Uncle, &c.

Object. In the Civil Law Uncles are Loco Parentum.

Answ. They were so estimated there, but thence it doth not follow that they are so. But I will give the True Reason why they were so called, (viz.) they, the agnati, are legitimi Tutores of the Brother's Children; and this appears by Justinian: But how absurd is it to apply this to this Matter? Why, by the same Reason the Guardian in our Law can't marry his Ward, let the Degree be what it will.

Object. The Canon Law does prohibit the same also, because they are Loco Parentum.

Answ. The Reason is borrowed from the Civil Law, and must have the same Answer. There is another Thing very remarkable as to this Distinction, (viz.) that our Law puts a great Difference between Parents and Uncles; the Father can't inherit the Son,

but the Uncle may. So that the Meaſure to be taken by and from the Laws of one Kingdom to another, is quite different.

In the Synod held by the Province of Canterbury, Anno 1603. there were certain Canons made: The Synod was called by the King's Writ, and the Canons ratified as they ought to be. In the 99th Canon of thoſe it is ordained, that no Perſon ſhall marry within any Degrees expreſſed in the Table there mentioned. This Table was firſt ſet up after this Canon; but it had been publiſhed by Proclamation, &c. in the Queen's Time. This Canon is ſo penned that it muſt be underſtood, that all the Degrees are expreſſed there within which Marriage was intended to be prohibited; but now there is no ſuch Degree as this in the preſent Caſe there. I do not take the Pleading in this Caſe to be good; becauſe here it is not ſaid, ſhe was carnally known, as before I obſerved it ought to be, to bring him within the Statute; then there is a Fault in the Plaintiffs; for though they have ſet down the Caſe ſo that we can ſee what it is, yet they ought to have averr'd that it was not within the Levitical Degrees; becauſe that then they might have given Opportunity to the Defendant to aſſign ſome other Cauſe, Bene & verum eſt, &c. but ſhe had married a former Husband before, &c.

Now I come to the other Sort of Objections, which I promiſed to give ſome Reaſons in Anſwer of, for the Satisfaction of People abroad.

I did ſay, that it were very difficult, without this Statute, to make it out, that we were bound to obſerve this Part of the Judaical Law: And we are not bound to obſerve any Part of the Judaical Law, except thoſe Particulars where there is a Natural Reaſon too. Acts Apoſt. 15. There is the Account of a Council held concerning the Keeping of the Moſaical Law, and the Reſult is, that it ſeems good to the Holy Ghoſt and the Apoſtles, to lay upon their Brethren (which were of the Gentiles in Antioch, &c.) no greater Burthen than theſe neceſſary Things, that they abſtained from Meats offered to Idols, Blood, Things ſtrangled, and Fornication. A Man can't ſay that all theſe were Moſaical neither; but it is plain theſe were all they would lay upon them and the Corinthians. 'Tis clear, they were not given as Precepts, but Counſels, that the Communion between the two Churches, which were then coming together, might not be interrupted, Cor. 10. ver. 17, &c. Whatſoever is ſet before you eat, asking no Queſtion for Conſcience Sake: But if any Man ſay unto you, this is offered in ſacrifice unto Idols, eat not for his Sake that ſhew'd it, and for Conſcience Sake, &c. Conſcience I ſay, not thine own, but the other's, &c. Give none Offence, neither to the *Jews*, *&c.* Rom. 2. ver. 14. does clearly affirm, that the Law of Moſes was not given to the Gentiles. And

Rom. 3.

Rom. 3 v. 2. shews that this Law, called there the Oracle of God, was committed to the Jews only.

Object. (And this is the great Objection against our Prohibitions.) This Law depends upon the Original Tongues and Tradition and History; and Laymen cannot know the Secret of this Law by which this Matter is to be decided.

Answ. This Objection hath some Speciousness in it, but no Weight.

First, The Law, viz. the Levitical Law is generally understood, to be that which is publickly received as the Translation; all Laws that are made concerning any such Thing, are to be understood of that Kind of the Thing which is vulgarly and generally known and received.

Secondly, And 'tis not long since the Clergy came to be so learned; they were content heretofore with the Vulgar Translation; and 'tis not necessary for a Dean (for that Purpose) or other Dignitary or Clergyman, quasi such, that he should understand the Languages. But, Vaugh. 268.

Thirdly, We have no Cognizance of this Matter; there was a Time when they had no Cognizance of Wills and Testaments; but now they have, they must study them, and determine concerning them. Since we have a Cognizance, we may as well prohibit in this Case of Land, Freehold, &c. For since this is made of the same Nature, we must go the same way: If an Act were made, that in Matter of Theft, &c. we should judge after the Law of Moses, we must study it, and judge by it. 'Tis no new Thing that Laws be thus transferred from one Nation to another; thus was the Law of the Twelve Tables from Athens to Rome; thus the Law of Rhodes to other Parts of the World; and so our Law was made the Law of Ireland; and this is the Answer I give to the two Statutes, that since we have Cognizance we must take Notice of God's Law. If Churchmen in this Case encroach Jurisdiction, they must be prohibited, because they have no Cognizance, and we have, though their accidental Learning may be more than ours.

Object. 'Tis hard that this should be a Prohibiting Law any more than those two other Statutes, which 'tis agreed were directive only to the Spiritual Courts, and gave the Temporal Courts no Jurisdiction.

Answ. There is a full and flat Answer to this; this Statute makes it not at all cognizable by them, for where any Court has Cognizance the Party must have Process, &c. But now here in the Close of this Statute, 'tis enacted, that no Person, &c. shall be admitted to any of the Spiritual Courts, &c. to any Process, Plea or Allegation contrary to this foresaid Act: And therefore all Cognizance of that Nature is taken away from

them. They have Cognizance of all Marriages within the Levitical Degrees (we allow and agree) to disturb and punish the Parties; but they have no Cognizance nor Power to determine what is within the Levitical Degrees, and what not.

I conclude, It is the Opinion of this Court and of all the Judges, that the Prohibition do stand, and no Consultation be granted.

In this Case Dr. Stern, the Archbishop of York, was very zealous and industrious to set aside the Prohibition. He made several and distinct Applications to the Judges about it; he earnestly and particularly debated the Matter with them, and gave them Papers of his Arguments and Reasons to prove this Marriage incestuous and unlawful.

Thomas Rudyard's Case.

Cro. Car. Lee's Case, Chambers's Case, Barkham's Case, Seely's Case, Woolnoth's Case, & Elliot & Hollis's Case, &c. and Hampden's Case, *int'* the State Trials.

THomas Rudyard, an Attorney of this Court, came into this Court upon the Return of an Habeas Corpus directed to the Keeper of Newgate, who returned, that he was taken and detained by Virtue of a Warrant to him directed from Sir Samuel Sterling Lord Mayor, and Sir J. Robinson, two of the King's Justices of the Peace, the Tenour of which Warrant follows in these Words. Whereas *T. R.* Gent. hath been brought before us, and examined touching several Misdemeanours by him committed within the City of *London* since the Month of *April* and before the 4th of this Instant *June*, and to us complained of, and more particularly for inciting and stirring up of his Majesty's Subjects, then and there, to the Disobedience of his Laws, and for abetting and encouraging of such as do meet in unlawful and seditious Conventicles, contrary to the Form of the late Statute made in the 22d Year of our Sovereign Lord the King that now is; upon whose Examination we find just Cause to suspect him to be guilty of the said Misdemeanours, and thereupon did require him to find Sureties to be of the Good Behaviour, which he refused: These are therefore to require you to take into your Custody the Body of the said *T. R.* and him safely to keep till he be from thence delivered by due Course of Law. Given under our Hands and Seals this 11th Day of *June*, 1670.

The Return being filed and spoken to by the Counsel upon two several Days, the Court delivered their Opinion seriatim.

Wylde held that he ought to be remanded; for if the Warrant had been that he appeared to be guilty, or that they had found him guilty; then the Commitment had been good, as hath been agreed on all Hands, and here the Words in a favourable Construction amount to as much. The Proceedings of the Magistrates against such Seditious Persons are to be encouraged, especially in such a Time as this, when 'tis known they are grown to such a Head.

Archer contra. For 'tis altogether uncertain; 'tis said he was complained of, &c. but not that he did any Thing, and that they find just Cause to suspect, but shew not the Cause in particular: If it had been said sundry Misdemeanours, and not expressed what, all would agree it insufficient, as Chamber's Case, 1 Cro. and Wolnoth's Case, ibid. Mr. Selden, 3 Car. was required to find Sureties for the good Behaviour, for which the Judges were severely reprehended in full Parliament, because no sufficient Cause appeared: Though the Justices here had sufficient Cause to induce their Suspicion, they ought upon the Return to have signified it to the Court for their Satisfaction also; it should have been expressed also in what Sum they required him to find Sureties, that it might have appeared to be reasonable, so that we cannot remand him; but I think 'tis fit to oblige him to Bail to appear the first Day the next Term, that he may answer such Things as shall be objected against him.

Tyrrel, It is the Statute of 34 E. 3. c. 1. that enables Justices of the Peace to require Sureties for the good Behaviour, and that upon Suspicion, and seems to refer it to their Discretion, but that must be exercised according to Law, and whether it be or no, the Judges in this Hall must judge, and therefore the Matters ought to be certainly certified to them. The present Return is altogether uncertain, wherefore I think he ought to be discharged, but I would advise him to consider the Statute of 35 E. c. 1. against Impugners of the King's Authority in Ecclesiastical Cases.

Vaughan, Chief Justice. This Case is one of the nicest that ever I met with; on the one side is the Consideration of discouraging Sectaries, and preserving of the Publick Peace and Quiet of the Government. On the other side the Legal Right which every one hath to his Liberty. Whoever excites the People to the Disobedience of a Law, commits the highest Offence under High Treason. I do not mean every Law, as if one which should cause a Trespass to be done, should be so guilty, but Laws which are of a Publick Nature.

As to the Return I think it is the most insufficient I ever yet saw. The Certainty of the Sum ought to have been expressed in which he and his Sureties should have been bound; for otherwise the Sum required might be so great that any Person might be constrained to remain in Prison. There may be lawful Inciting to the Breach of the Law, as a Counsel or Attorney advising An Action which is not maintainable, and sometimes it may be upon some particular Design, as in Dyer 168. Bronker being made Sheriff, one Hyde dissuaded him from taking the Sheriff's Oath, because of the Difficulty of the Articles. B. was condemned in 100 l. Fine and 5 Weeks Imprisonment for refusing of the Oath, and H. in 20 l. and 5 Weeks Imprisonment for inciting him to it; and the Reason

was becauſe Hyde knew it to be an Offence, and that makes it differ from the Caſe of a Counſel or Attorney; but the Offence was the leſs, becauſe the Incitement was upon a particular Reaſon, and not againſt the Law, quatenus a Law. In the Return here they don't ſay that they found he was guilty, but only that they found Cauſe to ſuſpect him. Now what Remedy can be had in ſuch a Caſe? Can an Iſſue be taken whether they had Cauſe to ſuſpect him or no? Put the Caſe, one who had been fined 10l. for an Offence againſt this Act (in which Caſe the Statute allows of an Appeal) had come to Mr. Rudyard to know what he ſhould do, and he had adviſed him to bring an Appeal at the Quarter-Seſſions, this is no Offence, and yet 'tis an Abetting to ſuch as meet, and perhaps might be a Cauſe of Suſpicion to a Juſtice of Peace: I do not ſee that the Return is good in any Part of it, and therefore he ought to be diſcharged; but I think the Juſtices ſhould do well, if they know him to be guilty, to commit him by a better Warrant; whereupon the Priſoner was diſcharged. For it is the Uſage of this Court when the Judges are of three Opinions, (as here my Lord Chief Juſtice and Tyrrell for diſcharging him, Archer for putting him to Bail, and Wylde for remanding him) to give the Rule according to the Opinion of the two which agree.

Carter 221. 1 Mod. 235. 2 Mod. 198. 2 Inſt. 55. Vaugh. 155, 6.

The Court ſaid they had often directed, that no Habeas Corpus ſhould be moved for in this Court except it concerned a Civil Cauſe, becauſe when the Party was brought in, and the Cauſe ſhewn, this Court cannot proceed upon it, therefore the proper Place to move for them is the King's Bench; but they permitted it in this Caſe, becauſe the Party was an Attorney of the Court.

The Court demanded of Rudyard upon his firſt bringing in, whether he would ſubmit to what they ſhould propoſe and direct? He ſaid he would ſubmit to the Rule of the Court; but the Court told him that he muſt do; but demanded whether he would yield to what they ſhould do by way of Arbitration; but he (tho' adviſed otherwiſe by his own Counſel) diſcovered his Unwillingneſs to ſubmit to any Thing but the Rule of Law.

Termino

Termino Sancti Michaelis, Anno 23 Car. II.

In Communi Banco.

Methuſelah Turner *verſus Sir* Samuel Sterling.

Paſch. 23. Rot' 363.

IN an Action upon the Caſe brought by the Plaintiff againſt the Defendant, the Plaintiff declares, That *London* is an antient City, and that there is an antient Bridge; and that there uſe to be two Officers for it to look after it, called Bridge-maſters, and that they have certain Fees and Profits belonging to them. And that there is a Cuſtom for the Citizens aſſembled in a Common Hall or Court, yearly to chooſe or continue thoſe Bridgemaſters. And another Cuſtom, that if one of theſe die within the Year, that the Mayor ſhall aſſemble a Common Hall, and they being congregated, ſhall proceed to the Election of another Bridgemaſter in his Stead for the Reſidue of the Year. And another Cuſtom, That upon their Proceeding to Election, if there be two Perſons upon Election, he that is choſen by the major Number of Votes is duly elected; and that if one in ſuch Caſe require that the Polls ſhould be numbered, that the Mayor ought to allow the Poll, and that the Aſſembly ought not to be diſmiſſed till that were done; and another Cuſtom, that the Party ſo choſen ought to be ſworn, and uſed to receive the Profits to his own Uſe. That 24 *June* 23 *nunc Regis* there was a Common Hall aſſembled, the Defendant being then Mayor, and that *A.* and *B.* were then and there choſen to this Office, *&c.* and being ſo, *A.* died in *October* following; and on the 18th of the ſame *October* there was another Common Hall for the Election of a Bridgemaſter in his Stead, congregated by the Defendant, and then and there the Plaintiff and one *Allen* ſtood as Competitors to be choſen for that Office, and the Queſtion grew which had the greateſt Number of Electors? And the Plaintiff avers that he had the greateſt Number, and the other denied it, and he requeſted that according to the Cuſtom they might go to the Poll; and the Defendant not minding the Execution of his Office, but violating the Law and Cuſtom of the City, did then and there maliciouſly refuſe the Numbering of the Polls, and made Proclamation, That the Congregation of Electors ſhould depart, and diſcharged the Court, and the other Man was ſworn, and ſo he loſt the Profits of the Place, *&c.*

1 Vent. 206. 2 Lev. 50. 3 Keb. 26, 32. 2 Mod. 228. 2 Jones 117. 6 Mod. 48, 55, 56, 100.

Upon Not guilty pleaded, and a Verdict for the Plaintiff, after it had been several Times spoken to in Arrest of Judgment, the Court delivered their Opinions seriatim.

Wylde. I think the Action well lies, for otherwise it will be in the Power of every Head-Officer to get whom he will have chosen or refused.

It is objected, That non constat whether the Plaintiff should have been chosen:

Answer, The Law gives an Action for but a Possibility of Damage, as an Action lies for calling an Heir apparent, Bastard.

It was objected also, That at the Common Law there was no Action for a Parliament-Man against a Sheriff for not returning of him, being elected.

I answer, That is a Place of Burthen, this of Profit; if I have an House or Beast-Market, and a Toll for Sale, and one hinder the Beasts from coming hither, non constat whether they should be sold. Yet for the Possibility of that, and of the Loss of the Toll thereon, an Action lies. 41 E. 3. 24. Pl. 17. b. An Action of the Case was brought against a Sheriff for making of a Precept to one to make a Return in the Plaintiff's Case, who indeed was not a Bailiff of a Franchise, and thereupon the Return was quashed, Br. tit' Act' Case, 120. So 9 H. 6. 60. Action against an Escheator, who had taken an Office, whereby the Party was found to hold of J. S. and he returned one whereby he was said to hold the Moiety in Capite. Where an Officer does any Thing against the Duty of his Place and Office, and a Damage thereby accrues to the Party, an Action lies: 'Tis positively affirmed here, he had the greater Number.

Archer of the same Opinion. This is a wilful Denial of the Duty of the Defendant's Place, and for the particular Damage an Action lies. 'Twas said there might be many Competitors, and all might bring Actions. No, for 'tis averred that the Plaintiff had the greatest Number. An Action lies against an Archdeacon for not inducting. F. N. B. 94. So if a Sheriff will not execute a Writ of Seisin, an Action lies against him. An Action lies against an Ordinary for admitting a wrong Patron's Clerk against a Verdict in a jure patronatus. Hob. 318. I agree to the Case put at the Bar, that upon a Writ de Coronatore eligendo, if the Sheriff will not return him Coroner, who was chosen by the major Part, an Action upon the Case lies, tho' I know no Authority for it in Point. Vide 6 E. 4. 9. b. Pl. 21. A Man that has a Title to an Office, before he has Possession, shall have an Action upon the Case after an Assize. 21 E. 4. 23. is as memorable a Case for the Purpose as any I know; there Fairfax gives good Advice to Pleaders to mind Actions upon the Case; and then he said the

Uſe of the Subpœna would not be ſo frequent. Hob. 205. Action for ſuing double Execution. I think Actions upon the Caſe ſhould be, according to Juſtice Fairfax's Advice, favoured in Courts of Juſtice.

Tyrrel. Perhaps there never was ſuch an Action, which is an Argument againſt it. Litt. 107. but I think it lies. Action lies not againſt a Lord for not admitting a Copyholder, nor againſt Feoffees in Truſt for refuſing to make a Feoffment, or a Tenant for refuſing to attorn, or againſt a Feoffor for refuſing to make Livery according to the Charter; but it lies againſt an Officer or againſt a Clerk for Refuſing to enrol: This Action is for Damages for being prevented of having the Office, and not for the Office it ſelf. The Caſes of the Copyholders, &c. are not to be compared to this; for there are proper Remedies for them, as Subpœna's, and other Writs at the Common Law, but here is none. De cætero non recedant Partes à Curia noſtra ſine Remedio, ne Curia deficeret in Juſtitia exhibenda, ſays the Statute. And my Lord Coke ſays, 'tis a Maxim in Law, That no Action lies for the Ward againſt the Lord which diſparages him, but the next of Kin may enter. Co. Lit. 107. An Action lies as much for injurious Preventing him of having the Office, as for Hindring him in the Executing of it after that he is in. For Actions of the Caſe are not of any certain Form, but vary according to the Circumſtances.

It was objected, That every Action upon the Caſe ſuppoſes damnum & injuriam; now here was no Election, 'tis impoſſible to know whether he ſhould be an Officer.

Anſw. The Cuſtom is alledged poſitive, that he which hath the greater Number is elected ipſo facto; again, qui deſtruit medium deſtruit finem; 'tis as bad as if he had turned him out of his Office: It may be tried whether he were duly elected, and 'tis in Effect tried here; there cannot be Multiplicity of Actions brought; by this the Mayor will make himſelf ſole Judge and Arbiter, and diſpoſe of Elections which ſhould be popular, and as my Brother hath ſaid, an Action of the Caſe lies for a Poſſibility of Damage.

Vaughan, Chief Juſtice, contra. That wherein I am ſatisfied is, that no Damage appears; ſuppoſe none had been elected, he ſhould not have an Action more than any Perſon in the Town: If a Mayor will not elect a Burgeſs, or a Sheriff a Knight, no Action lies, becauſe there is no Election. If an Officer will not elect at all, 'tis againſt his Duty, and ſo 'tis if he do it unduly; but he is puniſhable in a publick Way of Information, or it may be by Indictment. If twenty had ſtood, muſt each have recovered the Value of the Place?

Object. But there is an Averment that he was choſen by the greater Number.

Anſw. That can't be put in Iſſue, or known or tried; ſuppoſe the Election were by Ballots, &c. ſhould he have an Action for not opening the Box? In the Caſe of the Coroner there is apparent Damage, and 'tis againſt the Statute; and in the Caſe of Induction there is a certain Loſs. I take it that 'tis not actionable to call a Man Baſtard, while his Father is alive, the Books are croſs in it: Nay, if Land had deſcended, I Doubt it without a Special Damage, no more than to ſay one had no Title to his Land. The Caſe of the Market is cloſe, but there the Perſon damnified is certain, and the Thing leads to deprive him of the Benefit of the King's Grant. But my Brothers have given the Rule, take Judgment.

1 Vent. 206, 207. This Judgment was affirmed upon a Writ of Error in the King's Bench.

King of Grayes Inn *verſus* Sir Edward Lake.

1 Danv. 116, 117, 119. Moor 695. Palm. 65. Style 231. 1 And. 269. 2 And. 40. Her. 174. Cro. El. 358. Moor 409. Q. 3 Salk. 224.

ACtion for that whereas he was bred up to the Law and practiſed it, and had many Perſons of Honour and others his Clients, and thereby got Money and maintained his Family, &c. The Defendant, falſo & malitioſe wrote a Letter to Anne Counteſs of Lincoln, who was the Plaintiff's Client, containing that the Plaintiff would give vexatious, and ill Counſel, and ſtir up a Suit, and that he would milk her Purſe and fill his own large Pockets, &c. per quod he loſt the ſaid Counteſs and other Clients. Upon Not guilty pleaded and a Verdict for the Plaintiff, it being moved in Arreſt of Judgment, Wylde, Archer and Tyrrell, held that the Action lay; 'tis a ſcandalous Letter concerning his Profeſſion, and here is a Special Damage: He does give bad Counſel; ſpoken of a Lawyer, judged actionable; ſo Dunce ſtirring up Suits is taken in malam partem.

Vaughan, Chief Juſtice. I muſt ſubmit to the Rule given, but am of another Opinion. In antient Books we do not read of an Action for Words, unleſs the Slander concerned Life. 'Twas held not actionable to call Villain, unleſs 'twere added he was lain in wait to be ſeiſed; the Growth of theſe Actions will ſpoil all Communications; a Man ſhall not ſay ſuch an Inn, or ſuch Wine is not good. Their Progreſs extends to all Profeſſions; to ſay a Man was not a good Surveyor has been held actionable. The Words ſpoken here have no more Relation to the Plaintiff's Profeſſion, than to ſay of a Lawyer he hath a Red Noſe, or but a little Head; to ſay One had the Uſe of a Woman's Body is a Slander, it being an Idiom of Speech for lying with her. But,

Object. All theſe Words together make a Slander.

Anſw. No Man can aſſign me ſuch a Ratiocination, à male diviſis ad bene conjuncta: I never heard it but in my Lord Stafford's Caſe, viz. that many Treſpaſſes ſhould make a Treaſon. 'Tis ſaid he ſtirred up a Vexatious Action, ſo does a Counſel

when he adviſes an unſucceſsful Action; for the Party is amerced pro falſo clamore. He will milk your Purſe, taken enunciatively, ſignifies no more than Milking a Bull; the Phraſe is not come to an Idiom. So of Filling his Pockets; theſe Words might have been ſpoken of the Law, and indeed they are ſpoken of the Thing, not the Man or his Practice: Dunce, Corrupt, &c. concern the Profeſſion; but theſe Words are applicable to any. If he had ſaid, he were not a good Fidler, would that be actionable?

Termino Paſchæ, Anno 28 Car. II.

In Communi Banco.

Hockett & Uxor *verſus* Stegold & Ux'.

1 Vent. 93, 328.

TReſpaſs for Aſſault, Battery, and Wounding of the Baron and Feme. 2 Mod. 66. 1 Show. 350.

Upon Not guilty pleaded, the Verdict was, as to the Wife, Guilty, and quoad reſiduum, Not guilty.

It was moved in Arreſt of Judgment, That the Baron and Feme could not join in an Action of Treſpaſs for Beating them both. 2 Cro. 355, 655.

2. That there is nothing found as to the Beating of the Huſband, and ſo an imperfect Verdict; for the Quoad reſiduum ſhall extend only to the other Treſpaſſes done to the Wife. Yelv. 106. Vide Lib. which goes to both Points.

But the whole Court were of an Opinion, That the Verdict cured this Miſtake in the Action. 9 Ed. 4. 51. 6 Acc'. Vide Style 349.

Termino

Termino Paſchæ, Anno 29 Car. II.

In Communi Banco.

Herbert Perrot's *Caſe*.

1 Mod. 246. Poſt. 47, 48.

HE having married a Wife that had an Inheritance of a conſiderable Value, prevails upon her (while ſhe was but of the Age of twenty Years) to levy a Fine, upon which Uſe was declared to him and her, and the Heirs of their two Bodies. This was taken in the Country upon a Dedimus poteſtatem by Sir Herbert Perrot, his Father, and another. After which the Wife died without Iſſue; but had Iſſue at the Time of the Fine.

It was moved in Court, That this Fine might be ſet aſide and a Fine impoſed upon the Commiſſioners, for the undue Practice and taking of a Fine of one under Age. But all the Judges agreed, they could not meddle with the Fine; but if the Wife had been alive and ſtill under Age, they might bring her in by Habeas Corpus and inſpect her, and ſet aſide the Fine upon a Motion; for perhaps the Husband would not ſuffer the Bringing or Proceeding a Writ of Error.

It was done in Hutchinſon's Caſe. 3 Lev. 36. 2 Salk. 567.

And Juſtice Atkyns ſaid, Theſe Abuſes (which are ſo frequent in taking Fines) were occaſioned by the Alteration of the Common Law, made by the Statute of Carliſle 15 Ed. 2. that Fines which before were always to be done in Court, may now be taken by Dedimus: But the Common Law falls much ſhort of the Order the Statute preſcribes, which requires that two Judges of the Court, or one at the leaſt, ſhould (taking with him an Abbot, Prior, or Knight of good Fame) take ſuch Fines; whereas 'tis now the common Practice to name Attornies and inconſiderable Perſons.

The Court were of Opinion, That if a Commiſſioner to take a Fine do execute it corruptly, he may be fined by the Court; for in Relation to the Fine (which is the proper Buſineſs of this Court) he is ſubject to the Cenſures of it, as Attornies, &c. But they held, That they had no Power to fine the Parties for a Miſdemeanor in them.

But 'twas agreed that the Son ſhould be fined, for that it could not poſſibly be preſumed he was ignorant of his Wife's Age. 1 Mod. 247. 3 Lev. 36.

North, Chief Juſtice, and Wyndham, would have fined Sir Herbert Perrot for taking a Fine of one under Age: But Atkyns and Scroggs diſſented, becauſe it did not appear that Sir Herbert Perrot did know ſhe was under Age, and it could not be diſcerned by the View, ſhe being Twenty.

Termino Sancti Hillarii, Anno 29 & 30 Car. II.

In Communi Banco.

Sir John Otway's *Case.*

IN an Ejectment, upon a Special Verdict the Case was to this Effect: 1 Mod. 8, 117, 118, 206, 250.

It was found that there was a Parish of Ribton and Hill of Ribton; but not co-extensive with the Parish. J. S. had Land in Tail in the Parish and out of the Hill, and bargained and sold by Indenture, with a Covenant to levy a Fine and suffer a Recovery to the Uses of the Deed, of the said Land in the Parish of Ribton; and the Fine and Recovery were only of Lands in Ribton, and whether this would serve for the said Land in the Parish of Ribton was the Question? 1 Vent. 143, 170, 171. 2 Mod. 233, 47, 49. 2 Cro. 120.

Serjeant Maynard argued, That it would not; and said, That the Division by Parishes is wholly Ecclesiastical, the Limits of which are equal to the Cure of the Parson: But that of Towns and Hills is Civil, and hath the same Limits with the Power of the Constable and Tithingman. Where a Place is named in a Record of the Law, and no more said, 'tis always intended a Hill; tho' when a Hill and Parish are both mentioned, and of the same Name, they are intended co-extensive. The later Authorities have admitted Fines to be levied of Land in a Place known. 1 Cro. 2. Ro. 20. But in a Recovery the Town must be mentioned.

But 'tis objected, That here the Intention appears by the Deed, that these Lands should pass:

But he answered, That cannot carry the Words further than they are contained in the Record.

Again, it is objected, That the Deed, Fine and Recovery, do all make but one Assurance.

True, but each hath its several Effect; the Deed serves to declare the Uses, but it cannot make the Record larger than it is in the subject Matter of it. If a Formedon had been brought, and the Fine and Recovery pleaded in Bar, had it not been a good Reply to have said, Nient comprise, &c? In 2 Cro. 120. Storke and Fox, the Case was, Walton and Street were two Hills in the Parish of Street, and a Fine was of Lands in Street; and resolved, That no Lands, but in the Hill of Street (tho in the Parish) did pass. And so is Mo. 910. in Case of a Grant. 2 Ro. 54. If this were permitted it would introduce much Mischief; for

Men

Men would not know what paſſed by Searching the Record; but this ſhould be known only by a Pocket-Deed, and ſo they in Reverſion, a Lord of antient Demeſne, &c. would not know when to make their Claim, and ſhould be barred by Reaſon of a private Deed, when the Record of the Fine or Recovery did not import that they were concerned. Fines are to end Controverſies, and therefore muſt be certain, and in that Reſpect ſometimes receive a ſtricter Conſtruction than Grants. A Fine of a Tenement is not good, but ought to be reverſed; but a Grant of a Tenement will bind.

On the other Side it was argued, That ſince Common Recoveries have been ſo much in Practice, and become the common Aſſurance of Men's Eſtates, they have been favourably conſtrued. A Manor in Reputation hath paſſed by the Name of a Manor in a Recovery. Sir M. Finch's Caſe in Co. and in 5 Co. Dormer's Caſe, Common Recoveries have been admitted of an Advowſon. All here is to be taken as one Conveyance: A Deed expreſſing the Intent may abridge the Recovery in the Number of Acres. 2 Co. 76. 'Tis true in Caſe of the King, as that in Mo. 710. there ſhall be no larger Conſtruction than the expreſs Words import. So where the Intent appears, as that in Dyer 261. B.

North, Chief Juſtice, Wyndham and Atkyns (Scroggs abſent, but ſaid by the Chief Juſtice to be agreed) were of the ſame Opinion, and that Common Recoveries were not to be overthrown by nice Conſtructions, and that the Inconvenience objected againſt the Intent being explained by a Pocket-Conveyance, was the ſame where a Man had ſeveral Lands in the ſame Vill; that of late they have directed the Curſitors to make out Writs of Lands in Parochia. They ſaid, That there was no Caſe expreſs againſt this, and that it was the ſtronger becauſe found in the Verdict, that he which ſuffered the Recovery had no Lands in the Vill, and therefore muſt be void if not extended to the Pariſh.

Termino Paſchæ, Anno 32 Car. II.

In Communi Banco.

The Caſe of Dodwell *and* The Univerſity of Oxford.

A Prohibition was prayed to the Chancellor's Court of the Univerſity of Oxford in the Behalf of Dodwell, who being a Townſman of Oxford, was libelled againſt in the ſaid Court upon a Statute or By-Law of the Univerſity made in King James's Time; That whoever, Privilegiatus ſive non Privilegiatus, ſhould be taken Walking in the Streets at Nine of the Clock at Night, or after, having no reaſonable Excuſe to be allowed by the Proctor, &c. ſhould forfeit 40 s. &c. whereof one Moiety was to go to the Univerſity, and the other to the Proctor, &c. that ſhould take him: And that Dodwell was taken walking abroad at that Hour, and being demanded a Reaſon thereof, he refuſed to give any Account; & cauſa contemptus & ad morum reformationem this Libel was exhibited. Vide Poſtea 106, 362.

The Prohibition was moved for the laſt Term; but in regard the Court obſerved it touched the Juriſdiction of the Univerſity on the one Hand, and concerned the Liberties and Rights of the Townſmen on the other Hand, they deferred the Granting of it until they ſhould hear Counſel on both Sides, which was appointed this Term. And now ſundry antient Charters were ſhewn, by which was granted to the Univerſity a Juriſdiction tam in Laicos, quam in alios, and a By-Law made above 200 Years ſince againſt Night-walking, with the Penalty of 40 s. upon the Offender, and Precedents of Proceedings thereupon in the Chancellor's Court; and that they were as well Guardians of the Peace by Preſcription, as by Charter. And an Act of Parliament of 13 Eliz. was ſhewn, whereby their Juriſdictions, and Privileges, and Statutes, were confirmed: And altho' the Mayor hath alſo a Commiſſion of the Peace, yet 'tis ſubordinate, and he ſwears Fealty to the Chancellor.

Curia. This Libel is grounded upon a By-Law of 7 Jac. and being ſubſequent to that Statute of 13 Reginæ, it is queſtionable whether warranted by it, or no? This By-Law and Proceeding cannot be grounded nor derive Authority from their being Guardians of the Peace by Preſcription, as it ſeems they are by 9 H. 6. 44. For without Act of Parliament, or expreſs Preſcription, a

Corporation cannot make a By-Law to bind thoſe which are not of the Body. Juſtices of the Peace cannot ordain a Penalty for a Crime without their Juriſdiction; and the Proceeding in the Chancellor's Court, which is according to the Civil Law, cannot be warranted by the King's Charter. For no Court, other than ſuch as proceed according to Law, can be, unleſs by Preſcription or Act of Parliament; wherefore in Regard, if the Univerſity ſhould intitle themſelves to this Juriſdiction by Preſcription, it were properly triable by a Jury; and if upon the Act of 13 Eliz. Matter of Law might ariſe how far the Act might extend.

North, Chief Juſtice, Atkyns and Scroggs, thought it was not fit they ſhould determine thoſe Queſtions upon a Motion, but inclined to grant the Prohibition, and propounded to the Parties to agree that the Libel ſhould be amended, wherein it was grounded upon the By-Law made 7 Jacobi, which being ſubſequent to the Act of 13 Eliz. the Merits of the Cauſe would (not) be brought before themſelves to determine the Grand Points; which was agreed.

And then the Court ſaid, That they would grant a Prohibition, and let the other plead, &c. For North ſaid, That they did often deny a Prohibition, tho' it were a Writ ex debito Juſtitiæ, where they ſaw no Colour for it: But if any material Queſtions were like to ariſe, it was proper to grant it, and not to determine them upon Motion, but upon Pleading to the Prohibition, and therein it differed from a Habeas Corpus, which was to be inſtantly granted, becauſe the Party is in Priſon; but there is no ſuch Speed requiſite in a Prohibition.

But Wyndham was againſt the Prohibition in the Caſe at Bar; for he took it that the By-Law (7 Jac.) was but in Confirmation of that made before, and as a Renewing of it, which he took to be confirmed by the Act of 13 Eliz.

Nota, Scroggs ſaid, That Nine of the Clock could not be held ſuch an Hour, as it ſhould be a Crime for a Townſman to walk at, no more than Three in the Afternoon; tho' for Scholars it might be reaſonable to reſtrain them; but no Reaſon that Townſmen ſhould be ſubjected to ſuch Rules as were proper for Scholars. And upon this he much grounded his Opinion for the Prohibition.

Wallwin *verſus* Auberry.

IN an Action of Treſpaſs the Defendant pleaded, That the Plaintiff was Impropriator of ſuch a Rectory, and that he was ſued in the Eccleſiaſtical Court, and by Sentence there the Profits were ſequeſtred for the Repair of the Chancel. To which the Plaintiff demurred, ſuppoſing that by 31 H. 8. the Profits of Rectories Impropriate were made Lay Fee, and ſo not ſubject to be ſequeſtred by the Court Chriſtian; and therefore it was ſuppoſed that the Lay Impropriator could not ſue for Tithes in the Spiritual Court. For which Cauſe 32 H. 8. was made, to empower Laymen to recover them; and 35 H. 8. gives the ordinary Remedy for Procurations and Synodals, which was conceived had been loſt by Making the Rectories Lay Fee. 2 Cro. 518. in Parry and Banks's Caſe it is reſolved, That when the Rectory is in the hands of a Lay Impropriator, the Ordinary cannot diſſolve the Vicarage, nor in ſuch Caſe cannot augment the Vicarage. 2 Roll. 339. 1 Mod. 255. 2 Mod. 254. 1 Vent. 5. Hard. 188. 1 Mod. 216, 255. 2 Mod. 77.

The Form of Pleading was alſo objected unto: As,

Firſt, 'Tis not poſitively alledged, that the Chancel was out of Repair; but that he was libelled againſt, which Libel did mention it only to be out of Repair. 2 Mod. 259.

Secondly, The Whole is ſequeſtred, whereas it ought to have been but in Proportion to the Charge of Repairing, and ſhould be certainly expreſſed what it required. 1 Mod. 261.

Thirdly, The Sequeſtration is, to remain by the Sentence until the Judge ſhould take further Order. Whereas it ought to have been, but until the Repairs had been done.

Theſe Exceptions the Court held fatal, and therefore gave no Opinion as to the Matter in Law, but did incline that there could be no Sequeſtration; for being made Lay Fee, the Impropriation was out of their Juriſdiction, and it was now only againſt the Parſon as againſt a Layman, for not Repairing the Church. And they ſaid in Caſe of Dilapidations the Whole ought not to be ſequeſtred, but to leave a Proportion to the Parſon for his Livelihood.

Barker *verſus* Keate.

IN an Ejectment upon a Special Verdict the ſole Point was, Whether a Leaſe for a Year, upon no other Conſideration than reſerving a Pepper-Corn, if it be demanded, ſhall work as a Bargain and Sale, and ſo to make the Leſſee capable of a Releaſe?

And it was reſolved that it ſhould, and that the Reſervation made a ſufficient Conſideration to raiſe an Uſe, as by Bargain and Sale. Vide 10 Co. in the Caſe of Sutton's Hoſpital. 1 Mod. 262, 263. 2 Mod. 249.

Rozer *verſus* Rozer.

1 Vent. 311. 3 Keb. 756. 1 Vent. 268, 293.

AN Indebitatus Aſſumpſit pro parcell' Corii ad ſpecialem inſtantiam & requiſitionem of the Defendant, ſold and delivered to J. S. Et ſic inde Indebitat' exiſtens the Defendant promiſed to pay.

Upon Non Aſſumpſit pleaded, and a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That there is no Promiſe laid, and no Reaſon to preſume a Promiſe, when 'tis the very Ground of the Action, tho' after a Verdict. And admitting there were a Promiſe; yet it being collateral, it did not make a Debt, but ſhould have been brought as an Action upon the Caſe. Mo. 702. and Dyer 230. And hereupon Judgment was ſtayed. Tho' (as I

1 Vent. 311. hear) in the King's Bench about two Years ſince, between Derby and Kent, they held ſuch a Caſe well enough after a Verdict. Quære.

Termino Sanctæ Trinitatis, Anno 33 Car. II.

In Communi Banco.

Page *verſus* Kirke.

IN an Action of Treſpaſs, upon Not guilty, at the Aſſizes in Suffolk, a Verdict was found for the Plaintiff, and 10 s. Damages, and 40 s. Coſts, and Judgment entred accordingly.

3 Mod. 39. Raym. 488. 2 Jon. 232. Q. Poſt. 45, 48.

And an Action of Debt was brought upon the Judgment, and the Defendant pleaded Specially the Statute 22 & 23 Car. 2. cap. 9. againſt recovering more Coſts than Damages (where the Damages are under 40 s.) in Treſpaſs, unleſs certified by the Judge that the Title was chiefly in Queſtion, the Words of the Statute being, If any more Coſts in ſuch Action ſhall be awarded, the Judgment ſhall be void.

To which the Plaintiff demurred, and the Plea was held inſufficient; becauſe the Verdict was for 40 s. Coſts, and not Coſts increaſed by an Award of the Court.

2. If the Judgment were erroneous, yet it was hard to make it avoidable by Plea, notwithſtanding that the Words of the Statute are, Shall be void.

Termino Sancti Michaelis, Anno 33 Car. II.

In Communi Banco.

Onſlow's *Caſe.*

HE brought an Action againſt a Bailiff (being the chief Magiſtrate) of a Corporation, for that although he were choſen one of the Burgeſſes to ſerve in Parliament for the Corporation by the greater Number, &c. yet the Bailiff to diſappoint him of Sitting, and to bring Trouble, &c. upon him, in return another Perſon in the Indentures, together with him, to his Damage, &c. Upon Not guilty pleaded, and a Verdict for the Plaintiff, it was moved in Arreſt of Judgment that the Action would not lie. And of that Opinion were the whole Court, viz. North Chief Juſtice, Wyndham, Charlton and Levinz, for they ſaid they had no Juriſdiction of this Matter, the principal Part thereof being a Return in Parliament. No Action before the Statute H. 6. &c. did lie againſt a Sheriff or chief Officer of a Corporation for a falſe Return, and the Courts at Weſtminſter muſt not enlarge their Juriſdiction in theſe Matters further than thoſe Acts gave them. That there were no Precedents of any Actions at the Common Law ſave Nevil's Caſe in the late Times, and Sir Samuel Bernadiſton's Caſe, both which miſcarried. In the Long Parliament there were a great many double Returns, but no Actions had been brought, which is a great Argument that no ſuch Action lies, as Littleton argues upon the Statute of Merton of Diſparaging an Heir. By the Stat. 7 & 8 *W.* 3. *c* 7. Caſe lies againſt an Officer for a falſe or double Return, and the Party griev'd to recover double Damages, and full Coſts, which Act to continue for ſeven Years; and by Stat. 12 & 13 *W.* 3. to continue for eleven Years.

3 Lev. 29, 30. 2 Lev. 114. Pollexf. 470. 2 Sid. 168. 1 Danv. 205. 6 Mod. 45, 49. 2 Lev. 50, 250.

2 Sid. 168.

Termino

Termino Paſchæ, Anno 35 Car. II.

In Communi Banco.

The Lord Cornwallis's *Caſe*.

2 Lev. 169. 2 Show. 104. 1 Vent. 299. 2 Mod. 130. Pollexf. 181. 1 Salk. 269. Raym. 260.

THE Caſe was, Iſaac Pennington a Copyholder of the Manor whereof my Lord Cornwallis is now ſeiſed, committed Treaſon in the Matter of the Murder of King Charles the Firſt; and then about Anno 1655. ſurrendred into the Hands of the Lord of the Manor his Copyhold Lands to the Uſe of ſome of his Children, who were admitted. In 1659. the Manor was aliened to the Lord Cornwallis, then came the Act of Attainder, 12 Car. 2. whereby Tychburn with other Regicides were attainted, and thereby it was enacted, That all their Manors, Meſſuages, Lands, Tenements, Rents, Reverſions, Remainders, Poſſeſſions, Rights, Conditions, Intereſts, Offices, Annuities, and all other Hereditaments, Leaſes for Years, Chattels Real, and other Things of that Nature whatſoever they be, ſhall ſtand forfeited to the King, &c. Provided that no Conveyance, Aſſurance, Grant, Bargain, Sale, Charge, Leaſe, Aſſignment of Leaſe, Grants and Surrenders by Copy of Court-Roll, &c. made to any Perſon or Perſons, other than the Wife or Wives, Child or Children, Heir or Heirs of ſuch Perſon or Perſons, &c. After which Attainder, &c. the Lord of the Manor cauſed the Lands to be ſeiſed, and brought an Ejectment.

The firſt Point was, Whether in Caſe of Treaſon or Felony the Lord can ſeiſe before Conviction or Attainder? And the Court ſeemed to be of Opinion, That no Seiſure could be till Attainder, without Special Cuſtom; but they agreed the Preſentment of the
2 Danv. 192. Homage was not neceſſary to precede a Seiſure, or to entitle the Lord to take the Advantage of a Forfeiture; but in Caſe of a Capital Crime it would be unreaſonable and inconvenient to permit the ſame to be tried or controverted in a Civil Action before the Conviction appeared upon Record.

Secondly, Whether this were ſuch a Forfeiture as the Lord was bound to take Notice thereof? For if no Notice, then the Acceptance of the Surrender, &c. would not preclude him from taking Advantage of the Forfeiture. And the Court inclined that the Lord ſhould not be preſumed to take Notice in this Caſe, as

he ſhall in the Caſe of Failure of Suit of Court, Non-payment of Rent, &c. Vide 2 Cro. Matthews and Whetton 233.

Thirdly, Whether the Manor being conveyed away before the Attainder ſhall purge the Forfeiture?

Juſtice Levinz ſaid, That although no Advantage of this Forfeiture can be taken till Attainder, yet after Attainder it has Relation, and the Committing of Treaſon is the Forfeiture: There is a Difference between an Heir taking Advantage of a Forfeiture in the Time of the Anceſtor; and an Alienee in the Time of the former Lord. Vide Owen 63.

But then Juſtice Charleton declared his Opinion, That the Copyhold was given to the King, by the Statute of 12 Car. for the Generality of the Words, (Other Things of that Nature whatſoever,) and that enforced by the Proviſo, where meſne Conveyances, Surrenders by Copy, were mentioned. 1 Vent. 299.

But the other Juſtices ſeemed to be of another Opinion, for that Copyholds were never included in a Statute where any Prejudice would thereby accrue to the Lord, unleſs expreſly named; and for the Proviſo, it might be ſatisfied by the Copyholds, which the Traitors might hold of the King's Manors, or where they had a Manor held of the King, and had made voluntary Grants of Copyholds, and Surrenders made ſubſequent: And ſo 'twas ſaid to be the Opinion of my Lord Hale, 16 Car. 2. when he was Chief Baron of the Exchequer. But however they were ordered to attend the King's Attorney General, to know whether he deſired to be heard to that Point. Et adjornatur. 3 Co. 7, 8. Heydon's Caſe.

Anonymus.

UPon a Trial at Bar upon a Quare Impedit; the Caſe was, Parceners had made Partition to preſent by Turn; and an Uſurpation is in the Turn of one of them, whether this put all the reſt out of Poſſeſſion, or the Siſter which had the next Turn ſhould preſent when the Church became void. The Court inclined to an Opinion that it ſhould put all out of Poſſeſſion, and would not permit a Special Verdict upon the Motion of Serjeant Maynard, but a Caſe was made of it for the Conſideration of the Judges. Vide Kelleway, & F. N. B. 37. Kellew. 1.

Anonymus.

IN an Ejectment: Upon a Special Verdict, an Uſurpation had been made to a Church, and a Quare Impedit brought to remove the Incumbent, and pending the Quare Impedit, the perpetual Advowſon was ſold by the Plaintiff, and it was found ea intentione, that J. S. Clerk ſhould be preſented after the Uſurper

See Watſon's Clergyman's Law, chap. 5. and pag. 34, &c. 42, 46, 48, 405. 3 Salk. 323.

per Incumbent removed, and accordingly after such Removal J. S. was presented, admitted, instituted and inducted. And after Argument the Court gave Judgment for the Plaintiff, whose Lessor, supposing the Presentation, &c. void by the Statute against Simony, had procured a Presentation from the King, and Admission, Institution and Induction thereupon, and the Court held it to be plain Simony.

Termino Sancti Michaelis, Anno 2 Jac. II.

In Communi Banco.

Bathurst's *Case*.

2 Lev. 40, 110, 133. 1 Vent. 199, 292.

AN Action was brought against him, as Executor of an Executor of an Executor, against whom the Plaintiff had recovered a Judgment in Debt, and it was suggested that he had wasted the Estate of the first Testator, and so by the Statute 30 Car. 2. his Executor was liable in such Manner as his Testator would have been, if he had been living. Upon Plene Administravit pleaded, the Matter was found specially, and

1 Vent. 199.

that the Executor which wasted was indebted to the Defendant, whom he made his Executor upon a simple Contract. And the Question was, whether the Defendant might retain for his Debt against the Debt grounded upon the Devastavit? And the Court held that he might, for it shall not be adjudged a Debt superior to a simple Contract.

Termino Paſchæ, Anno 22 Car. II.

In Communi Banco.

Grove *and Dr.* Elliot, Chancellor of Sarum.

A Motion had been made for a Prohibition, upon a Suggeſtion that per legem terræ no Man ought to be Judge in his own Cauſe, &c. nor ought any Man to be compelled to anſwer Articles proſecuted againſt him ex mero Officio, &c. And that contrary hereto the Defendant had articled againſt the Plaintiff, That he did out of his own private Will and Spirit, and contrary to the Laws, keep Conventicles, and did allow and permit one South and others, pretended Miniſters, and not allowed by the Church, to expound and preach to himſelf and many others, &c. and this was ex promotione A. B. Notarii Publici, &c. 2 Show. 234, 238, to 241, 297, 330, &c.

It was not alledged in this Libel or Articles, That there was any Preſentment of this Matter, but the Regiſter of the Court ſwore that there was a Preſentment made by the Curate of the Pariſh, where, &c. and that a certain Copy which he delivered here into Court was a true Copy thereof.

Ellis, Serjeant, for the Plaintiff.

Firſt, Conventicles are properly puniſhable at the Common Law, and not by the Eccleſiaſtical Law; they are inquirable upon every Commiſſion of Oyer and Terminer, 4 Inſt. 162. and the late Act againſt Conventicles was in Force at this Time.

Secondly, No Man ought to be proceeded againſt in the Spiritual Court without a due Preſentment. 25 H. 8. c. 14. declares, That 'tis not reaſonable that any Ordinary by any Suſpicion conceived of his own Fancy, without due Accuſation or Preſentment, ſhould put any Subject of this Realm into the Infamy or Slander of Hereſy. And the Reaſon of this extends to other Things as well as Hereſy. Indeed this Statute is repealed, but as my Lord Coke, 12 Rep. 26. obſerves, it was herein declaratory of the Common Law; and 'tis great Reaſon that there ſhould be a Preſentment and Accuſation by ſome proper Perſon, for otherwiſe an innocent Perſon in Caſe of falſe Accuſation would not know where to have Remedy.

Object. Here is a Preſentment by the Curate, and by the 113 of the Canons made 3 Jacobi, a Curate in the Abſence of the Rector may preſent.

Anſw. Firſt, Theſe Canons were never confirmed by Act of Parliament, and without that there cannot be any Canons made to alter the Law, 12 Co. 72, 73. at leaſt they can bind none but the Clergy. Vide Mo. 755. and one Reaſon thereof is, becauſe the Laity have no Repreſentatives in the Convocation.

Secondly, This Canon ſays only, That a Curate may preſent in the Abſence of the Rector; it doth not appear here that the Rector was abſent.

Thirdly, All ſuch Preſentments ought to be upon Oath, and this is not proved ſo to be: The Courts in this Hall cannot proceed upon any ſuch Thing without Oath.

Fourthly, It is not alledged in the Libel or Articles, that there was any Preſentment at all, only the Regiſter comes in and ſaith, He finds ſuch a Preſentment among the Acts of the Court; ſo that Iſſue cannot be taken whether any or no? So it muſt be taken, his Proceeding was ex officio mero without Preſentment, and 'tis as great a Miſchief as was by Reaſon of common Informers before 18 Eliz. c. 5. appointed their Names to be endorſed upon all Proceſs ſued out by them.

Fifthly, In this Caſe they will examine upon Oath: Now no Layman ought to anſwer upon Oath except in Caſes Matrimonial and Teſtamentary. 12 Co. 26, 27. 3 Cro. 262.

Baldwyn contra.

Firſt, That Conventicles are puniſhable at the Common Law, or were by the late Statute, does not diſprove, or take away the Juriſdiction of the Spiritual Court, for the Proceedings are diverſo reſpectu. We proceed againſt Conventicles, as being againſt the Peace, and as being againſt the Laws of the Church, and to prevent the Broaching of heterodox Opinions, as in one Court we do agere civiliter by Action, & criminaliter by Information for the ſame Matter.

Secondly, The Proceeding in this Caſe is according to the conſtant Courſe of Proceeding in their Court; for when a Preſentment is made, they form Articles thereupon, tibi articulamur & objicimus, &c. but they never recite or mention the Preſentment in the Articles, and therefore it does not, nor need it appear in them in this Caſe. So that it cannot from hence be concluded to be a Proſecution ex officio mero. Moreover 25 H. 8. when it was in Force, concerned Hereſy only.

As to the Preſentment made in this Caſe by the Curate,

1. Thoſe Canons are not to be queſtioned, they have been always allowed, having been confirmed by the King.

2. The Rector's Abſence ſhall be intended.

3. The Church-wardens themſelves, whoſe antient and unqueſtionable Office it is to make Preſentments, don't take a particular Oath upon all the Preſentments they make, but they do it by

Virtue of their general Oath of Church-wardens, and Miniſters do the ſame (as the Biſhop of Sarum preſent in Court had aſſerted juſt before in verbo Sacerdotis) or rather by Virtue of their general Oath of Canonical Obedience.

4. They are not bound to ſpecify the Preſentment in their Articles; and this is not ſo liable to the Objection of Miſchief and Unreaſonableneſs, as the Informations daily brought in the King's Bench in the Name of the Clerk of the Crown; which Informations are approved and preſerved by the very Statute of 18 Eliz. c. 5. And if there be no due Preſentment, 'tis an Error which conſiſts in not proceeding according to their Rules, i. e. the Canon Law, and the proper Remedy for that is by Appeal; and our Courts will not take Notice whether they obſerve their Laws. Prohibitions are only to be granted when the Common Law is invaded and interfered with.

Thirdly, As to the Examining of the Party upon Oath, here is no Cauſe to mention it; and indeed it is not their Courſe; for they only ask him ore tenus, whether he will confeſs or deny the Articles; if he deny them, then there is litis conteſtatio, and they proceed to examine Witneſſes to prove it; and if it be not proved, the Informer is condemned in Coſts.

Juſtice Wylde. I am of Opinion that there ſhould go no Prohibition. We muſt judge only upon the Suggeſtion: Here 'tis ſuggeſted that the Defendant proceeded againſt the Plaintiff ex officio, but that may be underſtood two Ways, either that he proceeded officioſe on his own Head, or that he proceeded out of Duty according to his Duty, and nothing appears to the contrary of this laſt, and then he did as he ought. If the Plaintiff had ſuggeſted that by the Law of the Land there ought to be a Preſentment by ſuch Perſons in ſuch Manner, &c. he might have brought that into Queſtion.

Archer of the ſame Opinion. We muſt give Faith and Credit to their Proceedings, and preſume that they are according to their Law. 4 Co. 29. The King with the Convocation may make Orders and Conſtitutions for the Government of the Church.

Tyrrell of the ſame Opinion. But if the Suggeſtion were that no Preſentment by a Curate were ſufficient, nor unleſs it were upon Oath, &c. I ſhould have been of Opinion for a Prohibition. I hold that the King and Convocation, without the Parliament, can't make any Canons which ſhall bind the Laity, though they may the Clergy. Vide 35 H. 8. c. 19.

Vaughan of the ſame Opinion. If the Articles were exhibited meerly ex officio, i. e. out of the Mind of the Chancellor himſelf, they were not warrantable. But there is no Colour for this Suggeſtion, for they appear to be the Information of a Publick Notary. As to the Preſentment which is thought requiſite by the Pre-

amble of 25 H. 8. c. 14. declaratory of the Common Law or not, it is a ſufficient Anſwer to ſay, That the Act is repealed, and therein the Preamble: And for ought any Man knows, the Preamble was the Cauſe of the Repeal; this has been the only ſpecious Objection. As to the Canons 3 Jacobi, certainly they are of Force, tho' never confirmed by Act of Parliament. Indeed no Canons of England ſtand confirmed by Act of Parliament: Yet they are the Laws which bind and govern in Eccleſiaſtical Affairs. The Convocation with the Licence and Aſſent of the King under the Great Seal may make Canons for Regulation of the Church, and that as well concerning Laicks as Eccleſiaſticks, and ſo is Linwood. Indeed they cannot alter or infringe the Common Law, Statute Law, or King's Prerogative; but they may make Alterations, (viz. in Eccleſiaſtical Matters) or elſe they could make no new Canons: All that is required of them in making of new Canons is, that they confine themſelves to Church-Matters. As no humane Law can be made which is contrary to the Divine Law, and it is binding only in thoſe Things which are permiſſa by the Divine Law; ſo no Canon Law can be made which is repugnant to the Law of the Land. The ſubject Matter is in the Caſe. The Permiſſa, the Things of Eccleſiaſtical Nature, which are left indifferent by the Law of the Land; in this Caſe we muſt preſume there was a Preſentment according to their Law; if not, the Remedy is by Appeal. We ought not to aſſume the Juriſdiction of Judging upon their Law, but give Way to their Courſe of Proceedings.

Serjeant Ellis. I only intended that Canons cannot be made to alter the Law without Parliament.

Curia. We all agree as to the firſt Exception, That the Spiritual Court may proceed againſt Conventicles, as a Spiritual Offence, tho' not as a Civil.

As to the Second, That they have Conuſance of all Falſe Worſhippers.

As to the Third, That there is no Colour or Occaſion to make it.

Note, The Courſe of the Spiritual Court is not to make a Significavit until forty Days after the Excommunication. General Citation is a Cauſe of Prohibition, for it ought to be expreſſed for what Cauſe: But this is cured by Appearance or Appeal.

Termino Paſchæ, Anno 1 Willielmi & Mariæ.

In Communi Banco.

Anonymus.

UPon a Suggeſtion of Devaſtavit of a Feme Executrix, it was, That the Baron and Feme, devaſtaver' & converter' ad uſum ipſorum: And upon the Iſſue it was found accordingly. 1 Salk. 114, 119.

It was moved in Arreſt of Judgment, That they could not convert to their own Uſe: And ſo in Trover and Converſion, Quod converter' ad uſum ipſorum is not good. 1 Roll. Abr. 6. 1 Vent. 24. 1 Sid. 172.

Sed non allocatur: For here the material Part of the Iſſue was the Waſting, which the Baron and Feme might do jointly, and the Converſion is nothing to the Purpoſe. Vide 2 Saund. Iſſue upon a Devaſtavit. 2 Lev. 145. contra. 1 Saund. 305, 306. Merchant v. Driver.

Anonymus.

IN an Aſſumpſit, in Conſideration that he paid him ſo much Money, he promiſed to pay a like Sum into the Court, and appear. 2 Cro. 667. Yelv. 128. Palm. 281. 1 Roll. 25, 27, 35, 51.

Object. That there is no Benefit, as if it were in Conſideration that he depoſited ſo much Corn, he promiſed to deliver it over. 3 Cro.

Cur'. This is not like; for here he has Benefit for the Uſe of the Money, but in the other Caſe, he is to deliver the Corn in Specie.

Anonymus.

IT was moved, That whereas the Defendant was a Conſtable, and a Verdict for him being in the Execution of his Office, and no Memorandum appeared, as was uſual upon the Poſtea, to give him Double Coſts, according to the Statute of 7 Jac. that it muſt be now ſupplied.

But per Curiam, We cannot do it; becauſe the Statute ſays, The Judge before whom the Cauſe was tried ſhould allow double Coſts; and the Court cannot do it, unleſs the Judge of Aſſize had ordered the Poſtea to be marked. Q. Antea 36. Poſtea 48.

Anonymus.

Anonymus.

IT was pleaded in Abatement, That the Declaration varied from the Original in the Name of the Defendant and his Addition. 'Twas ſaid that in ſuch Caſe the Curſitor or Clerk that made out the Writ may be ordered to attend; and if his Inſtructions were Right, to amend the Writ by the Inſtructions. See a new Original, &c. Poſt. 130.

Poſt. 49, 50, 152.

Anonymus.

1 Salk. 495. WHere a Man was outlawed after the Plaintiff had him in Priſon, a Reverſal was ordered at the Charge of him that proſecuted the Outlawry, it appearing to be an Abuſe.

Anonymus.

Poſt. 61, 62. COvenant, that he ſhall have and enjoy; and a Breach was aſſigned, that ſuch an one brought Treſpaſs and recovered: And after Verdict it was moved in Arreſt of Judgment, that it does not appear, that he which recovered in Treſpaſs had a Title.

Serjeant Levinz. Here is an expreſs Covenant, that he ſhould quietly hold the Poſſeſſion, and he is diſturbed in his Poſſeſſion, tho' upon no Title. And ſo is Dyer 328. a. Vaughan 120. Vide Hob. 35. Et adjornatur. Poſt. 62.

Termino Sanctæ Trinitatis, Anno 1 Will. & Mar.

In Communi Banco.

Anonymus.

A Motion was made to change a Venue, where an Attorney was Plaintiff. 2 Salk. 668, 670. 2 Show. 176, 242. 1 Vent. 1, 11, 16, 29, 298.

Object. He has Privilege to lay it in Middlesex, because of his Attendance.

Answ. But here he has laid it within London.

Curia. Then let the Venue be changed; for then he is to be considered as a Person at large. 2 Salk. 668.

Anonymus.

A Motion was made for a Prohibition to a Suit for Tithe-Lamb, upon a Suggestion of a Modus to pay 2 d. falling in the Plaintiff's Farm in the Parish.

Object. A Prohibition was granted before to stop this Suit upon a Suggestion, which was tried and found for the Plaintiff, and a Consultation granted.

Answ. That Suggestion was for 2 d. to be paid for every Lamb which fell in the Parish, and this only to a particular Farm, and so not within the Statute of 50 Ed. 3. that a second Prohibition shall not be granted after a Consultation awarded in the same Suit. Vide 1 Cro. 151. Stroud and Hoskins, 1 Roll. Rep. 378.

Note here, If this Matter had been found by the Verdict, no Consultation had been granted. Hob. 192.

But here the Court inclined against a Prohibition by Reason of the said Statute of 50 Ed. 3.

Ball *versus* Cock.

A Fine was acknowledged before Herbert, Chief Justice, by a Man and his Wife, 7 Decemb. 1689. and by Reason that the late King James had deserted the Kingdom and taken away the Great Seal, there followed a Stop of Proceedings at Law; and the Woman died the 20th of February following, and upon the 22d of February the King's Silver was paid, as upon a Writ of Covenant in King James's Time, tho' no Writ was then sued out. But afterwards a Writ of Covenant was taken out, returnable 3 Mod. 140. Vide antea 30.

in

in Michaelmas-Term laſt, which was ſealed with the Seal of King William and Queen Mary; and the Fine was engroſſed and made as a Fine in Michaelmas-Term.

And this preſent Term it was moved, That the Fine might be vacated, and the Book of 1 H. 7. fo. 9. was cited, where the Cognizance of the Fine was in the Time of R. 3. and afterwards a Writ of Covenant was ſued in the Time of Henry the Seventh, which being ſhewn to the Court they ſtopped the Fine, tho' 'tis ſaid in that Caſe, that 'tis the common Courſe to take the Acknowledgment of Fines, and then to ſue out a Writ of Covenant: But they ſaid they would not permit a Precedent, That an Acknowledgment of a Fine ſhould be in the Predeceſſor King, and the Writ of Covenant in the Time of his Succeſſor.

But the Court (after the Cauſe had been twice moved, and full Conſideration of it) gave their Opinions ſeriatim, that the Fine ſhould ſtand. For the Entring of the King's Silver after the Party's Death could not be now examined, in regard the Fine was engroſſed and compleated as a Fine of Michaelmas-Term. And ſo was Farmer's Caſe, Hob. 330. and Carill's Caſe, Dyer 220. b. The Court would not ſtop a Fine taken of a Feme Covert when ſhe was dead. 1 Roll. Rep. 114.

Antea 30. 1 Mod. 246. Herbert Parrot's Caſe, and 3 Lev. 36. Hutchinſon's Caſe.

Note, Several Precedents were ſhewn where Fines were ſet aſide for undue Practice in the Paſſing of them, (viz.) in Caſe of perſonating Fines taken by Commiſſioners, of Infants, &c.

Anonymus.

Raym. 488. 2 Jones 232. 3 Mod. 39. 22 & 23 Car. 2. c. 9. Antea 36, 45.

IN an Action of Treſpaſs, Quare clauſum fregit, and putting Stakes upon his Ground, it was held that this was within the late Statute, which enacts, That the Plaintiff ſhall recover no more Coſts than Damages; but if any Thing had been taken away (of how little Value ſoever) it had not been within the Statute.

Anonymus.

2 Roll. Abr. 302. Pl. 19.

A Prohibition was granted to a Suit for Tithes, upon a Suggeſtion that the Tithes were ſet out; and it was moved for a Conſultation, That he did not alledge Notice given to the Parſon: And the Biſhop of Carliſle's Caſe, Hob. 107. was cited, where a Cuſtom was laid to ſet out Tithe-Wool, abſque aliquibus viſu & tactu, of the nine Parts by the Parſon, &c.

But the Court were all of Opinion, the Caſe having been twice moved, That no Notice need be given to the Parſon. And ſo it is ſaid to be adjudged in Noy 19. tho' the Eccleſiaſtical Law is otherwiſe. So is the Caſe of Chaſe and Ware, Roll. Tit. Tithes 643. Style 342. where 'tis held, That if an Action be brought againſt

the Parſon, for not taking away his Tithe after ſet out, Notice muſt be given before ſuch Action. For the Biſhop of Carliſle's Caſe in Hobart does not make againſt this; for there a Cuſtom was laid to excuſe the Parſon from ſeeing the Tithe which is to be ſet out, which Cuſtom is not to be omitted. Vide Roll. Abridg. Tit. Diſmes 647. And the 2 of E. 6. cap. 13. enacts, That it ſhall be lawful for every Perſon, to whom Tithe ought to be paid, to view his Tithe ſet forth and ſevered from the nine Parts.

Maſſingburn *verſus* Durrant.

IN an Action of Treſpaſs for Breaking of his Cloſe and Cutting of his Corn: The Plaintiff declared of ſeveral Treſpaſſes, ſome whereof were in the Time of King Charles the Second, and others in the Time of King James the Second, and Judgment was by Default. And after a Writ of Enquiry of Damages returned, Error was brought in the King's Bench, and aſſigned that there was no Original, and upon that a Writ was awarded to the Cuſtos Brevium, who certified an Original between the Parties, taken out in the Time of the late King James, which concluded contra pacem noſtram. And this could not be taken to be an Original in this Cauſe; becauſe then it ſhould have concluded, contra pacem noſtram, necnon contra pacem Caroli Secundi nuper Regis; and for that a Rule was in the King's Bench to reverſe the Judgment, niſi. 2 Salk. 636. Show. 27.

It was thereupon moved in this Court, That the Original might be amended; for that it was ſaid, That the Inſtructions to the Curſitor were right, and a Form given him to draw the Concluſion of the Writ contra pacem noſtram, & contra pacem nuper Regis. Antea 46. Poſt. 50, 130, 152.

And it was admitted on the other Side, that the Inſtructions were ſo given to the Curſitor.

But then it was objected, That this was Part of the legal Form of the Writ, and in that an Original was not amendable. And ſo Parker's Caſe in Hutton 56. where Indicari was put in a Writ upon the Statute of Hue and Cry inſtead of Indictari, and it could not be amended, tho' that Word was right in the Inſtructions to the Curſitor. And for Blackamore's Caſe, in 8 Co. there (in the principal Caſe) the Inſtructions were in a Matter of Fact, as in the Addition of the Party, Knight inſtead of Gentleman; but in that Caſe held, That the Writ could not be amended in the legal Form.

To this it was anſwered, That this was in Matter of Fact; for a Writ of Treſpaſs does not diſtinguiſh Treſpaſſes in one King's Reign or another; that is only diſtinguiſhed by the Concluſion contra pacem noſtram & nuper Regis, and for that the Inſtructions were particularly given; and that is the Manner of

giving the Inſtructions, when there are Treſpaſſes to be declared upon in the Reigns of ſeveral Kings.

And of that Opinion was all the Court, and ordered the Amendment accordingly: But that the Plaintiff in the Writ of Error ſhould have his Coſts, becauſe the Error was brought and aſſigned by Reaſon of this Fault in the Writ.

Note, The Curſitor was not required to attend with his Inſtructions; becauſe they were agreed to be as the Plaintiff's Counſel in the Action alledged, and ſo no Examination of the Curſitor requiſite.

Note, In Blackamore's Caſe in 8 Co. it is ſaid, That the Writ ſhall be amended by the Curſitor. Quære.

Fowkes *verſus* Joyce.

2 Lutw. 1161. 3 Lev. 260. 1 Lev. 196. 2 Lev. 2, 246, 253. 1 Mod. 6, 7, 74. 2 Show. 43. 1 Sid. 313. 1 Vent. 163, 383. 3 Mod. 290. Hardr. 118.

IN a Replevin the Defendant avowed the Taking, as a Diſtreſs for Rent. In Bar of the Avowry,

The Plaintiff replied, That the Avowant had let the Place where, with an Inn, and that he was Driving his Cattle to London ad proficuum inde faciend', and that he asked Leave of the Avowant to put his Cattle in the Ground for a Night, and that he gave him Leave, with the Conſent of the Leſſee, virtute cujus he put in his Cattle prout ei bene licuit.

Upon which it was demurred; and to maintain the Bar to the Avowry it was urged, That being put in the Ground belonging to the Inn they were privileged, and that being driving to London to a Market, and put in for Paſture by the Way, they could not be diſtrained.

To this it was anſwered, That there was nothing appeared in the Pleading of a Common Inn, and ſo the Matter did not come in Queſtion; neither was it ſet forth that the Cattle were driving to Market, but only to London, ad proficuum inde faciend'. And beſides, in the Bar to the Avowry the Licence is the only Matter relied upon, which doth not conclude the Leſſor from taking the Diſtreſs. And of that Opinion was the Court.

And the Court held, That Cattle driving to a Market, and put into Paſture by the Way, were not privileged from being diſtrained; for 'tis by the Statute of Marlbridge, That Beaſts cannot be diſtrained in the Highway; and not by the Common Law.

Morley *verſus* Polhill & al'.

Suſſex ſſ. EDwardus Polhill nuper de Burwaſh in Com̃ præd. Armig, & Walterus Roberts Jun' nuper de Saleherſt in Com. præd. Armig', Executores Teſtamenti Roberti Fowle Armig', Aſſign' Thomæ Carey Armig', Executores Teſtamenti Samuelis Gott Armig', nuper dicti Samuelis Gott of Gray's Inn in the County of Middleſex Eſquire, ſummon. fuer. ad reſpondend' Franciſco Morley Armig, Executori Teſtamenti Georgii nuper Domini Epiſcopi Winton. prox. Succeſſori Brian', nuper Domini Epiſcopi Winton̄ defunct' de plito, quod teneant ei convencionem inter præfat̄ Brian̄ nuper Dom̄ Epiſcopum Winton̄ in vita ſua, & præfat̄ Samuelem Gott in vita ſua factam ſecundum vim formam & effectum quarundam Indenturarum inde inter eos confectarum, &c. Et unde idem Franciſcus Morley per Joſeph' Newington Attorn' ſuum dicit quod cum per quandam Indentur. factam apud Weſtfield in Com. prædict. viceſimo quarto die Decembr. Anno Regni Domini Caroli Secundi nuper Regis Angl', &c. decimo tertio, inter præfat̄ Brian̄ nuper Dom̄ Epiſc̄ Winton̄ in vita ſua, per nomen Reverend. Patris in Deo Brian̄, per Divinam providentiam Dom. Epiſc̄ Winton. ex una parte, & præfat̄ Samuelem Gott in vita ſua, per nomen Samuelis Gott de Gray's Inn in Com̃ Midd̄ Armig' ex altera parte, cujus quidem Indenturæ alteram partem, ſigillo prædict' Samuelis Gott in vita ſua ſignat', idem Franciſcus hic in Cur̄ p̄fert, cujus dat̄ eſt eiſdem die & anno Teſtat. ſit quod præfat̄ Brian' tunc Dominus Epiſcopus Winton', pro & in conſideratione ſurſumreddicon. prioris Indenturæ, (Anglice, Leaſe) quæ fuit determinare (Anglice, to expire) in menſe Auguſti, qui tunc foret in Anno noſtri Domini Dei Milleſimo ſexcenteſimo ſexageſimo tertio, dimiſiſſet, conceſſiſſet, & ad firmam tradidiſſet. 'Et prædictus Brianus tunc Dominus Epiſcopus Winton', per Indentur. prædictam pro ſeipſo, & ſucceſſoribus ſuis, dimiſit, conceſſit & ad firmam tradidit eidem Samueli, Omnes illas Rectorias (Anglice, Parſonages) de Rye & Weſtfield, & quaſlibet earundem cum ſuis pertin. in Comitat. Suſſex', & omnia ædificia, ſtructuras, horrea, ſtabula, pomaria, gardina, terras, tenementa, hæreditamenta, prata, leſuras, paſturas, terras Glebal̄, boſcos, ſubboſcos, Decimas, (Anglice, Tenths) Decimas (Anglice, Tithes) oblacon̄, obvencon', p̄ficua, commoditat. (Anglice, Commodities) & advantagia (Anglice, Advantages) quæcunque dictis Rectoriis de Rye & Weſtfield pred', vel alteri illarum ſpectan' ſive appertinen' (except. & ſemper reſervat̄ præfat̄ Dom̄ Epiſcopo, & ſucceſſoribus ſuis extra dimiſſion' præd̄ Donis, Donacionibus, Advocationibus, Præſentationibus, Nominationibus & Jure patronatus (Anglice, Right of Patronage) Vicariarum de Rye & Weſtfield prædict') & cujuſlibet illarum Habend̄ & tenend̄ dictas Rectorias, & omnia & ſingula a̅l̄ præmiſſa

Covenant by the Executors of a Biſhop againſt the Executors of an Aſſignee of the Leſſee.

The Count. The Indenture ſet forth.

Profert in Curia.

The Conſideration.

The Demiſe of Rectories and Parſonages.

Glebes, Tithes, Oblations, Obventions, &c.

Exception of the Preſentation to the Churches.

Habend.

cum ſuis pertin̄, (except' præexcept') præfat' Samueli Gott, Executoribus, Adminiſtratoribus & Aſſign̄ ſuis a confectione Indentur. præd', uſque plenam finem & terminum, & pro & durant' plen̄ termino Viginti & unius annorum deinceps prox. ſequen', & plenar' complend' & finiend'. Reddend' & ſolvend' ꝑinde annuatim duran' dicto termino præfat' Dom' Epiſcopo, & ſucceſſoribus ſuis, apud ſuum & ſuos Scaccarium apud Wolveſey prope Winton' annual' reddit' viginti librarum legalis monet' Angl' ad Feſta Annunciationis beatæ Mariæ Virginis & Sancti Michaelis Archangel', per æquas & æquales portiones, (videlicet) pro dicta Rectoria de Rye annual. reddit' octo librarum, & pro prædict' Rectoria de Weſtfield annual' reddit' duodecim librarum, Acetiam reddendo & ſolvendo proinde annuatim duran' dicto termino prout hic poſtea mentionat' eſt præfat' Domino Epiſcopo, & ſucceſſoribus ſuis ſuper dies & apud locum prædict' per æquas & æquales portiones annual' reddit' viginti librarum ſimilis legalis Monet' Angl' ad ſolvend' ꝑ dict' Dominum Epiſcopum, & ſucceſſores ſuos annuatim Vicariis pro tempore exiſten' parochial' Eccleſiarum de Rye & Weſtfield ꝑdict', videlicet, Vicario pro tempore exiſten' de Rye prædict' annual' ſum' duodecim librarum & decem ſolidorum, & Vicario pro tempore exiſten' parochial' Eccleſiæ de Weſtfield prædict' annual' ſummam ſeptem librarum & decem ſolidorum in proſecutione (Anglice, **Purſuance**) tunc Regiæ Majeſtatis directionis pro augmentationibus in ea vice dat. (prima ſolutio inde pro dictis Vicariis faciend' ad Feſtum Annunciationis beatæ Mariæ Virginis, quod tunc foret in Anno Dom' noſtri Dei Milleſimo ſexcenteſimo ſexageſimo tertio) Et præfat' Samuel Gott, pro ſeipſo Executoribus, Adminiſtratoribus & Aſſign' ſuis convenit promiſit & conceſſit, ad & cum præfat' Domino Epiſcopo, & ſucceſſoribus ſuis per Indentur' prædict', quod ipſe præfat' Samuel Gott, Executor', Adminiſtrator' & Aſſignat' ſui, de tempore in tempus & ad omnia tempora tunc poſtea duran' dicto termino viginti & unius annorum, ad ejus, eorum, vel alicujus eorum propr' cuſtag' & onera quando, & toties quoties neceſſe foret, vel requirerent. bene & ſufficient. repararent, emendarent, manutenerent, ſupportarent, (Anglice, **uphold**) ſuſtinerent, præſepirent (Anglice, **Fence**) & cuſtodirent tam prædict' Rectorias & al' præmiſſa, (except' præexcept') quam Sacraria (Anglice, **the Chancels**) Eccleſiarum de Rye & Weſtfield prædict', & eorum alterius in per & cum omnibus, & omnimodis requiſit' (Anglice, **needful**) & neceſſar. reparationibus & emendationibus quibuſcunque, ac eadem & eorum quodlibet ſic bene & ſufficient reparat', emendat', manutent', ſupportat', ſuſtent' præſepit' & cuſtodit. ad finem prædict' termini, vel aliam citiorem determination' dimiſſion' prædict', utrum prius accideret, relinquerent ſurſumredderent & traderent (Anglice, **yield up**) præfat' Domino Epiſcopo & ſucceſſoribus ſuis, prout per eandem Indentur. prædict. inter alia plenius liquet & apparet Virtute cujus quidem Indentur.

For 21 Years. Reddend.

A further Reſervation.

A Covenant to repair.

And to yield up all repaired at the End of the Term.

dentur. prædictus Samuel Gott in Rectorias & tenementa præd. cum pertin. ſuperius dimiſſa (except. præexcept.) intravit & fuit inde poſſeſſionat', Et ſic inde poſſeſſionat. exiſten. idem Samuel poſtea ſcilicet quintodecimo die Septemb. Anno Regni dicti nuper Regis viceſimo tertio apud Weſtfield præd. condidit teſtamentum & ult. voluntat. ſuam & per eandem prædictum Thomam Bard Executorem ejuſdem teſtamenti & ult. voluntat. ſuæ conſtituit & ordinavit Poſteaque ibidem obiit de Rectoriis & al. dimiſſis præmiſſis prædictis cum pertin. ſic ut præfertur poſſeſſionat. Poſt cujus mortem prædictus Thomas Bard in Rectorias & al. dimiſſa præmiſſa cum pertin. intravit & fuit inde poſſeſſionat' Et ſic inde poſſeſſionat. exiſten. prædictus Thomas Bard poſtea ſcilicet primo die Octob. Anno Regni dicti Domini nuper Regis viceſimo quinto apud Weſtfield præd. conceſſit & aſſignavit Rectorias & cætera præmiſſa præd. cum pertin. ac totum ſtatum jus titulum intereſſe & termin. annorum adtunc ventur. & inexpirat. de & in eiſdem (virtute Indentur. præd') præfat. Roberto Fowle Executor. & Aſſign. ſuis: virtute cujus quidem conceſſion. cum pertin. per Indentur. præd. dimiſſa intravit & fuit inde poſſeſſionat' Et ſic inde poſſeſſionat. exiſten. idem Robertus Fowle poſtea & ante finem termini prædicti ſuperius dimiſſ. ſcilicet decimo die Decembris Anno Regni dicti nuper Regis triceſimo quarto apud Weſtfield præd' obiit de Rectoriis & al. tenementis prædictis cum pertin. ſuperius dimiſſis poſſeſſionat. Et prædictus Brianus de reverſione Rectoriæ & cæterorum præmiſſorum prædictorum præd. ſeiſit. exiſtens in dominico ſuo ut de feodo in jure Epiſcopat. ſui prædicti prædictus Brianus poſtea ſcilicet undecimo die Decemb. Anno triceſimo quarto ſupradicto apud Weſtfield præd. obiit de Reverſione Rectoriæ & cæterorum præmiſſorum præd. cum pertin. ſic ut præfertur ſeiſit. poſt cujus mortem reverſio tenementorum præd. cum pertin. deven. prædicto Georgio nuper Epiſcop. Winton. ſucceſſori p̄dict. Briani in Epiſcopat. præd. debito modo conſtitut. & præfectus in jure Epiſcopat. ſui præd' Et prædictus Georgius Epiſcopus de reverſione tenementorum præd. ſeiſit. exiſten̄ & p̄dict' Edwardus Polhill & Walterus Roberts de Rector' & cæteris præmiſſis cum pertin. ſic ut præfertur poſſeſſionat. exiſtent' præd' terminus viginti & unius Annorum de & in præmiſſis ſic ut p̄fertur dimiſſis finivit poſt mortem Briani nuper Epiſcop. Winton' & in vita p̄dicti Georgii prox. ſucceſſor. præd. Briani ſcilicet viceſimo tertio die Decembris Anno Dom̄ milleſimo ſexcenteſimo octogeſimo ſecundo (eodem Georgio tunc Epiſcopo Winton. de reverſione tenementor̄ p̄dictorum ſic ut p̄fertur ſeiſit exiſten̄) Et idem Georgius Epiſcopus Winton. poſtea ſcilicet triceſimo die Decembris Anno Regni dicti nup Regis triceſimo quarto ſupradicto apud Weſtfield præd. condidit teſtamentum & ult. voluntat. ſuam & p̄ eand. conſtituit & ordinavit prædictum Franciſc̄ Morley Executorem ejuſdem Teſtamenti poſteaq; ibidem

The Leſſee entred,

And made his Will,

And died poſſeſſed.

The Executor entred, And granted to the Defendant's Teſtator,

Who entred,

And died.

The Biſhop being then ſeiſed of the Reverſion in the Right of his Biſhoprick, died ſeiſed.

And the ſame came to his Succeſſor Biſhop, who was duly made Biſhop.

The Term expired.

The ſucceeding Biſhop made his Will, and made the Plaintiff Executor, and died.

ibidem obiit. Ac licet prædictus Brianus Dominus Epiſcopus in vita ſua & præfat' Georgius Dominus Epiſcopus poſt ipſius Briani mortem (cujus prox' Succeſſor' in Epiſcopat. præd. prædictus Georgius Dominus Epiſcopus fuit in vita ſua) bene & fideliꝫ obſervaveꝫ performaver. & perimplever. omnes & ſingulas convention. conceſſiones articulos & agreamenta in Indentur' præd' ſpecificat. ex parte ipſius Briani Dom̃ Epiſc̃ & ſucceſſorum ſuorum obſervand performand. & perimplend' ſecundam formam & effectum Indentuꝫ præd' idem tamen Franciſcus in ſecundo die qd̃ p̃dictus Edwardus Polhill & Walterus Roberts ante finem termini prædicti & poſt mortem prædicti Roberti Fowle (cujus Executores prædicti Edwardus & Walterus ſunt) in vita prædicti Georgii nuper Epiſcop. Winton', ſcilicet. viceſimo die Decembris Anno Regni dicti nuper Regis triceſimo quarto permiſer. p̃dictum Sacrarium (Anglice, the Chancel) Eccleſiæ Parochialꝫ de Weſtfield præd. (parcell. præmiſſorum ſtare & eſſe diſcoopert. pro defectu ſufficientis tecturæ inde & parietes muros oſtia & paviment. ejuſdem Sacrar. fore ruinoſa & in decaſu pro defectu ſufficien. tabulation. cruſtiation. (Anglice, Plaſtering) & emendation. inde cum lapidibus & aliis neceſſariis materialibus & vitrum de feneſtris Sacrarii illius fore fract. & dirupt. & feneſtras illas ſtare & eſſe minime vitriat. (Anglice, unglazed) per quod groſſum maheremium Sacrar. illius per tempeſtat. pluvial. ſuper ill. deſcenden. ac per vim venti ſuperinde afflan. putrid. devenit & corrupꝫ ac ratione inde Sacrar. ill. ruinaminatur Necnon prædicti Edwardus Polhill & Walterus Roberts eiſdem die & anno ult. præmentionat. permiſer. unum horreum Rectoriæ de Weſtfield præd. ſpectan. ac parcellꝫ præmiſſorum ſuperius ut præfertur dimiſſorum ſtare & eſſe diſcoopert. ruinoſ. & in decaſu pro defectu ſufficien' tegminis contabulationis (Anglice, Boarding) & ſubſtructionis (Anglice, Groundſelling) per quod groſſum maheremium horrei pred' putrid. & corrupt. deven. ac horreum præd. penitus corruit & in terram cecidit pro defectu reparationis præd' Prædictiq; Edwardus Polhill & Walterus Roberts Sacrar. præd. & horreum præd. ad aliquod tempus poſtea ante finem ejuſdem termini minime reparaver. ſeu emandaver. ſed Sacrarium præd. & horreum præd. ſic in decaſu & irreparat. ut præfertur exiſten. in fine termini præd. abſque aliqua reparatione vel emendatione inde reliquer' contra formam & effectum conventionis præd. in Indentur. præd. ut præfertur mention' Et ſic idem Franciſcus dicit quod præd. Edwardus Polhill & Walterus Roberts conventionem præd. Samuelis Gott de eo quod præd. Samuel Gott conveniſſet & conceſſiſſet pro ſeipſo Executoribus Adminiſtratoribus & Aſſign. ſuis ad & cum præfat' Brian. Epiſcopo & Succeſſoribus ſuis quod dictus Samuel Gott Executor' Adminiſtrator' & Aſſign. ſui de tempore in tempus duran. dict. termino quando & toties quoties neceſſe foret bene & ſufficient. repararent emendarent manuten. ſupportarent ſuſtinerent p̃ſepirent & cuſtodirent tam præd

The Breach aſſigned.

In permitting the Chancel and other Buildings to be out of Repair. The Particulars of the Defects.

And was not repaired.

Et ſic infregit Conventionem.

Rectorias & al' præmiſſa (except' præexcept') quam Sacraria Eccleſiarum de Rye & Weſtfield præd' & eadem ſic ſufficient' reparat' emendat' manutent' ſupportat' ſuſtentat' præſepit' & cuſtodit' ad finem dicti termini dimiſſ. præd' relinquerent ſurſumredderent & traderent præfat' Briano Epiſcopo & Succeſſoribus ſuis præfat' Georgio Epiſcopo Winton' in vita ſua prox' Succeſſori præd. Briani nuper Epiſcopi nec præfat' Franciſco poſt ipſius Georgii Epiſcopi mortem (licet ſæpius requiſit') non tenuer' ſed injuſte infreger' ac ill' eidem Franciſco hucuſq; tenere omnino contradixer' & adhuc' contradic' unde idem Franciſcus dic' quod ipſe deteriorat' eſt & dampn' habet ad valenc' ducentarum librarum & inde produc' ſectam, &c. Et profert hic in Cur' Literas Teſtamentar' præd. Dom' Georgii nuper Epiſcopi Winton' per quas ſatis liquet Cur' hic ipſum Franciſcum fore Executorem Teſtamenti præd. & inde habere Adminiſtrationem, &c.

Profert in Cur' the Letters Teſtamentary of the Biſhop.

Et prædictus Edwardus & Walter' per Robert' Spiller Attorn' ſuum ven' & defend' vim & injur' quando, &c. Et dic' quod narratio pred' materiaq; in eadem content' minus ſufficiens in lege exiſtit ad pred' Franciſcum actionem ſuam præd' verſus præd' Edwardum & Walter' habend' ſeu manutenend' Quodq; ipſi ad Narrationem illam modo & forma præd' fact' neceſſe non habent nec per legem terræ tenentur reſpondere & hoc parat' ſunt verificare Unde pro defectu ſufficien' Narration' ipſius Franciſci in hac parte iidem Edwardus & Walterus pet' Judicium & quod præd' Franciſcus ab actione ſua p'd' verſus eos habend' p'cludatur, &c.

The Defendants demur generally.

Et præd' Franciſcus dic' quod narratio præd' materiaq; in eadem content' bon' & ſufficien' in lege exiſtunt ad ipſum Franciſcum actionem ſuam præd' inde verſus præd' Edwardum & Walterum habend' manutenend' Quam quidem materiam idem Franciſcus parat' eſt verificare Unde ex quo præd' Edwardus & Walterus ad narrationem præd. non reſponder' nec materiam in eadem content' aliqualit' dedixer' idem Franciſcus pet' judicium & dampna ſua occaſione fractionis conventionis præd' ſibi adjudicari, &c. Et quia Juſtic', &c.

Joinder in Demurrer.

Morley

Morley *verſus* Polhill.

3 Salk. 109.

IN an Action of Covenant the Plaintiff declared as Executor to George Morley, late Biſhop of Wincheſter, and ſets forth, That Brian, the Predeceſſor of the ſaid Biſhop, had demiſed a Rectory and certain Lands to J. S. for twenty-one Years, who had aſſigned it to the Teſtator of the Defendant, and that the Leſſee covenanted with Brian and his Succeſſors to repair the Chancel of the Church, and the Barns, &c. and aſſigned a Breach in the not Repairing by the Teſtator of the Defendant in the Life of George Morley, and that the Leaſe afterwards expired.

To this the Defendant demurred, for that it was pretended, that the Executor of the Biſhop could not bring this Action, for the Covenant was with the Predeceſſor Biſhop and his Succeſſors, and cited the Caſes of Real Covenants, 1 Inſt. 384, 385. A Parcener after Partition covenants to acquit the other Parcener of a Suit, and the Covenantee aſſigns; the Aſſignee ſhall not bring Covenant. But the whole Court gave Judgment for the Plaintiff, and that the Executor is here well entitled to the Action for the Breach in the Teſtator's Time.

Note, This is miſrecited. Vide Co. Lit. 384, 5.

Wright *verſus* Wyvell.

3 Lev. 259. 11 H. 7. 17. b. Cro. Jac. 75. 1 Vent. 323. 376. 2 Jones 98. Vaugh. 263. 1 Roll. Ab. 848.

IN an Ejectment the Plaintiff declared upon a Demiſe of Dorothy Hewly, and upon a Special Verdict the Caſe appeared to be thus:

That Chriſtopher Hewly was ſeiſed of the Premiſſes in Fee, and made his Will in this Manner, I make my Laſt Will in Manner following:

As concerning my Perſonal Eſtate, Firſt, I give and bequeath unto Ann Hewly my Wife, the Sum of Six hundred Pounds to be paid unto William Weddal of Eaſtwick, Eſq; and it's for the full Payment of the Lands lately purchaſed of the ſaid M. Weddall by me the ſaid Chriſtopher Hewly, and is already eſtated in Part of a Jointure to Ann my ſaid Wife, during her natural Life, being of the Value of Sixty-ſeven Pounds per Annum; That of Wiskow, York and Malton, the Lands and Tenements there amounting to the yearly Value of ſixty-three Pounds, in all One hundred and thirty Pounds, which being alſo eſtated upon my ſaid Wife, it is in full of her Jointure.

And after this he gives ſeveral Legacies, and the reſt of his perſonal Eſtate he gave to his Wife, and made her Executrix.

Then they find that he had made no Settlement of the Premiſſes, or of any Part of them, upon his Wife; and that the Leſſor of the Plaintiff was Heir at Law to Chriſtopher Hewly, and that Ann the Wife is ſtill living: So that the ſole Queſtion was,

whether the Lands ſhould paſs to the Wife upon theſe Words in the Will? And divers Caſes were put upon implicit Deviſes, as that his Feoffees ſhould ſtand ſeized to the Uſe of J. S. has been held a good Deviſe to J. S. tho' there were no Feoffees, 3 Leon. 162, 167. Deviſe to his eldeſt Son after the Death of his Wife, there the Wife takes, tho' nothing expreſly deviſed to her. After Arguments heard on both ſides; by the Opinion of Pollexfen Chief Juſtice, Rokeby and Ventris, Judgment was given for the Plaintiff, againſt the Opinion of Powell. Here it appears indeed that the Teſtator took it, that ſhe had the Land; but it appears he did not intend to deviſe any Thing by the Will, for he mentions that ſhe was eſtated in it before; and in the Caſe of Implicit Deviſes there is no Reference to any Act that ſhould have conveyed the Land to the Deviſee before; but the Will there paſſes the Land by Conſtruction and Implication.

Again, This Deviſe is introduced with this Clauſe, As to the Diſpoſing of my Perſonal Eſtate; and throughout the Will he giveth only Perſonal Things.

Again, This Recital comes in as Part of another Clauſe of an expreſs Deviſe of the ſix hundred Pounds. But Powell relied upon the Caſe in Mo. 31. A Man made a Will in this Manner, I have made a Leaſe to J. S. paying but 10s. Rent; this was held a good Leaſe by the Will: To which it was anſwered, that the Caſe there was of little Authority, for it did not appear how that Matter came in Queſtion, or in what Court, or in what Action; and ſaid only fuit tenus 3 Eliz. And Judgment here was given for the Plaintiff.

Bowyer *verſus* Milner.

IN a Formedon againſt ſeveral Tenants, one appeared and was eſſoined, and then another appeared, and it was moved whether he could be eſſoined by reaſon of the Statute of W. 1. c. 43. which ſeems to be that Parceners and Jointenants ſhould have but one Eſſoin, and that they ſhould not fourch.

Cur' contra. The Statute is to be underſtood of Eſſoins after Appearance, and ſo is the Book of 28 Ed. 3. 18. It is ſaid to have been the Law of the Times for Tenants to fourch before Appearance; and ſo is Co. 2. Inſt. 250. Hob. 8, & 46. The Caſe of Eſſoins, if the Tenant voucheth two, one Eſſoin may be caſt for each of them ſingly. Vid. Stat. of Glouc. c. 6.

Co. Ent. 330, 331. 1 R. Ab. 825.

Anonymus

Excom. Cap. pleaded.

IN an Action of Treſpaſs de Uxore abducta cum bonis viri, to his Damage of 10000 l.

Q. 1 Salk. 293,294,295. 3 Lev. 334. N. Lutw. 8.

Upon Not guilty pleaded, and a Trial at the Bar, the Return of the Jury was Octab' Trin. and the Appearance-Day was die Mercurii, at which Day the Jury appeared; but it being appointed for the Keeping of a ſolemn Faſt by the King's Proclamation, the Jury was adjourned to the Day following, and then the Jury and Parties being at the Bar, a Plea was offered by the Defendant's Counſel puis darrein continuance, that the Plaintiff was Excommunicated, and produced it under the Seal of the Court, and begun their Plea thus, Ad hunc diem, viz die Jovis prox' poſt Octab' Trin', &c. So that the Plea came too late; for it ſhould have been pleaded die Mercurii; for tho' the Jury was adjourned to Thurſday, yet all Matters were entred as upon Wedneſday. So this Plea did appear upon the Record to come too late, and for that Cauſe it was diſallowed by the Court.

1 Cro. 369, 663. 2 Mod. 195. 3 Salk. 81. 1 Vent. 309, 366.

Note, This Plea was recited by Serjeant Trenchard in French, and then a Challenge was offered to the Array, for that it was returned by J. S. as Sheriff of Buckinghamſhire, who was made Sheriff in Michaelmas Term 1687. and had continued in the Office for more than three Months, and not taken the Oaths, and ſubſcribed the Declaration required by the Act of 25 Car. 2. made for preventing of Dangers by Popiſh Recuſants; and ſo his Office by that Act was void to all Intents and Purpoſes before he made this Return of the Jury.

But this Challenge was diſallowed by the Court; for he muſt be taken here as a Sheriff de facto, and if ſuch a Challenge ſhould be allowed, no Trial could be had, but ſhould be put off, unleſs the Party were ready to ſhew that the Sheriff had taken the Teſt.

Cro. El. 369.

In 1 Cro. 369. Hor *everſus* Brome, a Challenge was made, that the Sheriff which returned the Jury had a Writ of Diſcharge before he made the Return, and it was diſallowed by the Court as contrary to the Record.

Raſhleigh

Raſhleigh *verſus* Williams.

Trin. 4 Jac. Rot. 730.

PLACITA apud Weſtm. coram Edwardo Herbert Mil', & Sociis ſuis Juſtic. Dom' Regis de Banco; De Termino Sanctæ Trinitatis, Anno Regni Domini noſtri Jacobi Secundi, Dei gratia Angliæ, Scotiæ, Franciæ & Hiberniæ Regis, Fidei defenſor', &c. Quarto. Rot. 730.

Covenant against an Attorney, upon Articles of Agreement for quiet Enjoyment of Lands.

Alias prout patet Termino Paſchæ ult. præterit. Rot. DCXLVIII. continetur ſic. Memorandum, quod ſecundo die Maii iſto eodem Termino ven. hic. in cur. Jonathan Raſhleigh Armig' per Carolum Dymocke Attorn' ſuum, & exhibuit Juſtic. Domini Regis hic quandam Billam ſuam verſus Humfridum Williams Gen', un' Attorn. Cur. Dñi Regis de Banco hic præſent. hic in cur. in propria perſona ſua de placito conventionis fract' cujus quidem Billæ tenor ſequitur in hæc verba: Juſtic' Dom. Regis de Banco, Cornub' ſſ. Jonathan Raſhleigh Ar', per Carolum Dymocke Attorn. ſuum, queritur de Humfrido Williams Gen', un. Attorn. cur. Domini Regis de Banco hic præſent. hic in cur. in propria perſona ſua de Placito, quod cum per quoſdam Articulos Agreament. fact. ſexto die Aprilis, Anno Domini Milleſimo ſexcenteſimo octogeſimo quinto, apud Lanceſton, in com. prædict', inter prædict' Humfridum Williams, per nomen Humfrid. Williams de Burgo de Bodmyn. in com. Cornub. Gen'. pro & ex parte cujuſdam Thomæ Manning de London Gen', ex una parte, & eundem Jonathanum, per nomen Jonathani Raſhleigh de Menabilly in com. præd. Armig', ex altera parte fact. quor. quidem Articul. unam partem ſigillo præd' Humfr. ſignat', idem Jonathan hic in cur. profert cujus dat. eiſdem die & anno teſtat. exiſtit: Imprimis concludat. & agreat. fuit inter partes prædict' Quod idem Jonathan Raſhleigh pro conſiderat' in articulis prædict' poſtea expreſſ. quiete & pacifice haberet, teneret, occuparet, poſſideret & gauderet tenementum vocat. le Saltmarſh, & Marſh Parke, cum pertin. ſcituat', jacen. & exiſten. in paroch. de Tywardreth in com' præd. (pro Termino unius anni integri) à viceſimo quinto die Martii, tunc ult. præterit. & plenar. complend. & finiend. (except. é dimiſſione predict.) cuidam Edwardo Knollys nuper tenen. præmiſſorum unum parvum clauſum parcell. præmiſſorum tunc arat. (Anglice, Tilled) uſque & poſt tempus meſſionis & aſportationis grani abinde, per prædict. Edward. Knollys. Item concludat. & agreat. fuit inter partes prædict', quod præd. Jonathan. Raſhleigh ſolveret ſeu ſolvi cauſaret pro tenemento prædict ſummam viginti librarum legalis Anglicanæ monetæ, per quarterial. ſolutiones maxime uſual. in Anno. Item concludat. & agreat. fuit inter parſes præd' quod prædict. Jonathanus Raſhleigh ad finem termini prædict'

Ex parte of another.

Profert in Curia.

The Articles ſet forth.

ſurſumredderet tenementum prædict. bene reparat. & in tam bona conditione, quam idem Jonathan. tunc inveniebat tenementum prædict', prout per Articulos prædict' plenius apparet; virtute quorum quidem Articulorum idem Jonathan. poſtea, ſcilicet, nono die Aprilis, anno Domini Milleſimo ſexcenteſimo octogeſimo quinto ſupradicto in tenementum prædict' cum pertin', (except. præexcept.) intravit & fuit inde poſſeſſionat': Et idem Jonathan. dicit, quod licet ipſe à tempore confectionis Articulorum prædict', uſque finem termini prædict', omnia & ſingula conventiones & agreamenta in Articulis prædict. ſuperius ſpecificat', ex parte ipſius Jonathan. perform[illegible]erimplend', bene & fideliter performavit & perimplev[illegible].dum vim, formam & effectum Articulorum prædict' in [illegible] idem Jonathan. dic' quod prædict' Jonathan. poſt confectionem Articulorum, ſcilicet decimo quinto die Aprilis, anno Domini Milleſimo ſexcenteſimo octogeſimo quinto ſupradicto intravit in tenementum prædict. (except. præexcept.) per ſe & ſervos ſuos, videlicet, Arthurum Harris, Johannem Williams & Petrum Kittoe, & poſuit averia ſua, videlicet, equas, boves, vaccas, oves, parcos & bidentes ſuos in tenementum prædict' (except. præexcept.) & herbam ibidem creſcent. cum averiis ipſius Jonathan. prædict' depaſt. fuer. conculcaver. & conſumpſer': Ac ſuperinde prædict. Edwardus Knollys pro intratione & depaſturatione prædict' poſtea & ante finem prædict' termini unius anni, ſcilicet, Termino Sanctæ Trinitatis, Anno Regni Domini Regis nunc primo, in cur. ipſius Domini Regis de Banco (eadem cur. apud Weſtm' in com' Midd. exiſten.) implacitavit & proſecut. fuit ipſum Jonathanum & prædict. Arthurum Harris, Johannem Williams & Petrum Kittoe, ſervos ſuos, in placito Tranſg. pro prædict. intratione & poſitione averiorum ſuorum prædict. in tenementum prædict' (except. præexcept.) & herbam prædict' ibidem creſcen[illegible] cum averiis prædict' depaſcent'. Taliterque in eadem cur. poſtea ſuper placito illo proceſſ. fuit, quod per eandem cur. conſ. fuit, quod prædict' Edwardus recuperet verſus prædict' Jonathanum, Arthurum, Johannem & Petrum viginti libr. pro dampnis, quæ prædict' Edwardus ſuſtinuit occaſione Tranſgr. illius, necnon ſeptemdecim libr. quæ prædict' Edwardo adjudicat' fuer. pro miſis & cuſtagiis ſuis per ipſum circa ſectam ſuam in ea parte appoſit', quæ quidam dampna in toto ſe attingebant ad triginta & ſeptem libras; Et quod prædict. Jonathan', Arthurus, Johannes & Petrus capiantur, &c. put per Record. & Proceſſ. inde in eadem cur. de Banco hic remanen. plenius liquet & apparet, quas quidem triginta & ſeptem libr. idem Jonathan. poſtea, ſcilicet, viceſimo die Januarii, Anno Regni dicti Dom' Regis nunc ſecundo apud Lanceſton præd', præd' Edwardo ſolvere & ſatisfacere coactus & compulſus fuit, idempue Jonathan diverſas denar. ſummas, videlicet, duodecim libr. in defenſione Sectæ prædict', prædicto Humfrido ſolvit, erogavit & expoſuit. Et ſic idem Jonathan. dic', quod

Entry of the Plaintiff.

The Plaintiff avers Performance of all the Covenants. The Breach aſſigned.

The Defendant (and his Servants) ſued in an Action of Treſpaſs in the Common Pleas.

Damages recovered againſt them.

And the Plaintiff compelled to pay them.

quod ipſe non quiete & pacifice tenuit, habuit, poſſedit & gaviſus fuit tẽtum prædict', ſecundum convention' præd. prædicti Humfridi, ſed fuit ſectat', diſturbat. & moleſtat', & dampna prædict. ex cauſa prædict', modo & forma prædict' recuperat. proinde ſolvere coactus fuit, videlicet, apud Lanceſton, prædict. in com' prædict; unde dic' quod deteriorat. eſt & dampnu' habet ad valenc. ſexaginta librarum. Et inde produc. ſectam, &c.

Et ſic non quiete & pacifice tenuit.

Et prædict. Humfridus in propria perſona ven. & defend' vim & injur', &c. Et dicit, quod ipſe non infregit conventionem prædictam modo & forma prædict', prout præd. Jonathan. ſuperius verſus eum queritur. Et de hoc pon. ſe ſuper Pñam. Et prædict' Jonathan. ſimiliter, &c. Ideo Præcept. eſt Vic. quod Venire fac. hic die Mercurii px poſt tres Septimanas Sanctæ Trinitatis duodecim, &c. per quos, &c. Et qui nec, &c. Ad recogn', &c. quia tam', &c.

Non infregit Conventionem pleaded. Note, This Plea is good after a Verdict; but it had been naught upon a Demurrer.

Raſhleigh *verſus* Williams.

IN an Action of Covenant the Plaintiff declared upon certain Articles of Agreement made between the ſaid Williams (for and on behalf of Thomas Manning of London, Gent.) of the one Part, and the ſaid Raſhleigh of the other Part; whereby it appeared that it was agreed between the Parties, that the ſaid Raſhleigh quiete & pacifice haberet, teneret, occuparet, poſſideret & gauderet Tenement. vocat. Le Saltmarſh, &c. for the Term of one Year, Except é dimiſſione prædict' cuidam Edwardo Knollys nuper tenent. præmiſſorum unum parvum clauſum parcell' præmiſſ. And it was further agreed, that the ſaid Raſhleigh ſhould pay twenty Pounds by quarterly Payments for the ſaid Year.

3 Lev. 325. Dyer 328. Hob. 34. Cro. Jac. 315, 425. Cro. E. 914. Yelv. 30. Noy. 50. 2 Saund. 177. 1 Lev. 301. 1 Mod. 67, 290. 3 Mod. 135. 2 Lev. 194. 2 Mod 213. Vaugh. 118, 9.

1 Rol. Abridg. 434. poſt. 68, 69. antea 46.

And the Plaintiff ſets forth, that he entred into the Premiſſes and put in his Cattle, and that before the Year was out, the ſaid Edward Knollys ſued the ſaid Raſhleigh in an Action of Treſpaſs for entring into the Premiſſes, and putting in of his Cattle, &c. and in that Action he recovered twenty Pounds Damages againſt him and ſeventeen Pounds Coſts, which he was forced to pay, and was put to the Expence of twelve Pounds more in Defence of the Suit, and ſo he did not hold the Premiſſes quietly, but was ſued and diſturbed, and compelled to pay as aforeſaid.

The Defendant pleaded, that he did not break his Covenant. And upon that Iſſue was joined, and found for the Plaintiff.

It was moved in Arreſt of Judgment, that it did not appear that Knollys ſued upon any Title, which ſhould have been ſet forth.

Levinz

Vide antea 46. poſt 73, 99.

Levinz for the Plaintiff argued, that it was not neceſſary to ſet forth the Title of Knollys, becauſe this was a Covenant for the quiet Enjoyment of the Poſſeſſion; and for that cited Dyer 128. where the Covenant was, that he ſhould Enjoy abſque interruptione alicujus: And ſo is 1 Roll. Abr. 430.

Again, this is a Collateral Agreement by a Stranger to the Land, and no Leaſe. 'Tis no more than a Covenant by a Stranger, that he ſhall quietly enjoy the Land, and that ſhall be conſtrued ſtrongeſt againſt him to extend to any Diſturbance whatſoever.

And he argued further, that this Diſturbance was by Edward Knollys, and he was mentioned in the Articles; and ſo it ſeems a Covenant againſt a Particular Perſon, and that goes to any Diſturbance, whether upon Title or otherwiſe.

1 Cro. 512.

Cro. Car. 5. Vide 1 Ven. 184. 2 Lev. 37. 2 Keb. 878. 3 Lev. 325. Proctor and Newton, on which Caſe, Levinz reports this Caſe of Buckly and Williams, was Judgment given for the Plaintiff.

But it was Reſolved by Powell and Ventris, (the Chief Juſtice being abſent, and Rokeby doubting) that the Declaration was inſufficient, in Regard it was not ſet forth that Knollys had any Right; for the Articles did amount to a Leaſe, tho' by a Stranger, for he acted in behalf of the Owner of the Land, and it ſhall be taken he had an Authority to demiſe, and it appears they intended it a Demiſe; for that Part excepted is mentioned to be e dimiſſione prædict': But if it were a Collateral Covenant by a Stranger, it would be hard to extend it to a Tortious Entry. A Collateral Warranty given by a Stranger extends only to Titles precedent.

In the Caſe of Wotton and Hale in the 2 Saund. 177. it was ſet forth, that J. S. entred habens legalem titulum; and that was held naught after a Verdict, becauſe not expreſly ſet forth to be an ancient Right, The Caſe cited in Dyer ſeems to go upon the Words, Abſque interruptione alicujus. See for that Hob. in Teſdale and Eſſex's Caſe, and as 'tis cited by Roll. Abr. the 1ſt Part 430. and Vaughan 118 Hayes and Bickerſtaff. Vid. 3 Cro. 372, 436. Cro. Jac. 425. where the Promiſe was to enjoy without the Interruption of any Perſon, and yet held that a Title ought to be ſet forth. This is no Covenant expreſs againſt Knollys, for he is only mentioned for the Part excepted, and to have been Tenant of the Premiſſes; and ſo in the Principal Caſe Judgment was ſtayed. Levinz ſays that Judgment was given for the Plaintiff. 3 Lev. 325.

Bliſſe

Bliſſe *verſus* Froſt.

London ſſ. WIllielmus Froſt nuper de London', præd', **Felt-maker**, attach' fuit ad reſpondend' Ric. Bliſſe de placito Tranſg. ſuper Caſum, &c. Et unde idem Richardus per Willielmum Eyre Attorn. ſuum queritur quare cum quidam Joſephus Fiſher primo die Aprilis, Anno Regni Domini Jacobi Secundi nuper Regis Angliæ, &c. tertio, apud London in Parochia Beatæ Mariæ de Arcubus in warda de Cheape, poſſeſſionat. fuiſſet de quibuſdam bonis & catallis, videlicet, de decem Doliis Vini Helvici (Anglice vocat', **Hogſheads of Claret**) quinque Cadis Vini Hiſpanici (Anglice, **Pipes of Canary**) & uno vaſe (Anglice, **Village**) Vini Hiſpanici (Anglice, **Canary**) ad valentiam Ducentarum & undecim librarum, ut de bonis & catallis ſuis propr', & ſic inde poſſeſſionat' exiſten' idem Joſephus bona & catalla prædict', poſtea apud London prædict', in Parochia & Warda prædict', extra manus & poſſeſſionem ſuas caſualit' perdidit & amiſit; Quæ quidem bona & catalla poſtea, ſcilicet Viceſimo die Aprilis, Anno Regni dicti Domini nuper Regis tertio ſupradicto, apud London prædict', in Parochia Warda prædict', ad manus & poſſeſſion' ipſius Willielmi Froſt per Inventionem devener'; Cumque etiam prædict' Joſephus exiſten' Subdit' natus hujus Regni Angl' præd' viceſimo die Aprilis, Anno tertio ſupradicto, & per ſpatium trium annorum & amplius, antetunc elaps' & diu poſtea apud London prædict', in Parochia & Warda prædict', exercebat artem ſive myſter' Cauponis (Anglice, **of a Vintner**) & per totum idem tempus quærebat victum & vivend' facultat' ſuam (Anglice, **did ſeek and endeavour to get his Living**) per viam emend' & vendend' in arte ſive myſter' prædict' Cauponis (Anglice, **of a Vintner**) prædictuſque Joſephus artem ſive myſter' prædict', prædict' Cauponis (Anglice, **of a Vintner**) ſic exercend' & victum ſuum ſic quærend' adtunc & ibidem indebitat. devenit & adhuc indebitat' exiſtit eidem Richardo & diverſis al' perſonis Creditor' prædict' Joſephi, ſimilit' exiſten' Subdit' nat' hujus Regni Angl', in diverſis & ſeparalibus denar. ſummis legalis monet' Angl' in toto ſe attingen' ad ſummam Mille librarum & amplius: Cumque etiam idem Joſephus (prædict' ſeparal' denar' ſummis eidem Richardo & al' Creditoribus prædicti Joſephi minime ſolut' ſive ſatisfact' exiſten') poſtea, ſcilicet viceſimo quinto die Aprilis, Anno tertio ſupradicto, apud London prædict' in Parochia & Warda prædict' ſeipſum abſentavit & receſſit (Anglice, **did depart**) a domo manſional' ſua ea intentione ad defraudand' ipſum Richardum & cæteros Creditor' ipſius Joſephi de veris & juſtis debitis ſuis prædict'; & idem Joſephus eodem viceſimo quinto die Aprilis

Trover by an Aſſignee of Commiſſioners of Bankrupts.

The Proceedings of the Commiſſioners of Bankrupts, need not be alledged at large. 1 Lutw. 274, 7.

The Bankrupt poſſeſſed.

They came to the Hands of the Defendant.

The Bankrupt exerciſed the Trade of a Vintner.

And became indebted to ſeveral Perſons.

And went from his Houſe.

Aprilis, Anno tertio ſupradicto, apud London' prædict', in Parochia & Warda prædict' manifeſte devenit Decoctor (Anglice, a Bankrupt) infra veram Intentionem diverſorum Statutorum verſus Decoctores edit' & provis' Cumque etiam poſtea, ſcilicet, viceſimo octavo die Aprilis, Anno tertio ſupradicto, apud Weſtm' in com' Midd', ad Petitionem prædict' Richardi, tam pro ſeipſo quam pro omnibus aliis Creditor' prædicti Joſephi Præhonorab' Georgio Domino Jeffreys, Baroni de Wem, Domino Cancellar' Angl' apud Weſtm' prædict' in com' prædicto, in Scriptis ſecundum formam Statut' in hujuſmodi Caſu edit' & provis' exhibit. & fact' pro remediis ſuis verſus præfat' Joſephum exiſten' Decoctor' in hac parte habend', eidem Richardo, & cæteris Creditor' prædict' Joſephi de ſeparalibus diebus ſic prædict', ut ſupradict' eſt, minime ſolut' aut ſatisfact exiſten' Quædam Commiſſio dicti Domini nuper Regis ſuper eadem Statut' contra Decoctor' edit' & provis' ſub magno ſigillo ipſius Domini nuper Regis Angl' ſigillat' & in cur' Cancellar' dicti Domini nuper Regis de Recordo irrotulat' emanavit verſus præfat' Joſephum geren' dat' apud Weſtm' predictum, prædicto viceſimo octavo die Aprilis, Anno Regni dicti Domini nuper Regis tertio, quibuſdam Johanni Creſſett Armig', Georgio Evans Armig', Johanni Cole, Roberto Wilkinſon, & Johanni Weaver Gen', honeſt' & diſcret' perſon' per præfat' Domin' Cancellar' Angl' commiſſionat' nominat' & appunctuat' direct' (Quæ quidem commiſſio adtunc & ibidem eiſdem Johanni Creſſet, Georgio Evans, Johanni Colt, Roberto Wilkinſon & Johanni Weaver, deliberat' fuit) per quam quidem commiſſionem dictus Dom' nuper Rex dedit plenam poteſtatem & authoritat' prædict' Johanni Creſſet, Georgii Evans, Johanni Cole, Roberto Wilkinſon & Johanni Weaver, quatuor vel tribus eorum quorum præfat' Johannem Creſſet vel Georgium Evans un' eſſe voluit juxta Statut' prædict', non ſolum concernen' dict' Decoctor' Corpus ejus, Terras, Tenementa Libera & Cuſtomar', Bona, Debita ſua, & al' res quaſcunque, verum etiam concernen' omnes eorum perſonas, quæ per concelament' vel alit' offendiſſent ſeu offenderent (Anglice, did or ſhould offend) tangen' præmiſſa, vel aliquam partem inde contra verum ſenſum & intentionem in Statut' prædict', ſeu aliquo eorundem ad faciend', & exequend' omnes & ſingulas rem & res quaſcunque tam pro & erga ſaisfactionem & ſolutionem dictorum Creditorum, quam erga & pro omnibus aliis inventionibus & propoſit' ſecundum ordinem & proviſionem Statut' prædict'; ac idem Dominus nuper Rex per eandem Commiſſionem voluit & in mandat' deditdictis Commiſſionar', quatuor vel tribus eorum, quorum præfat. Johannem Creſſet vel Georgium Evans un' eſſe voluit ad procedend' in executionem & complementum Commiſſion' prædict', ſecundum Statut' præd', cum omni diligentia & effect' prout ſpecial' fiducia ejuſdem Domini nuper Regis fuit in eos repoſit' prout per eandem Commiſſion' (inter alia) plenius apparet virtute

And became a Bankrupt.

The Creditors petition the Lord Chancellor.

The Commiſſion ſued out.

Virtute cujus quidem commiſſion' præfat' Johannes Creſſett Georgius Evans Robertus Wilkinſon & Johannes Weaver quatuor Commiſſionar' præd' in Commiſſione præd' nominat' poſtea ſcilicet prædicto viceſimo octavo die Aprilis Anno tertio ſupradicto apud London prædict. in Parochia & Warda prædict. convener' ad Commiſſion. præd. in debito modo exequend' qui quidem Commiſſionar. ult. mentionat. ſic convent' adtunc & ibidem ſuper debitam examinacon' Teſt' & al' ſufficien' probacon' ſuper Sacrament' coram eiſdem Commiſſionar. ult. mentionat' capt. invener' qd' præd. Joſephus conat' fuiſſet victum ſuum quærere & adipiſci in emend' & vendend' in arte ſive myſterio Cauponis (Anglice, of a Vintner) per ſpatium trium annorum & amplius inſimul tunc ult' præterit. ante dat. & proſecution' Commiſſion' ac indebitat' deven' præfat' Rich. & diverſis al' perſonis Creditor' præd' Joſephi in diverſis & ſeparalibus denar' ſummis attingen' ad ſummam mille librarum & amplius legalis monet' Angliæ. Et ſic ſeparal' indebitat' exiſten' ut ſupradict' eſt qd' ipſe præd' Joſephus ante dat' & emanation' Commiſſion' præd' deveniſſet decoctor ad omnes intention' & propoſit' infra circuitum & veram intention' ſeparal' Statut' præd' in Commiſſion' præd' mentionat' ſive eorum alicujus. Cumque etiam præfat' Johannes Creſſett, Georgius Evans, Robertus Wilkinſon & Johannes Weaver quatuor Commiſſionar. præd. virtute Commiſſion' ill' & vigore Statut. præd. pro meliori remedio Creditorum præd' poſt maturam deliberation' ſuperinde capt' poſtea ſcilicet decimo octavo die Martii Anno tertio ſupradicto apud London prædict' in Parochia & Warda prædict. per quandam Indenturam ſuam aſſignation' int' eoſdem Commiſſionar. per nomen Johannis Creſſett Armig' Georgii Evans Armig' Rob' Wilkinſon & Johannis Weaver Gen' ex un' parte & prædict' Rich' per nomen Rich' Bliſs de Parochia Sanct' Salvator' Southwark in com' Surr' Mercatoris un' Creditoru' Joſephi Fiſher de Parochia Sancti Olavi Southwark in dic' Com' Surr' Cauponis ex altera parte fact' cujus quide' Indentur' un' partem ſigillo eorundem Johannis Creſſett, Georgii Evans, Rob. Wilkinſon & Johannis Weaver ſigillat' idem Richardus hic in cur' profert cujus dat' eſt eiſdem die & anno ult' ſupradictis pro conſideratione in eadem Indentur' ſpecificat' præd' dece' Dolia Vini Helvici quinq; Cados Vini Hiſpanici & un' Vas (Anglice, Ullage) Vini Hiſpanici (int' alia) aſſignaver' habend' & recipiend' eidem Rich' Executor' Adminiſtrator' & Aſſign' ſuis imperpet' in fiducia pro beneficio ipſius Rich' & omn' al' Creditorum præfat' Joſephi qui antetunc petiiſſent aut poſtea debito tempore peterent auxilium per Commiſſion' præd' & contribuer' erga cuſtag' ejuſdem Commiſſion' ſecundum direction' & limitation' Statut' præd' prout per Indentur' ill' plenius apparet p qd' & vigore Statut' prædict' eadem decem Dolia Vini Helvici quinque Cadi & un' Vas Vini Hiſpanici prædict' Rich' ſpectarent & pertiner' unde prædict' Will. Froſt adtunc & ibidem notitiam habuit prædict' tamen

The Commiſſioners find him a Bankrupt,

And make Aſſignment to the Plaintiff.

Will' Froſt ſciens præd' decem Dolia Vini Helvici quinq; Cados & un' Vas Vini Hiſpanici fuiſſe bon' & catalla præd' Rich' propr' & ad ipſum Rich' ſpectare & pertinere ſed machinans & fraudulenter intendens ipſum Rich' de eiſdem callide & ſubdole decipere & defraudare eadem decem dolia Vini Helvici & quinq; Cados & un' Vas Vini Hiſpanici (licet ſæpius requiſit') eidem Rich' non deliberavit ſed eadem adtunc & ibidem ad uſum ſuum propr' convertit & diſpoſuit. Cumq; etiam idem Rich' poſtea ſcilicet triceſimo primo die Maii anno tertio ſupradicto apud London præd' in Parochia & Warda prædict' poſſeſſionat' fuiſſet de diverſis al' bonis & catallis ſequen', videlicet, de decem al' Doliis Vini Helvici (Anglice vocat' Hogſheads of Claret) quinque al' Cadis Vini Hiſpanici (Anglice, Pipes of Canary) & un' al' vaſe (Anglice, Ullage, Vini Hiſpanici (Anglice, Canary) ad valentiam al' ducentarum & undecim librarum ut de bonis & catallis ſuis propr'. Et ſic inde poſſeſſionat' exiſtens idem Rich' bona & catalla illa extra manus & poſſeſſionem ſuas caſualit' perdidit & amiſit. Quæ quidem bona & catalla ult' mentionat' poſtea ſcilicet eodem triceſimo primo die Maii anno tertio ſupradicto apud London præd' in Parochia & Warda præd ad manus & poſſeſſion' præd' Will' Froſt per inventionem devener' præd' tamen Will' Froſt ſciens præd' decem Dolia Vini Helvici quinq; Cados & un' Vas Vini Hiſpanici ult' mentionat' fuiſſe bona & catalla prædict' Rich' propr' & ad ipſum Rich' de jure ſpectare & pertinere ac machinans & fraudulent' intendens ipſum Rich' de eiſdem callide & ſubdole decipere & defraudare eadem decem Dolia Vini Helvici quinq; Cados & un' Vas Vini Hiſpanici ult' mentionat' (licet ſæpius requiſit') eidem Rich' non deliberavit ſed eadem adtunc & ibidem in uſum ſuum propr' convertit & diſpoſuit. Unde idem Rich' dic' qd' deteriorat' eſt & damnum habet ad valentiam ducentarum & quinquaginta librarum. Et inde produc' Sectam, &c.

Then he lays a Converſion in the Defendant. Then he lays a general Action of Trover for the ſame Goods.

The Defendant demurs.

Et præd' Will' per Zach' Blunt Attorn' ſuum ven' & defend' vim & injur' quando, &c. Et dic. qd' Narratio prædict' materiaq; in eadem content. minus ſufficiens in lege exiſtunt ad prædict' Rich. actionem ſuam prædict' verſus præfat' Will. habend' manutenend. Quodq; ipſe ad narration' ill' neceſſe non habet nec per legem terræ tenetur reſpondere & hoc parat' eſt verificare. Unde pro defectu ſufficien. Narration. idem Will' pet' Judic' & qd' prædict' Rich. ab actione ſua præd' habend' præcludatur, &c.

The Plaintiff joins in Demurrer.

Et p̃d' Rich. ex quo ipſe ſufficien' materiam in lege ad p̃d' Rich' actionem ſuam præd' verſus ipſum Will' habend' manutenend' ſuperius narrando allegavit quam ipſe parat' eſt verificare Quam quidem materiam præd' Will' non dedic' nec ad eam aliqualit' reſpond' ſed verificationem ill. admittere omnino recuſat pet' judicium & dampna ſua occaſione præmiſſa ſibi adjudicari, &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſis prædictis priuſquam Judicium inde reddant dies dat' eſt partibus prædictis hicuſq; in craſtino

craſtino Sanctæ Trinitatis de audiend' inde judicio ſuo eo qd' iidem Juſtic' hic inde nondum, &c.

Bliſſe *verſus* Froſt.

IN a Trover and Converſion brought by the Plaintiff as Aſſignee of Commiſſioners of Bankrupts, amongſt other Things he declared that he was poſſeſſed de uno Vaſe (Anglice, Veſſel) Vini Hiſpanici, and it was objected upon a Demurrer to the Declaration, that it was not ſaid what the Veſſel was made of, and ſo no Meaſure for the Damages, Sed non allocat', for it is intended to be made of Wood, as is uſed for Casks of Wine. Vide poſt. 78, 262. 1 Sid. 445. 1 Vent. 71, 317. 1 Mod. 46. 2 Saund. 74. 2 Salk. 654.

Baynton *verſus* Bobbet.

IN an Action of Covenant brought in this Manner, (viz.) by Henry Baynton and the Lady Anne his Wife, the Lady Elizabeth Wilmot and the Lady Mallet Wilmot, againſt Robert Bobbet. The Plaintiffs declared, that whilſt the Lady Anne was ſole, by a certain Writing, bearing Date the 20th Day of March in the Year of our Lord 1684. ſealed by the ſaid Robert and produced in Court, it was agreed by the ſaid Robert for and on the Behalf of the ſaid Anne, Elizabeth and Mallet, Daughters and Co-heirs of the Right Honourable John late Earl of Rocheſter, for the Paſſages of all Boats and other Advantages of Navigation upon the River made navigable by John Mallet Eſq; deceaſed, Grandfather of the Right Honourable Elizabeth late Counteſs of Rocheſter, from the Bridge of Bridgwater, to a certain Place upon the River aforeſaid, called Ham Mills, (the Benefit of which River aforeſaid was granted to the ſaid Anne, Elizabeth and Mallet by the Letters Patents of the late King, bearing Date the laſt Year of his Reign, with Power to chain up a Bridge made by the ſaid John Mallet near the Place in the ſaid River called Knapp's Bridge, or any other Place of the River aforeſaid, granted to the ſaid Ladies as aforeſaid) with Power alſo to ſue or implead, in the Name of the ſaid Ladies, any Perſon paſſing with Boats upon the ſaid River without the Licence of the ſaid Robert firſt had and obtained, he taking for every Boat that ſhould paſs below the ſaid Knapp's Bridge, one Shilling. To have and to hold the Benefit of the Paſſage aforeſaid to him, his Executors and Aſſigns from the 25th of March next after the Date of the ſaid Writing, for three Years, yielding and paying for the ſame Yearly during the Term, to the ſaid Anne, Elizabeth and Mallet Wilmot the Rent of 45 l. at Michaelmas and our Lady-Day, by equal Portions.

The Plaintiffs further ſay, that altho' he the ſaid Robert had occupied and enjoyed the Paſſage and Premiſſes aforeſaid, the ſaid Robert did not pay to the ſaid Anne, Elizabeth and Mallet, whilſt the ſaid Anne was ſole, nor to the ſaid Henry, Anne, Elizabeth and Mallet, after the Marriage of the ſaid Anne, or to any of them, the ſaid Rent of 45 l. or any Part thereof; and ſo the ſaid Robert did not perform his Covenant, but broke the ſame ad dampnum, &c.

The Defendant pleaded proteſtando, that there was no ſuch Grant made by the King, and proteſtando that the ſaid River was not made navigable by the ſaid John Mallet, pro placito, that the ſaid River from the ſaid Place called Bridgewater-Bridge to the ſaid Place called Ham Mills, ſuppoſed and pretended to have been made navigable as aforeſaid, is and for Time out of Mind hath been, an ancient and navigable River, free and common for all the King's Subjects to paſs with Boats. And further ſaith, that the aforeſaid Anne, Elizabeth and Mallet Wilmot, at the Time of the making of the ſaid Writing, or at any other Time had nothing of Paſſage of Toll in the River aforeſaid, whereof they could make any Demiſe or Grant to the ſaid Robert, per quod the ſaid Robert could not have, take or receive the Advantage and Profit aforeſaid, according to the Purport of the ſaid Writing, but was wholly deprived thereof during all the Time aforeſaid, & hoc paratus eſt verificare, and ſo demands Judgment, ſi Actio.

Inſtit. Leg. 474, 479. Cumberba. 64, 239, 240.

To this the Plaintiff demurred, for that the Plea was double, and that no Traverſe was to the Enjoyment, which were the Cauſes ſpecially aſſigned for Demurrer.

Pollexfen, Chief Juſtice, Powell and Rokeby held the Plea to be double.

Ventris, contra. For it is all but one Matter; for if the River were free for all the King's Subjects to paſs, then the Plaintiffs could have no Toll, or make any Obſtruction thereupon, ſo that one Matter depended upon the other, and in ſuch Caſe a Plea ſhall not be ſaid to be double. Calf and Nevill, Poph. 186. In a Scire facias againſt the Bail, the Defendant pleaded, that the Principal rendred himſelf to Priſon before the Scire facias, and died in Priſon; either of theſe Matters would have ſerved, and yet the Plea not held double. But all the Court reſolved that the Plea was inſufficient to bar the Plaintiffs.

Vide antea 61, &c.

Firſt, Becauſe it was ſet forth in the Declaration, that the Defendant had enjoyed the Paſſage and Profit granted, and then the Rent muſt be paid ſo long; if an Eviction be pleaded in Bar to Rent, it muſt be Rent grown due after the Eviction, 20 H. 6. 22. if a Diſſeiſor lets, rendring Rent, and the Diſſeiſee enters after the Rent-Day, yet an Action of Debt lies for the Rent accrued before; therefore the Defendant ſhould have traverſed the Enjoyment.

Again, this is not a Rent, for 'tis reſerved out of a Thing incorporeal, and an expreſs Covenant to pay it. The Mayor and Commonalty of London againſt Hatton, Sty. 357. upon a Leaſe of the Barbier's Office, a Covenant was brought for the Rent, and pleaded that it could not be let, but it does not appear by the Book that Judgment was given, Vid. Newton and Weeks, Aleyn's Rep. 79. One reciting that he was ſeized of ſuch Land, granted a Rent out of it, and covenanted to pay the Rent; he could not plead to his Covenant that he had nothing in the Land, Poſt. 73, 99. 3 Lev. 153.

Judgment pro Quer'.

Bockenham *verſus* Thacker.

Trin. 4 Jac. 2 Rot. 1451.

A Special Indebitat' Aſſumpſit againſt an Attorney.

ALIAS prout patet Termino Paſchæ ult. præterit' Rotulo ſexcenteſimo octogeſimo continetur ſic. Memorandum quod viceſimo octavo die Maii iſto eod' Termino venit hic in cur' Hugo Bockenham per Robert' Snell Attorn' ſuum & exhibuit Juſtic' Dom' Regis hic quandam billam ſuam verſus Pet' Thacker ſen' un' Attorn' cur' Dom' Regis de Banco hic præſentem hic in cur' in propria perſona ſua de placito Tranſgr. ſuper caſum cujus quidem Billæ tenor ſequitur in hæc verba. Juſtic' Domini Regis de Banco hic. Norf. ſſ. Hugo Bockenham per Robertu' Snell Attorn' ſuu' queritur de Pet' Thacker generoſo uno Attorn' cur' Dom' Reg' de Banco hic præſente hic in cur' in propria perſona ſua pro eo videl't quod cum quidam Thomas Seely indebitat' fuiſſet eidem Hugoni in quadam pecuniæ ſumma exceden' duodecim libras Cumque etiam prædictus Pet' (ut ipſe dixit) indebitat' fuiſſet præfat' Thomæ Seely in duodecim libris aut eo circit' præd' Petrus quinto die Septemb' Anno Regni Dom' Jacobi ſecundi nuper Regis Angl' Tertio apud Hetherſett in Conſideratione quod idem Hugo ad ſpecialem inſtantiam & requiſitione' prædict' Petri procuraret ordinem prædict' Thomæ Seely in ſcriptis ſub manu ſua præfat' Petro pro ſolutione denarior' quos idem Pet' dicto Thomæ debuit aut alicujus partis eorundem eidem Hugoni ſuper ſe aſſumpſit & eid' Hugoni adtunc & ibidem fidelit' promiſit quod ipſe præd' Petrus denar' illos vel aliquam partem inde juxta hujuſmodi ordinem bene & fidelit' ſolvere & contentare vellet. Et idem Hugo in facto dic' qd' ipſe permiſſioni & aſſumptioni præd' Petri præd' fidem adhibens poſtea ſcilicet præd' quinto die Septemb' anno tertio ſupradicto apud Hetherſett prædictam procuravit Ordinem prædicti Thomæ Seely in ſcriptis ſub manu & nomine ipſius Thomæ Seely ſubſcript' & præfat' Petro direct' dictuſq; Thomas perinde requiſivit ipſum Petrum ſuper viſum Ordinis ſive not' illius ad ſolvend' eid' Hugoni vel ejus ordini quinq; libras & ad collocand' eaſdem ad compotum ipſius Thomæ Seely idemq; Hugo poſtea ſcilicet

One J. S. was indebted to the Plaintiff in a certain Sum of Money not exceeding 12 l. The Defendant was indebted to the ſaid J. S. in 12 l aut eo circiter The Defendant promiſes, that if the Plaintiff would procure a Note under the Hand of J. S. for payment of the Money which he owed J. S. or any Part thereof, that then he would pay the Plaintiff. The Plaintiff avers that he procured ſuch Note, And ſhewed it to the Defendant

And requeſted him to pay him the Money.

ſcilicet eiſdem die & anno ibidem oſtendebat præfat. Petro ordine' & notam ill' & eum requiſivit ad ſolvend. ſibi dicto Hugoni eaſdem quinq; libras prædictuſq; Petrus adtunc & ibidem habuit viſu' Ordinis & notæ ill' prædictus tamen Petrus promiſſion' & aſſumption' ſuas prædictas minime curans ſed machinans & fraudulent' intendens ipſum Hugon' in hac parte callide & ſubdole decipere & defraudare prædictas quinq; libras ſeu aliquem denarium inde licet ſæpius requiſit' eidem Hugoni non ſolvit ſeu aliqualit' contentavit ſed ill' ei hucuſq; ſolvere omnino recuſavit & adhuc recuſat. Cumque etiam prædictus Hugo poſtea ſcilicet prædicto quinto die Septembris anno tertio ſupradict' apud Hetherſett prædict' procuraſſet Ordinem cujuſdam Thomæ Seely in Scriptis ſub manu & nomine ipſius Thomæ Seely ſubſcript' & præfat' Petro direct' dictuſque Thomas perinde requiſiviſſet præd' Petru' ſuper viſum ordinis ſive not' illius ad ſolvend' eidem Hugoni vel ejus ordini quinq; libras & ad collocand' eaſdem ad compotum ipſius Thomæ ipſe præd' Petrus in conſideratione inde poſtea ſcilicet viceſimo nono die Septembris anno tertio ſupradicto apud Hetherſett præd' ſup' ſe aſſumpſit & eidem Hugon' adtunc & ibidem fidelit' promiſit qd' ipſe præd Petrus præd' quinq; libras ult' mentionat' eidem Hugon' cum inde poſtea requiſit' eſſet bene & fidelit' ſolvere & contentare vellet præd' tamen Petrus promiſſion' & aſſumption' ſuas præd' ult' mentionat' minime curans ſed machinans & fraudulent' intendens ipſum Hugon' in hac parte callide & ſubdole decipere & defraudare præd' quinq; libras ult' mentionat' eidem Hugon' (licet ad hoc per ipſum Hugon' viceſimo die Octob' anno tertio ſupradicto & ſæpius poſtea apud Hetherſett prædict' requiſit' fuiſſet) non ſolvit ſeu aliqualit' contentavit ſed ill' eſt hucuſq; ſolvere omnino recuſavit & adhuc recuſat ad dampnum ipſius Hugonis decem librarum. Et inde petit remedium, &c. Pleg' de proſequend' Johannes Doe & Richardus Roe.

But he refuſed payment.

Then he lays it another way.

The Defendant imparls,

Et prædictus Petrus in propria perſona ſua venit & defend' vim & injur' quando, &c. Et petit licenc' inde interloquendi hic uſq; diem veneris prox' poſt craſtinum Sanctæ Trinitatis & habet, &c. idem dies dat' eſt præfat' Hugoni hic, &c. Et modo ad hunc diem ſcilicet diem Veneris prox' poſt craſtinum Sanctæ Trinitatis venit tam præd' Hugo per Attorn' ſuum prædict' quam prædictus Petrus in propria perſona ſua. Et ſuper hoc idem Hugo petit qd' pred' Pet' ad Billam ſuam prædict' reſpondeat, &c. Et prædictus Petrus ut prius defend' vim & injur. quando, &c. Et dicit qd' narratio præd' modo & forma prædictis fact' ac materia in eadem cõtent' minus ſufficien' in lege exiſtunt ad prædict' Hugon' action' ſuam præd' verſus ipſum Petrum habend' manutenend' quodq; ipſe ad narration' illam modo & forma prædict' fact' neceſſe non habet nec per legem terræ tenetur reſpondere & hoc parat' eſt verificare unde pro defectu ſufficien' narration' in hac parte idem Petrus petit Judicium. Et quod prædictus Hugo ab actione ſua præd' verſus ipſum Petrum habend' præcludatur, &c.

And demurs to the Declaration.

Et prædictus Hugo ex quo ipſe ſufficien' materiam in lege ad actio-
on. ſuam præd' verſus ipſum Petrum habend' manutenend' ſuperius
declaravit quam ipſe parat' eſt verificare quam quidem materiam
prædictus Petrus non dedicit nec ad eam aliqualit' reſpondet ſed ve-
rification' illam admittere omnino recuſat petit Judicium & dampna
ſua occaſione præmiſſ. ſibi adjudicari, &c. Et quia Juſtic. hic ſe ad-
viſare volunt de & ſuper materia in narratione prædict' ſpecificat'
priuſquam judicium inde reddant dies dat' eſt partibus prædictis hic
uſq; diem Martis prox' poſt tres ſeptiman' Sanct' Michael' de audi-
end' inde Judicio ſuo quod iidem Juſtic' hic inde nondum, &c.

Bockenham *verſus* Thacker.

IN an Action upon the Caſe the Plaintiff declared, that J. S. was indebted in a Sum of Money to the Plaintiff not exceeding 12 l. and that the Defendant (as he the Defendant ſaid) was indebted to J. S. in 12 l. or thereabout. Poſt. 74,

That the Defendant in Conſideration, that the Plaintiff at his Requeſt would procure an Order from J. S. in writing to the Defendant for Payment of the Money which the Defendant owed J. S. or any Part thereof to the Plaintiff, he promiſed to pay the Money according to ſuch Order.

The Plaintiff avers, that he procured ſuch Order from J. S. for the Defendant to pay him; which he ſhewed to the Defendant, and the Defendant refuſed to pay, &c.

The Defendant demurs generally to the Declaration.

Levinz for the Defendant argued, that it was not ſufficiently ſet forth, that the Defendant was indebted to J. S. and if not, there was no Conſideration.

Cur. contra, For it muſt be intended that he was indebted, for 'tis ſet forth that the Defendant ſaid ſo, but if not, the Procuring the Note at the Defendant's Requeſt by the Plaintiff was a ſufficient Conſideration.

It was objected further, that the Plaintiff had not alledged that he procured the Note at the Requeſt of the Defendant, as the Agreement was, and for that 3 Leon 91. was cited, in Conſideration that he ſhould repair ſuch Part of a Houſe at his Requeſt; it was held naught for not laying the Repairing to be done at Requeſt. Sed non allocatur, for it ſhall be intended to have been done at Requeſt, and ſo is Bretton and Bolton's Caſe, 3 Cro. 246. 2 Cro. 404. Berisford's Caſe, and Poynter's Caſe, 1 Cro. Sed Nota, All thoſe Caſes are after Verdict, and ſo is the above cited Caſe. See more of this Caſe afterwards, Fol. 74.

Termino

Termino Sancti Michaelis, Anno 1 W. & M.

In Communi Banco.

SErjeant Trinder moved the Court to ſet aſide a Verdict recovered in an Action for the Meſne Profits after a Recovery in an Ejectment, ſhewing that the Defendant in the Ejectment had brought another Ejectment ſince and recovered; ſo that the firſt Recovery was diſaffirmed, and therefore there ought to have been no Recovery for the Meſne Profits; but the Motion was denied by the whole Court.

Leigh *verſus* Ward.

DEbt upon a Bond, the Condition was to perform an Award, and the Defendant pleaded, that the Arbitrator made no Award.

The Plaintiff replied, that after the Bond entred into, and before the Time ſet in the Condition for making of the Award, ſcilicet tertio die Novembris, anno, &c. per quoddam Scriptum ſuum arbitr' adtunc & ibidem fact', &c. and ſo ſets forth the Award, upon which the Defendant demurred, becauſe no Place was mentioned where the Award was made.

Vide poſt. 75. Tremain for the Plaintiff ſaid, That the adtunc & ibidem ſhould refer to the Place mentioned in the Declaration where the Bond was made.

Cur' contra. The adtunc & ibidem cannot be referred to the Place in the Declaration, and there is no Place mentioned in the Replication. Whereupon Judgment was given for the Defendant.

3 Mod. 259. Memorandum, Mr. Juſtice Eyre came to this Court at the Deſire of the Court of King's Bench, who were trying of a Cauſe at the Bar, to know the Opinion of the Court of Common Pleas upon this Queſtion. An Infant who was a Party to the Ejectment that was upon Trial, had anſwered a Bill in Chancery by his Guardian; whether that Anſwer could be read in Evidence againſt the Infant? And the Opinion of the whole Court was, that it could not be read, for it is not Reaſon, that what the Guardian ſwears in his Anſwer ſhould affect the Infant.

Blake *verſus* Clattie.

TReſpaſs Quare clauſum fregit & diverſa onera equina of Gravel had carried away, per quod viam ſuam amiſit. Poſt. 174.

After Verdict it was moved in Arreſt of Judgment, That the Diverſa onera equina was incertain, and then mentioned the Loſs of his Way, and had ſet forth no Title to the Way, nor ſet forth any Certainty of it. 1 Mod. 19. Cumberba. 11, 241, 433, 458, 464. N. Lutw. 443. Poſt. 186.

It was ſaid on the other Side, That the Incertainty was aided by the Verdict, and the other Matter about the Way was only laid in Aggravation of Damages.

But the Court held the Exceptions material, and thought it would be very inconvenient to permit ſuch a Form of putting a Title to a Way into a Declaration in Treſpaſs. Vide 3 Lev. 261. 1 Danv. 28. pl. 13.

Anonymus.

IN an Action of Debt for Rent, the Plaintiff declared in Michaelmas-Term laſt, and laid the Demiſe to be Anno primo Jacobi ſecundi Regis.

The Defendant pleaded Nil hab' in Tenementis, and the Plaintiff's Attorney delivered a Copy of the Iſſue where the Demiſe was laid Anno primo Regis nunc, and ſo the Niſi prius Roll was at firſt; but it was obſerved that the Plaintiff's Attorney had amended it, but gave no Notice thereof to the Defendant's Attorney, nor delivered him a new Copy of the Iſſue, and ſo went to Trial, which proceeded, the Niſi prius Roll being right, and a Verdict was found for the Plaintiff. Poſt. 99. Antea 62, 69. 3 Lev. 193.

And it was moved by Serjeant Rotheram, That there ſhould be a new Trial granted; for the Defendant was ſurprized to find the Record right, when they had a wrong Copy of the Iſſue.

But it appearing to the Court, That the Defendant notwithſtanding proceeded in his Defence, and the Verdict was after a long Evidence, the Court would not ſet it aſide, but ordered the Plaintiff's Attorney to attend for the undue Practice in making of an Amendment in ſuch Manner.

Bailes *verſus* Wenman.

IN an Ejectment upon a Special Verdict the Caſe appeared to be thus:

That Articles of Marriage were made between the eldeſt Son and Heir apparent of the Defendant and Martha, one of the Daughters of one William Nailor, whereby the Defendant was to ſettle the Lands in Queſtion upon the Leſſor for his Life, and after his Deceaſe upon Martha for her Jointure, with a Proviſo, That the Leſſor ſhould make a Leaſe of the Premiſſes to the Defendant for ninety-nine Years, if the Defendant and Suſan his Wife ſhould ſo long live, and that Suſan died before the Leaſe made to the Plaintiff. So the only Queſtion was, Whether the Leaſe for ninety-nine Years determined by the Death of the ſaid Suſan?

1 Mod. 187. The Court upon the firſt opening, without Argument, were all of Opinion, that it did determine, and ordered Judgment to be entred for the Plaintiff. 5 Co. 9. In Brudenell's Caſe, Daniel and Waddington, 2 Cro. 378. Vide Dyer 67. and 1 Inſt. 225. a. Trupenny's Caſe. Vide Anderſon 151. A Leaſe made to Two for their Lives, abſque impetitione vaſti durant' vitis of the Leſſees, and held that this Privilege would hold to the Survivor; for 'tis reaſonable to give the Privilege as large a Conſtruction as the Intereſt.

Bokenham *verſus* Thacker.

Trin. 4 Jac. 2. Rot. 1451.

Antea 71. 6 Mod. 200, 227, 260. THE Plaintiff declared, That whereas one Thomas Seely was indebted to him in a certain Sum of Money, amounting to above 12 l. and whereas the Defendant (as he ſaid) was indebted to the aforeſaid Seely in 12 l. or thereabout; the Defendant in Conſideration that the Plaintiff, at the ſpecial Inſtance and Requeſt of the Defendant, would procure an Order from the ſaid Thomas Seely in Writing under his Hand, directed to the Defendant for the Payment of the Money which the Defendant owed to the ſaid Thomas Seely, or any Part thereof;

The Defendant did promiſe to the Plaintiff, That he would pay the ſaid Money, or any Part thereof, according to the ſaid Order, and ſets forth, That he pmiſſioni & aſſumptioni præd fidem adhibens, did procure an Order of the aforeſaid Seely in Writing, directed to the Defendant, requeſting him upon Sight of the Note, to pay to the Plaintiff, or his Order, five Pounds, and Place it to the Account of the ſaid Thomas Seely: And the Plaintiff ſhew'd

him the ſaid Dyer at ſuch a Day and Place, and requeſted him to pay the ſaid five Pounds, and that he did not pay, &c.

And upon this Declaration the Defendant demurred; and by Levinz for the Defendant it was argued,

Firſt, That the Note is not alledged to be procured at the Requeſt of the Defendant, (3 Leon. 91. Merry and Lewis) in Conſideration that he would repair an Houſe at the Defendant's Requeſt he promiſed to pay; and alledgeth, that he repaired, and it was held naught after Verdict for not ſaying, he repaired at Requeſt.

Secondly, This is not for a Duty to the Plaintiff, but collateral, and became due upon a Special Promiſe; and therefore a Requeſt ought to have been laid with Time and Place. Requeſt, &c. 6 Mod. 200, 227, 260. 2 Salk. 585, 641. 3 Salk. 308, 309. 1 Saund. 35. N. Lutw. 70, 89, 90, 94, 117.

But both the Exceptions were over-ruled, and Judgment by the whole Court was given for the Plaintiff. For when 'tis ſaid to be agreed, That if he did procure at the Defendant's Requeſt a Note, there ſhall not be intended any Requeſt to be meant, other than what was included in the Agreement. Otherwiſe, if the Words had been to procure a Note when he ſhould be requeſted: But as this Agreement is, no ſubſequent Requeſt was intended. See for that the Caſe of Bretton and Bolton in 1 Cro. 246. 1 Cro. Pointer's Caſe, 194. and 2 Cro. 404. Berisford and Woodroffe.

As to the ſecond Point, If a Demand be neceſſary in this Caſe, the whole Court were of Opinion it was ſufficiently laid, ut ſupra; (viz.) That at ſuch a Day and Place he ſhewed the Note, and requeſted him to pay it, without ſaying, adtunc & ibidem requeſted him to pay it, for all ſhall be intended done together. Antea 72.

Levinz cited Hill and Wade's Caſe in 2 Cro. 523. as to the Requeſt.

Sed nota, In that Caſe the Promiſe was to pay it upon Requeſt: But here the Promiſe was not laid ſo in the Declaration; therefore I take it, no Requeſt at all was neceſſary. 1 Lutw. 231. 3 Mod. 295.

Chamberlain *verſus* Cooke.

Suff. ff. RObertus Cooke nuper de Bury Sancti Edmundi in Com' præd' Carrier attach. fuit ad reſpondend' Johanni Chamberlain de placito Tranſgr' ſuper Caſum, &c. Et unde idem Johannes per Thomam Folkes Attorn' ſuum queritur quod cum prædictus Robertus tertio die Octobris Anno Regni Domini Jacobi ſecundi nuper Regis Angl. tertio & diu antea & continue poſtea abinde hucuſque fuit & adhuc exiſtit Communis Portator (Anglice, a Common Carrier) & per totum idem tempus uſus fuit & conſuevit per ſeipſum & ſervien. ſuos cum Equis & Plauſtro An Action upon the Caſe, upon the Cuſtom of England, againſt a Common Carrier, for loſing of Goods deliver'd him to carry.

The Defendant is a Common Carrier.

(Anglice, Waggon) ipſius Roberti carriar. & portar. bona & catalla pro aliquibus perſonis hujuſmodi carriacon. & portacon. requiren. pro rationabil. mercede & ſtipendio proinde ſolvend. ad ab & inter Bury Sancti Edmundi præd. & Civitat. London juxta agreament. & ſolucon. in ea parte faciend. & habend'. Cumque

The Cuſtom of England.

etiam ſecund. legem & conſuetudinem hujus regni Angliæ omnes hujuſmodi communes portatores qui bona & catalla aliquarum perſonarum hujuſmodi carriation. & portation. ſic ut præfertur requiren. eis deliberat. exiſten. abſque ſubtraccone ſpoliatione & amiſſione ſalvo ducere cuſtodire & carriare debent & tenentur ita quod pro defectu vel pro defalt. talis communis portatoris vel ſervien. ſuorum hujuſmodi bona & catalla eis ſicut præfertur portand. & carriand. deliberat. non ſubtrahantur ſpolientur ſeu amittantur Cumque etiam præd. Johannes præd. tertio die Octobris anno tertio ſupradicto apud Bury Sancti Edmundi præd. poſſeſſionat. fuiſſet de bonis & catallis ſequen. videlicet, de duabus argenteis Crateris (Anglice, Salvers) una alba Pelvi (Anglice, a Baſon) quatuor Candelabris argenteis una patina pro emunctoriis (Anglice, a Snuffer-pan) un. par argenteorum emunctoriorum (Anglice, a Pair of Snuffers) ſex culullis (Anglice, Tumblers) duobus poculis argenteis (vocat. Tea-pots) duabus ſeriebus (Anglice, Sets) argenteorum vaſcillorum (Anglice, vocat. Caſters) quinque argenteis ignitabulis (Anglice, Chafing-diſhes) tribus argenteis pixidibus pro nicotian. (Anglice, Tobacco-boxes) tribus coralliis cum ſcapis argenteis (Anglice, Socket-Coyals) tribus poculis argenteis (vocat.

The Particulars of the Goods delivered to him.

Wants (alii.)

Cans) quatuor poculis more Japoniæ pictis (Anglice, Japan'd Pots) quatuor poculis argenteis undecim ſalillis argenteis duabus laminis argenteis duobus diſcis argenteis (vocat. Coffee-Diſhes)

Wants (alio) there being Pots and Candleſticks before.

uno poculo argenteo (vocat. a Child's Pot) uno candelabro argenteo (vocat. a Hand-Candleſtick) una argentea capula (Anglice, a Ladle) duobus cultris & furculis (Anglice, Knives and Forks) undecim unciis argenti format' in diverſas argenteas nugas (Anglice,

Uncertain.

Silver Toys) duabus ſeriebus (Anglice, Sets) aurearum fibularum (Anglice, Buttons) ſeptem annulis lapideis (Anglice, Stone Rings) quatuor deargent' thecis pro candelis (Anglice, vocat. Gilt Sockets) duobus pixidibus pro pulvere ptarmico (Anglice, Snuff-Boxes) quinque par. fibularum metallinarum (Anglice, Metal Buckles) duodecim fibulis ſeptem lapillis ornat' (Anglice, ſeven Stone Buttons) una ſerie Cyanorum & Granator. (Anglice, a Set of Turks and Garnets) ſex par. ærearum fibu-

Wants (aliis.)

larum ſex par. lapidearum fibularum (Anglice, Stone Buttons) quatuor poculis pro potu Turcico unice marginatis (Anglice, vocat. ſingle Tipp'd Coffee-Diſhes) duodecim longis & duodecim

Wants (aliis) there being Stone Buttons before.

rotundis fibulis lapideis (Anglice, Stone Buttons) ſex argenteis

Wants (aliar.)

rutellis (Anglice, Scoops) octo par. fibular. (Anglice, Buttons)

Wants (aliis.)

una Theca argentea (vocat. a Springing-Caſe) quatuor poculis more Japoniæ pict' duplicat. marginat. (Anglice, vocat. Japan'd double-

double-tipp'd Mugs) duobus poculis more Japoniæ pictis (Anglice, Japan'd Mugs) cum pedibus unice marginat. un. par. parvorum Candelabrorum argenteorum ſeptem poculis lapideis (vocat. Fire-Stone Mugs) duobus poculis pictis duplicat. marginat' ſex parvis poculis (vocat. Mugs) duobus magnis poculis (vocat. Mugs) duplicat. marginat. uno poculo (vocat. a Mug) unice marginat' tribus pixidibus pro pecunia (Anglice, Money-Boxes) duobus poculis (vocat. Dram-Cups) una pixide pro zibetho (Anglice, a Civet Box) treſdecim cochlearibus argenteis undecim argenteis furculis (Anglice, Forks) & viginti & duabus peciis auri (vocat. Guineas) ad valentiam Centum octoginta & ſeptem librarum quindecim ſolidorum & quinq; denarior. ut de bonis & catallis ſuis ꝑpriis Et ſic inde poſſeſſionat. exiſten. idem Johannes poſtea ſcilicet eodem tertio die Octobris anno tertio ſupradicto apud Bury Sancti Edmundi præd' bona & catalla illa præfat' Roberto ad eadem à Bury Sancti Edmundi uſq; Civitatem London præd' ſalvo ducend. cuſtodiend. & carriand. tradidiſſet & deliberaſſet & præfat' Roberto adtunc & ibidem præ manibus ſolviſſet tres ſolidos legalis monet. Angliæ pro carriatione & portatione bonorum & catallorum illorum quæ quidem bona & catalla præd. Robertus ad eadem a Bury Sancti Edmundi præd' uſque præd. Civitatem London ſalvo ducend. cuſtodiend. & carriand. & præd. tres ſolidos pro carriatione & portatione eorundem adtunc & ibidem habuiſſet & recepiſſet prædictus tamen Robertus bona & catalla prædicta poſt deliberationem inde eidem Roberto juxta conſuetudinem prædict' & officii ſive oneris communis portator. prædict. exigent. non carriavit uſque Civitatem London prædict' ſed idem Robertus bona & catalla præd. tam negligent. & improvide cuſtodivit carriavit & diſpoſuit quod pro defect. bonæ curæ & cuſtod. ipſius Roberti bona & catalla prædicta poſtea ſcilicet quarto die Octobris anno tertio ſupradict. apud Bury Sancti Edmundi prædict' amiſſa & deperdit. fuerunt ad dampnum ipſius Johannis ducentarum librarum & inde producꝫ ſectam, &c.

Wants (aliis.)
Wants (alior.)
Wants (aliis.) thrice.
Wants (alio.)
Wants (aliis.)
To be carried from Bury to London.
The Defendant loſt them.

Et præd' Robertus ꝑ Johan' Craske Attorn' ſuum venꝫ & defendꝫ vim & injuꝫ quando, &c. Et dicꝫ quod ips' in nullo eſt culpabilis de ꝑmiſſis ſuperius ei impoſit. ꝓut præd. Johannes Chamberlain ſuperius verſus eum queritur & de hoc pon' ſe ſuper Patriam & præd. Johannes Chamberlain ſimilit. Ideo Præcept' eſt Vic. quod Venire facꝫ hic à die Sanctæ Trinitatis in tres ſeptimanas duodecim, &c. Per quos, &c. Et quia nec, &c. ad recogn', &c. Quia tam, &c.

Not guilty pleaded.

Note, The Want of *alii*, *alio*, *aliis*, *&c.* ſeems ill on Demurrer: But here (it being only in Arreſt of Judgment) 'twas held well.

Chamberlain

Chamberlain *verſus* Cooke.

1 Vent. 238. 1 Sid. 98. Hard. 163. Palm. 523. Cro. Jac. 262. 1 Danv. 12, 13. 3 Salk. 19, 366.

IN an Action againſt a Common Carrier the Plaintiff declared, That he was poſſeſſed of divers Goods, (viz) Quatuor poculis argenteis, uno poculo argenteo, duabus ſeriebus aurearum fibularum, (Anglice, Sets of Gold Buttons) una ſerie Cyanorum & Granatorum, (Anglice, a Set of Turks and Garnets) and of divers other Things in the Declaration mentioned, and that he delivered them to the Defendant to carry from Bury St. Edmunds to London, there to be ſafely delivered to the Plaintiff, and that he paid the Defendant three Shillings for the Carriage, and that the Defendant afterwards through Negligence loſt them.

The Defendant pleaded Not guilty, and after Verdict for the Plaintiff it was moved in Arreſt of Judgment, that the Declaration was inſufficient.

First, He declares of four Silver Pots, and then afterwards of one Silver Pot, and doth not ſay uno alio poculo; and the like Omiſſion there is in divers other Parts of the Declaration: Sed non allocatur, For if for Want of the Word alio or aliis the Thing ſhall be taken to be the ſame, and ſo a Tautology, then the Jury ſhall not be ſuppoſed to have given Damages for the Things ſo laid; and if in Conſtruction they are to be taken as divers Pots, then Damages are well given for them.

Secondly, And that which was moſt inſiſted upon was the Incertainty of a Set of Buttons, and not ſaid how many Turkey Stones, and how many Garnets; as an Action of Trover pro ducentis ovibus matricibus & agnis has been held naught, for not ſetting forth how many Ewes and how many Lambs.

Antea 67. 1 Vent. 317.

Kellw. 153. Deviſe of a Brewhouſe, with Utenſils belonging to Brewing, and not ſaid what they were. 2 Sid. 174. Feke and Ward. 2 Saund. 74. 1 Mod. 46. 1 Sid. 445. 1 Vent. 71. 2 Salk. 654.

But the Court here held the Declaration well enough; for a Set is a ſufficient Certainty, being intended to be well known to thoſe that deal in ſuch Things, and in what Number the precious Stones are placed in ſuch Sets. The Caſe of Tailour and Wells. Trin. 21 Car. 2. Rot. 302. B. R. Trover decem parium velorum & tegularum (Anglice, ten Pair of Curtains and Valence) where the Plaintiff had Judgment, is as incertain. In Style 419. Trover for two Pieces of Cloth. Vide Cro. 244. A Hatband ſet with Pearls and Diamonds, the Plaintiff had Judgment in Trover. Sed nota. In that Caſe no Exception was taken to the Incertainty. Mod. Rep. 46. and Sid. 445. Herbert and Lane. Vide Style 370. an Action againſt an Inn-keeper for a Pack of Cloaths and other Goods loſt. Sic nota, A Carrier's Pack, a ſufficient Certainty.

Killigrew *verſus* Sawyer.

IN an Action of Covenant the Plaintiff declared, That he had and held the Office of Vice-Chamberlain to the Queen Dowager, and that by Deed produced in Court he agreed with the Defendant for the Sale of the ſaid Office, and that the Defendant ſhould hold it with the Conſent of the Queen. But by the ſaid Writing, the Defendant obliged himſelf, that the Plaintiff ſhould have, receive and enjoy (during the Life of the Plaintiff) divers Penſions and Salaries belonging to the ſaid Office, and that the Defendant ſhould receive no Part of them.

2 Salk. 466. 6 Mod. 234, 235. 3 Keb. 552, 659, 678, 711, 717. Cro. Car. 361. Cro. Jac. 269, 386.

Then he ſets forth, That the Defendant, at his Procurement, and with the Approbation of the Queen, was admitted into the ſaid Office and enjoyed it, and there were ſix Years arrear of a certain Salary belonging to the ſaid Office, according to the Agreement aforeſaid, due and payable to the Plaintiff, which he the Plaintiff had not received, and the Defendant had not paid unto him licet ſæpius requiſitus, and ſo the Defendant had broke his Covenant.

The Defendant pleaded in Bar, That he had from the Time of the Agreement aforeſaid, to the Time of the Writ brought, permitted the Plaintiff to receive yearly the Profits of the ſaid Office, according to the ſaid Agreement; abſq; hoc, that the Defendant had or received any Part of the Profits of the ſaid Office.

To this the Plaintiff demurred, and ſhewed for Cauſe of Demurrer, That the Defendant had traverſed Matter not alledged.

And upon the firſt Argument Judgment was given for the Defendant by the whole Court, that the Plea was good: And the Court held, that upon this Agreement the Defendant was not bound to pay the Money grown due for the Profits of the Office to the Plaintiff; but was only reſtrained from intermeddling with them, and to leave them to be received by the Plaintiff.

Note, This Judgment was given for the Defendant that his Plea was ſufficient, and thereupon a Writ of Error was brought in the King's Bench, and there two of the Judges were of Opinion that the Declaration was naught for Want of a good Breach aſſigned, and therefore they were for reverſing of the Judgment, quod placitum fuit ſufficiens, and for giving of a new Judgment, quod narratio fuit inſufficiens; but the other Judges were for affirming of the Judgment.

4 Mod. 43, 44.

Buſh

Buſh *verſus* Buckingham.

Debt upon a Bond.

Bedf. ſſ. THOMAS Buckingham nuper de Shenly in Com' Bucks Yeoman, alias dict' Thomas Buckingham de Houghton Reg in Com̃ Bedford Yeoman, ſum̃ fuit ad reſpondend Mariæ Buſh Vic' de placito qd reddat ei centum libras quas ei debet & injuſte detinet, &c. Et unde eadem Maria p Robertum Jenkin Attorn' ſuum dic' qd' cum præd' Tho' undecimo die Maii Anno Dom' milleſimo ſexcenteſimo octogeſimo ſexto apud Luton p quoddam ſcriptum ſuum obligatorium conceſſiſſet ſe teneri præfat. Mariæ in præd. centum libris in ſolvend' eidem Mariæ cum inde requiſit' fuiſſet præd' tamen Thomas licet ſæpius requiſit. prædictas centum libras eidem Mariæ nondum reddidit; ſed ill. ei hucuſq; reddere contradixit & adhuc contradic' unde dic' quod deteriorat' eſt & dampnum habet ad valenc' viginti librarum & inde produc' Sectam, &c. Et profert hic in Cur' ſcriptum præd' qd' debitum præd' in forma præd' teſtatur cujus dat' eſt die & anno ſupradict', &c.

Profert in Curia ſcriptum.

Defendant craves Oyer of the Condition.

Et præd' Thomas per Humfrid' Taylor Attorn' ſuum ven. & defend' vim & injur' quando, &c. Et pet. audit. ſcripti præd. & ei legitur, &c. pet. etiam audit. conditionis ejuſdem ſcripti & ei legitur in hæc verba, The Condition of this Obligation is ſuch, That if the above-bound Thomas Buckingham and William Holk, or either of them, they or either of their Heirs, Executors, Adminiſtrators or Aſſigns, or any of them, do or ſhall well and truly pay or cauſe to be paid unto the above-named Mary Buſh, her Executors, Adminiſtrators or Aſſigns, or any of them, the full and juſt Sum of fifty-two Pounds and ten Shillings of good and lawful Money of England, in or upon the twelfth Day of November next enſuing the Date hereof without Fraud or further Delay, That then this preſent Obligation to be void and of no Effect, or elſe to remain in full Force and Virtue. Quibus lectis & audit' idem Thomas dic' qd' ipſe de debito præd. virtute ſcripti p̃d onerari non debet quia dic' qd' p quendam Actum in Parliament. Dom̃ Caroli ſecundi nup Reg Angliæ inchoat. & tent. apud Weſtm̃ in Com̃ Midd' viceſimo quinto die Aprilis Anno Regni ſui duodecimo edit' & proviſ. inter alia inactitat. fuit Authoritat. ejuſdem Parliament. qd' nulla p̃ſona ſive p̃ſonæ quæcunq; ab & poſt viceſimum nonum diem Septembris Anno Dom. milleſimo ſexcenteſimo & ſexageſimo ſup̃ aliquem contractum ab & poſt p̃d' viceſimum nonum diem Septembris caperet ſeu caperent direct. vel indirect. p̃ accommodatione (Anglice, Loan) aliquorum denar' mercimonior' merchandizarum vel al' commoditat' quorumcunq; ultra valor' ſex librarum p̃ differend. (Anglice, Forbearance) centum librarum pro anno & ſic ſecundum iſtam ratam p̃ majori vel minori ſumma vel

And pleads the Statute of Uſury.

pro longiori ſeu breviori tempore & qd' omnes obligationes (Anglice, Bonds) contract' & aſſuranc' quæcunq; poſt tempus præd' fact' p̄ ſolutione alicujus principal. ſummæ pecun' accommodand' vel convent' performari ſuper vel pro aliqua uſuria (Anglice, Uſury) ſuper quas vel per quas reſervat' vel capt. foret ultra ratam ſex librarum in centum libris ut p̄fertur penitus vacuæ forent p̄ut per eundem Actum (inter al') plenius liquet & præd. Thomas dic̄ quod poſt præd' viceſimum nonum diem Septembris in actu præd' ſuperius mentionat̄ & ante confection̄ ſcripti obligat̄ præd. ſcilicet præd' undecimo die Maii An̄ Dom̄ milleſimo ſexcenteſimo octogeſimo ſexto ſupradict' apud Luton præd' int' p̄fat̄ Mariam & ipſum Tho' corrupt̄ & contra form̄ Statut̄ præd' agreat' & concordat̄ fuit qd̄ præd̄ Maria accommodaret eidem Thomæ quinquaginț libras eidem Mariæ p̄dict' duodecimo die Novembris in conditione præd. ſpeć reſolvend̄ quodq; p̄d̄ Thomas pro lucro intereſſe differendo & dando diem ſolutionis p̄dict' quinquaginta librarum p̄ tempus illud ſolveret præfat̄ Mariæ ſummam duarum librarum & decem ſolidorum Quodq; p̄ ſecurităt̄ ſolutionis tam prædictarum quinquaginta librarum de principal. debito præd. quam prædict. duarum librarum & decem ſolidorum ipſe idem Thomas per ſcriptum ſuum obligatorium debit̄ legis forma conficiend' deveniret tenț & obligat̄ p̄fat̄ Mariæ in centum libris cum conditione eidem ſubſcript̄ pro ſolutione quinquaginta & duarum librarum & decem ſolidorum ſuper p̄dict' duodecim diem Novemb. tunc prox' ſequen̄ & idem Thomas ulterius dic̄ qd' in performatione corrupt. concordiæ p̄d' int. ipſam Mariam & præfat̄ Thomam in forma præd' habit̄ & fact' prædict' Maria poſtea ſcilicet p̄dict' undecimo die Maii Anno Dom̄ milleſimo ſexcenteſimo octogeſimo ſexto ſupradicto apud Luton p̄dict' accommodavit eidem Thomæ quinquaginta libras reſolvend. eidem Mariæ p̄dicto duodecimo die Novembris tunc prox' ſequen. Quodq; ipſe idem Thomas pro ſecur. ſolutione tam p̄dictarum quinquaginta librarum quam p̄dict' duar. librar. & decem ſolid. pro intereſſe & lucro differendo diem ſolutionis inde per ſcriptum obligatorium p̄d̄ hic in cur. prolat̄ adtunc & ibidem devenit tenț & obligat̄ p̄fat̄ Mariæ in p̄dict' centum libris cum conditione p̄dict. ſuperius recitat. Quodq; p̄d' Maria tunc & ibidem accepit p̄dict' ſcriptum obligatorium pro ſolutione p̄dict' quinquaginta duarum librarum & decem ſolidorum ſecundum formam & effectum corrupt. concordiæ p̄dict. Et p̄dict' Thomas ulterius dic̄ quod p̄d̄ ſumma duarum librarum & decem ſolidorum pro differend. & dand. diem ſolutionis p̄dict' quinquaginta librarum pro tempore p̄dict' ſi ut p̄fertur excedit rat̄ ſex librarum pro centum libris pro uno anno per quod ſcriptum obligatorium p̄dictum hic in Cur. prolat̄ vigore præd. Actus Parliamenti vacuum & nullius vigoris in lege exiſtit & hoc parat. eſt verificare unde pet. Judicium ſi ipſe de debito præd. virtute ſcripti obligatorii p̄dict' onerari debeat, &c.

The uſurious Contract.

The Bond to be given thereupon.

The Money lent,

And the Bond in queſtion given for it,

Exceeds ſix per Cent.

The Plaintiff replies, That the Bond was made by a Scrivener in his Abſence, who miſtook the Condition, and traverſes the corrupt Agreement.

Et p̄dict' Maria dic̄ quod ipſa per aliqua præallegat' ab actione ſua prædict' verſus prædict' Thomam habend' p̄cludi non debet Quia dic̄ quod p̄dicto undecimo die Maii Anno Dom̄ milleſimo ſexcenteſimo octogeſimo ſexto ſupradicto apud Luton p̄dict' ad requiſitionem præd' Thomæ inter ipſos Mariam & Thomam agreat. fuit in forma ſequen̄, videlicet, quod eadem Maria accommodaret dict' Thomæ quinquaginta libras legalis Monet. Angliæ ac de eo haberet & reciperet pro intereſſe & dando diem ſolutionis inde ſecundum ratam quinq; librarum pro centum libris pro uno anno & non amplius. Quodq; quidam Thomas Cheyne de Luton præd' ſcriptor' qui tunc in manibus ſuis habuit quinquaginț' libras de denar' ipſius Mariæ illas dict' Thomæ Buckingam ſolveret & deliberaret ac p̄pararet & de p̄fat' Thoma Buckingam & p̄d̄ Willielmo How in conditione nominat' caperet ad uſum ipſius Mariæ legale ſcriptum obligatorium cum conditione pro ſolutione p̄d. quinquaginta librarum cum intereſſe ſecundum ratam quinq; librarum pro centum libris ut præfertur & eadem Maria ulterius dic̄ quod p̄dict' Thomas Cheyne poſtea die & anno ult' ſpecificat' apud Luton p̄d. ſolvit & deliberavit p̄d. Thomæ Buckingam p̄d̄ quinquaginta libras ac adtunc & ibidem in abſentia & ſine notitia ipſius Mariæ p̄dict' ſcriptum obligatorium in placito prædicto ſuperius ſpec' ſcripſit & de præd' Thoma Buckingam & Willielmo cepit in conditione cujus p̄d. ſumma quinquaginta & duarum librarum & decem ſolidorum pro quinquaginț & un̄ libris & quinq; ſolidis negligent' improvide & ex errore p̄d̄ ſcriptoris contra voluntatem & abſq; noticia ipſius Mariæ ſcript' & inſert' fuit abſq; hoc quod int' ipſam Mariam & p̄fat' Thomam Buckingam corrupte contra formam Statut' p̄d. agreat' ſeu concordat' fuit modo & forma p̄ut præd. Tho' Buckingam ſuperius placitando allegavit & hoc parat' eſt verificare unde pet' judic̄ & debitum ſuum præd' unacum dampnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c.

A Scrivener made the Bond,

Paid the Money to the Defendant, And took the Bond without the Plaintiff's Notice.

Traverſe of the corrupt Agreement.

Demurrer.

Et p̄dict' Tho' Buckingam dic' quod placitum præd. per p̄fat' Mariam ſuperius replicando placitat' materiaq; in eodem content' minus ſufficien' in lege exiſtunt ad ipſam Mariam action' ſuam p̄d. inde verſus eum habend' manutenend' ad quod quidem placitum modo & forma p̄d. ſuperius placitat' idem Thomas Buckingam neceſſe non habet nec p̄ legem terræ tenetur aliquo modo reſpondere & hoc parat' eſt verificare prout Cur', &c. Unde p̄ defectu ſufficien̄ replicationis in hac parte idem Thomas Buckingam (ut prius) pet' judic̄ & qd' p̄d' Maria ab actione ſua p̄d' inde verſus eum habend. p̄cludatur, &c.

Joinder.

Et præd' Maria ex quo ipſa ſufficien' materiam in lege in placito ſuo præd' ſuperius replicando placitat' ad ipſam Mariam actionem ſuam prædict' verſus præd' Thomam Buckingam habend' manutenend' ſuperius allegavit quam ipſa parat' eſt verificare quam quidem materiam præd' Thomas Buckingam non dedic̄ nec ad

eam aliqualit. respond. sed verificationem ill' admittere omnino recusat eadem Maria ut prius pet' judicium & debitum suum præd' unacum dampnis suis occasione detentionis debiti illius sibi adjudicari, &c.

Bush *versus* Buckingam.

DEbt upon Bond in 100 l. Penalty.

The Defendant demands Oyer of the Condition, which was to pay the Plaintiff 52 l 10 s. upon the 2d Day of November, which was at the End of six Months after the End of the Date of the Bond, and pleaded the Statute 12 Car. 2. that none should take above 6 l. per Cent. for Use of Money, and makes all Bonds and Contracts for more Use void, and shews that it was corruptly agreed between the Plaintiff and Defendant, That the Plaintiff should lend to the Defendant upon the 11th of May, 1686. fifty Pounds, and that he was to pay the Plaintiff 2 l. 10 s. for the Forbearance thereof upon the 12th of November next ensuing, and for securing of the Payment thereof, the Defendant should become bound in the Obligation, upon which the Action was brought, and in Performance of the said corrupt Agreement the Plaintiff lent the Defendant the 50 l. and he became bound ut supra to the Plaintiff, and that the Plaintiff did receive the aforesaid Bond, which became void by Force of the said Statute, and so demands Judgment of the Action.

Post. 108. Q. 3 Salk. 390. 3 Mod. 35. 2 Show. 329. N. Lutw. 84, 140, &c. Cumberba. 92, 125, 133.

The Plaintiff replies, That upon the 11th of May aforesaid, it was agreed, that he should lend 50 l. to the Defendant, and that the Defendant should pay for the Forbearance thereof according to the Rate of 5 l. per Cent. and no more, and that J. S. a Scrivener had 50 l. of the Plaintiff's in his Hands, and it was agreed between the Plaintiff and Defendant, that the said J. S. should pay the 50 l. to the Defendant, and that the said Scrivener should take a lawful Bond with Condition to pay the Interest according to the Rate of 5 l. per Cent. and that the said J. S. the Scrivener did pay to the Defendant the said 50 l. and in the Absence, and without the Notice of the Plaintiff, took the Bond ut supra, ex errore præd. Scriptoris, contra voluntatem & absq; notitia ipsius Quer. 2 l. 10 s. was inserted in the Condition ut supra, for six Months Forbearance, absq; hoc that it was corruptly agreed between the Plaintiff and Defendant, as the Defendant by his Plea alledgeth.

Postea 108.

To this Replication the Defendant demurred, and it was insisted upon, That here 'tis expresly pleaded, that the Plaintiff accepted the said Bond, which implies a Consent to it; and tho' the Plaintiff says in the Replication, that he had no Notice at the Time of Taking of the Bond, yet if there were Notice when it was accepted, that carries the Plaintiff's Consent to the corrupt

Agreement, But the whole Court gave Judgment for the Plaintiff, and held it to be the ſame Caſe with that of Neviſon and Whitley. 3 Cro. 501. For tho' the Plaintiff did know how it was when the Bond was accepted, as it muſt be ſuppoſed in the Caſe of Neviſon, That the Plaintiff had Notice how it was when the Action was brought, yet that does not make the Plaintiff Party to the corrupt Agreement; and the Plaintiff muſt uſe the Bond of Neceſſity to recover the Money. 2 Cro. 677. Buckly and Guilbank's Caſe.

Bracton *verſus* Liſter.

AN Action againſt an Adminiſtrator, and not ſhewn in the Declaration that Letters of Adminiſtration were committed to him.

1 Sid. 228, 302. Trin. 9 W. 3. Fyly Mil. verſ. Wharton in the Exchequer-Chamber contra & 2 Cro. 10. contra.

And this was held by the Court incurable. For tho' they need not ſhew by what Authority they were committed, yet it is neceſſary to ſet forth, That Adminiſtration was committed to charge him with the Action.

Otherwiſe of an Executor; It is not neceſſary to ſhew he proved the Will, becauſe an Action lies againſt him before Probate.

Dawſon *verſus* The Sheriffs of London.

Caſe againſt a Sheriff for Returning of a Nulla bona upon a Special Utlawry, and when the Party had Goods. J. S. indebted to the Plaintiff for Goods ſold,

Midd. ſſ. JOHANNES Parſons nuper de London Mil. & Baſil. Firebrace nuper de London Mil. nuper Vic. Civitat. London attach. fuer. ad reſpondend. Johanni Dawſon de placito Tranſgr. ſuper Caſum, &c. Et unde idem Johannes Dawſon per Carolum Blood Attorn' ſuum queritur qd' cum quidam Radulphus Davis nup de London Vintner tertio decimo die Junii anno regni, &c. in Paroch' Beatæ Mariæ de Arcubus in Warda de Cheap indebitat. fuiſſet eidem Johanni Dawſon in vigint. & quinq; libris legalis monet. Angl. p̄ cerviſia lupulat. & illupulat. (Anglice, Beer and Ale) per præd. Radulph. de eod. Johanne Dawſon ante tempus illud. habit. & recept. ac ſic inde indebitat. exiſten. præd. Radulph. in conſ. inde ſuper ſe aſſumpſit & eidem Johanni Dawſon adtunc & ibidem fidelit. promiſit quod ipſe præd. Radulph. præd. vigint' & quinque libras præfat' Johanni Dawſon cum inde poſtea requiſit. eſſet bene & fidelit. ſolvere & contentare vellet Cumque etiam poſtea ſcilicet tertio decimo die Junii anno tertio ſupradicto apud London prædict' in paroch. & Warda prædict' computaſſet cum præfat. Johanne Dawſon de diverſis denar. ſummis eidem Johanni Dawſon per præfat. Radulph. tunc debit. pro diverſis aſ̄ cerviſia lupulat. & illupulat. (Anglice, Beer and Ale) per ipſum

And alſo upon an Account ſtated.

Radulph. de eodem Johanne Dawſon ante tempus illud' empt. & habit' & ſuper comput' illo prædict' Radulph' invent' fuit in arrerag'erga eundem Johannem Dawſon in al' vigint' & quinque libris conſimilis legalis monet Angl' & ſic inde in arrerag exiſtēn ipſe idem Radulphus in conſ. inde ſuper ſe aſſumpſit præfatoque Johan' Dawſon adtunc & ibid' fidelit' ꝓmiſit qd' ipſe idem Radulph. præd. vigint' & quinque libras eidem Johanni Dawſon cum inde poſtea requiſit' eſſet bene & fidelit' ſolvere & contentare vellet præd' tamen Rad' ſeparal' promiſſion' & aſſumption' ſuas præd' in forma præd' fact' minime curans ſed machinans & fraudulent' intendens eundem Johannem Dawſon de præd' ſeparalibus denar' ſummis (in toto ſe attingen' ad quinquagint' libr') in hac parte callide & ſubdole decipere & defraudare præd' quinquagint' libr' ſeu aliquam inde denar. eidem Johanni Dawſon juxta promiſſion' & aſſumption' ſuas præd' nondum ſolvit ſeu aliqualit' pro eiſdem contentavit licet ad hoc faciend' præd' Radulphus poſtea ſcilicet quarto decimo die Junii anno tertio ſupradicto apud London præd. in parochia & Warda præd. per præd. Johannem Dawſon requiſit' fuiſſet ſed ill' ei ſolvere omnino recuſavit ad dampn' ipſius Johan' Dawſon quadragint' librarum Cumque idem Johannes Dawſon pro obtentione dampnorum ſuorum per ipm̄ occone nonperformation' promiſſion' & aſſumption' prædict. ſuſtentat. in Cur. dicti nuper Regis Jacobi ſecundi de Banco hic ſcilicet apud Weſtm. per breve Originaℓ ipſius nuper Regis extra Cur. Cancellar. ejuſdem nuper Regis apud Weſtm. præd. emanat. & retornabile & retornat. coram Juſtic ejuſdem nup Regis de Banco hic implacitaſſet præd. Radulph' in placito Tranſgr. ſuper Caſum pro non-performation. promiſſion. & aſſumption. præd'. Idemque Radulph. pro eo quod non venit in eadem Cur' dicti nup Regis hic præfaℓ Johanni Dawſon inde reſponſ. ſecundum legem & conſ. hujus regni poſit' fuiſſet in exigendo utlagand. in London præd. & ea occaſione poſtmodum ſcilicet die Lun' viceſimo tertio die Aprilis anno regni dicti nuper Regis Jacobi ſecundi, &c. quarto utlagat' fuit in London ad ſectam præfat' Johan. Dawſon de præd. placito prout ꝓ Record' inde in Cur. hic remanen' plenius liquet & apparet Cumque etiam idem Johannes Dawſon pro citiori expedition. ſectæ ſuæ præd. habend. poſtea ſcilicet quarto die Julii Termino Sanctæ Trinitatis anno regni dicti nuper Regis quarto proſecut. fuit extra eandem Cur. dicti nuper Regis de Banco hic ſcilicet apud Weſtm' præd. quoddam breve dicti nuper Regis de Capias utlagat' ſuper utlagar' præd. tunc Vic' Civitat. London. prædict. direct. per quod quidem breve idem nup Rex eiſdem tunc Vic præcepit quod non omitterent propt. aliquam libertatem Civitat. London prædict. quin per Sacr. proborum & legalium hominum de baliva ſua diligent. inquir. quæ bona & catalla terr. & tenementa præd Radulphus habuit in baliva ſua præd. viceſimo tertio die Aprilis anno regni dicti nuper Regis quarto

J. S. did not pay the Money.

The Plaintiff ſues out an Original,

Upon an Aſſumpſit.

And is thereupon outlawed.

The Plaintiff ſued out a Special Writ of Outlawry thereupon.

quarto ſupradicto vel unquam poſtea quo die ut præfertur idem Radulphus utlagat' fuit & ill' per eorum Sacr' extend' & adpretiar' fac' juxta verum valorem eorundem. Ac ea quæ per inquiſic' ill' inven' in manus ejuſdem nuper Regis caper' & ſalvo cuſtod' facerent Ita quod de vero valore & exit. eorundem eidem nuper Regi reſpond. Et ill' ſic extent' & appretiat' quod inde fac' Scire fac' Juſtic' ipſius nuper Regis hic ſcilicet apud Weſtm' prædict' à die Sancti Michaelis in tres ſeptimanas tunc prox' ſequen' diſtincte & aperte ſub ſigillis ſuis & ſigillis eorum per quorum Sacr. extent. & appretiationem ill' fac'. Ac pro eo quod idem Radulphus utlagat' latitat & diſcur' in Civitat. London prædict. in contempt. ipſius nuper Regis & Coronæ ſuæ præjudicium idem nuper Rex eiſdem tunc Vic' præcepit quod prædict. Radulph. ubicunque in baliva ſua tam infra libertat' quam extra invenire continger' caper' & eum ſalvo cuſtod. Ita quod haberent corpus ejus coram Juſtic' dicti nuper Regis de Banco præd. hic apud Weſtm. præd. ad præfat' termin' ad fac' & rec' quod eadem Cur' de eo conſ. in ea parte & quod haberent tunc hic breve illud quod quidem breve idem Johan. Dawſon poſtea & ante præd' tres ſeptimanas Sancti Michaelis ſcilicet ſexto die Julii anno quarto ſupradicto deliberavit præfat' Johanni Parſons & Baſil' Firebrace tunc Vic' Civitat' London præd' exiſten' in forma Juris exequend. Ac licet præd. Radulphus die utlagariæ præd' ac tempore deliberationis præd' brevis eiſdem Vic' (ut præfertur exequend') & poſtea diverſa habuit bona & catalla ad valenc' quadragint' librar' & amplius in baliva eorundem Vic' ſcilicet apud London præd' in paroch' Beatæ Mariæ de Arcubus in Warda de Cheape quæ iidem Vicecom' extend' appretiar' & in manus dicti nuper Regis Jacobi ſecundi caper. & ſeiſire potuer' præd' tamen Johannes Parſons & Baſil' Firebrace Vic' Civitat' præd ut præfertur exiſten' officia ſua præd. in vera & juſta executione præd. brevis dicti nuper Regis minime curan. ſed machinan. & fraudulenter intenden' non ſolum ipſum nuper Regem de eo quod ad ipſum pertinet occaſione utlagar. præd. defraudare ac ipſum nuper Regem & Cur. ſuam hic illudere verum etiam ipſum Johannem Dawſon ab aſſecutione & recuperatione dampnorum ſuorum præd' retardare aliqua bona ſeu catalla terras ſeu tenementa præd. Radulph. in baliva ſua extend' appretiar. vel in manus dicti nuper Regis capiend. minime fecerunt ſed hoc facere recuſaver. & penitus neglexer. & ad prædict. tres ſeptimanas Sancti Michaelis Anno regni dicti nup Regis Jacobi ſecundi quarto ſupradicto Juſtic. dicti nuper Regis de Banco hic ſcilicet apud Weſtm præd. falſo deceptive & fraudulenter retorn. quod idem Radulphus nulla habuit bona ſeu catalla terras ſeu tenementa nec die utlagariæ præd. ſeu unquam poſtea aliqua habuiſſet in baliva ſua quæ extendi appretiari ſeu in manus dicti nuper Regis capi potuer. prout eis per breve præd. præcept. fuit in dicti nuper Regis contempt. ac

The Writ delivered to the Defendants.

J. S. was poſſeſſed of divers Goods.

The Defendants refuſe to ſeize the Goods, but return a Nulla bona.

in Cur' hic illuſionem ac præd. ſectæ ipſius Johannis Dawſon dilationem & retardationem manifeſt. ad dampnum ipſius Johannis Dawſon quinquagint. librar. Et inde producit ſectam, &c.

Et præd. Johannes Parſons & Baſil Firebrace per Johannem Haſlewood, Attorn. ſuum ven. & defend. vim & injur. quando, &c. Et iidem nuper Vic̃ dicunt quod p̃d. Johannes Dawſon Action' ſuam p̃d' verſus eos habere non debet quia dicunt quod antequam per Sacr. proborum & legalium homin. de baliva ſua inquiſiver. quæ bona & catalla terr. & tenementa p̃d. Radulph. habuit in baliva ſua ut ill. per eor. Sacr. extend. & appretiat. facerent juxta verum valorem eorundem prout p̃d breve de Capias utlagat. ſuper utlagar. p̃d. in ſe exigebat & requirebat ſcilicet Viceſimo tertio die Julii anno regni Jacobi ſecundi nuper Regis Angl', &c. quarto deliberat. fuit eiſdem nuper Vic' quoddam breve Prærogativæ e Cur' Scaccarii dicti nuper Regis apud Weſtm. ſcilicet quarto die Julii anno regni dicti nuper Regis quarto emanat' eiſdem nuper Vic' direct' in forma juris exequend' per quod quidem breve p̃cept' fuit eiſdem nuper Vic' quod de bonis & catallis terris & tenementis præfat. Radulphi Davis in baliva eorundem nuper Vic. quoddam debitum quadragint. librar. fieri & levari facerent quod capt' & ſeiſit' fuit in manus dicti nuper Regis per Thomam Rawlinſon Mil' & Thomam Fowle Mil' nuper Vic' Midd' viceſimo ſecundo die Januarii anno regni dicti nuper Regis ſecundo quodque per Judicium Baron. dicti Scaccarii dict' nuper Regis apud Weſtm. poſtea reddit' recuperat' fuit per dict. nuper Regem verſus p̃fat' Radulph' Davis ita quod denar. ill. cum ſic levaſſent iidem nuper Vic' ſcilicet Johannes Parſons & Baſil' Firebrace haberent coram tunc Baron' de Scaccario apud Weſtm. p̃d. à die Sancti Michaelis in tres Septiman̄ anno regni dicti nuper Regis quarto dict. Cur. ejuſdem nuper Regis tunc ibidem ad uſum ipſius nuper Regis ſolvend. Virtute cujus quidem brevis Prærogativi p̃d. iidem Vic' ſcilicet Johannes Parſons & Baſil' Firebrace ſeiſire fecerunt omnia bona & catalla præd. Radulphi Davis in baliva eorundem nuper Vic' prout breve Prærogativ' in ſe exigebat & requirebat Quæ quidem bona & catalla per appretiator' per eoſdem nuper Vic' ſcilicet Johannem Parſons & Baſil' Firebrace nominat' apprec' fuer' ad viginti & ſeptem libras quinque ſolidos & novem denar' quas quidem viginti & ſeptem libras quinque ſolidos & novem denar' iidem nuper Vic' ſcilicet Johannes Parſons & Baſil' Firebrace habuer' coram Baron̄ de Scaccario dicti nuper Regis apud Weſtm' præd. ad diem & locum in brevi Prærogativo p̃dict' content' dict' Cur' ejuſdem nuper Regis tunc ibidem ad uſum ipſius nuper Regis ſolvend' prout per breve Prærogativ' p̃d. eis præcept' fuit & præd. nuper Vic' ſcilicet Johannes Parſons & Baſil' Firebrace ulterius dicunt quod præd. Radulphus null' aliqua alia ſive plura bona & catalla terr' aut tenementa die utlagar' præd. ſeu

The Defendants plead, a Prerogative Writ came out of the Exchequer, whereupon they were ſeiſed.

The Prerogative Writ ſued out.

The Sheriffs thereupon ſeiſed the Goods,

And Appraiſed them.

Nulla alia bona.

ſeu unquam poſtea habuiſſet in baliva ſua quæ extendi appretiar. ſeu in manus dicti nuper Regis cap. potuer. præterquam bona & catalla præd. ut præfertur ſeiſit. virtute brevis Prærogativi præd. & hoc parat. ſunt verificare & pet. Judicium ſi præd. Johannes Dawſon action. ſuam præd. inde verſus eos habere debeat, &c.

Demurrer. Et præd. Johannes Dawſon dicit quod præd. placitum præd. Johannis Parſons Mil. & Baſil. Firebrace Mil. ſuperius in barram placitat. ac materia in eodem content. minus ſufficien. in lege exiſtunt ad ipſum Johannem Dawſon ab actione ſua præd. verſus præfat. Johannem Parſons Mil. & Baſil. Firebrace Mil. habend' præcludend' quodq; ipſe ad placitum illud modo & forma præd. placitat. neceſſe non habet nec per legem terræ tenetur reſpondere & hoc parat. eſt verificare unde pro defect. ſufficien. reſponſ præd. Johannis Parſons & Baſil. Firebrace Mil. in hac parte placitat. idem Johannes Dawſon pet. Judicium & dampna ſua occaſione Tranſgr. illius ſibi adjudicari, &c.

Joinder. Et præd. Johannes Parſons & Baſil. Firebrace ex quo ipſi ſufficien. materiam in placito ſuo præd. ad præd. Johannem Dawſon ab actione ſua præd. verſus eos habend. præcludend. ſuperius allegaver. quam ipſi parat. ſunt verificare quam quidem materiam præd. Johannes Dawſon non dedicit nec ad eam aliqualiter reſpond. ſed verificationem illam admittere omnino recuſat iidem Johannes Parſons & Baſil. Firebrace pet. Judic. & quod præd. Johannes Dawſon ab actione ſua præd. verſus eos habend' præcludatur, &c.

Et quia Juſtic. hic ſe adviſare volunt de & ſuper præmiſſis priuſquam Judicium inde reddant dies dat. eſt partibus præd. hicuſque à die Sancti Michaelis in tres Septimanas de audiend. inde Judicio ſuo eo quod iidem Juſtic' hic inde nondum, &c.

Dawſon *verſus* the Sheriffs of London.

Case against a Sheriff for a falſe Return. 1 Salk. 12. 3 Salk. 149. 1 Show. 173. 4 Mod. 402. 1 Danv. 179, 180, 181. 1 Vent. 83, 86. 1 Mod. 57, 244. 2 Mod. 84, 84, 86, 180, &c. 1 Sid. 276, 439.

IN an Action upon the Caſe againſt Sir John Parſons and Sir Baſil Firebrace, Sheriffs of London,

The Plaintiff declared, that whereas one Ralph Davis was indebted to him in 25 l. and to recover it he brought an Original Writ returnable in the Common Pleas, and for that the ſaid Davis did not appear, he proſecuted him to an Outlawry in London. And the ſaid Davis was outlawed, and thereupon the Plaintiff took out a Capias Utlagatum in Trinity-Term, 4 Jacobi nuper Regis, directed to the Defendants, then Sheriffs of London: by which Writ they were commanded to enquire what Goods and Chattels, Lands and Tenements the ſaid Davis had at the Time of the Outlawry, or at any Time ſince, and to extend and appraiſe the ſame, and to return ſuch Extent in tres Septimanas ſci' Michael', and that they ſhould take the ſaid Davis, &c. Which Writ was delivered to the Defendants, then Sheriffs of London: And altho' the ſaid Davis had at the Time of the Outlawry, and after, divers Goods and Chattels to the Value of 40 l. and more, within the Bailiwick of the ſaid Sheriffs, which they might have taken, appraiſed and extended; yet not regarding the Duty of their Office, non ſolum ipſum Regem de eo quod ad ipſum pertinet occaſione Utlagariæ prædict' defraudare verum etiam ipſum Johannem Dawſon ab aſſecutione & recuperatione debit' prædict' retardare, they did not take, ſeize or extend the ſaid Goods, but neglected and refuſed to do it; and at the Day of the Return of the Writ, falſly, deceitfully and fraudulently returned, that the ſaid Davis had no Goods and Chattels, Lands or Tenements at the Time of the Outlawry, or ever after within their Bailiwick, in Dom' Regis contemptum Curiæ hic illuſionem & in Sectæ ipſius Quer. dilationem & retardationem ad damnum Quadraginta librarum.

To this the Defendants pleaded, that before they made any Enquiry of the Goods, &c. of the ſaid Davis, (viz.) the 23d of July, Anno Regni nuper Regis Jacobi Secundi quarto, a Prerogative Writ was iſſued out of the Exchequer to them the ſaid Sheriffs directed, whereby they were commanded to levy a certain Debt of 40 l. of the Goods and Chattels, Lands and Tenements of the ſaid Davis, which was taken and ſeized into the Hands of the ſaid late King by Rawlinſon and Fowle, late Sheriffs of Middleſex, and which was recovered by the ſaid late King in the Court of Exchequer, againſt the ſaid Davis, &c. by virtue of which Writ they ſeized all the Goods of the ſaid Davis in their Bailiwick, which were appraiſed at 27 l. which they returned into the Exchequer, as the Writ required; and the ſaid Davis had no other

Goods or Chattels, Lands or Tenements within their Bailiwick at the Time of the Outlawry, or ever after, &c.

To this the Plaintiff demurred, and the Court held the Plea insufficient, for they set forth, That the Predecessor Sheriffs had seized and taken the Debt into the King's Hands, so that Execution seemeth to be had before the Defendants were Sheriffs.

But Judgment was given against the Plaintiff; for the Court held that the Action would not lie for the Party who was an Outlaw, that because the Sheriff upon the Cap Utlagatum neglects to extend or seize the Goods and Lands of the outlawed Person, for that is the King's Loss: And tho' it was pretended, that the Sheriff extending and seizing would be a Means to enforce the Defendant to appear to the Plaintiff's Action, the Court said that it was so remote, as not to be considered as a Ground to support an Action; but if it had been shewn, that the Sheriffs might have taken his Body, and had neglected to do it, there might have been more Reason to support this Action. So Judgment was given, quod Querens nil capiat per breve.

2 Cro. 361.

Sir Thomas Gower's Case.

HE had upon a Commission made an Attorney, in order to suffer a Recovery this Term, which was done the last Assizes at York.

And the Court was now moved in behalf of the Heir in Tail to stop the Passing of the Common Recovery; and several Affidavits were produced to satisfie the Court, that Sir Thomas Gower (since the said Assizes) died in Ireland, and the Court being satisfied of the Truth thereof, did stay the Passing of the Recovery; and they said, if it should pass, it would be erroneous.

Vide antea 30. 2 Salk. 567. 3 Lev. 36.

Bealy *versus* Sampson.

Trespass for impounding of his Cattle, quousque finem fecit of 11 l.

Lincoln' ss. JOHANNES Sampson nuper de Mawvis Enderby in Com' prædict' Yeoman attach' fuit ad respondend' Willielmo Bealy de placito quare ipse simul cum Georgio Francis nuper de Stanton in Com' prædict' Labourer, vi & armis averia ipsius Willielmi pretii quadraginta librarum apud Halton cum Beckeringe nuper invent' cepit & imparcavit & ea ibidem sic imparcat' quousque idem Willielmus finem undecim libraru' pro deliberatione eorundem inde habend' cum prædict' Johanne & Georgio fecisset detinuit & alia enormia ei intulit ad grave dampnum ipsius Willielmi. Et contra pacem Domini Regis nunc, &c.

Et unde idem Willielmus per Johannem Fancourt Attorn̄ ſuum queritur quod prædict' Johannes ſimul cum, &c. primo die Februar' anno regni Domini Regis nunc, &c. tertio vi & armis, &c. averia, (viz.) quatuor boves & quatuor vaccas ipſius Willielmi pretii, &c. apud Halton cum Beckeringe prædict' nuper invent' cepit & imparcavit & ea ibidem ſic imparcat' quouſque idem Willielmus finem undecim librar' pro deliberatione eorundem inde habend' cum' præd' Johanne & Georgio feciſſet detinuit. Et alia enormia, &c. ad grave dampnum, &c. Et contra pacem, &c. Unde dic' quod deteriorat' eſt & dampnum habet ad valenc' quadraginta librar' & inde produc' ſectam, &c.

Et prædict' Johannes Sampſon per Stephan' Malton Attorn' ſuum ven' & defend' vim & injur' quando, &c. Et quoad venire vi & armis ſeu quicquid quod eſt contra pacem dicti Domini Regis nunc dic' quod ipſe non eſt inde culpabilis prout prædict' Willielmus ſuperius verſus eum queritur. Et de hoc pon' ſe ſuper patriam. Et prædict' Williel' ſimilit'. Et quoad reſid' Tranſgr prædict' ſuperius fieri ſuppoſit' idem Johannes dic' quod prædict' Willielmus actionem ſuam prædict' inde verſus eum habere non debet quia dic' quod ante prædict' tempus quo Tranſgr' præd' ſuperius fieri ſupponitur ſcilicet quintodecimo die Junii anno regni dicti Domini Regis nunc tertio emanavit extra Cur' dicti Domini Regis de Banco hic ſcilicet apud Weſtm' quoddam breve dicti Domini Regis nunc de Fieri fac' verſus prædict' Willielm' ad ſectam ipſius Johannis tunc Vic' Com' Lincoln' direct' per quod quidem breve dictus Dom' Rex nunc præfat' tunc Vic' Com' Lincoln' præcepit quod de terris & catallis prædict' Willielmi in baliva ejuſdem Vic. Fieri fac' tam quoddam debitum decem librar' quod prædict' Johannes Sampſon in Cur' dicti Domini Regis coram Juſtic' ejuſdem Domini Regis apud Weſtm' recuperaſſet verſus eum quam quadragint' ſolid' qui eidem Johanni Sampſon in eadem Cur' dicti Domini Regis adjudicat' fuer. pro dampnis ſuis quæ habuiſſet occaſione detent. debiti illius & quod denar. ill. haberet coram Juſtic. dicti Domini Regis apud Weſtm' a die Sancti Martini in quindecim dies ad reddend' præfat' Johanni de debito & dampnis prædict' unde convict' fuit quod quidem breve poſtea & ante retorn' ejuſdem brevis necnon ante prædict' tempus quo, &c. ſcilicet ſecundo die Auguſti anno tertio ſupradicto apud Halton in Com' prædict' cuidem Antonio Eyre Ar' tunc Vic' Com' Lincoln' exiſten' deliberat' fuit in forma juris exequend' Virtute cujus quidem brevis præd' Vic' præd' Com' Lincoln' poſtea & ante retorn' ejuſdem brevis necnon ante prædict' tempus quo, &c. ſcilicet eodem ſecundo die Auguſti anno tertio ſupradicto apud Halton prædict' pro executione brevis prædict' habend' fecit quoddam Warrant' ſuum in ſcriptis ſigillo Officii ſui Vic' ſigillat' ballivo Wapentag' de Wraggoe necnon prædict' Georgio Francis Balliv' ejuſdem Vic' ea vice tantum direct' per quod quidem Warrant' prædict' Vic' prædict' Com'

The Defendant pleads a Seizure by the Sheriff, by virtue of a Fieri facias non culp' to Part.

Fieri facias iſſued out of the Court of Common Pleas.

Delivered to the Sheriff.

The Sheriff made his Warrant.

Lincoln. eis & quilibet eorum conjunctim & diviſim mandavit qd. de terris & catallis prædicti Willielmi Bealy in baliva ejuſdem Vic. Fieri fac' tam præd. debitum decem librar. quod præd. Johannes Sampſon in Cur. dicti Domini Regis coram Juſtic' dicti Domini Regis apud Weſtm' recuperaſſet verſus eum quam præd' quadragint' ſolid' qui eidem Johanni in eadem Cur. dicti Domini Regis adjudicat. fuer. pro dampnis ſuis quæ habuiſſet occaſione detentionis debiti illius ita quod denar. ill haberet coram Juſtic' dicti Dom' Regis apud Weſtm' a die Sancti Martini in quindecim dies ad reddend' præfat' Johanni de debito & dampnis prædictis unde convict' fuit quod quidem Warrant' poſtea & ante retorn' ejuſdem brevis necnon ante prædict. tempus quo, &c. ſcilicet eodem ſecundo die Auguſti anno tertio ſupradicto apud Halton in Com. præd. præfat. Georgio Francis deliberat' fuit in forma juris exequend.

The Warrant delivered to the Defendant,

virtute cujus quidem Warranti præd' Georgius Francis & præd. Johannes ut ejus ſervien. & per ejus mandat' poſtea & ante retorn' brevis præd. necnon ante præd' tempus quo, &c. ſcilicet die & anno ult. mentionat' apud Halton præd. averia prædicta in narratione prædicta ſpec. in executione pro debito & dampnis præd. ceper' & ſeiſiver. & eadem averia debito modo appreciari fec' quæ quidem averia appreciat. fuer. ad ſummam undecim librar. exiſten. verum valorem eorundem. Et ſic capt. & ſeiſit. imparcaver. & detinuer. quouſque præd. Williel. præd. ſummam undecim librar. præfat' Georgio Francis ad uſum dicti Vic' pro deliberatione averiorum illorum habend. ſolviſſet prout eis bene licuit quæ ſunt idem reſid. Tranſgr. præd. unde præd. Williel. ſuperius ſe modo queritur abſque hoc qd' ipſe idem Johannes ſit culpabil' de caption' ſive detenſione averior. præd. ad aliquod tempus ante præd. ſecund' diem Auguſti anno tertio ſupradicto vel poſt præd. quinden. Sancti Martini anno tertio ſupradicto. Et hoc parat. eſt verificare unde pet' Judicium ſi præd. Williel' actionem ſuam prædict. inde verſus eum habere debeat, &c.

Who, with his Servant ſeized the Plaintiff's Cattle in Execution, and cauſed them to be Appraiſed, and kept them in Cuſtody until the Plaintiff paid the Execution Money. Traverſe, that he is guilty before or after.

Special Demurrer.

Et præd' Willielmus dic' qd' præd' placitu' præd. Johan. Sampſon ſuperius in barram placitat' materiaque in eodem content' minus ſufficien. in lege exiſtunt ad ipſum Willielm' actionem ſuam præd. verſus præfat' Johannem Sampſon habend' præcludend' quodque ipſe ad placitum ill' modo & forma præd' placitat' neceſſe non habet nec per legem terræ tenetur reſpondere. Et hoc parat' eſt verificare unde pro defectu ſufficien' placiti in hac parte idem Willielm' pet' Judiciu' & dampna ſua occaſione Tranſgr. præd' ſibi adjudicari, &c.

Cauſe of Demurrer, that the Traverſe is naught.

Et pro cauſis morac'on in lege idem Willielm' ſecundum formam Statuti oſtend' & Cur' hic demonſtrat has cauſas ſubſequen', videlicet, qd' placitum præd' male traverſat' mater' & tempus in ea parte traverſat' ac travers' ill' extra idem placitum omitti debuiſſet ſi non idem placitum traverſaſſet tempus inter præd. ſecundum diem Auguſti & præd' quinden' Sancti Martini in eodem placito

placito mentionat' Item qd' placitum præd' ſuppon' averia prædict. imparcari quouſq; ſumma undecim librarum ad uſum dicti Vic' ſolut' fuit ubi revera dict' Vic' hujuſmodi ſummam ad uſum ipſius Vic' per legem terræ recipere non potuit.

Et præd. Johannes ex quo ipſe ſufficien' mater' in lege ad præd. Will' ab actione ſua præd. habend. præcludend. ſuperius allegavit quam ipſe parat' eſt verificare quam quidem materiam præd' Will' non dedic' nec ad eam aliqualit' reſpond. ſed verificationem ill' admittere omnino recuſat ut prius pet' judicium, & qd. præd' Will' ab actione ſua præd' habend. præcludatur, &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſis priuſquam Judic' inde reddant dies dat. eſt partibus prædict. hicuſq; a die Sancti Michaelis in tres ſeptimanas de audiendo inde Judicio ſuo eo qd' iidem Juſtic' hic inde nondum, &c. Joinder.

Bealy *verſus* Sampſon.

THE Plaintiff brought an Action of Treſpaſs, and declared, that the Defendant Sampſon, ſimul cum Georgio Francis 1 Febr. Anno Jacobi Regis tertio, vi & armis, &c. quatuor Boves & quatuor Vaccas of the Plaintiff took at Stamton in Com', &c. & imparcavit & detinuit quouſq; the Plaintiff finem undecim libraru' pro deliberatione earum inde habend. cum prædicto Sampſon, the Defendant, & Georgio Francis feciſſet, &c. ad dampnum, &c. 1 Lut. 924. Vide poſt. 218. antea 89.

The Defendant pleaded Not guilty as to the vi & armis, and as to the Reſidue of the Treſpaſs he pleaded in Bar, that before the Time in which the Treſpaſs is ſuppoſed to be done, viz. the 14th Day of June anno ſupradicto, there went out a Writ of Fieri Facias out of this Court againſt the now Plaintiff at the Suit of the ſaid Defendant Sampſon, directed to the then Sheriff of Lincoln to levy a Debt of 10 l. which the ſaid Sampſon had recovered in the ſaid Court, and 40 s. for Coſts of Suit, and that he ſhould have the Money in Court in quiden' Martini ad reddend' præfato Johanni Sampſon de deb. & dampnis præd. unde convictus fuit: Which Writ of Fieri Facias was delivered to the Sheriff of the ſaid County, and thereupon the Sheriff, for the executing of the ſaid Writ, made his Warrant in writing, ſealed with the Seal of his Office, to one J. S. and the ſaid George Francis balivis ejuſdem Vicecomitis ea vice tantum directed, commanding them to levy the ſaid Debt and Coſts, of the Goods and Chattels of the now Plaintiff, that the ſaid Sheriff might have the Money in Court at the Day of the Return of the Writ, to pay the ſaid John Sampſon; which Warrant was delivered to the ſaid George Francis, and by virtue of the ſaid Warrant, the ſaid George Francis, and the ſaid Defendant Sampſon, ut ejus ſerviens & per ejus mandatum, the aforeſaid Beaſts in Execution for the Debt and Coſts afore-

aforesaid, took and seized, and caused them to be appraised, and they were appraised at 11 l. being the true Value of them, and detained them quousq; præd. W. Bealy the aforesaid Sum of 11 l. to the said George Francis, to the Use of the said Sheriff, pro deliberation' averiorum illorum habend. solvisset prout eis bene licuit quæ sunt idem resid. transgress. præd. unde præd. Willielmus Bealy se modo queritur absq; hoc quod ipse idem Johannes Sampson est culpab. de captione, &c. ad aliquod tempus ante præd. secundum diem Augusti vel post præd. Quinden' Sancti Martini & hoc parat. est verificare.

And to this the Plaintiff demurred.

This Case was spoken to the last Term, and then Pollexfen Chief Justice, and Rokeby were of Opinion for the Plaintiff, and Powell and Ventris for the Defendant; and it was again argued at the Bar this Term, and by the Opinion of the Chief Justice, Powell and Rokeby, Judgment was given for the Plaintiff.

The Chief Justice and Rokeby held the Plea to be naught, chiefly because the Defendant pleads that he detained the Cattle till the Plaintiff had paid so much Money to the Use of the Sheriff; whereas it should have been to the Use of the Plaintiff, at whose Suit the Execution was.

The Chief Justice said, that he found no Authority in Law that warranted the Delivering of the Goods back to the Plaintiff, especially upon Payment of Part of the Money. Vid. 1 Cro. 404. Stringer versus Stanlack; but here the Taking of the Money to the Use of the Sheriff made him a Trespasser, for it could not be done in Pursuance of the Execution. He also said, that one Farr in the Time of King Charles the Second, by Colour of a Writ of Execution came into the House and carried away the Goods; and it was adjudged Felony. He also said, that if this Manner of Pleading should be allowed, admitting that the Bailiff had agreed to take the Money to the Sheriff's proper Use, how should the Plaintiff be let in to a Replication in this Manner of Pleading to put the Matter in Issue?

Vide Keyling's Reports 43. 1 Sid. 254. Ray. 276.

Rokeby said, Parols font Plea, and that it must be here taken that the Money was paid to the proper Use of the Sheriff; and in pleading the Matter is to be taken most strongly against him that pleads.

Another Matter they went upon is, that in the Justification the Defendant saith he detained the Cattle till 11 l. was paid to Francis, whereas the Declaration charged him with detaining till 11 l. was paid to the Defendant; and so Francis Answers nothing to the Payment alledged to himself.

Note,

Note, The Chief Juſtice cited the Caſe of Thompſon and Clarke, 1 Cro. 504. where 'tis ſaid, that the Sheriff cannot deliver the Defendant's Goods to the Plaintiff in Satisfaction of the Debt; neither ought they to be delivered to the Defendant againſt whom the Execution is, but they ought to be ſold, and the Appraiſment is not material, for the Goods upon a Fieri facias need not to be appraiſed as they muſt be upon Elegit, 1 Cro. 584. in Palmer's Caſe. In the Caſe of Goodyers and Ince, 2 Cro. 246. upon an Elegit it was held, that the Sheriff could not ſell a Term to the Plaintiff himſelf that took out the Elegit.

Powell was of Opinion, that the Plea was good in that Point of paying the Money to the Uſe of the Sheriff, for he hath an Intereſt or ſpecial Property in the Thing taken in Execution, 1 Cro. 639. the Sheriff may bring Treſpaſs againſt one that takes Goods after they are ſeized in Execution, Wilbraham and Snow, 2 Saunders 47. reſolved that in ſuch Caſe the Sheriff may bring Trover.

But he held the Plea inſufficient for the other Exception, becauſe the Declaration is of a Detainer till the Money was paid to Francis and the Defendant: And in the Plea the Juſtification is of the detaining till the Money was paid to Francis.

He took another Exception alſo, that the Defendant had not ſhewn that there was a Return made of the Warrant to the Sheriff, and cited Br. Tit. Treſpaſs 566. but that was not much inſiſted upon, becauſe the Warrant was not directed to the Defendant here, but to Francis and another, and the Defendant ought not to be puniſhed for the Omiſſion of the Bailiffs in not returning the Warrant. Upon a Meſne Proceſs the Bailiff who acts by a Warrant from the Sheriffs, is not liable in Treſpaſs if the Sheriff does not return the Writ. Cr. Car. 447.

Ventris was of Opinion for the Defendant as to the firſt Matter; the Payment to the Uſe of the Sheriff he thought ought to be taken upon the whole Matter ſet forth in the Plea, that it was paid to the particular and ſpecial Uſe of the Sheriff, viz. that he might have the Money in Court as the Writ commands, and the Warrant mentions, and it was a ſtrained Conſtruction to take it to be to the proper Uſe of the Sheriff; it would not have been proper to ſay, paid to the Bailiff to the Uſe of the Plaintiff, becauſe 'tis not the Plaintiff's Money till 'tis paid to him: In the Caſe of Benſon and Flower, 3 Cro. and Jones 115. it was reſolved, that if the Plaintiff became Bankrupt, the Commiſſioners could not aſſign Money that had been levied at the Plaintiff's Suit upon Execution, or remaining in the Sheriff's Hands, or in Court; Alſo a Bar is good to a common Intent.

2. The

2. The Pleading of the Payment to Francis, and not ſaid to Francis and the Defendant, tho' it does not preciſely anſwer the Declaration, yet he held it well enough, becauſe Payment to Francis is a Payment to both, becauſe it is ſet forth, that they acted jointly in Purſuance of the Warrant; and Averring that the Matters pleaded were idem reſiduum tranſgreſſionis was a ſufficient Anſwer of the Allegation in the Declaration of Payment to both.

He put the Caſe, one brings Treſpaſs againſt A. that he ſimul cum B. took his Cattle and detained them quouſque he made a Fine with the ſaid A. and B. for the Delivery of them. A. the Defendant pleads, that a Rent was granted to B. with a Clauſe of Diſtreſs; and that the ſaid B. and A. as his Servant, and by his Command took the Cattle by way of Diſtreſs, and detained them till the Plaintiff paid the Arrear to B. quæ eſt eadem tranſgreſſio, would it not have been good?

Again, If this Payment muſt be taken to be to the proper Uſe of the Sheriff, and ſo not in Purſuance to the Execution, yet he held that the Plaintiff here could not maintain an Action of Treſpaſs, that in regard that he is particeps criminis, the Detaining the Goods is but a Nonfeazance. If the Sheriff upon Meſne Proceſs refuſes Bail, this does not make him a Treſpaſſer ab initio, tho' he is liable to an Action upon the Caſe for ſuch Refuſal; and ſo is the Caſe of Salmon and Percival, Jones 226. and 1 Cro. So alſo if the Sheriff detains a Man taken upon Meſne Proceſs after a Superſedeas, and that appears by Stringer and Stanlack's Caſe, 1 Cro. 404. and Withers and Henley's Caſe, 2 Cro. 379. there ſaid the Detaining is a new Caption; but it is objected, that the Taking of the Money is a Miſfeaſance; and in 6 Co. Poulter's Caſe, if a Man diſtrain and abuſeth the Diſtreſs, he is a Treſpaſſer ab initio; ſo where a Thing is done by an Authority of Law, and an Abuſe is committed after.

Anſw. That is true, if there were a Miſfeaſance in any Matter wherein the Plaintiff in this Action had not concurred: If a Man ſhould detain a Horſe, and the Owner ſhould bid him ride him, would this make him a Treſpaſſer ab initio, as if he had rode him without ſuch Licence? The Payment is here the Act of the Plaintiff in this Action, and therefore he was of Opinion, that he could not bring Treſpaſs. But by the Opinion of the other three Judges, Judgment was given pro Quer. ſed minus juſte, ut Credo. W. B.

Clarke *verſus* Peppin.

Somerſet ff. GEORGIUS Peppin nuper de Culverton in Com̃ præd. Gen̄ aꝑ dic̃ George Peppin of Culverton in the ſaid County, Gent. ſummonitus fuit ad reſpondend Edwardo Clarke Armig Johanni Bowles Armig & Georgio Muſgrave Armig executoribus teſtamenti Wilꝑ Clarke Ar. de placito qd̃ teneat eis conventionem inꝯ eoſdem Willielmum & Georgium Peppin in vita ejuſdem Willielmi factam juxta vim formam & effectum cujuſdem ſcripti agreament̄ inꝯ eos confect', &c. Et unde iidem Edwardus Johannes & Georgius Muſgrave per Humfr' Stear Attorn̄ ſuum dic̃ qd̃ cum ꝑ quoddam ſcripꝯ agreament̄ habit̄ & fact' apud Camington̄ decimo ſeptimo die Julii anno Dom̃ Milleſimo ſexcenteſimo octogeſimo quarto inꝯ ꝑd̃ Wilꝑ ex una parte & præd' Georg Peppin ex altera parte ſub ſigillo præd' Georg Peppin ſignat̄ & hic in Curꝯ prolat̄ cujus dat̄ eſt eiſdem die & anno agreat̄ fuit inter eaſdem partes pro una dimiſſione pro annis (Anglice, a Chattel-Leaſe) pro nonaginta novem annis ad incipiend̄ (Anglice, to commence) poſt mortem vel aꝑ determinationem ſtatus ux' Chriſtophori Melhuiſh deceſſi & ad determinand' ſuper mortem Eliz' Peppin ætat̄ (Anglice, aged) circa decem & ſeptem annos filiæ ꝑd̃ Georgii Peppin ac Johannis Peppin filii Johannis Peppin de Culverton præd' ætat̄ (Anglice, aged) circa duodecim annos de & in omni ilꝑ uno meſſuagio & tenemento cum ꝑtin̄ continen̄ circa viginti & ſeptem acras de quibus quatuor ſunt pratum nup in poſſeſſione ꝑd̃ Chriſtophori Melhuiſh & parcel̄ manerii de Curry Pool ſub antiquo annuaꝑ reddit̄ viginti & ſeptem ſolidorum & quatuor denar̄ & pro Herioto (Anglice, an Heriot) optimo averio vel quatuor libris ad Dom̃ electionem & uſuaꝑ convencon ut in omnibus dimiſſionibus (Anglice, Leaſes) conceſſis per fiduciarios (Anglice, Truſtees) conſtitut. per nuper Comitem Roffen. omnium quorum conſideratione præd' Georgius Peppin pro ſe Executoribus Adminiſtratoribus & Aſſign̄ ſuis convenit promiſit conceſſit & agreavit ad & cum præd. Willielmo Executoribus & Aſſign̄ ſuis qd̃ ipſe Georgius Peppin Executores Adminiſtratores vel Aſſign' ſui ſolverent vel ſolvi cauſarent præd. Willielmo Executoribus vel Aſſign̄ ſuis plenam ſummam centum & octoginta librarum videlicet unam medietat̄ inde ad Feſtum Sancti Michaelis Archi tunc prox' poſt dat̄ ſcripti illius & alteram medietat̄ ad Feſtum Sancti Michaelis Archi tunc prox' ſeq̃uen' proviſo qd̃ ſi Ux' præd' Chriſtophori contingeret mori ante ſigillationem præd. deſignat̄ dimiſſionis (Anglice, intended Leaſe) quod tunc ſcripꝯ ilꝑ vacuum foret Ac etiam proviſo qd̃ ſi aliqua ſupramentionat̄ vitarum contingeret mori antequam ꝑd̃ deſignat̄ dimiſſio ſigillat̄ foret qd̃ tunc licitum foret ad & ꝑ præd. Georgio Peppin Executoribus Adminiſtratoribus & Aſſign̄

Executors bring Covenant, reciting an Agreement for a Chattel-Leaſe under a Rent and Covenant.

The Defendant pleads that the Teſtator Nihil habuit in Tenementis, &c.

Scriptum agreamenti.

The Agreement ſet forth.

ſuis nominare & appunctuare aliquam aꝑ ꝑſonam in loco talis perſonæ ſic obien' Et iidem Edwardus Johannes Bowles & Georgius Muſgrave ulterius dic' qd licet ipſe ꝑfaꝫ Willielmus in vita ſua & præd. Edwardus Johannes Bowles & Georgius Muſgrave poſt mortem ipſius Willi perimpleveꝫ & cuſtodiveꝫ omnia & ſingula agreament' & conventiõ in ſcripꝫ præd. ſpec' ex parte ſua perimplend' & cuſtodiend' Proteſtando etiam quod præd' Georgius Peppin non perimplevit nec cuſtodivit aliqua agreamenꝫ ſive conventiones in ſcripto præd' ſuperius ſpec' ex parte ſua perimplend & cuſtodiend' in facto iidem Edwardus Johannes & Georgius Muſgrave dic' quod præd. Ux' ꝑd Chriſtophori adhuc ſuperſtes & in plena vita exiſtit, videlicet, apud Camimgton præd' qdq; præd. Georgius Peppin non ſolvit præfaꝫ Willielmo in vita ſua ſeu eiſdem Edwardo Johanni & Georgio Muſgrave poſt mortem præd' Willielmi præd. centum & octoginta libras, videlicet, unam medietaꝫ inde ad Feſtum Sancti Michaelis Archi ꝑx' poſt daꝫ ſcripꝫ illius & alteram medietaꝫ inde ad Feſtum Sancti Michaelis Archi tunc ꝑx. ſequen. Et ſic iidem Edwardus Johannes & Georgius Muſgrave dic' qd ꝑd Georgius Peppin conventionem ſuam ꝑd nec cum ꝑfaꝫ Willielmo in vita ſua nec eiſdem Edwardo Johanne & Georgio Muſgrave poſt mortem ꝑfaꝫ Willielmi in hac parte factam tenuit ſed iꝑ penitus infregit ac iꝑ ꝑfaꝫ Willielmo in vita ſua & eiſdem Edwardo Johanne & Georgio Muſgrave poſt mortem ꝑfaꝫ Willielmi tenere contradixit & adhuc contradic̃ unde dic̃ qd deterioraꝫ ſunt & dampnum habent ad valenciam ducentarum librarum & inde ꝑduc' ſectam, &c. & ꝑferunt hic in Curꝫ Literas Teſtamentaꝫ ꝑfaꝫ Willielmi ꝑ quas ſatis liquet Curꝫ hic ipſos Edwardum Johannem & Georgium Muſgrave fore Executores Teſtamenti præd' Et inde habere Adminiſtrationem, &c.

Licet the Plaintiff Teſtator performed all the Covenants, &c.

Proteſtando that the Defendants have not kept them. The Breach aſſigned.

Et ſic, &c.

Profert in Cur' Literas Teſtamentarias.

Et præd' Georgius Peppin per Thomam Webber Attorn' ſuum veñ & defend' vim & injur. quando, &c. Et dic. quod præd. Edwardus Clarke Johannes Bowles & Georgius Muſgrave actionem ſuam præd. inde verſus eum habere ſeu manutenere non debent quia dic' quod prædict' Willi Clarke defunct' præd' tempore quo ſupponitur præd. conventionem fieri nec unquam poſtea nihil habuit in tenementis præd' ꝑ ipſum Willielmum ꝑ ſcripꝫ agreamenꝫ præd. ſic ut præfertur dimitti agreatum Et hoc paraꝫ eſt verificare unde peꝫ Judicium ſi præd' Edwardus Clarke Johannes Bowles & Georgius Muſgrave actionem ſuam præd. inde verſus eum habere ſeu manutenere debeant, &c.

Teſtator nihil habuit in Tenementis.

Et ꝑd Edwardus Johannes Bowles & Georgius Muſgrave dic' qd placitum præd. Georgii Peppin ſuperius in Barram placitaꝫ ac materia in eodem contenꝫ minus ſufficien. in lege exiſtunt ad ipſos Edwardum Johannem & Georgium Muſgrave ab actione ſua præd. verſus præfaꝫ Georg Peppin habend. præcludend. qdq; ipſi ad placitum iliꝑ modo & forma præd. placitaꝫ neceſſe non habent nec ꝑ legem terræ tenentur reſpondere & hoc paraꝫ ſunt verificare unde

Demurrer to the Plea.

pet' Judic & dampna ſua præd occaſione fractionis conventionis præd ſibi adjudicari, &c.

Et p̄d' Georgius Peppin ex quo ipſe ſufficien' materiam in lege ad præfat' Willielmum Johannem & Georgium Muſgrave ab actione ſua p̄d verſus ipſum Georgium Peppin habend' p̄cludend' ſuperius placitat' inde allegavit quam ipſe parat' eſt verificare quam quidem materiam p̄d Edwardus Johannes & Georgius Muſgrave non dedicerunt nec ad eam aliqualit' reſponder' ſed verificationem ill' admittere omnino recuſant ut prius pet' Judic'. Et quod præd Edwardus Johannes & Georgius Muſgrave ab actione ſua præd habend' p̄cludantur, &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper p̄miſſis priuſquam Judic' inde reddant dies dat' eſt partibus præd uſq; à die Sancti Martini in xv dies de audiendo inde Judicio ſuo eo qd iidem Juſtic' hic nondum, &c. Joinder in Demurrer.

Clarke *verſus* Peppin.

IN an Action of Covenant the Plaintiff declared, that whereas by an Agreement in Writing made between him and the Defendant, it was agreed between the ſaid Parties for a Demiſe of a Leaſe for ninety-nine Years, of and in a certain Meſſuage, &c. under a certain Rent, and the uſual Covenants as in all Demiſes granted by the Truſtees of the Earl of Rocheſter were uſed, omnium quorum conſideratione, the ſaid Peppin did agree to pay to the ſaid Clarke 180l. at Michaelmas next following, and licet the Plaintiff performed all of his Part, the Defendant had not paid the Money, &c.

The Defendant pleaded in Bar, That the Plaintiff tempore quo ſupponitur præd' conventionem nec unquam poſtea nil habuit in Tenementis præd, ſo agreed to be demiſed. Antea 69, 73.

To this the Plaintiff demurred, and Judgment by the whole Court was given for the Plaintiff; for tho' that may be pleaded in an Action for Debt for Rent, yet it cannot be pleaded in Covenant for a Sum in groſs. 3 Lev. 146. Heath ver. Vermedon.

Beſides, the Agreement does not neceſſarily import that the Leaſe ſhould be made by the Plaintiff; it may be underſtood, that it was agreed that he ſhould procure a Leaſe for the Defendant.

Pinager *verſus* Gale.

IN an Action of Treſpaſs the Plaintiff declared for the Taking of his Cattle, and detaining them till he was forced to pay 2 l. 8 s. and 2 d.

The Defendant juſtified, That J. S. levied Plaint in the County-Court in a Plea of Debt, of 39 s. 11 d. againſt the now Plaintiff, & ſuperinde taliter proceſſum fuit, that he recovered the ſaid Debt, and 8 s. and 4 d. for Coſts of Suit, prout p̄ proceſſum inde in Cur̄ Com̄ præd̄ remanen̄ plenius apparet & ſuper quo ad proſecutionem ipſius J. S. quoddam p̄ceptum extra Cur̄ Com̄ præd̄ emanavit, p̄ quod præceptum the Sheriff commanded the Defendant to levy the Money, &c. by Virtue of which Precept he took the Cattle, and detained them till the Plaintiff paid the Money, &c.

The Plaintiff demurred, and it was adjudged for the Plaintiff.

2 Lev. 81. Parmyter and Doe. 3 Lev. 243. Adney and

First, Becauſe when a Judgment is pleaded in an inferior Court, eſpecially in a Court not of Record, the Proceedings ſhould be ſet forth at large, and not to ſay taliter proceſſum fuit. Vernon adjudg'd contra; & vide 3 Lev. 404. Patrick and Johnſon.

Secondly, It is not ſhewn that the Debt aroſe within the Juriſdiction.

Thirdly, It doth not appear that the Court awarded the Precept, 'tis only ſaid quoddam Præceptum è Cur̄ emanavit per quod the Sheriff commanded, whereas the Suitors are the Judges; for it ſhould be per quod præceptum p̄ præfat̄ Cur̄ directum fuit, &c. Vide Raſtal's Entries in Treſpaſs, 669. and as to the letting forth, the Proceedings at large.

Prynne *verſus* Sloughter.

ALIAS prout patet Termino Sancti Michaelis ult' præterit' Rotulo DCCLXXIV. continetur ſic. London ff. Præceptum fuit Vic' Cum Robertus Prynne generoſus nuper in Cur' Domini Caroli ſecundi nuper Regis Angl', &c. ſcilicet Termino Sanctæ Trinitatis Anno regni ſui decimo nono coram Orlando Bridgman Mil' & Baronetto & ſociis ſuis tunc Juſtic' dicti nuper Regis de Banco hic ſcilicet apud Weſtm' per conſideracon' ejuſdem Cur' recuperaſſet verſus Willielm' Wormell nuper de London Armig' alias dict' Willielm' Wormel de Spittlefield in dicto Com' Midd' Armig tam quoddam debitum ducentarum librarum quam octoginta ſolid' quæ eidem Roberto in eadem Cur' dicti nuper Regis adjudicat' fuer' pro dampnis ſuis quæ habuit occaſione detentionis debiti illius unde convict' eſt prout per recordum & proceſſum inde in Cur' Domini Regis nunc de Banco hic reſiden' liquet manifeſte Execut' tamen Judic' prædict' adhuc reſtat faciend' ac prædict' Willielmus mortuus eſt prout ex inſinuatione prædicti Roberti acceperat Rex & quia, &c. quod p probos, &c. Scire fac' tenentibus terrarum & tenementorum quæ fuer' prædicti Willielmi in Octabis Sanctæ Trinitatis anno regni dicti nuper Regis decimo nono ſupradicto quo die Judicium præd' reddit' fuit vel unquam poſtea in baliva ſua quod eſſent hic à die Sanctæ Trinitatis in tres Septimanas ult' præterit' oſtenſ. ſi quid, &c. quare debitum & dampna prædicta de terris & tenementis illis prædict' Roberto reddi non deberent juxta formam recuperacon' fieri & præfat' ſi, &c. ad quem diem hic ven' prædict' Robertus per Willielm' Mantell Attorn' ſuum. Et op' ſe quarto die verſus præfat' tenentes de præd' placito & ipſe ſolempnit' exact' non ven' & Vic' videlt Johan' Parſons Miles & Baſilius Firebrace Miles modo mand' qd' nulli ſunt tenentes nec aliquis eſt tenens aliquar' terrar' ſeu tenementor' quæ fuer' præd' Willielmi in præd. Octab' Sanctæ Trinitatis anno decimo nono ſupradicto vel unquam poſtea in baliva ſua quibus vel cui Scire fac' poſſunt prout per breve illud eiſdem Vic' præcept' fuit & ſup hoc teſtat' eſt in eadem Cur' Regis hic quod ſunt ſeparal' tenentes diverſorum terrarum & tenementorum in Com' Norf. quæ fuer' præd' Willielmi in eiſdem Octab' Sanctæ Trinitatis anno decimo nono ſupradicto & poſtea unde debitum & dampna prædicta fieri & levari poſſunt. Ideo Præcept' eſt Vic' Norf. quod p pbos, &c. Scire fac' tenentibus terrarum & ten'torum quæ fuer' prædicti Willielmi in prædic' Octab' Sanctæ Trinitatis anno regni dicti nup' Regis decimo nono ſupradicto vel unquam poſtea in baliva ſua quod eſſent hic ad hunc diem ſcilicet à die Sancti Michaelis in tres Septimanas ad oſtend' in forma prædicta, &c. Et modo hic ad hunc diem ven' tam prædictus Robertus per Attorn' ſuum

Scire facias against Heir and Tertenants, the Defendants Tertenants appear and plead that there are Lands in another County.

Vide 2 Inſt 472. that this Writ being in C. B. ought to name all the Tertenants.

The Plaintiff obtulit ſe.

The Sheriffs of London return, that there are no Tertenants.

Teſtatum ſcire fac'

ſuum præd' quam Paris Sloughter per Henr̃ Clift Attorn̄ ſuum & ſuper hoc Vic̃ præd' Com̄ Norf. videlicet, Thomas Seaman Armig̃ modo mand̃ quod ipſe virtute brevis prædicti ſibi directi per Willielm̄ Dicker & Johannem Scott p̄bos, &c. Scire fac̃ præfat̃ Paris Sloughter tenenti undecim Meſſuagiorum cum p̄tin' in Lin-Regis in Com̄ ſuo modo vel nuper in ſeparalibus poſſeſſionibus ſive occupation̄ Ezekielis Goddard, Elizabethæ Tilſon Vid' Everardi Farthing, Johannis Wilſon, Roberti Edwards, Georgii Burnett, Johannis Williamſon, Willielmi Melton, Willielmi Cobb, Suſan' Weſtgate, and Janæ Kutry Vid' & unius repoſitorii (Anglice, a Warehouſe) modo vel nup̄ in poſſeſſione ſive occupatione Nicholai Rookes quæ quidem ſepal̃ meſſuagia & repoſitorium fuer̃ tenementa præd̃ Willielmi Wormel in præd̃ Octab̃ Sanctæ Trinitatis anno decimo nono ſupradicto & poſtea quod eſſent hic ad hunc diem ſcilicet præd' tres ſeptimanas Sancti Michaelis ad oſtendend' ſi quid, &c. quare debitum & dampna præd. de tenementis illis fieri & præfat̃ Roberto Prynne reddi non deberent juxta formam recupationis præd. prout p̄ idem breve ſibi præcepl̃ fuit quodq; non ſunt aliqui alii tenentes nec eſt aliquis alius tenens aliquarum terrarum ſive ten̄torum quæ fuer̃ præd̃ Willielmi Wormell in prædictis Octab' Sanctæ Trinitatis anno decimo nono ſupradicto vel unquam poſtea in baliva ſua quibus vel cui Scire fac̃ poteſt ſuper quo prædict' Robertus Prynne pet̃ executionem verſus præfat̃ Paris de debito & dampnis præd. de eiſdem tenementis cum pertin' levand̃ ſibi adjudicari, &c.

Plaintiff and Tertenants appear. Scire feci returned,

Doth not ſay what Eſtate Wormell had in the Tenements.

Nulli alii Tenentes.

Et prædict' Paris ſalvis ſibi omnibus & omnimod' exceptionibus & advantag̃ tam ad prædict' breve quam prædictam narration' pet' licenc̃ inde interloquend̃ hic uſque in Octab' Sancti Hillarii & habet, &c. idem dies dat̃ eſt præfat̃ Roberto hic, &c. Poſteaque ſcilicet à die Paſchæ in quindecim dies de quo die loquela prædicta antea remanen' ſine die virtute cujuſdam Actus Parliamenti Domini Willielmi & Dominæ Mariæ nunc Regis & Reginæ Angl̃, &c. tertio die Februarii anno regni ſui primo revivificat̃ continuat̃ & adjournat̃ fuit hic ven' tam præd' Robertus Prynne quam prædict' Paris per Attorn' ſuos præd' & ſuper hoc idem Paris ſalvis ſibi omnibus & omnimod' exceptionibus & advantag̃ tam ad breve quam ad narration̄ præd. ulterius pet̃ licenc̃ inde interloquendi hic uſque in Craſtino Sanctæ Trinitatis & habet, &c. Idem dies dat̃ eſt præfat̃ Roberto Prynne hic, &c. & modo hic ad hunc diem ſcilicet ad prædict. Craſtin' Sanctæ Trinitatis ven. tam prædictus Robertus Prynne quam prædict. Paris per Attorn. ſuos prædictos & ſuper hoc idem Robertus Prynne ut prius pet̃ Execution̄ verſus præfat̃ Paris de debito & dampnis præd. de tenementis prædictis cum pertin' levand̃ ſibi adjudicari, &c. Super quo prædict' Paris pet̃ Judic̃ de prædicto brevi de Scire fac̃ Vic̃ præd' Com̄ Norf. direct' quia dic' qd̃ diu ante emanation' ejuſdem brevis de Scire fac'

Special Imparlance.

Loquela revivificat' continuat' & adjournat' fuit per actum Parliamenti.

Ulterius ſpecial Imparlance.

The Plaintiff prays Execution.

Tertenants plead in Abatement of the Writ.

& tempore emanationꝭ inde quidam Georgius Underwood & Jeremias White ſeiſiꝫ fuer. & adhuc ſeiſiꝫ exiſtunt de duobus Meſſuagiis cum pertiñ in Paroch. de Thames Ditton in Com. Surr. ultra & præꝫ prædict. teñta in prædicto retorno ejuſdem brevis de Scire faꝫ ſuperius ſpecificaꝫ de quibus quidem duobus Meſſuagiis cum pertin. prædict' Willielm. Wormell ſeiſiꝫ fuit in dominico ſuo ut de feodo in præd. Octab Sanctæ Trinitatis anno decimo nono ſupradicto Et hoc paraꝫ eſt verificare unde ex quo præd. Georgius & Johannes non ſum. fuer. nec in eodem brevi de Scire fac. nominat. nec in præd. retorno inde retornaꝫ tenentes præd. duorum Meſſuagiorum cum pertin. vel aliquor. tenementorum quæ fuer. præd. Willielmi Wormell præd. tempore redditionis Judicii præd. idem Paris peꝫ Judic. de breve illo & quod idem breve caſſetur, &c.

Lands in another County.

Unde ex quo the Tenants of thoſe Lands were not ſummoned, perit Judicium de brevi.

Et præd. Robertus dic. quod præd. placitum præd. Paris ſuperius in forma præd. placitaꝫ ac materia in eodem contenꝫ minus ſufficien. in lege exiſtunt ad præd. breve de Scire fac. præfaꝫ Vic. Norf. direct. caſſand. vel ad ipſum Robertum ab executione ſua verſus p̄faꝫ Paris de debito & dampnis præd. levand. de terris & teñtis præd. cum pertin. unde idem Paris tenens ut p̄fertur retornaꝫ exiſtit repellend. ſeu retardand. quodq; ipſe ad placiꝫ illud modo & forma præd. placitat. neceſſe non habet nec p̄ legem terræ tenetur reſpondere & hoc parat. eſt verificare Unde pro defectu ſufficien. placiti præd. Paris in hac parte idem Robertus petit Judicium & quod breve ſuum præd. boñ adjudicetur necnon executioñ ſuam verſus p̄faꝫ Paris de debito & dampnis præd. de terris & tenementis præd. cum p̄tin. unde dictus Paris tenens ut p̄fertur retornat. exiſtit levand. ſibi adjudicari, &c.

Demurrer to the Plea.

Et præd. Paris ex quo ipſe ſufficien. materiam in lege in placito ſuo præd. ad p̄d. breve de Scire fac. p̄fat. Vic. Norf. direct. caſſand. & ad præd. Robertum ab executione ſua præd. retardand. ſuperius allegavit quam ipſe parat. eſt verificare quam quidem materiam p̄d. Robertus non dedic. nec ad eam aliqualit. reſpondit ſed verification. illam admittere omnino recuſat Unde ut prius peꝫ Judic. de brevi præd', & quod idem breve caſſetur, &c. Et quia Juſtic. hic ſe adviſari volunt de & ſuper p̄miſſis priuſquam Judic. inde reddant dies dat. eſt partibus præd. hic uſq; à die Sancti Michaelis in tres Septimanas de audiendo inde Judicio ſuo eo quod Juſtic. hic inde nondum, &c.

Joinder in Demurrer.

Prynne *verſus* Sloughter.

IN a Scire facias upon a Judgment recovered in Trinity-Term, Anno 19 Car. 2. nuper Regis in this Court, againſt William Wormell Eſq; in 200l. Debt, to warn the Tertenants of the ſaid Wormell, if they could ſhew any Thing why Execution ſhould not be, &c. which was directed to the Sheriffs of London, who returned that there were no Tertenants in their Bailiwick, upon which a Teſtatum Scire facias went to the Sheriff of Norfolk to warn the Tertenants there, and the Sheriff returned the ſaid Sloughter Tenant of a Meſſuage, &c. which the ſaid Wormell was ſeiſed of at the Time of the Judgment, and that there were no other Tertenants in baliva ſua.

Sloughter appeared, and demanded Judgment of the Writ of Scire facias; quia dicit quod diu ante emanationem ejuſdem brevis & tempore emanationis inde quidam Geo. Underhill & Jer. White were and ſtill are ſeiſed of two Meſſuages, &c. in Thames Ditton in the County of Surrey, ultra & præter Tenementa prædict. in retorno ejuſdem brevis de Scire facias ſuperius ſpecificat', of which the ſaid Wormell was ſeiſed, &c. Unde ex quo præd. Georgius & Jeremias non ſummon. fuer. nec in eodem brevi de Scire facias nominat' nec in prædict' retorno inde retornat' tenentes, &c. idem Sloughter petit Judicium de brevi illo & quod idem breve caſſetur.

To this Plea the Plaintiff demurred, and Serjeant Pemberton argued, That it was no Plea in Scire facias to ſay that there were Tertenants in another County than where the Scire facias was brought, tho' it might be if the Tenants were in the ſame County. Eſpecially this Plea is not to be admitted ſince the Statute of 16 & 17 Car. 2. c. 5. which was made to prevent Delay of Execution upon Judgments, Statutes and Recognizances; and enacts, That when any Judgment, &c. ſhall be extended, the ſame ſhall not be delayed or avoided by Occaſion, that any Part of the Lands and Tenements extendible, are or ſhall be omitted out of ſuch Extent, ſaving the Remedy for Contribution againſt ſuch Perſons as ſhall have any of the Lands extendible. Which Statute was at firſt temporary, and made perpetual by 22 & 23 Car. 2. cap. 2.

The Court were of Opinion, that as to the Matter of the Plea, that it might be pleaded. And when one Tertenant is returned ſummoned upon a Sci. fa. he may plead that there are other Tertenants, tho' in another County; and this will put the Plaintiff to take out a Scire facias againſt them. Vid. for that the Lady Greſham's Caſe, Mo. 426. and Clarke and Hardwick's Caſe, Mo. 524. Vid. Dy. 331. B. ſemble cont. In a Scire facias for a Tertenant in the Nature of an Audita Querela, it was

held, That the Tertenant returned could not plead, there was another Tertenant not warned. Vide 1 Rol. Rep. 57. Holland and Lee, it ſeems to be made a Doubt.

But the whole Court held, That ſuch Matter might be pleaded, and the Statute of 22 & 23 Car. 2. does not extend to this Caſe; for that is when an Extent is executed, and the Tertenant brings an Audita querela, he ſhall not drive the Plaintiff to extend anew, but the Extent ſhall ſtand, and he ſhall have Contribution againſt the reſt.

But the Pleading in this Caſe was altogether ill and inſufficient; for it is pleaded in Abatement of the Writ, which it ought not to be, but he ſhould have demanded Judgment, ſi ipſe ad breve præd in forma præd. retorn' reſpondere compelli debeat; and ſo is the Concluſion in Jefferſon and Dawſon's Caſe, 2 Saund. 23. and in Clarke's Caſe in Mo. 524.

And then he ſheweth, that the ſaid George and Jeremy were not ſummoned, nec in eodem brevi de Scire fac' nominat' nec in eodem retorno retornat', which is naught; for the Sheriff of Norfolk could not ſummon or return thoſe Tenants, being in another County.

But then it was ſhewn on the Part of the Defendant, that the Record of the Scire fac' was wrong, for it was tituled Alias prout patet Term. Sancti Michaelis ultimo præterito, and then ſets forth a Scire facias to the Sheriffs of London, returnable tres ſeptiman' Trin. ultimo præterito; who returned, that there were no Tenants in Billiva ſua, & ſuper hoc Teſtatum eſt in Cur' Regis hic, that there were ſeveral Tenants in the County of Norfolk; and upon that a Scire facias was awarded to the Sheriff of Norfolk, returnable tres Michael', &c. So by this Record it would ſeem, the Writ and Return is all the ſame Day, whereas the Teſtatum Scire fac' ought to be in Trinity-Term before; and therefore the Record ſhould have been tituled Alias prout patet Term. Sanctæ Trinitat'.

And this the Counſel for the Plaintiff prayed might be amended; but the Court would not permit it, unleſs they agreed to amend on both Sides.

The City of Oxford's *Case.*

Antea 33. Poſt. 362. Hardr. 505. Cro. Car. 73, 88. 3 Salk. 383. 1 Mod. 163.

A Townſman of Oxford was choſen into an Office in the Corporation, and refuſing to hold he incurred a Penalty according to the Uſage of this Place, for which an Action of Debt was brought.

And it was moved for the Defendant, That he might be allowed the Privilege of the Univerſity; and a Charter was ſhewn, whereby it was granted to the Univerſity that their Members, Servants, &c. belonging to the Univerſity, ſhould be ſued in the Court before the Vice-Chancellor, and not elſewhere. And a Certificate was produced from the Chancellor of Oxford, directed to the Chief Juſtice, & Sociis ſuis Juſticiariis de Banco, that the Party was matriculated and regiſtred in the Univerſity, and a Servant to Doctor Iriſh.

And after hearing Counſel, and it appearing to the Court, That he was regiſtred in the Univerſity but two Days before he was choſen into the Office, and was a Painter that had dwelt long in the Town, and been for many Years of the Corporation, and no Servant attendant to Dr. Iriſh, but had his Dwelling-houſe, and kept Shop in the Town; and that he procured himſelf to be admitted in the Univerſity as an Artificer, to hinder the Remedy the Town had againſt him for holding his Office.

The Privilege was denied by the whole Court.

Bond *verſus* Moyle.

IN an Action of Debt for 28 l. 2 s. and 4 d. the Plaintiff declared, That whereas the Defendant by a certain Bill obligatory, cognoviſſet ſe debere & indebitat' fore to the Plaintiff ſummam viginti & octo librarum duorum ſolid' & quatuor denar' ſolvere querenti, &c. ad vel ſuper viceſimum nonum diem Septembris qui foret anno Dom. 1685. pro vera ſolutione quatuordecim librar' unius ſolidi & quatuor denar' ipſe the Defendant obligaſſet ſe firmiter per eandem billam, and in facto dicit quod the ſaid Moyle non ſolvit querenti the ſaid 14 l. 1 s. and 4 d. upon the ſaid 29th of September, per quod actio accrevit.

To this the Defendant demurred, and it was adjudged for the Plaintiff; for tho' it is not drawn properly as a Penal Bill for the Payment of the 14 l. &c. yet there is enough to ground an Action of Debt for the 28 l. 2 s. and 4 d. and the Day of Payment ſeems to refer to the 28 l. 2 s. and 4 d. Vide 1 Cro. 771.

Note, 'Tis the common Course to declare in Communi Banco per scriptum indentat, without saying, sigillo sigillat; but 'tis otherwise in B. R.

Buckler *versus* Millerd.

THE Plaintiff Buckler and two others, Executors of Peter Becket, brought Debt upon a Bond of 200 l. which the Defendant (together with one Katharine Becket) had entred into to the Testator.

The Defendant demanded Oyer of the Condition, which was, (viz.) That if the above-bound Katharine Becket, and James Millerd, should yearly, during the Life of the said Peter Becket and the Minority of Mary Becket, pay unto the said Peter Becket, or his Assigns, the Sum of twelve Pounds by equal Payments, upon the 15th Day of August and the 15th Day of February, that then the Bond should be void.

The Defendant pleaded Actio non, for that upon the 15th of February, when the Bond was alledged to be made, and before the Sealing thereof, the said Peter Becket (being Grandfather to Mary Becket in the Condition mentioned) who was then within Age, did deliver to the Defendant and the said Katharine Becket 200 l. to the Use of the said Mary, to be paid to her when she should be One and twenty Years of Age. And it was then agreed, that the Defendant and the said Katharine Becket should give a Bond in 230 l. Penalty to the said Peter Becket: And it was also then agreed, that the Condition should be for the Payment of 12 l. yearly for the Interest thereof to the said Peter and his Assigns during the Minority of the said Mary, If the said Peter should so long live, at the two Days mentioned in the said Condition, by equal Portions; and if it should happen that the said Peter should die before the said Mary should be one and twenty, that then the said 12 l. Interest should remain in the Hands of the Defendant and the said Katharine, for the Use of the said Mary, to be paid to her when she should come to twenty-one Years of Age, and then to be paid to the said Mary. And the Defendant further saith, that after the Bond and Condition were so agreed, one Yeomans by Mistake wrote the Obligation as is in the Bond, upon which the Action is brought; and the said Defendant and Katharine not knowing the Mistake, sealed the said Bond prout; and that the said Peter Becket afterwards died, and that only the first Day of Payment incurred between the Date of the said Bond and the Death of Peter Becket, (viz.) the 15th Day of August, anno tertio Jacobi Regis. And the Defendant on the said 15th Day, six Pounds (being all that was then due to the said Peter Becket) at

Usurious Bonds, &c. Antea 83. 1 Vent. 38. 1 Saund. 295. 1 Sid. 421. Raym. 191, 197. 1 Mod. 69. 3 Mod. 35. 1 Sid. 285. 3 Salk. 390. 1 Lev. 54. 2 Lev. 7. 2 Show. 319. N. Lutw. 84, 140, 141, &c. Cumberba. 92, 125, 133.

S. obtulit ſolvere, and was ever after ready to pay it to him; and after, ſcilicet, the firſt Day of December, anno tertio ſupradicto, did pay to the ſaid Peter Becket the ſaid ſix Pounds, which he did accept, unde petit Judicium, &c.

The Plaintiff replied proteſtando, That there was no ſuch Agreement, and that the ſaid Mary Becket was ſtill living and under Age, and that ſix Pounds became due upon the 15th of February, anno quarto nuper Regis Jacobi, according to the ſaid Condition, which the Defendant had not paid, & hoc paratus eſt verificare, &c.

To this the Defendant demurred, and it was inſiſted on for the Defendant that this Agreement might be pleaded, and averred to ſhew the Meaning of the Parties, and to have the Condition taken accordingly. As the Caſe of Neviſon and Whitley, in 3 Cro. and
Antea 83. in Jones's Rep. 396. where the Condition of the Bond was for Payment of Intereſt at ſix Months, as much as the Statute allows for a Year, and it was ſhewn to be made ſo by the Miſtake of the Scrivener, and that the Agreement of the Parties was for no more than juſt Intereſt; and this was held a good Averment to ſave the Bond from being void by the Statute of Uſury. And a Caſe between Lewknor and Mountague was cited, where the Condition of a Bond was, If William Mountague ſhall do, &c. whereas there was William Mountague the Father and William Mountague the Son, and by the Averment of the Meaning of the Parties this was expounded of the Son.

But the whole Court were here of Opinion, That the Averment in the Caſe at Bar was not to be admitted; for it would carry the Condition to another Senſe than the Words import.

As to the Caſe upon the Statute of Uſury, there it depends upon the Agreement; and the Party may ſhew any to make appear there was no corrupt Agreement. Vide antea hoc Termino the
Antea 82,83. Caſe of Buſh and Buckingham. And as to Lewknor's Caſe, the Averment was but to aſcertain which William Mountague was meant, and ſtands well with the Words of the Condition. But whether, as the Condition is penned, for the Payment to be during the Life of Peter Becket and the Minority of Mary, that the Payment ſhould determine upon the Death of Peter, the Court did not deliver their Opinion: According to the Opinion in Brudenell's Caſe in 5 Co. 9. it would ſeem that it ſhould. But the Caſe of Croſs and Tooker in Latch. 162. ſeems ſtrong to the contrary. Vide that Caſe in Popham 201. and in 1 Anderſon 151. abſque impetitione vaſti during their Lives, held, that the Privilege ſhall continue to the Survivor.

But the whole Court held the Pleading of the Tender insufficient, because it is not said that Peter Becket refused; otherwise if a Place of Payment had been in the Condition, and it had been shewn in Pleading, that the Party which was to receive the Money, was not there. 1 Cro. 888. Plea of Tender without setting forth a Refusal, not good, Lea and Exelly's Case: And the Acceptance after the Day signifies nothing, and upon that Point the Court were of Opinion for the Plaintiff; but Judgment was not given, because the Parties shewed an Inclination to compose the Business.

Mason *versus* Watkins.

AN Action of Debt upon a Bond of 20 l.

The Defendant demanded Oyer of the Condition, which was, That the Obligor should not himself bring any Evidence at the Assizes to prove the two Cows now in Question between one Owen Mason the Younger, and the said Watkins, to be the Cows of the said Watkins or of Robert Gillo; and that the said Gillo shall set in a Bill of Ignoramus, that then the Bond should be void.

1 Show. 3. N. Lutw. 189, 207. Cumberba. 246. 2 Mod. 285. 1 Saund. 66. 3 Salk. 341.

The Defendant pleaded quod ipse de deb præd. virtute Scripti Obligat' prædict' onerari non debet, because that one of the said Cows was the Cow of the said Watkins, and the other of the said Gillo; and that before the Bond, Owen Mason jun. in the said Condition mentioned, being the Plaintiff's Son, stole the said two Cows, and was imprisoned thereupon; and the Defendant Watkins was bound by Recognizance to prosecute him at the Assizes for the said Felony; and there the said Mason jun. was indicted and convicted, and the Defendant did give Evidence that one of the Cows was his, prout bene licuit, and that the Defendant did not give any Evidence by himself, or any one else, to prove the two Cows to be the Cows of the Defendant, or the Cows of the said Gillo, & hoc paratus est verificare, &c. unde petit judicium, &c.

To this the Plaintiff demurred, and upon the first Opening, Judgment was given for the Defendant; For the Condition is against Law, viz. to shift off Evidence of Felony, and that makes the Bond void, vide Jones's Case, 1 Leon. 203. and the Court recommended it to Serjeant Pawlet who was a Judge in Wales where the Plaintiff lived, to see to have him prosecuted for taking such a Bond.

Termino

Termino Sancti Hillarii, Anno 1 & 2 W. & M.

In Communi Banco.

Trippet *verſus* Eyre.

Debt upon a Bond to perform an Award.

Lond. ſſ. JOhannes Eyre nuper de Sheffeild Manor in Com' Eborum Gen' aꝑ dict' Johannes Eyre de Sheffeild Manor in Com. Eborum Gen. ſummonitus fuit ad reſpondend' Burrowes Trippet Gen. de placito quod reddat ei trecentas libras quas ei debet & injuſte detinet, &c. Et unde idem Burrowes per Rich. Milward Attorn' ſuum dic' quod cum prædict. Johannes nono die Martii Anno Regni Domini Regis nunc tertio apud London in Paroch beatæ Mariæ de Arcubus in Warda de Cheap per quoddã Scriptum ſuum obligatorium conceſſit ſe teneri eidem Burrowes in præd. trecentis libris ſolvend. eidem Burrowes cum inde requiſit. fuiſſet præd. tamen Johannes licet ſæpius requiſit. præd. trecentas libras eidem Burrowes nondum reddidit ſed ilꝑ ei hucuſq; reddere contradixit & adhuc contradic. unde dic. quod deteriorat. eſt & dampnum habet ad valentiam centum librarum Et inde ꝓduc. Sectam, &c. Et profert hic in Cur. ſcriptum prædict. quod debitum præd' in forma præd' teſtatur cujus dat. eſt die & anno ſupradictis, &c.

The Defendant craves Oyer of the Condition.

Et præd. Johannes per Johannem Gatacre Attorn. ſuum ven. & defend. vim & injur. quando, &c. Et pet. audit. ſcripti præd' & ei legitur Pet. etiam audit. conditionis ejuſdem Scripti & ei legitur in hæc Verba. ſſ. The Condition of this Obligation is ſuch, That if the above-bounden John Eyre, his Heirs, Executors and Adminiſtrators, for his and their Parts and Behalfs, do in all Things well and truly ſtand to, obey, abide, perform, fulfil and keep the Award, Order, Arbitrament, final End, and Determination of Francis Barlow of Sheffeild in the ſaid County, Gent. and Robert Soresby of Sheffeild aforeſaid, Gent. Arbitrators indifferently named, elected and choſen, as well on the Part and Behalf of the above-bounden John Eyre, as of the above-named Burrowes Trippet to Arbitrate, Award, Order, Judge and Determine of and concerning all and all Manner of Action and Actions, Cauſe and Cauſes of Actions, Suits, Bills, Bonds, Specialties, Judgments, Executions, Extents, Quarrels, Controverſies, Treſ-

paſſes, Damages and Demands whatſoever, at any Time or Times heretofore had, made, moved, brought, commenced, ſued, proſecuted, done, ſuffered, committed or depending by or between the ſaid Parties, or either of them; ſo as the ſaid Award be made and put in Writing, or by Word of Mouth, on or before the ninth Day of April now next enſuing; but if the ſaid Arbitrators do not make ſuch their Award of and concerning the Premiſſes, by the Time aforeſaid; that then if the ſaid John Eyre, his Heirs, Executors and Adminiſtrators, for his and their Parts and Behalfs, do in all Things well and truly ſtand to, obey, abide, perfarm, fulfil and keep the Award, Order, Arbitrament, Umpirage, final End and Determination of ſuch Umpire as the ſaid Francis Barlow and Robert Soresby ſhall nominate between the ſaid Parties of and concerning the Premiſſes, ſo as the ſaid Umpire do make his Award or Umpirage of and concerning the Premiſſes by Writing or Word of Mouth, on or before the ſixteenth Day of April aforeſaid, then this Obligation to be void, or elſe to remain in full Force, Strength and Virtue. Quibus lectis & audit idem Johannes Eyre dic. qd̄ præd̄ Burrowes Trippett actiõ ſuam præd' inde verſus eum virtute ſcripti obligatorii præd̄ hic in Cur̄ plac̄ habere non debet quia dic. qd̄ præd̄ Franc. Barlow & Rob. Soresby in conditione p̄d̄ ſupius menc̃onat̄ poſt confectionem ſcript̄ obligat̄ p̄d̄ hic in Cur̄ plac̄ & infra tempus p̄d̄ in conditione præd̄ in ea parte limitat̄ nullum fecer̄ Arbitrium Ordinem Arbitramentum final̄ finem vel determinatiõ in Scriptis vel p̄ verbum oris de & ſuper p̄miſſis in Conditione præd̄ ſupius mentionat̄ inter p̄fat̄ Burrowes Trippet & præd̄ Johannem Eyre Et p̄d̄ Johannes Eyre ulterius dic. quod præd' Franciſcus Barlowe & Robertus Soresby poſt confectiõ ſcripti obligatorii præd̄ hic Cur̄ plac̄ & infra tempus Conditiõ præd̄ in ea parte limitat̄ ſcilicet decimo die Aprilis anno tertio ſupradicto apud London præd̄ in paroch & Warda præd' nominaver' quendam Franc. Jeſſopp Ar̄ fore Umpirator. inter præd' Burrowes Trippet & p̄fat̄ Johannem Eyre de & ſuper p̄miſſis præd' quodq; præd. Franc. Jeſſopp ſic ut p̄fertur Umpirator nominat̄ infra tempus ei Condition. præd. in ea parte limitat̄ nullum fec. Arbitriũ ſive Umpiragiũ aut determinatiõ de & concernẽ p̄miſſ. præd. p̄ ſcriptum vel verbum oris Et hoc parat. eſt verificare Unde pet̄ Judicium ſi præd' Burrowes Trippet actionem ſuã præd' inde verſus eum virtute ſcripti obligatorii præd. habere debeat, &c.

Defendant pleads that the Arbitrators made no Award.

But they named an Umpire, who made no Award in Writing, or by Word of Mouth.

The Plaintiff replies and ſays, That true it is that the Arbitrators, nor A. B. by them firſt choſen Umpire, made no Award; but they ſay, that afterwards the Arbitrators choſe one J. N. who made an Award.

Et præd. Burrowes dic. quod ipſe per aliqua præallegat. ab actione ſua præd. verſus p̄fat' Johannem habend' præcludi non debet quia dic. quod bene & verum eſt quod præd. Franciſcus & Robertus in conditione prædict. ſuperius nominat. poſt confectionem ſcripti obligatorii præd̄ & infra tempus prædict' in conditione prædict' in ea parte limitat̄ nullum fecer. arbitrium ordinem arbitramentum

tramentum final. finem vel determinationem in ſcriptis per verbum oris de & ſuper præmiſſis in conditione prædicta ſuperius mentionat. inter præfat. Burrowes & prædict. Johannem Eyre ac quod præd. Franciſc. Barlowe & Robertus Soresby antea decimum ſextum diem Aprilis in Conditione prædict. mentionat. ſcilicet die & loco in placito præd. mentionat. nominaver prædict. Franc. Jeſſopp Ar. fore Umpiratorem inter præd. Burrowes & præfat. Johannem ſed præd. Burrowes ulterius dic. quod prædict. Franc. Jeſſopp adtunc & ibidem fore Umpirator. int. eund. Burrowes & præfat. Johannem de & ſuper præmiſſ. penitus recuſavit Et ſuperinde prædict. Franciſc. Barlowe & Robert. poſtea adtunc & ibidem ſcilicet prædicto decimo die Aprilis Anno tertio ſupradicto apud London præd. in paroch. & Warda præd. nominaver. quendam Cornel. Clarke Armig. fore Umpirator. int. prædict. Burrowes & præfat. Johannem Eyre de & ſuper præmiſſ. præd' Et idem Burrowes ulterius dic. quod præd. Cornelius poſtea, & antea præd. decim. ſextum diem Aprilis in Conditione præd. mentionat. ſcilicet quartodecimo die Aprilis anno tertio ſupradicto apud London præd. in paroch. & Warda prædict. ſuſcepto ſuper ſe onere Umpiragii præd. ore tenus (Anglice, by Word of Mouth) arbitravit & ordinavit quod præd. Johannes ſolveret præd. Burrowes ſeptuagint. libras ſuper decimum nonum diem Maii tunc prox. ſequen. apud dom. Johannis Elliſon in Sheffeild in Com. Eborum int. duodecimam & tertiam horas poſt meridiem ejuſdem diei Et quod poſt talem ſolutionem ſuper eundem diem apud eundem locum præd. Burrowes & Johannes Eyre un. eorum alteri invicem ſigillarent generaſ Relaxationes præd. tamen Johannes Eyre licet ſæpius requiſ. prædict. ſeptuagint. libras eidem Burrowes non ſolvit juxta formam & effectum Umpiragii prædict. Et hoc parat. eſt verificare unde petit Judicium & debitum & dampna ſua ſibi adjudicari, &c.

The Defendant's ſpecial Demurrer.

Et præd. Johannes dic. quod præd. placitum præd. Burrowes ſuperius replicando placitat. ac materia in eodem content. minus ſufficien̄ in lege exiſtunt ad prædict. Burrowes Actionem ſuam prædict. verſus eundem Johannem habend. manutenend. quodque ipſe ad placitum ilꝑ modo & forma præd̄ placitaꝑ neceſſe non habet nec per legem terræ tenetur reſpondere & hoc parat. eſt verificare unde pro defectu ſufficien. Replication. prædict. Burrowes in hac parte idem Johannes petit Judicium Et quod præd' Burrowes ab actione ſua præd. verſus eum habend. p̄cludatur, &c. Et pro cauſis morationis in lege ipſius Johannis in hac parte idem Johannes juxta formam Statuti in hujuſmodi Caſu nup̄ edit. & proviſ. oſtend. & Cur. hic demonſtrat has cauſas ſubſequen̄ videlicet quod non conſtat per Replication' ilꝑ quod idem Johannes habuit notitiam quod arbitrator. præd. nominaver. præd. Cornelium Clarke fore Umpirator. inter partes præd. vel quod prædictus Cornelius habuit

Cauſes of Demurrer.

aliquam authoritat' ad faciend' aliquod Umpirag' vel fore Umpirator. inter eaſdem partes de præmiſſis præd', &c.

Et prædictus Burrowes ex quo ipſe ſufficien' materiam in lege ad actione' ſuam præd. manutenend. ſuperius replicando allegavit quam ipſe parat. eſt verificare. Quam quidam materiam prædict' Johannes non dedicit nec ad eam aliqualit. reſpond. ſed verification. ill' admittere omnino recuſat, idem Burrows pet. Judic. & debitum ſuum præd. una cum dampnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſis prædictis priuſquam Judic' inde reddant dies dat' eſt partibus præd. hicuſque a die Sancti Michaelis in tres Septiman' de audiendo inde Judic' ſuo eo quod Juſtic. hic inde nondum, &c. Joinder in Demurrer.

Trippet *verſus* Eyre.

Trin 4 Jac. Secundi Rot.

IN Debt upon an Obligation of 300 l. Penalty.

The Defendant demanded Oyer of the Condition, which was thus, viz. If the above bounden John Eyre, his Heirs, Executors and Adminiſtrators, for his and their Parts and Behoofs, do in all Things well and truly ſtand to and keep the Award of Francis Barlow, and Robert Soresby, &c. Arbitrators indifferently named and elected, as well on the Part and behalf of the above-bounden John Eyre, as of the above-named Burrows Tripett, to arbitrate and award of and concerning all Actions and Demands whatſoever at any Time heretofore had, made, or depending between the ſaid Parties or either of them, ſo as the ſaid Award be made and put in Writing, or by Word of Mouth, on or before the 9th Day of April next enſuing, but if the ſaid Arbitrators do not make ſuch their Award by the Time aforeſaid, that then if the ſaid John Eyre, his Heirs, &c. do ſtand to and keep the Award and Umpirage of ſuch Umpire, as the ſaid Francis Barlow and Robert Soresby ſhall nominate between the ſaid Parties of and concerning the Premiſſes, ſo as the ſaid Umpire do make his Award or Umpirage of and concerning the Premiſſes by Writing or Word of Mouth, on or before the 16th Day of April aforeſaid, then this Obligation to be void. 3 Lev. 263. 1 Mod. 15. 274, 428 5 Mod. 457. 1 Lev. 285. Raym. 187. 2 Keb. 562. 2 Saund. 129. 1 R. Ab. 261. 2 Jones 167. Show. 76.

The Defendant pleaded Actio non quia dicit, that the ſaid Francis Barlow and Robert Soresby made no Award within the Time aforeſaid; and the ſaid Defendant ulterius dicit, that the ſaid Francis Barlow and Robert Soresby the 10th Day of April in the Year aforeſaid, at London, in the Pariſh and Ward aforeſaid, did name one Francis Jeſſup Eſq; to be Umpire between the aforeſaid Burrows Trippet and the aforeſaid John Eyre, and the ſaid Francis

Jeſſup ſic ut præfertur Umpirator nominatus, did within the Time to him limited make no Award or Umpirage of and concerning the Premiſſes, & hoc paratus eſt verificare unde petit Judicium, &c.

The Plaintiff replies, Quod bene & verum eſt, that the ſaid Arbitrators made no Award, and that before the 16th Day of April aforeſaid, Scilicet, at the Day and Place in the Plea of the Defendant mentioned, they did name the ſaid Francis Jeſſup to be Umpire between the ſaid Parties; but he further ſaith, that the ſaid Francis Jeſſup adtunc & ibidem fore Umpirator penitus recuſavit: & ſuperinde, the ſaid Arbitrators poſtea adtunc & ibidem nominaverunt quendam Cornelium Clarke Armig. to be Umpire between the ſaid Parties; and further ſaith, that the ſaid Cornelius Clarke poſtea & ante prædict' decimum ſextum diem Aprilis, ſcilicet, apud London, &c. ſuſcepto ſuper ſe onere Umpiragii præd. ore tenus arbitravit & ordinavit quod prædict' Johannes Eyre ſolveret prædict. Burrows Trippett ſeptuaginta libras, &c. And that after Payment the Parties ſhould give mutual Releaſes, and ſaith that the Defendant did not pay the ſaid 70 l. according to the ſaid Award, & hoc paratus eſt verificare, &c.

To this Replication the Defendant demurred. This Caſe was the laſt Term argued at the Bar, and the Court took Time till this Term to give their Opinions.

The ſole Queſtion was, Whether the Award made by Clarke was good, in regard the Arbitrators had before named Jeſſup to be Umpire? and tho' he refuſed, it was inſiſted on for the Defendant, that the Arbitrators were concluded to name another, and ſo Cornelius Clarke had no Authority as Umpire.

Powell, Rokeby and Ventris were of Opinion for the Plaintiff.

Pollexfen, Chief Juſtice, for the Defendant.

If the Arbitrators chooſe an Umpire, their Authority is executed, and they can't revoke or chooſe again, tho' the Perſon Elect refuſe to accept; per Holt. C. Juſtice. 1 Salk. 70.

The Reaſons the three Juſtices went upon were, that the Nomination of Jeſſup to be Umpire did not make him Umpire, and that his Refuſal immediately upon his Nomination made it amount to no more than a bare Propoſal to him, and ſo to ſtand for nothing, and then it did not conclude the Arbitrators, but that they might name another: The Penning of the Condition of the Bond is to be obſerved, the Words being, to ſtand to the Award of ſuch Umpire as the Arbitrators ſhould nominate, and not of ſuch Perſon as they ſhould name to be Umpire. So that there is in the Condition a Deſcription or Qualification of the Perſon to whoſe Award the Parties ſhould ſubmit, viz. to ſuch an one as ſhould be Umpire, and Umpire by the Nomination of the Arbitrators. Now Jeſſup, though nominated, yet was not Umpire, for his Refuſal hindred that, and therefore doth not come within the Qualification; the Pleading is always ſuſcepto ſuper ſe onere Arbitrii,

so that 'tis the Acceptance that makes him Umpire or Arbitrator.

But it is objected, that the Arbitrators here have executed their Authority, and 'tis done as fully as can be on their Parts, and therefore they have no Power to name any other; the Condition empowered them to name one, but not to name a second.

Answ. 'Tis True, when an Authority is once fully executed, the Power is determined; but here, admitting it to be an Authority, (which Ventris said it was not properly to be called so, there being no express Authority given to the Arbitrators, but 'tis rather a Description or Qualification of the Person which is to make the Award ut supra) yet there is no compleat Execution. If a Letter of Attorney be to deliver Seisin, and the Attorney deliver Seisin within the View, which is no good Execution of his Authority; yet sure that does not hinder him from delivering Seisin upon the Land: An habere fac' possess. was executed by the Sheriff in delivering a House, and after it was over, it was discovered that a Person was hid in a Room of the House, whereupon he was turned out, and the Sheriff delivered Execution again, which was resolved to be well in Palmer's Rep. 289. Submissions to Awards have been favourably construed, because they tend to the End of Controversies; it was surely the Parties Meaning, if the Arbitrators named a Man that rejected the Umpirage, that this should not conclude them from naming another: This Nomination can be taken to be no more than a Proposal of the Thing to Jessup, who must be taken to be present at the first Nomination, for the Pleading is, quod adtunc & ibid. penitus recusavit.

But the great Objection relied upon at the Bar, and by the Chief Justice was, that Jessup, tho' he did refuse, might have still proceeded with the Umpirage; and then if Clarke were well nominated, there should be a concurrent Authority in several Persons to make an Award, which the Law will not suffer, as the Case of Bernard and King, Rol. Abr. 262. and Sti. 306. where the Submission was to the Award of A. and B. so that they made the Award within such a Time; and if they made no Award, then to the Award or Umpirage of C. so as he made his Award within the same Time; and the Pleading was, that the Arbitrators denegassent facere Arbitrium within the Time, & superinde C. made an Award within the Time, and it was adjudged that the Award was void, because the Arbitrators, notwithstanding the Denial, might have made an Award, and the Umpire could have no Power till their Power was determined. And the Case of Barber and Giles, 1 Ro. Abr. 261. is to the same Purpose.

Vid. 1 Lev. 285, 302. 1 Sid. 428. 2 Saund. 129 to 133. Ray. 187. 1 Salk. 70, 72. N. Lutw. 167. 1 Mod. 15, 274, &c. 2 Mod. 169.

To which it was answered, that if it be admitted that Jessup, after his Refusal, might have taken upon him the Umpirage in Case the Arbitrators had named no other Umpire, yet 'tis clear Jessup could not have accepted the Umpirage after another was named; for the Arbitrators naming another upon his Refusal, had quite taken away their first Nomination; and in Case Jessup had accepted before they had proceeded to name another, then the Arbitrators had been prevented naming of any other; so here could be no concurrent Power at all. Vide the Case of Frall and Brierly, 2 Ro. Abr. 261. where the Submission was to two Arbitrators, and if they did not agree within a certain Time, then to the Umpirage of such an one as they should choose, so that the Umpire made his Award within the same Time: And it was shewn that the Arbitrators made no Award, and they chose an Umpire who made an Award within the Time; and that was held good, because they had determined their Power by choosing an Umpire; and so it differred from the Case of Bernard and King, where the Umpire was named in the Submission; and the Case of Copping and Horner, 2 Saund. 129. where the Submission was to Arbitrators, and if they made no Award, and could not agree in such a Time, then to the Arbitrament of J. S. so that he made an Award within the same Time.

3 Salk. 44.

In an Action brought upon the Award made by the Umpire, it was set forth, that the Arbitrators made no Award, nec facere potuerunt aliquod Arbitrium inter Partes, and that the Umpire made an Award within the Time; upon a Demurrer to the Declaration, Judgment was given for the Defendant; for the Averment quod non potuerunt facere Arbitrium was idle, for it appeared they might have made an Award within the Time: But as 'tis reported by Saunders, if the Plaintiff had set forth that they had declared they would make no Award, then all the Court held, (except Twisden Justice) that the Award of the Umpire had been good.

And this, Ventris said, did somewhat shake the Authority of Bernard and King's Case. This Case denied to be Law, in 2 Jones 167. Case versus Dare.

But Pollexfen, Chief Justice, said he had taken a Report of the Case of Copping and Horner, and produced his Report, where there was no Mention of that last Opinion reported by Saunders.

1 Mod. 274, 275. 'Twas held per Holt Ch. Justice, that if the Arbitrators choose an Umpire before the Time allowed by their Award is expir'd, 'tis ipso facto void, tho' they absolutely resolve to make no Award themselves. 1 Salk. 70. Reynolds versus Gray. And in the Case of Mitchil versus Harris, 1 Salk. 71. 'twas held per Holt Ch. Justice, that if there be a Submission to two, so as they make their Award before Midsummer, and if they can't agree, then to such Umpire as they chuse, so as he make his Umpirage before Midsummer, and an Umpire is chosen accordingly; this is good, and so will the Umpirage if made, because the Arbitrators had determined their Power before, by chusing an Umpire, and so resolved in the Case of Twisleton and Traverse, but if the Umpire is named in the Submission, he can't make his Umpirage before the Time given to the Arbitrators to make their Award, is expired.

And the Chief Justice said, no Case could be put that where a Man that was vested with a bare Authority, his Denial or Refusal to execute it could conclude him, but that notwithstanding he might execute his Authority; but if he makes a void or insufficient Execution, he may do it over again. There is no Reason, he said, to take the Words adtunc & ibidem penitus recusavit, that he

was

was preſent, and that the Nomination was but a Communication or Propoſal, for if he had Notice of it many Days after, and refuſed, the Pleading might be the ſame, and the Traverſe could be taken to the adtunc & ibidem. Where a Man is to be veſted with an Intereſt, his Acceptance is neceſſary; but it ſignifies nothing when but a bare Authority. In the Caſes of Awards the Pleading is, nullum fecerunt arbitrium, and 'tis never pleaded that they were not Arbitrators, or that they refuſed to be Arbitrators; for the Submiſſion makes them ſo; the Pleading ſuſcepto ſuper ſe onere arbitrii is but mere Form. Leſſee for Years aſſigns upon Condition to obtain the Aſſent of the Leſſor; the Leſſor at firſt denies, he may after conſent, and 'tis a good Performance of the Condition, 14 H. 7. 17. This is properly an Authority in the Arbitrators; 'tis ſo taken in Vinyor's Caſe in 8 Co. and is revocable as other Authorities are.

Theſe were the chief Reaſons upon which the Chief Juſtice relied.

But Judgment was given for the Plaintiff by the Opinion of the other three Juſtices.

Anonymus.

IN a Writ of Dower the Tenant was eſſoined, and the Eſſoin adjourned in Craſtino Purificat', at which Day the Demandant did not appear with the Writ, and demand the Tenant, but would have a Grand Cape made out.

This being ſhewn to the Court, they ſaid the Demandant muſt be Nonſuit, for his not being ready in Court at the Day of Adjournment of the Eſſoin to demand the Tenant, and the Tenant was therefore in no Default.

Dowſe *verſus* Cale.

Covenant by an Aſſignee of an Aſſignee againſt an Executor.

Midd. ſſ. JOHANNES CALE nuper de London Plumber, Executor' Teſt'i Ricardi Cale nuper dict. Richard Cale of the Pariſh of St. Bridget's alias Brides, London, Plumber, ſum. fuit ad reſpondend' Thomæ Dowſe Gen' aſſign' Thomæ Dowſe patri ſuo aſſign' Arthuro Stanhope Armig' Edwardo Roſſeter Mill. Johanni Wolſtenholme Armig' & Thomæ Briſtowe Gen. aſſign. Johannis Comitis de Clare de placito quod teneat ei convention' inter ipſum Johan' Comitem de Clare & præfat' Ric' Cale in vita ſua fact. ſecundum vim formam & effectum quarundam Indentur' inter eos confectarum, &c. Et unde idem Thomas Dowſe per Robert' Waring Attorn. ſuum dic' quod cum prædict. Johannes Comes de Clare nono die Decembris Anno Domini milleſimo ſexenteſimo quadrageſimo ſeptimo ſeiſit. fuiſſet de & in tribus Meſſuagiis cum pertin. in Parochia Sancti Clementis Dacorum in Com'

Leſſor ſeized in Fee.

Com' Midd' præd' in dominico ſuo ut de feodo, ipſoque Johanne Comite de Clare ſic inde ſeiſit' exiſten', idem Johannes Comes de Clare poſtea ſcilicet eodem nono die Decembris Anno Domini milleſimo ſexcenteſimo quadrageſimo ſeptimo ſupradicto apud paroch' Sancti Clement' Dacorum præd' in Com' præd' per quandam Indentur' inter ipm' Johannem Comit' de Clare per nomen Prænonorabil' Johannis Comit' de Clare ex una parte & præfat. Ric' Cale in vita ſua per nomen Ricardi Cale de paroch' Sanctæ Bridgettæ alias Brides London Plumber ex altera parte adtunc & ibidem fact' cujus alteram partem ſigillo ipſ. Ricardi in vita ſua ſigillat' idem Thomas Dowſe modo quer' hic in Cur. profert cujus dat' eſt eiſdem die & anno dimiſiſſet præfat' Ricardo ten'ta prædict. cum pertin' per nomina tot. illorum trium Meſſuagiorum ſive tenementorum ſuorum cum pertin' in paroch. Sancti Clement. Dacorum in Com. Midd. adtunc vel nuper in tenura & occupation' Elianoræ Peirſon Vid. Aſſign. vel ſubtenen' (Anglice, Undertenants) ſuorum prox. jacen. meſſuag. ſive tenement' Willielmi Haberfield erga orien. & continen. in longitudine ex ea parte Centum & ſexagint' pedes Aſſizæ (Anglice, of Aſſize) aut eo circit. & prox. meſuagio ſive tenement. adtunc in tenura Willielmi Hobſon cogn. per nomen de le Bear & Harraw erga occiden. & continen. in longitudine ex ea parte Centum & ſexagint' pedes Aſſizæ (Anglice, of Aſſize) aut eo circit' & in latiudine erga Auſtr. ſuper plateam adverſus quendam locum vocat' le Butcher Rowe quatuordecim pedes Aſſizæ (Anglice, of Aſſize) & ad finem erga Boream novemdecim pedes Aſſizæ (Anglice, of Aſſize) aut eo circit. habend. & tenend. dict. tria meſſuag' ſive tenementa & præmiſſia cum pertin. dicto Richardo Cale Executor' Adminiſtrator' & Aſſign' ſuis a Feſto Natalis Domini noſtri Dei prox. ſequen' dat. ejuſdem Indentur' pro & duran' toto tempore & termino quadragint' & unius annor. extunc px' ſequen' plenar' complend' & finiend. reddend. & ſolvend. proinde annuatim & quolibet anno duran. toto dict. termino dicto Comiti Hæred. vel Aſſign. ſuis ſummam viginti libr. legalis Monetæ Angl' ad vel in magna Aula capitalis meſſuagii ſive domus manc'onal. dicti Comitis ſituat' in Drury-Lane in Paroch. Sancti Clement' Dacorum præd' ad quatuor maxime uſual. terminos & Feſta in anno (videlicet) Annunciation. beatæ Dom' noſtræ Sanctæ Mariæ Virginis Nativitat. Sancti Johannis Baptiſtæ Sancti Michaelis Arch'i & Natal. Domini noſtri Dei per æquas & æqual. portion. vel infra octodecim dies prox. poſt unumquodque eorundem Feſtorum prima ſolution. inde incipiend' & fiend. ad & ſuper Feſtum Nativitat. Sancti Johannis Baptiſtæ px. ſequen' dat. ejuſdem Indentur. vel infra octodecim dies px. poſt dict' Feſtum Et prædict. Ric. Cale pro ſeipſo Executor. Adminiſtrator. & Aſſign. ſuis & quilibet eorum convenit promiſit & conceſſit ad & cum dicto Comite de Clare Hæred' & Aſſign. ſuis per Indentur. prædict. Qd. ipſe præd. Ric. Cale Executor. Adminiſtrator. vel Aſſign. ſui indilate poſt dat.

And demiſed by Indenture.

For 41 Years.

Reddend', &c.

The Covenant.

ejuſdem Indentur. divellerent & proſternerent (Anglice, pull or take down) tot. dict. tres domos tunc ſtan. & exiſten. ſuper dimiſſ. præmiſſ. & erigerent edificarent & extruerent (Anglice, ſet up) ſuper dict. ſolum ad ejus vel eorum propr' onera & cuſtag' tres tam valid' firmas ſubſtantial' & artificioſas (Anglice, Workmanlike) domos tam in operibus Laterar. Carpentar. Dealvator. (Anglice, Plaiſterers) Plumbar. Fabr. Vitrar. Lapidar. (Anglice, Maſon) & Pictor. (Anglice, Painter) quam ipſe præd. Ric. Cale tunc nuper ædificaverat pro ſeipſo in Fleetſtreet in præd. Paroch. Sanctæ Bridgettæ alias Brides Lond. in un' quarum quidem Domorum ipſe tunc habitabat Ac etiam de tempore in tempus & ad omnia tempora tunc poſtea duran' dicto termino annorum per eandem Indentur' conceſſ. ad ejus vel eorum propr' onera & cuſtag. bene & ſufficien' reparare fulcirent ſuſtinerent conſervarent & manutenerent omnia domos & ædificia agreat. & convent. ædificat. fore ſuper dicta dimiſſ. præmiſſ. aut aliquam partem inde Ac etiam omnia & ſingula Canal. (Angl' Sewers) Sentinas (Anglice, Sinks) Eljcia (Anglice, Drains) & Paviment. (Anglice, Pavements) fact. vel fiend. in per & cum omnibus requiſit. & neceſſar. reparation. Ac dicta dimiſſ. præmiſſ. ac domus & ædificia ſuperinde fore erect. & ædificat. & eoru' quodlibet bene & ſufficient. reparat. ſupportat. ſuſtent. conſervat. & manutent' in fine vel citiori determination' dicti termini quadragint. & un. annorum pacifice & quiete relinquerent traderent & ſurſum redderent dict. Comiti Hæred. vel Aſſign. ſuis prout per eandem Indentur. plenius apparet Virtute cujus quidem dimiſſion' prædict. Ric'us Cale in tenementa præd' cum pertin', &c. ſic ut p'fertur dimiſſ. intravit & fuit inde poſſeſſionat' reverſion. inde eidem Johanni Comiti de Clare & Hæred. ſuis ſpectan. Ipſoque Ric. Cale ſic de tenementis prædict. cum pertin. poſſeſſionat' exiſten. ac præd. Johanne Comite de Clare de Reverſione inde in dominico ſuo ut de feodo ſeiſit. exiſten. idem Johannes Comes de Clare poſtea ſcilicet ſexto die Auguſti Anno Regni Domini Caroli ſecundi nuper Regis Angl', &c. decimo quarto apud Paroch' Sancti Clement. Dacorum præd. in Com. præd. per quandam Indentur. int. eundem Johannem Comit' de Clare per nomen prænobilis. Johannis Comit. de Clarke ex una parte Et præd' Arthurum Stanhope Edward. Roſſeter, Joh. Wolſtenholme & Tho. Briſtowe p nomina honorabil. Arthur' Stanhope Armig. ſecundi Filii nuper prænobilis. Philippi Comitis de Cheſterfeild Ed. Roſſeter de Somerby in Com. Lincoln. Mil. Joh. Wolſtenholme de London Armig' & Tho. Briſtowe de Beſthorpe in Com. Nottingham Gen. ex altera parte adtunc & ibidem facta cujus quidem Indentur. un. partem ſigillo præd. Comit. de Clare ſigillat' idem Tho. Dowſe modo Quer. hic in Cur. profert cujus dat' eſt eiſdem die & anno ult. ſupradictis pro & in conſideration. cujuſdam Pecuniæ ſummæ eidem Comit' de Clare in manibus præd. Arthur' Stanhope E. Roſſeter Joh. Wolſtenholme & Tho. Briſtowe ſolut. barganizavit & vendidit præfat. Arthuro Stanhope

To pull down ſome Houſes,

And build up new Houſes in their Rooms.

The Leſſee entered and was poſſeſſed.

Leſſor bargains and ſells the Revertion for a Year.

hope Ed. Roſſetur Joh. Wolſtenholme & Tho. Briſtowe (int' al') reverſion. tenementorum præd. cum pertin. præfat. Ricar. Cale, &c. ut præfertur dimiſſ. habend. & tenend. reverſion. ill eiſdem Arthur. Stanhope Ed. Roſſeter Joh. Wolſtenholme & Tho. Briſtowe Executor. Adminiſtrator. & Aſſign. ſuis a die prox. ante dat. ejuſdem Indentur. pro & duran. termino un. anni integri extunc prox. ſequen. plenar. complend. & finiend. reddend. & ſolvend. proinde dicto Joh. Comiti de Clare Hæred. & Aſſign. ſuis reddit' un' grani Piperis ad Feſtum Sanct' Michaelis Arch. prox. ſequen. poſt dat. ejuſdem Indentur. ſi idem foret petit. Virtute quarum quidem barganiæ & vendition. nec non vigore cujuſdam Actus in Parliament. Dom. Henrici nuper Regis Angl. octavi apud Weſtm. in dicto Com. Midd. quarto die Februar. Anno Regni ſui viceſimo ſeptimo tent' edit. & proviſ. de uſibus in poſſeſſion. transferend. præd. Arthur. Stanhope Ed. Roſſetur Joh. Wolſtenholme & Tho. Briſtowe fuer. de præd. reverſion. tenementorum præd. cum pertin. poſſeſſionat' reverſion. inde ulterius eidem Comit. & Hæred. ſuis ſpectan. Ipſique Arthur. Stanhope Ed. Roſſeter Joh. Wolſtenholme & Tho. Briſtowe ſic de præd. reverſion. tenementorum præd. cum pertin. poſſeſſionat' exiſten. ac præd. Comite de reverſion. inde immediate ſuper præd' termin' præd' Arthur. Ed. Joh. Wolſtenholme & Tho. Briſtowe expectan' in dominico ſuo ut de feodo ſeiſit' exiſten. idem Comes poſtea ſcilicet ſeptimo die Auguſti Anno Regni dict. nuper Regis Caroli Secundi decimo quarto ſupradicto apud paroch. Sancti Clement. Dacorum præd. in Com. præd. per quandam al' Indentur. int' eundem Joh. Comit. de Clare per nomen prænonorabilis Joh. Comitis de Clare ex una parte & præfat. Arthur. Stanhope Ed. Roſſeter Joh. Wolſtenholme & Tho. Briſtow per nom. prænonorabilis Arthur. Stanhope Armig. ſecundi Filii nuper prænonorabil. Philip. Comit. de Cheſterfeild defunct. Roſſeter de Somerby in Lincoln. Mil. Joh. Wolſtenholme de London Armig. & Thomæ Briſtowe de Beerthorpe in Com. Nottingham Gen. ex altera parte adtunc & ibidem fact. cujus un. partem ſigillo præd' Comit' de Clare ſigillat. idem Tho. Dowſe modo quer. hic in Cur. profert cujus dat. eſt eiſdem die & anno ult. ſupradict. pro & in conſ. in eadem Indentur. mentionat. relaxavit & remiſit præfat' Arthur. Stanhope Edwardo Roſſeter Johanni Wolſtenholme & Thomæ Briſtowe (inter. al.) præd. reverſion' ipſius Comitis tenementorum præd. cum pertin. habend. & tenend. eiſdem Arthur. Stanhope Edwardo Roſſeter Johanni Wolſtenholme & Thomæ Briſtowe Hæred. & Aſſign' imperpetuum ad uſum prædict. Johannis Comitis de Clare prò termino vitæ ſuæ natural. Et poſt deceſſ. ipſius Comit' tunc ad uſum eorundem Arthur. Stanhope Edwardi Roſſeter Johannis Wolſtenholme & Thomæ Briſtowe Executor. Adminiſtrat. & Aſſign' ſuorum pro & duran' termino Mille annorum a dat. ejuſdem Indentur. computand. plenar. complend. & finien. virtute cujus quidem relaxation. necnon vigore prædict' Statut. de uſibus

By Virtue whereof, and of the Statute of Uſes the Bargainee was poſſeſſed.

The Leſſor releaſes the Inheritance.

To the Uſe of himſelf for Life,

And after his Deceaſe to the Grantee for 1000 Years.

in poſſeſſion' tranferend. idem Johannes Comes de Clare fuit de præd. reverc̃on tenementorum præd. cum pertin̄ ſeiſit in dominico ſuo ut de libero tenemento pro termino vitæ ſuæ naturaℓ remanere inde ut p̄fertur limitat' ſpectan. Et ſic inde ſeiſit. exiſten̄ idem Comes poſtea ſcilicet primo die Julii anno regni dicti nup̄ Regis Caroli ſecundi decimo octavo apud præd. paroch Sancti Clement. Dacorum obiit ſic de tali ſtatu ſuo inde ſeiſit. poſt cujus mortem iidem Arthur Stanhope Edwardus Roſſeter Johannes Wolſtenholme & Thomas Briſtowe poſſeſſionat' fuer̄ de præd. reverc̃on tenꝺtorum præd. cum pertin' pro præd. termino Mille annorum Et ſic inde poſſeſſionaℓ exiſten' iidem Arthur Stanhope Edwardus Roſſeter Johannes Wolſtenholme & Thomas Briſtowe poſtea ſcilicet ſeptimo die Julii anno regni dicti nup̄ Regis Caroli ſecundi viceſimo apud præd. Paroch' Sancti Clement. Dacorum per quandam Indentur' inter Gilbertum Comit. de Clare & p̄fat' Arthur' Stanhope Edward. Roſſeter Johannem Wolſtenholme & Thomam Briſtowe per nomina Præhonorabil. Gilberti Comit. de Clare Honorabil. Arthur. Stanhope Armig' ſecundi filii nuper Præhonorabiℓ Philippi Comit' de Cheſterfield defunct' Domini (Anglice, Sir) Edwardi Roſſeter de Somerby in Com̄ Lincoln̄ Miℓ Johannis Wolſtenholme de London Armig & Thomæ Briſtowe de Beerthorpe in Com. Nott. Gen. ex un. parte & quendam Thomam Dowſe patrem p̄d' Thomæ Dowſe modo quer. per nomen Thomæ Dowſe, de Grays Inn in Com. Midd' Gen' ex altera parte adtunc & ibidem fact' cujus quidem Indentur' un' partem ſigillis præd. Gilberti Comitis de Clare Arthur. Stanhope Edwardi Roſſeter Johannis Wolſtenholme & Thomæ Briſtowe ſigillat. idem Thomas Dowſe modo quer' hic in Cur' profert cujus dat' eſt eiſdem die & anno ult' ſupradict' p̄ & in conſ. cujuſdam pecuniæ ſummæ eiſdem Arthur. Stanhope Edwardo Roſſeter Johanni Wolſtenholme & Thomæ Briſtow in manibus per præd. Thomam Dowſe patrem ſoluℓ conceſſeℓ dicto Thomæ Dowſe p̄ri Executoℓ Adminiſtrator' & Aſſign' ſuis (inter aℓ) p̄d' reverc̃on tenementor. præd. cum pertin' habend' & tenend' reverc̃on' p̄d cum p̄tin̄ dicto Tho' Dowſe p̄ri Exec̃ Adminiſtr̄ & Aſſign̄ ſuis p̄ & duran̄ omni reliq. & reſid' dicti termin̄ Mille annoℓ tunc ventur̄ & inexpiraℓ p̄ut p̄ eand' Indentur̄ plenius apparet ad quam quidem conceſſion̄ dictus Ricardus Cale poſtea ſcilicet octavo die Julii anno regni dicti nuper Regis Caroli ſecundi viceſimo ſupradicto apud præd. paroch Sancti Clementis Dacorum eodem Ricardo Cale tunc tenent' tenementorum præd. cum pertin' virtute dimiſſion' præd. ſibi ut p̄fertur fact' exiſten̄ ſe attorn̄ & aggreavit virtute cujus quidem conceſſion̄ & attornament. præd. p̄textu præd. Thomas Dowſe pater de præd. reverc̃on' tenꝺtorum prædict. cum pertin' fuit poſſeſſionat' pro reſid dicti term' Mille annorum Ipſoque Ricardo Cale ſic de tenementis prædict' cum pertin' ut p̄fertur poſſeſſionaℓ exiſten' idem Ricardus Cale in vita ſua ſcilicet octavo die Julii anno regni dicti nup̄ Regis

Seiſin by Virtue of the Statute of Uſes.

Tenant for Life died ſeiſed.

The Grantees poſſeſſed for the Term of 1000 Years.

And by Indenture grant to the Defendant's Teſtator for the Reſidue of the Term.

The Tenant for Years attorns.

The Tenant in Poſſeſſion makes his Will, and makes the Defendant's Father his Executor, And died poſſeſſed.

Caroli ſecundi decimo nono apud præd. paroch. Sancti Clementis Dacorum condidit teſt. & ult̃ voluñ ſua in ſcriptis & inde conſtituit præd. Johannem Cale Executor̃ & præd. Ricar' Cale poſtea & poſt attornament. præd' fact. ſcilicet decimo die Decembris anno regni dicti nup̃ Regis Caroli ſecundi viceſimo ſecundo apud præd' paroch Sancti Clementis Dacorum obiit de tenementis præd. ſibi ut præfertur dimiſſ. ſic ut p̃fertur poſſeſſionat̃ poſt cujus mortem præd' Johannes Cale onus execution' teſt' præd. ſup̃ ſe ſuſcepit & ut Executor' teſt' præd' in tenementa præd' cum pertin' intravit & fuit inde poſſeſſionat.

The Defendant proved the Will and entered, and was poſſeſſed: Then the Grantee in Reverſion made his Will, and deviſed the Reverſion to the Plaintiff for Life, and after his Deceaſe to his Son in Tail.

Et ſic inde poſſeſſionat. exiſten. p̃dictoque Thoma Dowſe patre de reverc̃on' inde ut p̃fertur etiam poſſeſſionat̃ exiſten. ipſe præd' Thomas Dowſe pater poſtea ſcilicet viceſimo ſexto die Februarii anno regni dicti nuper Regis Caroli ſecundi triceſimo ſexto apud paroch Sancti Clement' Dacorum præd' fecit & condidit teſtm̃ & ult̃ voluntat̃ ſua in ſcriptis & p̃ eadem teſt. & ult. voluntat. ſua dedit & deviſavit inter al̃ præd. reverc̃on. tenementorum prædict. cum pertin. eidem Thomæ Dowſe modo quer. filio ſuo pro termino vitæ ejuſdem Thomæ filii & poſt ejus deceſſ. tunc cuidam Thomæ Dowſe filio prædict. Thomæ Dowſe modo quer̃ & hæred̃ de corpore ejuſdem Thomæ filii præd. Thomæ modo quer. exeun. & eodem teſtõ idem Thomas Dowſe pater conſtituit dict. fil̃ ſuum Thomam Dowſe modo quer̃ ſol̃ Executor̃

And made the Plaintiff Executor. And died.

Poſteaque ſcilicet decimo ſexto die Aprilis anno triceſimo ſecundo ſupradicto apud Paroch Sancti Clement̃ Dacorum præd. in Com' præd. prædict' Thomas Dowſe pater obiit de prædict' reverc̃on' tenementor' præd. cum pertin' in forma præd. poſſeſſionat̃ poſt cujus mortem præd. Thomas Dowſe modo quer' ſcilicet viceſimo ſexto die Januarii anno regni dicti nup̃ Regis Caroli ſecundi triceſimo tertio ſupradicto teſt. præd̃ debita juris forma apud præd. Paroch Sancti Clementis Dacorum probavit ac onus & execution' teſt. prædict. ſuper ſe ſuſcepit & præd. reverc̃on' tenementorum prædict' cum pertin. ratione legat. p̃dict' dict' viceſimo ſexto die Januarii anno triceſimo tertio ſupradicto apud prædict. paroch. Sancti Clement. Dacorum clamavit virtute cujus quidem legationis idem Thomas Dowſe modo quer. de reverc̃on. tenementor. præd. cum pertin' pro reſid. dicti termini Mille annorum fuit poſſeſſionat̃ Et ſic inde poſſeſſionat. exiſten' p̃dictoque Ricardo Cale de tenementis prædict' cum pertin. in forma p̃dict' ut præfertur poſſeſſionat. exiſten. licet idem Thomas Dowſe modo quer. bene & fidelit' obſervavit perimplevit performavit & cuſtodivit omnia & ſingula convenc̃on. conceſſion. articul̃ & agreament̃ in Indentur' dimiſſion' ſuperius primo recitat̃ ſpec̃ ex parte prædict' Johannis Comit' de Clare hæred' & aſſign' ſuor' obſervand' performand' perimplend. ſeu cuſtodiend' ſecundum formam & effect' ejuſdem Indentur' proteſtandoque quod prædict. Johannes Cale non tenuit obſervavit perimplevit p̃formavit ſeu cuſtodivit aliqua convenc̃on.

The Plaintiff proved the Will,

And claimed the Tenements Virtute Legat'.

Proteſtando, That the Defendant did not perform the Covenants of his Part.

conceſſion articulos & agreament' in eadem Indentur' ſpec ex parte prædict' Ricardi Cale Executor. Adminiſtrator. & Aſſign ſuorum obſervand' performand' perimplend' ſeu cuſtodiend' ſecundum formam & effect' Indentur' dimiſſion' prædict' in facto idem Thomas Dowſe modo quer. dic' quod præd. Johannes Cale ſic ut præfertur poſſeſſionat' exiſten. poſt mortem dicti Thomæ Dowſe patris & ante finem prædict' termini quadragint' & unius annorum per eandem Indentur' conceſſ. ſcilicet decimo tertio die Septembris anno Dom' milleſimo ſexcenteſimo octogeſimo quarto apud paroch' Sancti Clementis Dacorum præd. in Com' præd' permiſit un' domum ad valentiam ducentarum librarum ſuper prædict' dimiſſ' præmiſſ. per prædict' Ricar' Cale in vita ſua poſt dimiſſion' præd. ſibi ut præfertur fact' & duran' dimiſſion' ill' erect' fore penitus proſtrat' conſumpt' & totaliter ruinat' in omnibus partibus inde p defectu ſupportacon. inde. Et præd' Johannes Cale ſic ut præfertur poſſeſſionat' exiſten' ad finem præd. termini quadraginta & un' annorum qui finivit ad Feſtum Natalis Dom' Anno Domini MDCLXXXVIII. p'd dom' ſic proſtrat' conſumpt' & total' ruinat' reliquit contra formam & effect. convencon' præd' in ea parte quodque præd. Johannes Cale ſic ut præfertur poſſeſſionat' exiſten' poſt mortem patris ſui præd. & duran' præd' termino quadraginta & unius annorum ſcilicet decimo die Maii anno regni dicti nup Regis Caroli ſecundi viceſimo quarto & continue poſtea uſque ad finem præd. termini quadraginta & unius annorum p'miſit paviament' cujuſdam areæ (Anglice, Yard) parcel' præmiſſor. ut præfertur dimiſſ. fore & eſſe fract' dirupt' & in decaſu pro defectu reparacon' inde per quod aqua pluvial' & al' aqua in aream præd. venien' p defectu reparacon paviament' præd' à præd' area in & ſup muros & aream querceam (Anglice, an Oaken Floor) cujuſdam cellarii parcel' præmiſſorum ut p'fertur dimiſſ. deſcender. ita quod muri & area quercea ill' per aquam ill' putrid' devener' & corrupt' quodque præd. Johannes Cale præd. paviament' ſic fract' dirupt' & in decaſu & præd. muros & aream querceam ſic putrid' & corrupt' pro defectu reparacon' inde ad finem præd' termini quadragint' & un' annorum reliquit contra formam & effect' convencon' prædict' in ea parte Quodq; prædict' Johannes Cale ſic ut p'fertur poſſeſſionat' exiſten. poſt mortem patris ſui præd' & duran' prædict' termino quadraginta & un' annorum ſcilicet primo die Octobris Anno Domini milleſimo ſexcenteſimo octogeſimo octavo permiſit tegulas lateras (Anglice, Lathes) feneſtras & muros cement' (Anglice, Plaiſter-Walls) videlicet, decem mille tegulas decem mille latas ducent' pedes feneſtr' & centum virgat' cement' quatuor al' Domorum ſuper dimiſſ. p'miſſ. p p'd Ric' Cale in vita ſua poſt dimiſſ. præd. ſibi ut præfertur fact' & duran' dimiſſ. ill' erect. fore & eſſe fract' dirupt' & in decaſu pro defectu reparacon' inde Et prædict. Johannes Cale prædict' tegulas latas feneſtras ac muros ſic fract' dirupt' & in decaſu pro defectu reparacon' inde ad finem prædict'

Breach aſſigned in permitting the Premiſſes to be out of Repair.

The Particulars.

Another Breach aſſigned for Want of Repairs.

Another Breach for Want of Repairs.

termini quadragint. & unius annorum reliquit contra formam & effect. convencon̄ præd' in ea parte Et ſic idem Thomas Dowſe modo queꝝ dic̄ quod præd. Johannes Cale convencon̄ præd' in Indentur̄ dimiſſion. p̄d ſuperius prim̄ mencionat̄ in hac parte fact' non tenuit ſed infregit ac ill̄ eidem Thomæ Dowſe modo quer. tenere contradixit & adhuc contradic̄ unde idem Thomas Dowſe modo queꝝ dic' quod deterioratꝫ eſt & dampn' habet ad valenc' treſcent' librarum Et inde produc' ſectam, &c. Et profert hic in Cur. idem Thomas Dowſe modo quer. Literas teſtamentꝫ præfatꝫ Thomæ Dowſe patris per quas ſatis liquet Cur' hic ipm̄ Thomam modo quer. fore Executor. teſtamenti ill̄ & inde habere adminiſtracon̄, &c.

Et ſic, &c.

The Defendant pleads Performance ſpecially to each Breach aſſigned.

Et prædict' Johannes per Johannem White Attorn' ſuum ven. & defend' vim' & injur. quando, &c. & dic' quod prædict. Thomas Dowſe actionem ſuam præd. inde verſus eum habere non debet quia dic' quod præd' Ricardus Cale in vita ſua poſt confection' Indenturæ præd. ſuperius prim̄ mencionat̄ proſtravit totꝫ præd. tres Domus quæ dicto tempore confection' ejuſdem Indentur' fuer' ſtant' & exiſten' ſuper dimiſſa præmiſſa & de novo erexit ædificavit & extruxit ſuper dict' ſolum in eiſdem loc' ubi prædict' tres domus ſic proſternatꝫ ſic fuerunt ſtantꝫ tres alꝫ domus tantæ magnitudinis quantꝫ prædict' tres domus ſic proſternat' fuerunt quodque idem Johannes Cale a p̄d tempore mortꝫ præd. Ricardi Cale de tempore in tempus duran' toto præd' termino quadraginta & unius annorum bene & ſufficien' reparavit ſuſtinuit conſervavit & manutenuit omnes ill̄ tres domus ſic de novo ædificat' cum pertin' & tres domus ſic de novo ædificat' cum p̄tin. & tres domus ill̄ & quamlibet eorum ſic bene & ſufficien' reparat' ſuſtent' conſervat' & manutent' in fine prædict' termini quadragint' & unius annorum ſurſumreddidit & reliquit ſecundum formam convencon' prædict' in ea parte fact. Et de hoc

An Iſſue tendered.

pon̄ ſe ſup̄ Patriam Et quoad non reparacon̄ paviament. areæ p̄d. idem Johannes dic' quod ipſe idem Johannes non permiſit paviament' areæ præd. fore fract. dirupt' ſeu in decaſu pro defectu reparacon' inde nec paviament' & muros & aream querceam prædict' ſeu aliquam partem inde fore fract' dirupt' ſeu in decaſu pro defectu reparac̄ inde ad finem præd. termini quadragint' & unius annorum modo & forma prout præd Thomas ſuperius verſus eum queritur

Another Iſſue tendered.

Et de hoc ponit ſe ſup̄ patriam & præd' Thomas ſimiliter Et quoad permiſſion' tegular' laterar' feneſtr' & murorum tenṫ. in narratione prædict' mentionat' fore & eſſe fract' dirupt' & in decaſu pro defectu reparation. idem Johannes dic' quod ipſe idem Johannes Cale non permiſit tegulas lateras feneſtras & muros cementꝫ præd' ſeu aliquam partem inde fore fract' dirupt' ſeu in decaſu p̄ defectu reparation' inde nec præd' tegul̄ latꝫ feneſtras & muros cement' præd ſeu aliquam partem inde fract' dirupt' ſeu in decaſu pro defectu reparation' inde ad finem præd termini quadragint' & unius annorum reliquit modo & forma prout præd' Thomas ſuperius verſus eum

queritur Et de hoc ponit se super patriam & prædict' Thomas similiter, &c. A third Issue tendered.

Et præd' Thomas Dowse filius dic' quod præd. placitum præd. Johannis Cale quoad fraction' convention. præd' in relinquendo ad finem p̃d termini quadragint' & unius annorum p̃d un̄ domum super p̃d dimissa præmissa per præd. Ric. Cale in vita sua post dimission' præd. sibi ut præfertur fact' & duran' dimission' ill' erect. prostrat' consumpt' & totalit' ruinat' prout idem Thomas Dowse filius superius inde narravit superius in barram placitat' materiaq; in eodem placito content' minus sufficien. in lege existunt ad ipsum Thomam Dowse filium ab actione sua præd' inde versus p̃fat. Johannem Cale habend' p̃cludend' qd̃q; ipse ad placitum illud in hac parte modo & forma præd' placitat' necesse non habet nec ꝑ legem terræ tenetur respondere Et hoc parat' est verificare unde pro defectu sufficien' placiti in hac parte idem Thomas Dowse pet' judicium & dampna sua occasione fraction' convention' præd. in hac parte sibi adjudicari, &c. A Demurrer to the first Plea, upon which the Issue is tendered but not taken.

Et præd' Johannes Cale dic' quod placitum p̃d per ipsum Johannem modo & forma præd' placitat' materiaq; in eodem content' bon. & sufficien' in lege existunt ad Cur' dict' Domini & Dominæ Regis & Reginæ nunc hic a cognitione placiti præd' habend' præcludend. quod quidem placitum materiaque in eodem content. idem Johannes parat' est verificare & ꝑbare prout præd. Cur', &c. Et quia p̃d Thomas Dowse ad placitum illud non respond. nec ill' hucusq; aliqualit' dedic' idem Johannes Cale pet' Judicium si Cur' dictorum Dom̄ & Dominæ Regis & Reginæ nunc hic placitum illud ulterius cognoscere velit. Hen. Trinder. Et quia Justic' hic se advisare volunt de & sup p̃missis unde partes præd. superius posuer' se in Judicium Cur' priusquam Judicium inde reddant dies dat' est partibus præd. hicusque in Octab Sancti Hillarii de audiendo inde judicio suo eo quod iidem Justic. hic inde nondum, &c. Et quoad triand. separal' exit' præd. inter partes præd. per patriam triand' superius junct' Præc' est Vic' quod Venire fac' hic ad præfat' Terminum duodecim, &c. per quos, &c. Et quia nec, &c. ad recogn̄, &c. Quia tam, &c. A Joinder in Demurrer.

Dowse

Dowſe *verſus* Cale.

3 Lev. 264. Covenants to Repair, &c. 2 Saund. 420. 1 Vent. 38. 1 Lev. 114. 1 Salk. 199, 317. 1 Saund. 47, 322. 1 Lutw. 391, 545, 550.

IN an Action of Covenant brought by Thomas Dowſe, as Aſſignee of Thomas Dowſe his Father, Aſſignee of Arthur Stanhope, Edward Roſſeter, John Wolſtenholme and Thomas Briſtowe, Aſſignees of John late Earl of Clare, againſt John Cale Executor of Richard Cale. The Plaintiff ſet forth a Leaſe of Indenture, made by the ſaid Earl of Clare the 9th of December 1647. to the ſaid Richard Cale, of three Meſſuages in the Pariſh of St. Clement Danes in Middleſex, to hold from Chriſtmas-Day then next following for forty-one Years, rendring 20 l. yearly Rent; and further ſets forth, That the ſaid Richard Cale by the ſaid Indenture covenanted with the ſaid Earl, his Heirs and Aſſigns, to pull down the ſaid three Houſes, and would in the ſame Place build three as good and ſubſtantial Houſes in all Reſpects as he the ſaid Richard Cale had for ſome ſhort Time before built for himſelf in Fleet-ſtreet; Ac etiam, That he would, during the ſaid Term, well and ſufficiently repair all the Houſes ſo agreed to be built; ac etiam, omnia & ſingula Canal. (Anglice, Sewers) Sentinas (Anglice, Sinks) Elicia (Anglice, Drains) & paviamenta fact. vel fiend' in pro & cum omnibus requiſitis & neceſſar. reparationibus ac dicta dimiſſa p̃miſſa ac domus ædificia ſuperinde fore erect' & edificat' & eorum quodlibet bene & ſufficienter reparat' ſupportat' & manutent' in fine vel citiori determinatione dicti termini pacifice & quiete relinqueret & ſurſumredderet dicto Com̃ Hæred' & Aſſign' ſuis prout per Indentur' præd', &c.

By Virtue of which ſaid Demiſe the ſaid Richard Cale entered and was poſſeſſed, and the ſaid Earl being ſeiſed of the Reverſion by Leaſe and Releaſe, dated the 6th and 7th of Auguſt 1662. conveyed the ſaid Reverſion to the ſaid Arthur Stanhope, Edward Roſſeter, John Wolſtenholme and Thomas Briſtowe and their Heirs, to the Uſe of the ſaid John, Earl of Clare, during his Life, and after his Deceaſe to the Uſe of the ſaid Stanhope, Roſſeter, Wolſtenholme and Briſtowe for one thouſand Years next after the Date of the ſaid Indenture; and that after the ſaid Earl of Clare died, and the ſaid Stanhope, Roſſeter, Wolſtenholme and Briſtowe became poſſeſſed of the Reverſion of the Premiſſes for the ſaid Term of 1000 Years; and upon the 7th of June 1668. by an Indenture between Gilbert, Earl of Clare, and the ſaid Stanhope, Roſſeter, Wolſtenholme and Briſtowe of the one Part, and Thomas Dowſe (Father of the Defendant of the other Part; they granted to the ſaid Thomas Dowſe the Reverſion of the ſaid Premiſſes, for and during the Reſidue of the Term of 1000 Years, to which

the ſaid Richard Cale being then poſſeſſed of the Term demiſed to him as aforeſaid of the Premiſſes, did attorn; and the ſaid Richard Cale being ſo poſſeſſed in the Year 1672. died, having made his Laſt Will, and the Defendant Executor thereof, who after the Deceaſe of the ſaid Richard entered into the ſaid demiſed Premiſſes, and became poſſeſſed: And the ſaid Thomas Dowſe, Father to the Plaintiff, died poſſeſſed of the Reverſion aforeſaid, in the Year of our Lord 1686. having made his Will, and thereby deviſed the ſaid Reverſion to the Plaintiff for his Life, and after his Deceaſe to Thomas Dowſe Son of the Plaintiff, and to the Heirs of his Body, and made the Plaintiff Executor of his ſaid Will, who cauſed the ſame to be proved, and did claim the Reverſion of the ſaid Premiſſes ratione legationis præd', and thereupon became poſſeſſed thereof for the Reſidue of the ſaid Term of 1000 Years then to come, and unexpired: And the ſaid Richard Cale being poſſeſſed by Virtue of the Demiſe aforeſaid, altho' he the ſaid Thomas Dowſe performed all the Covenants to be performed as aforeſaid on the Part of the ſaid John, late Earl of Clare, his Heirs and Aſſigns; the ſaid Defendant did not perform the Covenants which were to be performed on the Part of the ſaid Richard Cale his Executors and Adminiſtrators, and in facto dicit, the ſaid John Cale being poſſeſſed of the Premiſſes, after the Deceaſe of the ſaid Thomas Dowſe, Father of the Plaintiff, before the End of the ſaid Term of one and forty Years, viz. the 13th of September 1684. did permit one Houſe of the Value of 200 l. erected upon the Premiſſes by the ſaid Richard Cale, in his Life-time, to fall down, and to be wholly ruinated; and the ſaid John Cale at the End of the ſaid Term, which ended at Chriſtmas Anno Dom 1688. left the ſaid Houſe ſo proſtrated and ruined contra formam conventionis præd.

And aſſigns another Breach, for that he permitted the Pavement of the Yard to be broken and in Decay; and at the End of the Term left it ſo in Decay for Want of Repair, and that he ſuffered the Tiles, and one hundred Yards of Walling of four Houſes upon the Premiſſes, erected by the ſaid Richard Cale, in his Life-time, during the Term, to be broken and in Decay for Want of Repairs, and ſo the ſaid John Cale left them at the End of the ſaid Term; and ſo the ſaid Defendant broke the Covenants ad damnum of the Plaintiff 300 l.

The Defendant pleaded, that the ſaid Richard Cale, in his Life-time, did demoliſh the three Houſes demiſed, and upon the Ground whereon they ſtood, did erect three new Houſes according to the Agreement, which, during the Term, were kept well repaired, and at the End of the Term left in good Repair, and ſo yielded up according to the Covenant aforeſaid, & de hoc ponit, &c. And as

to

to the not Repairing the Pavements, traverseth that also, and the like as to Repairing of Tiles and Walls.

The Plaintiff as to the not Repairing of one House in the Declaration mentioned, and Delivering it up well repaired, demurs to the Defendant's Plea; which Demurrer came to be argued this Term, and the sole Question was upon this Covenant, Whether the Defendant being obliged only to build three Houses, and having built one more, whether the Covenant did not bind him to repair and deliver up that House well repaired, as well as those which were agreed to be built? And the Court were of Opinion that the Covenant did extend to the other House as well as to the Three which were agreed to be built: For in the last Covenant, which is to deliver up well repaired, 'tis dicta p̃missa, ac Domos & Ædificia superinde fore erect', which is general; and 'tis the rather so to be taken, because in the first Covenant for Keeping in Repair during the Term, 'tis the Houses agreed to be built; which Words, (agreed to be built) are left out in the last Covenant, which the Court took to be a distinct Covenant.

Rokeby doubted, it seeming to him to be all as one Covenant, and so all the subsequent Matter concerning leaving the Houses well repaired, should be restrained and understood of those agreed to be built.

But Judgment was given for the Plaintiff upon the Reasons aforesaid.

It was also objected on the Part of the Defendant, That Dowse the Plaintiff was not an Assignee in this Case to bring Covenant; for that the Term in the Reversion was devised to him for Life only; and if he died within the Term, then to his first Son, &c.

Cumberba. 186, 192. To this it was answered, That the Devise of the Term to him passed the whole Estate, and the Remainder to the Son was but a Possibility, and an executory Devise. Matthew Manning's Case. 8 Co. 96. Lampet's Case, 10 Co.

Welbie *verſus* Phillips.

IN Debt for Rent, the Plaintiff declared upon a Demiſe made the 25th of March Anno nuper Regis Jac. 4 of one Meſſuage to hold from thenceforth quamdiu ambabus partibus placeret, yielding 10l. Rent quarterly, and avers that the Defendant entered by Virtue of the ſaid Demiſe, and continued poſſeſſed of the Premiſſes till Chriſtmas then next following, and for 50s. a Quarter's Rent ending at the ſaid Chriſtmas Day, he brings his Action, and ſo lays two ſeveral other Demiſes of two other Houſes, to begin at the ſame Time, under the ſame Rent, and demands a Quarter's Rent upon each at Chriſtmas aforeſaid, in all 7 l. 10s. which the Defendant did not pay, which he lays ad damnum 5l. Vide 1 Show. 8, 9. 1 Lutw. 459, 539. 1 Salk. 139. 2 Salk. 658. Farr. 37. 3 Salk. 118, 303.

The Defendant demurred to this Declaration, for that he ſues for a Quarter's Rent upon each Demiſe, ending at Chriſtmas, whereas there were two Quarters incurred before, which he doth not ſhew were paid, and ſo ſues for leſs, than upon his own Shewing appeareth to be due; and the Caſe of Baily and Offord, 3 Cro. was cited, where upon a Demiſe, rendring 31 s. per Annum at our Lady-Day and Michaelmas, the Plaintiff declared for 15 s. and 6 d. due for a Year's Rent, ending at our Lady-Day, and held naught, becauſe he demands but 15 s. and 6 d. and doth not ſhew that the Reſt of the Year's Rent was ſatisfied; and the Caſe of Clothworthy in 3 Cro. where in a Writ of Annuity the Plaintiff demanded Arrears, incurred at Michaelmas, 3 Car. 1. and brought his Writ the 16th of April 4 Car. 1. and ſaid in that Caſe by Maynard, that a Man cannot bring an Action for Part of a Debt without he ſhews the Reſt ſatisfied. Vide 2 Cro. 499. Cr. Car. 137. Cr. Car. 436, 437.

But the Court gave Judgment for the Plaintiff, and ſaid this was not like the Caſes cited; for in the firſt Caſe of Baily, the whole Year's Rent is ſaid to be due, and yet demands but half a Year: And for the Caſe of Clothworthy, there the Judgment as appears by 3 Cro. and Ro. Abr. 1 part 229. was, that he ſhould recover the Arrears before the Writ, and pending the Writ, whereas he demanded the Arrears but to Michaelmas before the Writ brought, and ſo the Judgment was for more than was demanded; but in this Caſe every Quarter's Rent is a ſeveral Debt, and diſtinct Actions may be brought for each Quarter's Rent; and ſo not like Debt brought for Part of the Money upon a Bond or Contract. Vid. for this 7 H. 6. 26. a. Aleyn 57. Noy's Rep. 45. Cr. Car. 104, 137, 436.

Chaſe *verſus* Sir James Etherege.

THE Plaintiff in an Action of Words had taken out an Original and delivered a Declaration, which the Defendant upon ſearching for the Inſtructions given by the Plaintiff to the Curſitor found differed in divers material Things from the Original, and thereupon the Defendant pleaded the Statute of Limitations, that the Words were not ſpoken within two Years. The Plaintiff ſuſpecting ſome Miſcarriage had been, upon which the Defendant, as he conceived, did rely, (for the Plaintiff knew the Fact would not ſerve the Defendant to plead the Statute) he found that he had miſtaken his Original, and upon that petitions the Maſter of the Rolls for another Original that ſhould warrant the Declaration delivered, and had it granted and filed in Court; whereupon the Defendant moved the Commiſſioners of the Great Seal, and ſhewed the whole Matter; upon which they ſet aſide the Order of the Maſter of the Rolls, and ordered an Original to be taken out according to the firſt Inſtructions given to the Curſitor: And now the Court was moved here, that the laſt Original might be filed, and ſo it was ordered by the Court; for that taken out by the Order of the Maſter of the Rolls, was unduly taken out.

Of Originals amended, &c. antea 46, 49, 50. poſt. 152, 154.

Whitaker *verſus* Thoroughgood.

BEnjamin Thoroughgood Mil' attach. fuit per breve Domini Regis & Dominæ Reginæ de privilegio è Cur' hic emanan' ad reſpond' Edwardo Whitaker Gen' un' Attorn' Cur' Domini & Dominæ Regis & Reginæ de Banco juxta libertat' & privileg' ejuſde' Cur' pro hujuſmodi Attorn' & aliis Miniſtris de eodem Banco a tempore quo non extat memoria uſitat' & approbat' in eadem Cur' de placito tranſgreſſionis ſuper caſum, &c. and ſo declares in propria perſona in an Action, for that the Defendant being a Juſtice of Peace in the Time of the late King James, made a Warrant, directed to the Conſtable, charging the Plaintiff with being outlawed of High Treaſon, ubi re vera, &c. The Defendant demurred, and ſhewed for Cauſe, that in the Preſcription for the Privilege, it was tempore quo non extat memoria, which was ſaid to be inſenſible; and the Courſe in Pleading was to ſay tempore cujus contrariu' memoria hominum non exiſtit. Sed non allocatur, for the Court took the Words to be ſufficiently expreſſing Time out of Mind, and divers Precedents are in this Manner. Raſtall's Entries 475, 476. and 143.

Poſtea 132.

Shipley *verſus* Craiſter.

IN an Action of Debt upon a Bond of 80l. the Plaintiff declared, that the Defendant entred into a Bond to him, who was then the Sheriff of Northumberland by the Name of his Office, of 80l.

The Defendant demanded Oyer of the Condition, which was, that one Jenkin Wood ſhould appear cora' Dom' Rege apud Weſtm' die Lunæ proxime poſt Octab. Pur', &c. and then he pleaded a Releaſe of all Demands under the Plaintiff's Hand and Seal made to him, bearing Date the 9th Day of March, in the third Year of the Reign of the late King James, & profert' hic in Cur' the Releaſe. And to this the Plaintiff demurred.

Serjeant Jefferſon offered to argue, that this Bond being taken by the Sheriff, according to the Duty of his Office, and for the Benefit of the Plaintiff who brought the Action, that his Releaſe to the Obligor would not bar this Action; but the Court ſaid there was no Colour but it ſhould be a good Bar.

But upon Peruſing of the Record it appeared, that the Defendant had pleaded that the Plaintiff had releaſed by his Deed of Releaſe, bearing Date the 9th of March, whereas the Releaſe produced in Court, bore Date the 19th Day of the ſame March, and this the Court held a material Variance.

Note, the King cannot diſcharge a Recognizance taken for Security of the Peace, but after 'tis broken he may. 11 H. 7. 12. 3 Inſt. 238. Vaugh. 334.

Holland *verſus* Lancaſter.

ff. JOHANNES LANCASTER ſum' fuit ad reſpondend' Thomæ Holland de placito quare cepit averia ipſius Thomæ & ea injuſte detinuit contra Vad. & Pleg', &c. Et unde idem Thomas p' Robertum Bird Attorn' ſuum queritur qd. præd. Johannes viceſimo ſecundo die Octobris Anno Regni Domini Jacobi ſecundi nup Regis Angl', &c. tertio apud Mounckton in Inſula de Thanet in quodam loco ibidem vocat' le Barnyard cepit averia videlicet octo Vaccas ipſius Thomæ & ea injuſte detinuit contra vad' & pleg' quouſq; &c. Unde dic' qd. deteriorat' eſt & dampnum habet ad valenc' decem librarum Et inde producit ſectam, &c. Count in Replevin.

Et præd. Johannes Lancaſter per Brian Courthorpe Attorn' ſuum ven' & defend' vim & injur' quando, &c. Et ut Ballivus Decani & Capitalis Eccleſiæ Cathedral' & Metropolitan' Cantuar. bene cognoſcit captionem averiorum prædictorum in præd. Clauſo in quo, &c. & juſte, &c. Quia dic' qd' diu ante præd. tempus captionis averiorum præd' ac eodem tempore quo, &c. præd' Decanus & Capital' fuer' ſeiſit' de Manerio de Mounckton cum pertin' in Com' Kanc' Conuzance as Bailiff to the Dean and Chapter of Canterbury, for a Diſtreſs for a Fine upon an Alienation. Dean and Chapter ſeiſed of a Manor in Fee in Jure Eccleſiæ.

Kanc' præd' in dominico ſuo ut de feodo in jure Eccleſiæ ſuæ p̃d.
J. S. ſeized in Fee of the locus in quo. Qd'que quidam Johannes Sabine Baronettus diu ante præd' tempus quo, &c. fuit ſeiſit' de tribus Meſſuagiis quatuor Horreis centum & quadraginta Acris terræ & octogint' acris mariſci cum pertin' in Parochiis de Mounckton & ſancti Nicolai Atwade in Inſula Thanet in Com' Kanc' præd' unde præd' Clauſum in quo, &c. eſt & p̃d' tempore quo, &c. necnon a tempore cujus contrar' memoria hom'
And held it of the Dean and Chapter. By Fealty and Rent, and Suit of Court. non exiſtit fuit parcel' in dominico ſuo ut de feodo & illa tenuit de eiſdem Decano & Capitulo ut de Manerio ſuo præd' per fidelitat' & reddit' ſex librar'. duorum ſolidorum ſex denar. & un' oboli ſingulis annis ad Feſtum Sancti Michaelis Arch'i ſolvend' & per ſervicium faciend' ſectæ ad Cur' ipſorum Decani & Capituli Manerii ſui prædict' de tribus ſeptimanas in tres ſeptimanas apud Manerium
The Dean and Chapter ſeized of the Services. ill' tenend' de quibus quidem ſervitiis iidem Decanus & Capitulus fuer' ſeiſit' per manus præfat' Johannis Sabine ut per manus veri tenentis ſui videlicet de fidelitate & ſecta Cur' p̃d. ut de feodo & jure ac de reddit. p̃d. in dominico ſuo ut de feodo & prædict' Johannes
A Cuſtom for the Lord to have a Year and half's Rent upon every Alienation. Antea 130. Lancaſter ulterius dic' qd' infra Manerium p̃d. talis habetur conſuetudo & à tempore quo non extat memoria hom' habebatur ſcilicet qd. poſt quamlibet alienationem in feodo vel de ſtatu liberi tenementi alicujus parcel' terræ vel tenementorum tent' de Manerio præd' Dom' Manerii præd' pro tempore exiſten' cum talis alienatio acciderit habuit & habere conſuevit reddit' un' anni & medietat' reddit' unius anni per quem tal' terræ vel tenementa ſic alienat' tent' fuer' de Manerio p̃d. nomine finis pro alienatione Et ſi
V. Poſtea 134. dictus finis pro alienatione ſic ut præfertur per conſuetudinem Manerii p̃d. ſolubil' aut aliqua pars in aretro fuit & inſolut' qd' tunc Dom' Manerii præd. pro tempore exiſten' de tempore in tempus
And Power to diſtrain for it (if in arrear.) & ad omnia tempora duran' toto tempore præd. quando & quoties neceſſe requiſivit diſtringit & uſus fuit & conſuevit diſtringere in & ſuper terras & tenementa p̃d. de Dom' Manerii p̃d. ut de eodem Manerio tent' & ſic ut p̃fertur alienat' quouſque dictus finis pro alienatione ſic ut præfertur ſolubil' ſolut' foret & prædict' Johannes
Quouſque it be paid. Lancaſter ulterius dic' qd' p̃d. Decano & Capitulo de Manerio p̃d. cum pertin' ac præd' Johanne Sabine de Meſſuagiis Horreis & Terris præd' cum pertin' unde, &c. in forma præd. ſeiſit' exiſten' idem Johannes Sabine ante præd' tempus quo, &c. ſcilicet viceſimo die Septembris Anno Regni Domini Caroli Secundi nuper Regis
The Alienation. Angliæ, &c. triceſimo quarto apud Paroch' de Mounckton præd' alienavit præd' tria Meſſuagia quatuor Horrea centum & quadraginta acr' Terræ & octoginta acras Mariſci cum pertin' inde, &c. cuida' Waltero Tyndall Armig' habend. eidem Waltero Hæred' &
The Purchaſer entred, and was ſeized. Aſſign' ſuis imperpetuum Virtute cujus idem Walterus in Meſſuagia Horrea & Terras præd' cum pertin' inde, &c. intravit & fuit inde ſeiſit' in dominico ſuo ut de feodo Et ſic inde ſeiſit' exiſten' ac eiſdem Decano & Capitulo de Manerio præd' cum pertin' in forma

præd'

præd' ſeiſit' exiſten' Idem Walterus ante præd' tempus quo, &c. ſcilicet decimo die Septembris Anno Regni dicti Domini Caroli Secundi nuper Regis Angliæ, &c. triceſimo ſexto apud Paroch. de Mounckton præd alienavit præd' tria Meſſuagia quatuor Horrea centum & quadraginta acras Terræ & octoginta acras Mariſci cum pertin' inde, &c. cuidam Chriſtophoro Yates Gen' habend' eidem Chriſtophoro Hæred' & Aſſign' ſuis imperpetuum Et præd' Johannes Lancaſter ulterius dic' qd' p præd' conſuetudinem Manerii pd' debit' fuer' eiſdem Decano & Capitulo pro fine pro præd' prima alienation' præfat' Waltero Tyndall ſic ut præfertur fact' ſumma novem librarum trium ſolidorum novem denar' un' oboli & un' quadrantis Ac pro fine præd' pro ſecunda alienatione eidem Chriſtophoro ut præfertur fact' conſimilis ſumma novem librarum trium ſolidoru' novem denar' un' oboli & un' quadrantis & quia præd' ſeparal. denar. ſum'æ in toto ſe attingen' ad octodecim libras ſeptem ſolid' ſeptem denar' & un' obol' præfat' Decano & Capitulo præd' tempore quo, &c. aretro fuer' & adhuc exiſtunt inſolut' Idem Johannes Lancaſter ut Ballivus eorundem Decani & Capituli captionem averiorum præd' videlicet captionem quatuor Vaccarum de præd' octo Vaccis pro præd' novem libris tribus ſolid' novem denar' uno obolo & uno quadrante pro fine pro præd' prima alienatione præfat' Waltero Tyndall ſic ut præfertur fact' debit' & inſolut' & captionem prædict' aliarum quatuor Vaccar' de prædict' octo Vaccis pro prædict' novem libris tribus ſolid' novem denar' uno obolo & un' quadrante pro fine pro prædict' ſecunda alienatione præfat' Chriſtophoro Yates ſic ut præfertur fact' debit' & inſolut' bene cognoſcit in præd' Clauſo in quo, &c. Et juſte, &c. ut in parcell' tenementorum præd. cum ptin' de ipſis Decano & Capitulo in forma præd' tent' ac infra feodum & dominicum ſuum, &c. Et hoc parat' eſt verificare unde pet' judicium & retorn' averioru' præd. unacum dampnis miſis & cuſtag' ſuis per ipſum in hac parte ſuſtent' ſecundum formam Statuti in hujuſmodi caſu edit' & proviſ. ſibi adjudicari, &c.

That there was ſo much due for a Fine by the Cuſtom.

And becauſe the ſame were in Arrear and unpaid, the Defendant diſtrained.

Infra feodum, &c.

Et præd' Thomas dic' qd' cognitio præd' Johannis præd' ac materia in eadem content' minus ſufficien' in lege exiſtunt ad præd' Johannem Lancaſter captionem averiorum præd' in præd' loco in quo, &c. juſtam cognoſcend' Qd' q; ipſe ad cognitionem ill' modo & forma præd' fact' neceſſe non habet nec per legem terræ tenetur reſpondere Et hoc parat' eſt verificare unde ex quo pd. Johannes Lancaſter captionem averioru' præd ſuperius cogn' idem Thomas pro defectu ſufficien' cognitionis prædict' Johannis Lancaſter in hac parte pet' judic & dampna ſua occaſione captionis & injuſtæ detentionis averiorum illorum ſibi adjudicari, &c.

Demurrer to the Conuzance.

Et præd' Johannes Lancaſter ex quo ipſe ſufficien' materiam in lege ad ipſum Johannem ad captionem averiorum præd' in prædict' loco in quo, &c. juſtam cognoſcend' habend' manutenend' ſuperius allegavit quam ipſe paratus eſt verificare quam quidem materiam

Joinder.

præd'

præd' Thomas non dedic' nec ad eam aliqualit' reſpond' ſed verificationem illam admittere omnino recuſat ipſe præd' Johannes Lancaſter ut prius pet' judicium & retorn' averiorum prædict' unacum dampnis miſis & cuſtagiis per ipſum in ea parte ſuſtent' juxta forma' Statuti in hujuſmodi caſu edit' & proviſ ſibi adjudicari, &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſis priuſquam judicium inde reddant dies dat' eſt partibus præd' hic uſque a die Sancti Michaelis in tres ſeptimanas de audiendo inde judicio ſuo eo qd' iidem Juſtic' hic inde nondum, &c.

Holland *verſus* Lancaſter.

IN Replevin, for taking of 8 Cows in a Place called the Barnyard, in the Iſle of Thanet in Kent.

Poſt. 141, 143, 149. The Defendant made Conuſance as Bailiff to the Dean and Chapter of the Cathedral Church of Canterbury, and ſets forth, that the Dean and Chapter were ſeized of the Manor of Mounckton in Fee, jure Eccleſiæ; and that one John Sabin Baronet, was ſeiſed of 3 Meſſuages, 4 Barns, 140 Acres of Marſh in the Iſle of Thanet, unde locus in quo eſt & a tempore, &c. fuit parcell', and held them of the ſaid Dean and Chapter as of their ſaid Manor, by Fealty, and the Rent of 6 l. 2 s. and 6 d. ob. Yearly, payable at Michaelmas; and ſhewed that the ſaid Dean and Chapter were ſeiſed of the ſaid Rent by the Hands of the ſaid Sir John Sabin, as by the Hands of their very Tenant, and lay a Cuſtom in the ſaid Manor, qd' poſt quamlibet alienationem in feodo vel de Statu liberi tenementi alicujus parcell' terr' vel tenement' tent' de Manerio p̄d' Dom' Manerii præd. pro tempore exiſten' cum talis alienatio acciderit habuit & habere conſuevit redd' unius anni & mediet' redd' unius anni per quem talia terræ vel tenementa ſic alienat' tent' fuer' in Manerio præd' nomine finis pro alienatione, and lays a Cuſtom to diſtrain for the ſaid Alienation-Fine, and then ſets forth an Alienation of the ſaid Meſſuage and Premiſſes by the ſaid Sir John Sabin to one Walter Tyndal in Fee, and ſhews that the ſaid Walter Tyndal made another Alienation in Fee to one Chriſtopher Yates, and ſo ſets forth, that there were two Fines due upon the ſaid Alienations, after the Rate aforeſaid, amounting to 18 l. 7 s. and 7 d. ob. and that he, as Bailiff of the Dean and Chapter, captionem prædict' bene cognoſcit in prædict' loco in quo ut in parcell' tenement' prædict'.

Antea 132.

To this the Plaintiff demurred, and it was ſpoke to at the Bar the laſt Term, and likewiſe this Term: The main Thing was that the Cuſtom, as it was laid, was not good; for the Alienation-Fine is ſet forth to be due upon the Alienation of any parcell of Lands or Tenements held of the ſaid Manor, to have a

a Year and half's Rent, by which the Lands or Tenements ſo alienᵈ were held; ſo that if the 20th Part of an Acre be alienᵈ, a Fine is to be paid, and that of the whole Rent for every Parcel is held at the Time of the Alienation by the whole Rent, and no Apportioning thereof can be but ſubſequent to the Alienation, and this the whole Court held an unreaſonable Cuſtom; and as it is ſet forth, it could not be otherwiſe underſtood than that a Fine ſhould be due, viz. a Year and half's Rent upon the Alienation of any Part of the Lands held by ſuch Rent.

The Court doubted alſo whether the Cuſtom was good as to the Claiming an Alienation-fine upon an Alienation for Life, becauſe by that the Tenure of the Lands alienᵈ is not altered, for the Reverſion is ſtill held as before by the ſame Tenant. Judicium pro Quer'.

Colley *verſus* Helyar.

IN an Action of Debt for 34 l. the Plaintiff declared againſt the Defendant an Attorney of this Court, præſent' hic in Cur' in propria perſona ſua, upon a Bond of 34 l.

The Defendant pleads in Bar, quoad quinque libras ſex ſolid' & tres denar' of the aforeſaid 34 l. that the Plaintiff poſt confectionem ſcripti obligat' prædict', ſcilicet viceſimo, &c. anno, &c. p quoddam ſcriptum ſuum acquietantiæ cognoviſſet ſe accepiſſe & habuiſſe de præd' Defendente 5 l. 6 s. and 3 d. in Part ſolutionis majoris ſummæ, and pleaded a frivolous Plea as to the reſt of the Money, to which the Plaintiff demurred.

And it was argued, that the Acquittance under the Plaintiff's Hand and Seal for 5 l. 6 s. and 3 d. Part of the Money due might have been pleaded in Bar of the whole; and that if the Defendant here had relied upon it, it would have barred the Plaintiff of the whole. Vide for that Matter, Hollingwoth and Whetſton Style 212. Aleyn 65. Beaton and Foreſt. Note, here the Payment was ſince the Action brought, and pleaded in Abatement; where it was ſaid, that it could not be ſo pleaded without an Acquittance. Vide Kellew. 20, 162. 3 H. 7. 3. B. Receipt of Parcel pending the Writ, 7 H. 4. 15. a. But it ſeems clear by the Book of Ed. 4. 207. Mo. 886. Speke verſus Richards, that if Part be received, and an Acquittance given before the Action, it is a Bar only of ſo much, but it ſeems the Action muſt be brought for the whole.

Dickman

Dickman *verſus* Allen.

Caſe brought againſt the Defendant for not folding his Sheep upon the Plaintiff's Land, according to Cuſtom. The College of St. Mary and St. Nicholas ſeized in Fee jure Collegii.

Cantabr. ſſ. ABRAHAMUS ALLEN nuper de Granceſter in Com' prædicto Yeom' attach' fuit ad reſpondend' Roberto Dickman Gen' de placito tranſgr' ſup Caſum, &c. Et unde idem Robertus per Robertum Drake Attorn' ſuum queritur quare cum Præpoſitus & Scholares Collegii Regalis Beatæ Mariæ & Sancti Nicolai in Cantabr' in Com' præd' ſeiſit' fuiſſent de uno Capitali Meſſuagio cum pertinen' in Granceſter in Com' præd' ac de centum & ſexaginta acris terræ arabil' jacen' in communibus campis de Granceſter prædicta cum pertinen' in dominico ſuo ut de feodo in jure Collegii ſui prædicti iidemq; Præpoſitus & Scholares & omnes ill' quorum ſtatum ipſi habuer' de & in tenementis præd' cum pertinen' a tempore cujus contrar' memoria hominum non exiſtit habuer' & habere conſuever' pro ſe Firmariis & Tenentibus eorundem Tenementorum cum pertin' libertatem Faldagii (Anglice, Foldage) omnium ovium (ovibus ſuis propriis & ovibus tenen' & occupatorum pro tempore exiſten' quorundam Meſſuagiorum & Terrarum in Villa de Coton in Com' præd' qui a tempore cujus contrarium memoria hominum non exiſtit reſpective uſi fuer' interc'oiare cauſa vicinagii in quibuſdam communibus campis de Granceſter præd' cum ovibus ſuis in & ſuper prædict' Meſſuagiis & terris ſuis in Coton præd' levan' & cuban' except') euntium & depaſcen' infra communes campos & territoria de Granceſter prædicta a viceſimo quinto die Martii uſque primum diem Novembris quolibet anno ſup p'dictas centum & ſexaginta acras terræ arabil' percipiend' & faldand' tanquam ad tenementa prædicta cum pertinentiis pertinen' prædictiſque Præpoſito & Scholaribus Collegii prædict' de Tenementis prædictis cum pertinen' in forma prædicta ſeiſit' exiſten' Præpoſitus & Scholares poſtea ſcilicet decimo nono die Octobris Anno Domini milleſimo ſexenteſimo octogeſimo primo apud Granceſter prædictam quodam Johanne Coppleſtan Sacræ Theologiæ Profeſſore adtunc Præpoſito Collegii prædicti exiſten' p quandam Indenturam inter ipſos Præpoſitum & Scholares ex una parte & quendam Johannem Wittewrong Mil' & Baronet' ex altera parte factam cujus altera' partem Sigillo ꝯoi ipſorum Præpoſiti & Scholarium ſignat' idem Robertus Dickman hic in Cur. profert cujus dat' eſt eiſdem die & anno dimiſer' & ad firmam tradider' eidem Johanni Wittewrong Tenementa præd. cum pertinen. habend. & occupand. præfat' Johanni & Aſſign. ſuis a tempore confectionis Indenturæ illius uſque plenum finem & terminum viginti ann' extunc ꝓx' ſequen' & plenar' complend' & finiend' Virtute cujus dimiſſionis præd' Johan' in Tenementa p'd. cum pertinen' intravit & fuit inde poſſeſſionat' & ſic inde poſſeſſionat' exiſten' idem Johannes poſtea ſcilicet decimo die Auguſti Anno Domini milleſimo ſexenteſimo octogeſimo ſecundo apud Granceſter prædictam

A Cuſtom for all the Tenants to fold their Landlords Land.

Common of Vicinage.

Levant and Couchant.

From ſuch a Day to ſuch a Day.

The Principal and Scholars demiſe to the Plaintiff by Indenture.

Habendum:

For 21 Years.

Leſſee enters.

dimiſit & ad firmam tradidit eidem Roberto Dickman Tenementa prædict' cum pertin' habend. & occupand. eidem Roberto & Aſſign. ſuis a Feſto Sancti Michaelis Arch. tunc prox ſequen. uſque plenum finem & termin. ſex annorum extunc px. ſequen. & plenar' complend. & finiend. virtute cujus dimiſſionis idem Robertus in craſtino dicti Feſti Sancti Michaelis Arch. Anno Domini milleſimo ſexcenteſimo octogeſimo ſecundo ſupradicto in Tenementa p̄dicta cum pertinen' intravit & fuit inde poſſeſſionat' uſque finem & expirationem ejuſdem termini præd tamen Abrahamus p̄miſſorum non ignarus ſed machinans & fraudulenter intendens ipſum Robertum minus rite p̄gravare ac eum de faldagio præd. ut p̄fertur habend' impedire ac de proficuo & commoditate inde totaliter deprivare diu ante finem termini prædicti ult. mentionat. ſcilicet primo die Maii Anno Regni Domini Jacobi ſecundi nuper Regis Angliæ tertio oves (videlicet) ducent. oves ipſius Abrahami in communes campos de Granceſter præd ibidem depaſturand. poſuit & oves ibidem eun. & depaſcend. extunc uſque decimum diem Septembris tunc prox. ſequen. exiſten. ante finem termini præd. ult. mentionat' cuſtodivit & continuavit ſed oves ill. in aut ſuper prædictas centum & ſexaginta acras terræ arabilis ipſius Roberti vel in aut ſuper aliquam inde parcellam minime faldavit ſicut ipſe debuiſſet nec p̄miſit ipſum Robertum habere beneficium faldagii earundem præd' Abrahamo duran' eodem termino non exiſten' tenen' ſive occupatore aliquorum meſſuag ſive terrarum in Villa de Cotton præd. de quibus tenen̄ ſive occupator' inde p̄ tempore exiſten' à tempore cujus contrarium memoria hominum non exiſtit uſi fuer' intercoicare cauſa vicinagii in præd. communibus campis de Grànceſter præd. cum Ovibus ſuis præd. ut p̄fertur p̄ qd̄ idem Robertus p̄ficuum & advantagium faldagii ovium præd. ſuper præd. centum & ſexaginta acras terræ arabil' quibus ipſe gaudere debuiſſet p̄ tempus illud omnino p̄didit & amiſit ad dampnum ipſius Roberti quadraginta librarum & inde produc. Sectam, &c.

And demiſed to the Plaintiff,

For ſix Years.

The Leſſee enters.

The Cauſe of Action.

For not Folding his Sheep according to Cuſtom.

Per quod the Plaintiff loſt the Benefit of Foldage.

Et præd. Abrahamus per Ricardum Pyke Attorn' ſuum ven. & defend' vim & injur' quando, &c. Et dic. quod ipſe in nullo eſt culpabilis de p̄miſſis præd. ſuperius ei impoſit. prout præd. Robertus ſuperius verſus eum queritur Et de hoc pon̄ ſe ſuper Patriam Et præd. Robertus ſimiliter Ideo p̄cept' eſt Vic' quod venire fac' hic a die Sanct' Trin. in tres ſeptimanas duodecim, &c. p̄ quos, &c. Et qui nec, &c. ad recogn', &c. quia tam, &c.

Not guilty pleaded.

Dickman *verſus* Allen.

1 Vent. 264, 5. 275, 319. Poſtea 185, 288, 292. 6 Mod. 1, 2, 3.

IN an Action upon the Caſe, the Plaintiff declared, That the Provoſt and Scholars of King's College in Cambridge were ſeiſed in Fee in jure Collegii of a Meſſuage in Granceſter in Cambridge, and 160 Acres of arable Land, lying in the common Fields of Granceſter aforeſaid; and the ſaid Provoſt, &c. and all thoſe whoſe Eſtate they have in the Tenements aforeſaid, have Time whereof, &c. for themſelves, their Farmers and Tenants of the ſaid Tenements, libertatem Faldagii (Anglice, Foldage) omnium ovium (except, &c.) euntium & depaſcentium infra communes campos & territoria de Granceſter p̄d ſuper præd. centum & ſexaginta acras Terræ p̄cipiend. & faldand. tanquam ad præd. Tenement̄ pertinent̄, and then ſets forth a Leaſe made by the Provoſt and Scholars to Sir John Witwrong, of the ſaid Meſſuage and 160 Acres for twenty Years, which ſaid Sir John let them to the Plaintiff for ſix Years, by Virtue whereof the Plaintiff entred and was poſſeſſed; and the ſaid Defendant, p̄miſſorum non ignarus, did put 200 Sheep into the common Fields of Granceſter aforeſaid, and there kept and depaſtured them for a certain Time; ſed oves illas in aut ſup̄ præd' centum & ſexaginta acras terræ arab̄ ipſius quer. vel in aut ſup̄ aliquam inde parcell. minime faldavit ſicut ipſe debuiſſet nec p̄miſit ipſum Querentem habere beneficiū faldagii earundem (and ſhews how the Defendant was not within Exception) by which the Plaintiff loſt the Profit of the Foldage, &c. and laid it to his Damage of 40 l.

The Defendant pleaded Not guilty, and a Verdict was for the Plaintiff. And it was moved in Arreſt of Judgment, that the Plaintiff had not in his Declaration ſet forth a ſufficient Cauſe of Action; for he ſaith that the Defendant had not folded his Sheep upon the 160 Acres, as he ought; and it is not ſet forth, that the Cuſtom was for the Owner of the Sheep to bring his Sheep to fold them upon the ſaid Lands.

But it was objected on the Plaintiff's Part, that the Word Faldagium did imply as much, and it was the Uſage in Norfolk and Suffolk for the Owner of the Sheep to put his Sheep into the Lord's Land and fold them there, for which the Lord provided Hurdles, and prepared the Fold to receive them; and of this Faldagium a Fine was levied of int̄ al̄, as is reported in 1 Ed. 3. fo. 2. and the Uſage in Norfolk and Suffolk is there mentioned. And it was ſaid in a poſſeſſory Action 'tis enough to ſay ſicut debuit, without ſetting forth any particular Cuſtom or Preſcription: And Dent and Oliver's Caſe was cited, 2 Cro. 122. where an Action was brought for Diſturbing of him in Taking of Toll ad Feriam ipſius le Plaintiff ſpectan̄; and it was moved after Verdict,

that he made no Title by Prescription or Custom to the Toll, and it was held by the Court to be sufficient in a possessory Action to say, ad Feriam suam spectant: So also in an Action for Stopping of a Way belonging to his House, without setting forth any Prescription, between St. John and Moody, a late Case; and if this sicut debuit is not sufficient, 'tis laid further in the Declaration that he did not permit the Plaintiff to have the Benefit of this Foldage. Postea 185. 1 Vent. 275. Postea 228, 292.

But the Court held the Declaration insufficient, for that there is no Authority in any Book of Law to shew that the Word Faldagium did imply so much as was pretended on the Plaintiff's Part; Faldagium is to have Sheep folded in his Ground, as Falde cursus is a Sheep walk or feed for his Sheep; and if it be the Usage in Case of Foldage for the Owner of the Sheep to bring his Sheep to the Fold, it ought to have been so set forth, for the Court cannot take Notice of the private Usages of Countries; and if the Faldagium did imply what the Plaintiff would have it; then it should have been set forth, that the Plaintiff had set up a Fold in the Land where the Sheep were to have been folded, for he was to do the first Act, which must have been shewn, if all the Particulars had been set forth; and sicut debuit is not enough here for the Obscurity of the Word Faldavit; so that it doth not appear to the Court what ought to have been done on the Defendant's Part; and to say non permisit Querentem habere beneficium Faldagii, was not good without shewing how he disturbed him, as 8 Co. in Francis's Case. Sed nota, That was upon Demurrer; but here 'tis not said non permisit the Plaintiff habere Faldagium, or non permisit eum faldare, but non habere beneficium faldagii; so that it was not certain what was meant, for the Sheep might be folded, and yet he might be deprived of the Benefit of the Foldage: And the Chief Justice said, Here the Prescription is laid to have the Sheep going infra communes campos & territoria de Grancester, to be folded, and territoria is a Word unknown in the Law, so no Certainty in the Prescription. 2 Lutw. 1259. Postea 278.

Nota, Here a Prescription is laid in a Body aggregate, in a Que Estate, but that was held to be well enough, because for a Thing appurtenant to the Manor. Vide 2 Cro. 673. Kellew. 140. B. 1 Inst. 121. a. But for the Reasons above-mentioned, the Judgment was stayed by the Opinion of the whole Court.

George *verſus* Butcher.

DEbt upon a Bond. The Defendant demands Oyer of the Condition, which was to perform certain Articles of Agreement; and the Defendant ſet forth the Articles made between the Defendant of the firſt Part, the Plaintiff of the ſecond Part, and Rebecca Morſe Widow, Joſeph Morſe, Samuel Morſe, John Morſe, Daniel Morſe, Nathaniel Morſe, Robert Morſe and Thomas Morſe, Sons of the ſaid Rebecca, of the third Part; by which it was recited, that a Marriage was intended between the Defendant Butcher and the ſaid Rebecca, by Means whereof the Defendant would become poſſeſſed of her perſonal Eſtate, and in Conſideration thereof the Defendant covenanted by the ſaid Articles, inter al' (having alſo recited that Robert Morſe deceaſed, Father of the ſaid Joſeph Morſe, Samuel Morſe, John Morſe, Daniel Morſe, Nathaniel Morſe, Robert Morſe and Thomas Morſe, had by his Will bequeathed cuilibet ipſorum præd' Joſepho, Samuel', Johan', Daniel', Robert' & Tho. (omitting Nathaniel) the Sum of 50 l.) with the Plaintiff, that the ſaid Defendant would pay p'd' Joſepho, Samuel', Johan', Nathaniel', Robert' & Tho' p'dict' ſeparal' legationes vel ſummas quinquaginta libral'; and the Defendant pleads further, that he paid to the ſaid Joſeph, Samuel, John, Daniel, Robert and Thomas the ſaid ſeveral Sums of 50 l. and ſheweth Performance of all the other Articles.

And to this the Plaintiff demurred, becauſe that he did not ſhew that he paid 50 l. to Nathaniel Morſe, and expreſly covenanteth to pay to the ſaid Nathaniel and the reſt, the ſaid ſeveral Legacies or Sums of 50 l.

Sed non allocatur, for in the Recital of the ſaid Bequeſt by the Will, there is nothing mentioned to have been bequeathed to Nathaniel; and though he covenants to pay to Nathaniel as well as the reſt, yet it is legationes vel ſummas præd. and there being no Legacy to Nathaniel, and that appearing by the Recital of the Will, his Covenant ſhall not oblige the Defendant to pay him any Thing. Et ſic Judicium p' Defendente.

Trethewy *verſus* Elleſdon.

IN Replevin: The Plaintiff declared of Taking his Cattle in a Place called the Barncloſe in Barnwel in the County of Cornwal.

The Defendant made Conuſance, as Bailiff of Elizabeth Coſſen, and ſhews that Nicholas Coſſen was ſeiſed in Fee of a Meſſuage and Lands, of which the Place where was and is Parcel; and being ſo ſeiſed the 9th of September, in the fourteenth Year of the late King Charles the Second, by his Deed indented produced in Court, did grant to the ſaid Elizabeth Coſſen an annual Rent of 10 l. to be iſſuing out of the Premiſſes, to have to the ſaid Elizabeth and her Aſſigns for Term of her Life, payable at the uſual Feaſts; and in caſe it were arrear, that it ſhould be lawful for her to diſtrain, by Virtue whereof the ſaid Elizabeth Coſſen (who is ſtill living) became ſeiſed of the Rent for her Life, and avers that the uſual Feaſts are our Lady, Midſummer, Michaelmas and Chriſtmas, and for 40 l. for four Years Rent ending at Michaelmas 1668. the Defendant took the ſaid Cattle as a Diſtreſs for the Arrear of Rent, &c. Poſt. 145, 149. Antea 134.

The Plaintiff demanded Oyer of the Indenture, which was read, containing as followeth, viz. This Indenture made the 29th Day of September, &c. between Nicholas Coſſen, &c. of the one Part, and Elizabeth Coſſen, &c. and Nicholas Coſſen the Younger, Son of the ſaid Elizabeth, of the other Part, witneſſeth, That whereas the ſaid Elizabeth Coſſen hath given and ſurrendred into the Hands of the ſaid Nicholas Coſſen one Indenture of Leaſe of an Annuity, dated the 15th of March 1657. of ten Pounds yearly, going out of all that his Barton and Demeſne called Melder, for a Term yet to come, as in and by the ſaid Indenture of Leaſe more fully and at large appeareth, Hath given, granted and confirmed, and in and by theſe Preſents, doth give, grant and confirm unto the ſaid Elizabeth Coſſen, her Heirs and Aſſigns by theſe Preſents, one Annuity or yearly Rent of ten Pounds, to be iſſuing and going out of all that his Barton, &c. to have, receive, and take yearly the ſaid Annuity to the ſaid Elizabeth Coſſen and Nicholas Coſſen the Younger, and the Survivor and Survivors of them, at the uſual Feaſts in the Year, by equal Portions; and if it ſhall happen the ſaid yearly Rent to be behind after any of the ſaid Feaſts, that then it ſhall and may be lawful to and for the ſaid Elizabeth, during her natural Life, and for the ſaid Nicholas Coſſen the Younger, after

after her Death, to enter into the Premiſſes, and diſtrain, &c. In Witneſs whereof, &c.

Quibus lectis & auditis idem Querens dicit quod cognitio præd' in forma p̃d fact' & materia in eadem content' ac factum Indentur' p̃d in forma p̃d fact. minus ſufficien' in lege exiſtunt, &c. and the Defendant joined in Demurrer.

It was argued for the Plaintiff, that there is no ſufficient Grant by this Indenture; for it is ſaid to be made between Nicholas of the one Part, and Elizabeth and Nicholas Coſſen junior of the other Part, and then recited the Surrender of a former Grant; after which came the Words, hath given and granted, and by theſe Preſents doth give and grant, &c. and no Grantor named, but if it ſhould be taken for a Grant from Nicholas Coſſen, 'tis a Grant to Elizabeth and her Heirs, and the Habend. cannot alter the Premiſſes in the Limitation of the Eſtate in the Grant of a Rent; and the Defendants in their Plea ſet forth, that the ſaid Elizabeth was ſeiſed of the ſaid Rent for her Life, ut de libero Tenemento; ſo there is a material Variance between the Indenture and the Plea.

Poſtea 196. 1 Lutw. 234. 2 Salk. 663.

The Court were of Opinion as to the firſt Matter, That it was a good Grant, the Indenture being between Nicholas Coſſen of the one Part, and Elizabeth of the other Part; and then after a Recital ſaith, hath given and granted to Elizabeth, &c. That muſt be taken, that Nicholas Coſſen hath given and granted, and that the Conuſance ſetting her forth to be ſeiſed for Life, whereas there paſſed an Eſtate in Fee, was a material Variance.

The Chief Juſtice Pollexfen ſeemed to incline, that it was a Rent-charge for Life, for the Power of Diſtreſs was given to her only for Life, and a Rent-ſeck in Fee, and that it was as a Grant of two ſeveral Rents, and then the Pleading was good.

But the other Juſtices held it was one intire Rent, and that ſhe had it with a Privilege of Diſtreſs, during her Life only; but Leave was given to amend the Conuſance upon Payment of Coſts.

Dod *verſus* Dawſon.

SCire Facias upon a Recognizance of Bail in this Court, upon Condition, That if Judgment ſhould be had againſt the Principal in an Action of Debt for 2000 l. in this Court, that he ſhould pay the Debt and Damages recovered, or render his Body in Execution to the Priſon of the Fleet; and ſets forth, that he recovered the ſaid Debt of 2000 l. and 12 l. pro damnis, Termino Paſchæ, 4 Jacobi Secundi nuper Regis, and that the Defendant did not pay the ſaid Money, nor render himſelf in Execution, &c. 3 Mod. 274.

The Defendants plead to this Scire fac. that the Money, prætextu cognitionis præd' in præd. brevi de Scire fac. mentionat. de Terris & Catallis, &c. præd. Defendentis fieri ad uſum præd. Timothei Dod levari non debet quia dicunt quod Narratio ſuper quâ Judicium præd. in præd Brevi de Scire fac' mentionat' obtent. fuit verſus ipſum Willielmum Dawſon, ſeu aliqua alia narratio in placito debiti non fuit exhibit. in Curia hic in Termino Paſchæ Anno Regni dicti nuper Regis primo quo Termino recognitio præd' facta fuit nec ad aliquod tempus infra duos terminos poſt præd Terminum Paſchæ proxime ſequen. unde pro defectu Narr. per p'fatum Timotheum Dod verſus p'fat. Willielmum Dawſon in eadem Cur. ante finem præd duorum terminorum præd ſumma duarum mille librarum per curſum legis de Terris & Catallis præd Defend. vel eorum alicujus fieri & levari non debent & hoc parat. ſunt verificare unde pet. Judicium, &c.

To this the Plaintiff demurs, and Judgment was given for the Plaintiff; for altho' by Courſe of the Court, if the Defendant lie in Priſon two whole Terms, without any Declaration put in, he may get a Rule to be diſcharged; yet if a Declaration be afterwards delivered, and Judgment thereupon, 'tis a good Judgment, and the Bail will be liable in ſuch Caſe.

Rogers *verſus* Bradly.

IN a Replevin for Taking of a Cow apud Liſcard in Cornwall, in a certain Place there, called the Underway.

The Defendant made Conuſance as Bailiff to William Trewman and Thomas Coll, and ſets forth that Joſeph Mark diu ante, &c. was ſeiſed in Fee of a Cloſe called Underway, Parcel of the Manor of Liſcard, of which the Place where was and is Parcel, according to the Cuſtom of the ſaid Manor; and being Poſtea 149.

ſo

ſo ſeiſed the 9th Day of January, Anno Domini 1663, demiſed to Sampſon Rogers the Premiſſes for ninety-nine Years from the Date of the Indenture, if A. B. ſhould ſo long live, rendring 10 l. yearly Rent, by Virtue whereof the ſaid Rogers entered, and the ſaid Joſeph Mark being ſeiſed of the Reverſion in Fee, ſecundum conſuetudinem Manerii præd upon the firſt Day of February, Anno 1663 ſupradict. at a Court of the ſaid Manor then held, did ſurrender in Manus Domini Caroli Secundi nuper Regis Angliæ, &c. adtunc Domini Manerii præd ſecundum conſuetudinem Manerii præd', the aforeſaid Reverſion and Rent to the Uſe of the ſaid Trewman and Coll, and their Heirs, to which ſaid T. and C. at the Court, præd Dominus Rex per quendam Thomam Moulton adtunc Seneſchal ſuum Manerii præd did grant the ſaid Reverſion and Rent, to hold to them and their Heirs, according to the Cuſtom of the ſaid Manor; and by Virtue thereof the ſaid T. and C. became ſeiſed of the ſaid Reverſion and Rent in their Demeſne as of Fee, according to the ſaid Cuſtom of the ſaid Manor, and for five Years Rent, ending at Michaelmas, &c. bene cognoſcunt captionem, &c.

To this the Plaintiff replied, and the Matter in the Replication was frivolous, and Demurrer thereupon

2 Lutw. 1171. 1 Salk. 365. N. Lutw. 368. 6 Mod. 20.

But the Court gave Judgment for the Plaintiff, becauſe the Conuſance was inſufficient; for the Lands whereupon the Diſtreſs was taken, being Freehold (for ſo they muſt be taken to be, tho' it is ſhewn that Mark was ſeiſed according to the Cuſtom of the Manor, becauſe it is not ſaid at the Will of the Lord) could not be conveyed by Surrender in Court, and an Admittance without an eſpecial Cuſtom to paſs them in that Form; and 'tis not enough to ſay, that he ſurrendred them ſecundum conſuetudinem Manerii, but the Cuſtom ſhould have been fully ſet forth, viz. quod infra Manerium præd de tempore, &c. talis habebatur conſuetudo, &c. but here the Cuſtom is by Implication. 1 Cro. 185. Vaughan 253. 2 Leon. 29.

Lade *verſus* Baker & Marſh.

Kanc. ff. THomas Baker & Nicolaus Marſh ſum. fuer' ad reſpondend' Philippo Lade Gen' de placito quare ceper' averia ipſius Philippi & ea injuſte detinuer' contra Vad' & Pleg, &c. Et unde idem Philippus per Brian' Courthope Attorn' ſuum queritur qd' præd. Thomas & Nicolaus viceſimo die Martii Anno Regni Dom' Jacobi Secundi nuper Regis Angliæ, &c. quarto apud Barham in quodam Clauſo Terræ ibidem (vocat' le **fourteen Acres**) cepit averia ipſius Philippi, videlicet, tres Spadones & unam Equam & ea injuſte detinuer' contra vad' & pleg quouſq; &c. unde idem Philippus dic' qd ipſe deteriorat' eſt & dampnum habet ad valenciam viginti librar' Et inde produc' ſectam, &c.

Declaration in Replevin.

Trin. 3 W. & M. Rot. 268. in B. R.

Et præd. Thomas Baker & Nicolaus Marſh per Johannem Wade Attorn. ſuum ven' & defend' vim' & injur' quando, &c. Et idem Nicolaus Marſh bene advocat ac præd. Thomas Baker ut Balivus ejuſdem Nicolai bene cogn' caption' averiorum præd' in præd' loco in quo, &c. & juſte, &c. quia dicunt quod prædict' locus in quo ſupponitur caption' averiorum præd. fieri continet & præd' tempore quo, &c. continebat in ſe quatuordecim ac' Terræ cum pertin' in Barham præd. quodq; diu ante præd' tempus quo, &c. quidam Robertus Lade Armig' & Lancelot Lade filii præd' Roberti Lade fuer' ſeiſit' de eiſdem quatuordecim ac' Terræ inter alia in Dominico ſuo ut de feodo & ſic inde ſeiſit' exiſten' iidem Robertus Lade & Lancelot Lade diu ante præd' tempus quo, &c. ſcilicet primo die Octobris Anno Regni Domini Caroli Primi nuper Regis Angliæ, &c. viceſimo quarto apud Barham præd' p̄ quoddam Scriptum ſuum Indentat' inter ipſos Robertum Lade & Lancelot' Lade p̄ nomina Roberti Lade de Barham in Com' Kanc' Armig' & Lancelot Lade fil' præd. Roberti Lade ex una parte & quendam Nicolaum Marſh nup̄ defunct' Avum præd. Nicolai Marſh modo defend' p̄ nomen Nicolai Marſh de eadem Yeom' ex altera parte ibidem fact' cujus ſcript' alteram partem ſigillis præd. Roberti Lade & Lancelot Lade ſigillat' iidem Thomas Baker & Nicolaus Marſh modo defend' hic in Cur' p̄fer' cujus dat' eſt eiſdem die & anno p̄ & in conſideratione centum libr. bonæ & legalis Monet' Angliæ eidem Roberto Lade in manibus ſolut' p̄ ſeipſis & Hæred' ſuis deder' conceſſer' & confirmaver' p̄fat. Nicolao Marſh avo & Hæredibus ſuis quandam annuitat' ſive annuat' reddit' octo libr. bonæ & legalis Monet' Angliæ exeunt' de omni it' Capitat' Meſſuagio ſive Tento cum p̄tin' in Barham præd. & exeun' de omnibus terris & hæreditament' in Barham præd' Meſſuagio præd' ſpectan' & tunc in occupatione præd' Roberti Lade unde prædict. locus in quo, &c. eſt & prædict' tempore quo, &c. fuit parcell' Habend' tenend' percipiend' & recipiend'

Avowry and Conuſance.

Seiſin in Fee in Jointenants,

And by Deed grant an Annuity,

Iſſuing out of the Capital Meſſuage.

piend' annuaℓ reddiℓ præd. præfaℓ Nicolao Marſh avo Hæred' & Aſſign' ſuis imperpetuum ad ſolum opus & uſum præd Nicolai Marſh avi Hæred' & Aſſign' ſuorum imperpetuum ſolvend' annuatim apud meſſuagium præd. ad Feſta Annunciaconis Beatæ Mariæ Virginis & Sancti Michaelis Archi per æquales portiones vel infra octo dies prox' poſt quodlibet præd. Feſtorum. Et ſi contingeret præd. annuitaℓ ſive annuaℓ reddiℓ octo libℓ ſive aliquam inde partem aretro fore & inſoluℓ ꝑ ſpacium octo dierum prox' poſt aliquod præd. Feſtorum ſolution' dierum quod tunc deinceps liciℓ foret præd. Nicolao Marſh avo Hæred' & Aſſign' ſuis in ꝑmiſſis præd. intrare & diſtringere & diſtrictiones illas imparcare quouſq; præd. Nicolaus Marſh avus plene content' & ſoluℓ foret inde ſub conditione quod ſi præd. Robertus Lade vel Lancelot Lade Hæred' vel Aſſign' ſui vel eorum aliquis bene & fideliℓ ſolveret vel ſolvi cauſaret præd. Nicolao Marſh avo Hæred' vel Aſſign' ſuis ſummam centum librarum legalis Moneℓ Angliæ cum arreragiis ſi aliqua eſſent ad vel ſup diem Sancti Michaelis Arch' qui eſſet in Anno Dom̃ Dei noſtri milleſimo quinquageſ ſexenteſ primo apud meſſuagium præd. qd̃ tunc conceſſio illa & omnia in eadem contenℓ forent vacua & nullius valor' in lege aliqua re antea contenℓ in contrarium non obſtanℓ ꝑut ꝑ idem ſcript. indentaℓ plenius apparet. Et iidem Thomas Baker & Nic. Marſh modo Defend' ulterius dicunt qd̃ nec præd. Robertus Lade vel Lancelot Lade Hæred' vel Aſſign' ſui vel aliquis eorum ſolverunt aut ſolvi cauſaver' nec eorum aliquis ſolvit aut ſolvi cauſavit ꝑfaℓ Nic. Marſh avo in vita ſua præd. ſummam centum libr' ſuper præd. Feſtum S. Michaelis anno Dom' milleſimo ſexcenteſimo quinquageſimo primo præd. ſecundum formam & effectum Conditionis in ſcripℓ indentaℓ præd. virtute cujus quidem conceſſionis præd. Nicolaus Marſh avus de annuaℓ reddiℓ præd' fuit ſeiſiℓ in dominico ſuo ut de feodo & ſic inde ſeiſiℓ exiſten' præd' Nicolaus avus ante præd. tempus quo, &c. ſcilicet viceſimo octavo die Novembris Anno Dom' milleſimo ſexcenteſimo quinquageſimo quarto apud Barham ꝑd' condidit teſtamentum & ultimam voluntat' ſuam in ſcripℓ & ꝑ eandem voluntat' ſuam (inter alia) deviſavit præd. annuitat' ſive annuaℓ reddit' octo libr' Aliciæ exec' ejus pro & duran' vita ſua naturaℓ pro education' & vict' nept' ſuorum Ann' & Aliciæ Waters quouſq; pervenirent ad ſeparaℓ ætat' octodecim annorum & poſt uxor. ſuæ mortem & taℓ ætat' octodecim annorum præd. Ann' & Aliciæ Waters tunc præd. Nicolaus avus per ult' voluntat' ſuam prædictam voluit quod filius ſuus Ric' Marſh & Hæred' ſui haberent præd. annuitat' ſive annuaℓ reddit' octo libr. ſolvend. decem libr. ſeparatim (Anglice, a Piece) prædict' Ann' & Aliciæ Waters & decem libr. legalis monet' Angℓ Nic. Waters fratri ꝑd̃ Ann' & Aliciæ Waters infra ſex menſes prox' poſt mortem Ux' ſuæ ſi eſſent ætat. ꝑd̃ ad eandem recipiend' & extunc voluit & legavit præd. annuitat. ſive annuaℓ reddiℓ octo libr. præd. filio ſuo

Habend' to the Grantee in Fee.

And if behind, in 8 Days to diſtrain,

Upon Condition to be void upon Payment of a Sum of 100l. in futuro.

The 100l. was not paid.

The Grantee made his Will,

And deviſed it to his Wife for the Education of his Children.

After his Wife's Death to his Sons.

Ric. & Hæred. ſuis imperpetuum & prædict' Nicolaus avus poſt confection. teſt'i ſui prædicti & ante prædictum tempus quo, &c. ſcilicet primo die Junii Anno Dom̃ milleſimo ſexcenteſimo quinquageſimo ſeptimo apud Barham p̃d obiit ſic inde ſeiſit poſt cujus quidem Nicolai Marſh avi mortem præd' Alicia Ux' ejus virtute teſt'i præd', ſeiſit fuit de p̃d annuit' ſive annual' reddit' octo libr. in dominico ſuo ut de libero ten̄to pro term̃ vitæ ſuæ. Et ſic inde ſeiſit' exiſten' præd. Alicia Ux. præd. Nic' Marſh defunct' die ante præd. tempus quo, &c. ſcilicet tertio die Junii Anno Dom̃ milleſimo ſexcenteſimo quinquageſimo octavo apud Barham præd. obiit poſt cujus quidem Aliciæ Ux' mortem præd Ric' Marſh fuit ſeiſit de præd. annuitat. ſive annual' reddit' octo libr. in dominico ſuo ut de feodo & ſolvit præd. ſeparal' legata præfat' Ann. & Aliciæ & Nic' Waters ſecundum formam & effectum teſtamenti præd. ſcilicet apud Barham præd. Et ſic inde ſeiſit' exiſten̄ præd. Ric' Marſh diu ante præd' tempus quo, &c. ſcilicet decimo die Auguſti anno regni Dom̃ Caroli ſecundi nuper Regis Angliæ, &c. triceſimo ſecundo apud Barham præd' per quoddam ſcriptum ſuum indentat' inter ipſum Ric' Marſh per nomen Ric' Marſh de Swingfield in Com̃ Kanc̃ Yeom. ex una parte & præd. Nic' Marſh modo defend̃ per nomen Nic' Marſh filii prædict. Ric' ex altera parte ibidem fact' cujus ſcripti alteram partem ſigillo præd. Rich. Marſh ſigillat' iidem Tho. Baker & Nic' Marſh modo defend̃ hic in Cur. p̃ferunt cujus dat' eſt eiſdem die & anno p̃ & in conſideratione naturalis amoris & affectionis quæ geſſit præd. Nic' modo defend. filio ſuæ & ſummæ quinq; libr. legalis monet' Angliæ per p̃d Nic' Marſh modo defend̃ eidem Ric' Marſh & Aſſign. ſuis ſolvend. ſecur' (Anglice, ſecured) duran. vita ſua natural' ad duos dies ſolutionis in anno & p̃ diverſis aliis bonis cauſis & conſiderationibus ipſum Ric' ad hoc movent' dedit & conceſſit aſſignavit & tranſpoſuit præd. Nicol' Marſh filio ſuo modo defend. Hæred. & Aſſign. ſuis præd. annuitat' ſive annual' reddit' octo libr. habend̃ & tenend̃ dict' annuitat' ſive annual' reddit' octo libr. præd. Nicolao Marſh filio modo defend. Hæred. & Aſſign. ſuis ad ſolum opus & uſum præd. Nicolai filii modo defend̃ Hæred̃ & Aſſign. ſuorum imperpetuum ſub conditione q̃d ſi Hæred. vel Aſſign. p̃d Roberti Lade tunc defunct' vel præd. Lancelot Lade Hæred. vel Aſſign' ſui vel aliquis eorum bene & fideliter ſolveret vel ſolvi cauſaret prædicto Nicolao Marſh filio modo defend' Hæred̃ vel Aſſign. ſuis ſummam centum & octodecim libr. legalis monet' Angliæ apud Capital' Meſſuag p̃d. ad vel ſuper Feſtum diem Sancti Michaelis Archi prox' ſequen. dat. præd. Indentur. ult. mentionat. quod tunc p̃recitat' fact' annuitat' & omnia articula clauſ. & res in eadem content. forent vacua fruſtra & nullius valoris aliqua re in eodem mentionat' in contrarium non obſtant' put p̃ idem ſcriptum indentat' ult' mentionat' plenius apparet Et idem Thomas Baker & Nicolaus Marſh modo defend̃ ulterius

The Teſtator died.

The Wife ſeiſed Virtute Teſtamenti,

And died.

The Son ſeiſed,

And paid the Legacies,

And conveyed the Deed to the Defendant.

Habendum.

The Uſes.

Upon Condition

The Money was not paid.

rius dicunt quod Hæred. vel Aſſign. præd. Roberti non ſolverunt nec ſolvi cauſaver. nec præd' Lancelot Lade Hæred' vel Aſſign̄ ſui vel aliquis eorum ſolvit vel ſolvi cauſavit p̄fat. Nic' Marſh modo defend' præd. ſummam centum & octodecim librarum ſuper præd. Feſtum Sancti Michaelis tunc p̄x' ſequen̄ ſecundum formam & effectum Conditionis in præd' ſcripto indentat. ult̄ mentionat̄ Virtute cujus quidem conceſſionis & aſſignationis ult̄ mentionat̄ ac vigore cujuſdam Statuti fact' apud Weſtm' in Com̄ Midd' quarto die Februarii Anno Regni Domini Henrici octavi nup̄ Regis Angliæ, &c. viceſimo ſeptimo de uſibus in poſſeſſionem transferend' præd. Nic. Marſh modo defend' præd. tempore quo, &c. fuit & adhuc eſt ſeiſit̄ de præd. Annuitat̄ ſive annual̄ reddit̄ octo libr̄ in dominico ſuo ut de feod' Et quod quadraginta & octo libr̄ de reddit̄ p̄d̄ per ſex Annos integros finit̄ ad Feſtum Sancti Michaelis Archi p̄x. ante præd' tempus quo, &c. præd. Nic. Marſh modo defend' aretro fuer̄ & inſolut̄ ad præd' Feſtum Sancti Michaelis Arch. prox' ante præd. tempus quo, &c. & p̄ octo dies prox' poſt idem Feſtum & prædict' tempore quo, &c. idem Nic' Marſh modo defend̄ in jure ſuo propr̄ bene advocat. & præd' Thomas Baker ut balivus prædict' Nic' Marſh modo defend' bene cogn' caption' averiorum præd. in præd. loco in quo, &c. pro eiſdem quadraginta & octo libr' de reddit' præd' ſic aretro exiſten' & juſte, &c. ut in terris diſtriction' præd. Nic. Marſh modo defend' in forma præd' onerat̄ & obligat̄, &c.

Vigore Conceſſionis, and of the Statute of Uſes.

The Defendant was ſeiſed in Dominico ſuo ut de feodo.

For ſix Years Rent due the Diſtreſs was made.

The one Defendant bene advocat, and the other bene cognovit,

And in Lands charged with the Diſtreſs.

Demurrer. Et præd̄ Philippus Lade dic̄ qd' per aliqua per præd' Thomam Baker & Nicolaum Marſh ſuperius in advocatione præd' alleg. iidem Thomas Baker & Nicolaus Marſh captionem averiorum præd' in præd̄ loco in quo, &c. juſtam cognoſcere non debent quia dicit qd̄ placitum præd̄ per eoſdem Thomam Baker & Nicolaum Marſh modo & forma præd. ſuperius placitat' materiaque in eodem content̄ minus ſufficien' in lege exiſt' ad captionem averiorum præd' in præd. loco in quo, &c. juſtam cognoſcend' ad quod idem Philippus Lade neceſſe non habet nec p̄ Legem Terræ tenetur aliquo modo reſpondere. Et hoc parat̄ eſt verificare Unde pro defectu ſufficien̄ placit̄ in hac parte idem Philippus Lade pet̄ judic̄ & dampna ſua præd' occaſione captionis & injuſtæ detentionis averiorum præd. ſibi adjudicari, &c.

Joinder. Et præd. Thomas & Nicolaus ex quo ipſi ſufficien' materiam in Lege ad ipſum Nicolaum captionem averiorum præd. in prædict. loco in quo, &c. juſtam advocand' Et ad ipſum Thomam ut balivum ipſius Nicolai eandem captionem in eodem loco juſtam cognoſcend' in advocare & cognitione ſuis præd' ſuperius allegaver' quam ipſi parat̄ ſunt verificare quam quidem materiam prædictus Philippus non dedic̄ nec ad eam aliqualit̄ reſpond' pet̄ judicium & retorn' averiorum præd. unacum dampnis, &c. ſibi adjudicari, &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper p̄miſſis priuſquam

uſquam Judicium inde reddant dies dat. eſt partibus p̃dictis hic uſq; a die Sancti Michaelis in tres Septimanas de audiend inde Judicio ſuo eo qd̃ iidem Juſtic̃ hic inde nondum, &c.

Lade *verſus* Baker & Marſh.

REplevin for Taking his Cattle at Barham in Kent, in a Place there called the Fourteen Acres.

The Defendant Baker made Conuſance as Bailiff of Nicholas Marſh, and ſaith, That diu ante p̃d̃ tempus quo, &c. one Robert Lade was ſeiſed in Fee of the ſaid fourteen Acres, and by his Deed indented, dated 1 Octob 24 Car. 1. between him of the one Part, and Nicholas Marſh, Grandfather of the ſaid Nicholas Marſh, of the other Part, and produceth the ſaid Deed in Court, in Conſideration of 100 l. paid to him by the ſaid Nicholas Marſh the Grandfather, did grant to the ſaid Nicholas Marſh and his Heirs, an annual Rent of 8 l. to be iſſuing out of all that Capital Meſſuage with the Appurtenances in Barham aforeſaid, and out of all Lands and Hereditaments in Barham aforeſaid, to the ſaid Meſſuage belonging, and then in the Occupation of the ſaid Robert Lade, unde præd. locus in quo eſt & præd. tempore quo, &c. fuit parcell' to be paid at our Lady-Day and Michaelmas, by equal Portions, with Power to diſtrain, if the ſaid Rent, or any Part thereof were behind.

And the Defendant further ſaith, That by Virtue of the ſaid Grant, the ſaid Nicholas Marſh the Grandfather became ſeiſed in Fee of the ſaid Rent; and being ſeiſed by his Will in Writing, dated the 28th of November 1654. deviſed the ſaid Rent to Richard Marſh and his Heirs, and died; by Virtue whereof the ſaid Richard Marſh became ſeiſed in Fee of the ſaid Rent, and being ſo ſeiſed, diu ante præd' tempus, quo, &c. viz. 10 Aug. 32 Car. 2. nuper Regis, by his Deed indented between him of the one Part, and the ſaid Nicholas Marſh the Defendant, Son of the ſaid Richard of the other Part, cujus Scripti alteram partem ſigillo præd̃ Ricard. Marſh (omitting ſigillat') idem Thomas Baker the Defendant hic in Cur̃ p̃fert, for and in Conſideration of Natural Love and Affection which he bore to the ſaid Nicholas now Defendant, his Son, and the Sum of 5 l. yearly by him the ſaid Nicholas to the ſaid Richard Marſh, during the Life of the ſaid Richard, ſecured to be paid, and for divers other good Cauſes and Conſiderations conceſſit aſſignavit & tranſpoſuit to the ſaid Defendant Nich. Marſh and his Heirs the ſaid Annuity or yearly Rent of 8 l. to the Uſe of the ſaid Nicholas Marſh the Defendant and his Heirs, prout

Poſtea 260, 266, 267. Antea 141, 143. 1 Vent. 137. 3 Lev. 291. 4 Mod. 149. Cumberba. 190.

prout p idem ſcriptum indentat' plenius apparet Virtute cujus quidem conceſſionis & aſſignation' ulterius mentionat' & vigore Statuti anno regni Hen. 8. nuper Regis Angliæ viceſimo ſeptimo de uſibus in poſſeſſionem transferend' præd. Nic. defend. fuit & adhuc eſt ſeiſit. de præd annuat' reddit, &c. and for 48 l. for ſix Years Arrears at Michaelmas next before the Taking of the Cattle, to the ſaid Nicholas, the Defendant bene cognoſcit ut balivus ipſius Nicolai, &c.

To this the Defendant demurs.

Firſt, It is not ſufficiently ſhewn that the Place where, &c. was charged with the Rent, for the Rent is granted out of a Meſſuage with the Appurtenances in Barham, and out of all the Lands in Barham aforeſaid to the ſaid Meſſuage belonging, and then in the Occupation of the ſaid Robert Lade unde præd. locus in quo eſt & tempore quo, &c. fuit parcell'; and tho' it were Parcel at the Time of the Diſtreſs taken, it might not be belonging to the ſaid Houſe, or in the Tenure of Lade at the Time of the Rent granted, which ſhould have been ſhewn, and of that Opinion were the Court.

Secondly, In the Deed by which the Defendant Nicholas Marſh claims, it is ſaid ſigillo præd. Ric' Marſh, (omitting ſigillat.)

Sed non allocatur, for it is ſaid before that per Scriptum indentat. factum, &c. he granted, and that is enough.

Thirdly, Here is a Grant of the Rent from Richard Marſh pleaded without any Attornment or Enrolment. To which it was anſwered by the Counſel for the Defendant, That it appeareth that the Grant was made in Conſideration of Natural Affection as well as Money, and ſo it ſhall enure as a Covenant to ſtand ſeiſed; and for this the Caſe of Croſſing and Scudamore was cited, 1 Vent. 137. 1 Mod. 173. Paſch. 23 Car. 2. Rot. 871. where in Ejectment it was found by Special Verdict that Nicholas Hele was ſeiſed of Lands in Fee, and that he made a Deed to Jane Hele, enrolled within ſix Months, by which he did, for and in Conſideration of Natural Love, Augmentation of her Portion, and the Preferment of her in Marriage, and other good and valuable Conſiderations, give, grant, bargain and ſell, alien, enfeoff and confirm unto the ſaid Jane and her Heirs the ſaid Lands, and in the ſaid Deed there was a Covenant, that after due Execution, &c. the ſaid Jane ſhould quietly enjoy, and alſo a Clauſe of Warranty; and the Jury found that there was no other Conſideration than what was expreſſed in the Deed, ut ſupra; this Deed could not enure as a Bargain and Sale, but it was adjudged that it ſhould work as a Covenant to ſtand ſeiſed; and Watts and Dix's Caſe was alſo cited. Sti. 188, 204. where Rolle ſaid, If Lands are paſſed

for Money only, the Deed ought to be enrolled, but if for Money and Natural Affection the Land will pass without Enrolment.

The Court here in the principal Case inclined, that this Grant would work as a Covenant to stand seised. Postea 318.

But Pollexfen, Chief Justice, was of Opinion that it ought to have been so pleaded, and not to use the Words concessit assign' & transposuit, which is to plead it as a Grant at Common Law. Postea 260, 266. 1 Lutw. 271. 356.

Powell and Ventris did conceive that it was pleaded sufficiently, in regard it was said that by Virtue of the Deed and Statute of Uses he became seised; but Leave was given by the Court to amend the Plea as the Defendant should see Cause.

Accordingly the Plea was amended only by adding of an Allegation, that the Deed from the Father to the Son had no other Execution but Sealing and Delivery, and so did operate by Way of Covenant to stand seised, and thereupon the Avowant had Judgment in the Common Pleas.

Note, Upon a Writ brought upon this Judgment, entred Trin. 3 W. & M. Rot. 268. in B. R. this Judgment was reversed; for that the Conveyance from Marsh to his Son was pleaded by Way of Grant without Attornment; and the Averment that operated by Way of Covenant to stand seised, did not help it: But it ought to have been pleaded positively, that the Father did covenant to stand seised. Postea 266.

Bland *versus* Haselrig & alios.

QUarto Jacobi Secundi the Case was, An Assumpsit was brought against four, who pleaded non Assumpser infra sex annos, and the Verdict was, That one of the Defendants did assume infra sex annos, and the other non Assumpsit. And it was moved that no Judgment could be given against the Defendant, upon whom the Verdict was found, for this is an Indeb' Assump' for Goods sold, and 'tis an intire Contract, and they must all be found to promise, or else 'tis against the Plaintiff. Q. 5 Mod. 425, 426. 6 Mod. 240. 1 Saund. 37, 38. 2 Saund. 65, 125. 2 Lev. 166. 3 Lev. 367. 2 Salk. 420, to 425.

Torts are in their Nature several, so one Defendant may be found Guilty and the other Not guilty, but 'tis not so in Actions grounded upon Contract. 2 Mod. 71, 72, &c. 2 Lutw. 813. Postea 224.

Pollexfen, Chief Justice, Powell and Rokeby were of Opinion in this Case, That the Plaintiff could not have Judgment.

Ventris inclined to the contrary; he admitted if an Indebitat' Assumpsit be brought against four, and they plead non Assumps and found that one of them assumed, this is against the Plaintiff, for he fails in his Action. But in the Case at Bar it may be taken, that

that they did all promise at first, and that one of them only renewed the Promise within six Years: The Plea of non Assumpsit infra sex annos implies a Promise at first, and if one should renew his Promise within six Years, 'tis Reason it should bind him, and the Plaintiff must sue them all, or else he will vary from the original Contract.

But the Chief Justice seemed to be of an Opinion, that if the Promise were renewed within the six Years, yet if not upon a new Consideration, it should not bind; and if there were a new Consideration, the Action will lie against him that promised alone. Sed Quære, for the common Practice is upon a Plea of the Statute of Limitations to prove only a Renewing the Promise without any further Consideration, but a bare Owning the Debt is not taken to be sufficient; Quære, if the first Consideration upon repeating the Promise within six Years be not enough to raise a new Cause of Action? Judgment was given for the Defendant.

'Tis an Evidence of a Promise. 5 Mod. 425.

Westby's *Case*.

Antea 46, 49, 50, 130. 1 Salk. 50, 462.

WEstby brought an Action by Original, and the Instructions to the Cursitor for Drawing of the Writ were Westby; but the Writ was Westly, and so all the Proceedings. Afterwards the Court upon a Motion ordered the Cursitor to attend, who satisfied the Court that the Instructions were right, and so they ordered the Original to be amended in Court, and this without any Application to the Chancery or Order from thence, and they amended all the Proceedings after.

Termino Paſchæ, Anno 2 Willielmi & Mariæ.

In Communi Banco.

Ellis *verſus* Yates.

IN an Action of Treſpaſs the Writ was brought, and ſo recited, Quare clauſum fregit & herbam ibid' creſcent' conculvavit & conſumpſit & averia fugavit; and the Declaration was Quare clauſum & herbam idid' creſcent conculvavit conſumpſit & bidentes, &c. fugavit & alia enormia, &c.

Upon Not guilty pleaded, a Verdict was found for the Plaintiff. It was moved in Arreſt of Judgment, that fregit was omitted in the Declaration, ſo one of the Treſpaſſes contained in the Writ, viz. the Clauſum fregit was not mentioned in the Declaration, and if the Writ contains more than is declared for, this is a Variance not aided by the Verdict. 1 Cro. 329. Haſelop and Chaplin, where a Replevin was de averiis, and declares only of an Horſe; and for that the Judgment was reverſed in a Writ of Error. So where the Writ was Quare clauſum fregit, and the Declaration Quare clauſum, 1 Cro. 185. Edwards and Watkin. Cro. Eliz. 330. Cro. Eliz. 185.

Pollexfen, Chief Juſtice and Rokeby were of that Opinion, that Judgment ſhould be arreſted.

Ventris contra (Powell being abſent) becauſe the Treading and Conſuming of the Graſs neceſſarily implied a Breach of the Cloſe; for there could not be an Entry without a Breach. So the Declaration by neceſſary Intendment comprehended all that was in the Writ, and to ſupport the Verdict it was reaſonable to intend no other Breach of the Cloſe, than by a bare Entry: But the other two ſaid, that there might be given in Evidence a Breach of a Gate or Hedge, and Damages might be given for that, and then there was no Ground for ſuch Damage ſet forth in the Declaration.

And by the Opinion of the Chief Juſtice and Rokeby the Judgment was ſtayed.

Vid. Kellewey 187. B. finding in a Verdict upon a Writ of Forcible Entry, that the Defendant expulit, diſſeiſivit, &c. this implies it was Vi & armis, and yet that is the very Point of the Action.

The Warden of the Fleet's Caſe.

A Motion was made by the Warden of the Fleet, for a Writ of Privilege, ſitting the Parliament, alledging that he was obliged to attend the Houſe of Lords, and therefore ought to be privileged from Suits; and divers Precedents were ſhewn, where Writs of the like Nature were granted to the Warden of the Fleet upon Motion, one whereof was 2 Car. 1. and divers ſince that Time, ſome whereof appeared to be upon hearing of Counſel on both ſides.

And the Court were at firſt inclined to grant him the like Writ; but it being afterwards made appear to the Court, that he was ſued upon Eſcapes, and the Court conſidering the great Inconvenience that would enſue thereupon, and being of Opinion that it was in their Diſcretion, whether they would grant ſuch Writ upon Motion or no; for they could not Judicially take Notice of this Privilege of Parliament; and therefore in Caſe he had ſuch Privilege, the Court ſaid he might plead it, if he would, but they would not grant him ſuch Writ upon Motion: Or if his Privilege were infringed by the Parties proſecuting a Suit againſt him, he might complain to the Lords for a Breach of Privilege.

Anonymus.

Vide antea 130.

There was a Judgment by Default, which the Defendant let go by Default depending upon the Miſtake in the Original. Now ſuſpecting that the Plaintiff had diſcovered it, and ſo would procure another Original that ſhould be right, he moved the Court by Serjeant Birch, that he might have Oyer of the Original; and this was intended to prevent the Procuring of another.

But the Court denied the Motion, and ſaid, it was uſual for a Plaintiff to take out his Original after Judgment entred.

Beaumont *verſus* Weldon.

IN an Aſſumpſit the Plaintiff declared upon ſeveral Promiſes, three whereof were for finding of Lodging for ſo many Months for the Wife of the Plaintiff at his Requeſt, and the laſt Promiſe was an Indebitat, for Goods and Wares ſold to the Defendant himſelf. 1 Sid. 109. 1 Lev. 4, 5. 1 Keb. 69. 1 Mod. 9, 124. 1 Ven. 42. Scott and Manby.

The Defendant pleaded in Bar, that long before the Plaintiff had found his Wife any Lodging, (viz.) ſuch a Day his Wife went away from him without his Conſent, and lived in Adultery with ſome Perſon or Perſons unknown to the Defendant from that Time to this preſent; and that the Plaintiff, before he had provided her any Lodging, had Notice of that her Departure, notwithſtanding which the Plaintiff provided her Lodging, and alſo ſold to her the ſaid Goods and Wares, ſuppoſed in the Declaration to be ſold to the Defendant, without any Aſſent or Notice of the Defendant, abſque hoc quod aſſumpſit ſuper ſe modo & forma prout prædictus Querens ſuperius verſus eum queritur, & hoc patatus eſt verificare, &c. 1 Sid. 425. 2 Keb. 554. 2 Lev. 16. 1 Salk. 116, 118.

To this the Defendant demurred generally, and it was argued that the Plea was naught both as to the Matter and Form. It was ſaid, the great Caſe of Scot and Manby was reſolved chiefly upon the expreſs Prohibition that the Husband had given to truſt his Wife. 1 Mod. Rep. 9. Dyer and Eaſt, it was ſaid that the Wife ſhould have been endowed though ſhe eloped before the Statute of Weſtm. 2. cap. 34. and as to the Manner of Pleading, it is altogether inſufficient; for it amounts to the general Iſſue, and he ſhould have traverſed the Requeſt: And for the Goods and Wares alledged to be ſold to the Defendant himſelf, there is no Anſwer given at all; but only ſaid, that the Wares ſuppoſed to be ſold to the Defendant, were ſold and delivered to the Wife; which is nothing to the Purpoſe.

The Court, as to the Special Matter pleaded, gave no Opinion, but ſeemed to agree, that upon Non Aſſumpſit pleaded, the Matter ſet forth in the Plea would have been good Evidence for the Defendant.

Vid. the Opinion of ſome of the Judges in 1 Siderfin in Scot and Manby's Caſe 129. and the Court held that the Plea amounted to the general Iſſue, as to the Lodging found for the Wife; but then this was cured upon a General Demurrer, But becauſe there was nothing pleaded to the Indebitat' Aſſumpſit laid for the Wares alledged to be ſold to the Defendant himſelf, they were of Opinion to give Judgment for the Plaintiff. 1 Mod. 124, 125, &c. 1 Show. 76.

Nota, The Traverse absque hoc, as this Pleading is, amounteth to no more than a Protestation. Vide Kellewey 187. B.

Brown *versus* Rands.

Cro. Car. 219, 597. 1 Mod. 211. 2 Mod. 172, 173. 1 Salk. 313. N. Lutw. 10. 2 Danv. 512.

THE Plaintiff brought an Action of Debt for 400 l. and declared upon two Bonds, each of them in the Penalty of 100 l.

The Defendant demands Oyer of the several Bonds, and of the Conditions of each Bond; which Conditions reciting, that a Marriage was intended between the Defendant and Anne Stow, one of them was to permit and suffer her to dispose of her Personal Estate, and to permit the Person and Persons to whom she should dispose of it, to enjoy it; and the other Condition was to permit her to give away 50 l. and that the Defendant should pay it within two Months after her Decease: And to each of these Bonds the Defendant pleaded, Quod Conditio ejusdem scripti nunquam infracta fuit per ipsum ad aliquod tempus hucusque, & hoc paratus est verificare.

To this the Plaintiff demurred. It was insisted on for the Defendant that this Plea was good, and should drive the Plaintiff to assign a Breach; for the Matter did not lie within the Notice of the Defendant, whether she had made any Disposition of her personal Estate, or had given the 50 l. and so could plead no otherwise than thus.

But the Court held the Plea to be naught, and that for saving of the Bond, it is necessary for the Defendant to shew how he hath performed the Condition, and this Manner of Pleading was never admitted.

Lechmere & al' *versus* Toplady & al'.

Trover brought for a great many Goods.

Lond. ff. ALICIA Toplady nuper de London Vid' Benjamin Thorowgood nuper de eadem Mil' Thomas Kinsey nuper de eadem Mil' & Georgius Benson nuper de eadem Servien. ad Clavum attach. fuer. ad respond' Nicolao Lechmere & Sabian. Coles mercatoribus de placito Transgr. super Casum & unde iidem Nicolaus & Sabian. per Humfridum Wall Attorn. suum queruntur quare cum prædict. Nicolaus & Sabian. quarto die Junii Anno Domini millesimo sexcentesimo octogesimo sexto apud London, videlt.

The particulars of the Goods.

in paroch' Beatæ Mariæ de Arcubus in Warda de Cheape possessionat. fuissent de bon' & catal' sequen' (videlt.) de ducent. vigint. & quinque libris legalis monet' Angl' in pecun. numerat ac de decem pipis (Angl', Pipes) & quingent' lagen' (Angl', Gallons) Vini Hispanici (Angl' vocat' Canary) duobus buttis (Angl', Butts) dimid'

Cadi (Anglice, half Hogſheads) & ducent' & quinquagint' lagen' Vini Hiſpanici (Anglice vocat. Sherry) duabus buttis & ducent. & quinquagent. lagen. Vini Hiſpanici (Anglice vocat' Malaga) quinq; Tonnis (Anglice, Tons) vigint' Cadis (Anglice, Hogſheads) & mille lagen. Vini Gallici (Anglice White-wine) decem tonnis quadragint' cadis ſeptem vaſibus (Anglice vocat. Fats) un' pipa & duobus mille lagen' Vini Gallici (Anglice vocat. Claret) duobus vaſibus (Angl', Fats) tribus Cadis & trecent. lagen. Vini Rhenent. (Anglice vocat. Rheniſh) un. cado un. Tertia (Anglice, Tierce) & ſexagint. lagen' Vini Hiſpanici (Anglice, vocat' Tent) ſex duoden' (Anglice, Dozen) ampullar. (Anglice, Bottles) implet. cum Vino Hiſpanico (Angl. vocat. Canary octo duoden. ampullar. implet. cum Vino Gallico (Anglice vocat Claret) ſeptem duoden. ampullar. implet. cum Vino Gallico (Anglice vocat. White-wine) vigint. & tribus vaſibus (Anglice, Casks) tribus circulis (Anglice, Screw-hoops) duodecim ferreis circulis (Anglice, Iron Hoops) duobus cantharis (Anglice vocat. Cans) ſex Infundibulis (Anglice, Funnels) ſex Cupis (Angl', Tubs) un' par. cranor. (Anglice, Cranes) & hancher. (Anglice Hanchers) vigint. librat. ponderibus Nicotian. ſex duoden. librat. ponder' Candelar. (Anglice, Candles) trigint. duoden. ampullar. Vitriar. (Anglice, Glaſs Bottles) un. Crate (Anglice, Range) duobus Fenſoribus (Anglice, Fenders) tribus Batillis (Anglice, Fireſhovels) tribus Forcipibus (Anglice, Pairs of Tongs) un' furca Ignar. (Anglice, Firefork) duabus cranis (Anglice, Cranes) & hamis (Anglice, Hooks) duobus uncis pro verubus (Anglice, Spit-Racks) duobus craticulis (Anglice, Gridirons) duobus Ignitabulis (Anglice, Chafing-diſhes) duobus tripis (Anglice, Trevets) duobus Anſoriis (Anglice, Chopping Knives) un. pixid. ferrea (Anglice, Box-Iron) quatuor calefactor' (Anglice, Heaters) un. Veruverſori (Anglice, Jack) un. catena & ponderibus (Anglice, Weights) tribus verubus (Anglice, Spits) un. folle (Anglice, Pair of Bellows) un. pixid. pro Sale (Anglice, Salt-Box) un. unco pro Sartagine (Anglice, a Rack for a Frying Pan) un. inſtrument. ferreo (Angl. vocat' a Plat-Frame) tribus ollis æreis (Anglice, Brass Pots) & tegminibus (Anglice, Covers) tribus ſcutellis (Anglice, Sauce-pans) duobus æreis caldariis (Anglice, Brass Kettles) ſex æreis ignitabulis (Angl', Brass Chafing-Diſhes) un' æreo caleficio lectuali (Angl', Warming-Pan) vigint. & novem patinis Stanneis (Anglice, Pewter-Diſhes) tribus malluviis (Angl. Basons) quinque duoden. & dimid. (Angl. Dozen and half) lamin' Anglice, Plates) tribus catillis (Anglice, Poringers) tribus ſcutellis (Angl' Saucers) un. lamina (Angl. Paſty-Plate) quatuor laminis pro caſeo (Anglice, Cheeſe-Plates) duobus ſalſariis (Angl. Saltſellers) novem matulis (Angl. Chamber-Pots) duobus ferreis diguttoriis (Anglice, Iron Dripping-Pans) duobus ſartaginibus (Angl' Frying-Pans, vigint. & tribus menſis (Angl' Tables) ſeptem tapet. (Anglice, Carpets) nonagint' & uatuor cathedris (Angl' Chairs) duobus ſedil' (Anglice,

glice, Stools) un. pixid. pro aromat. (Angl' Spice-Box) un' ærea ſicula (Angl' Paſl) un' fulcro (Angl. Turn up-Bed) quatuor lect. pulvinar' (Angl' Featherbeds) quatuor cervical' (Ang' Bouſters) ſex pulvinar. (Angl' Pillows) quatuor lodic. lanear. (Angl' Blankets) quatuor par. lodic. linear. (Angl. Sheets) quatuor opiment' (Ang' Juggs) quatuor fulcris (Angl' Bedſteads) un' ſtannea ciſterna (Angl' Ciſtern) un. cantharo continen' tres quartas (Anglice, Three Quart Pots) un' plumbea ciſterna un' plumbea ſentina (Angl' Sink) un' pipa plumbea un' ærea papilla adinde affix' (Ang. a Lead Pipe and Brass Cock) quadragint' & ſex duoden' ampullar' vitrear' tribus duoden. ſtannea candelabra (Angl' Tin Candleſticks) duobus æreis candelabris un' cantharo continen' quarter pinte (Angl' Quartern Pot) novem cantharis continen. dimid' pinte (Angl' Half Pint Pots) vigint' & quatuor cantharis continen' pintas (Angl' Pint Pots) octo cantharis continen. quartas (Angl' Quart Pots) duobus cantharis continen' duas quarras (Anglice, Pottle Pots) quatuor cratibus ignear' (Angl. Fire Grates) tribus tintinnabulis un' plumbeo tegmin' (Angl' Lead Cover) duabus celdis carbon. (Angl' Chaldron of Coals) quatuor cratibus (Angl' Stoves) un' lagen' (Angl' Gallon) aceti duabus poſtibus (Angl' Poſts) un' furca ferrea (Angl' Spud) un' cantharo (Angl' black Jack) un' abaco (Angl' Cupboard) ſex cultris Angl' Knives) tribus curtinis (Angl' Curtains) un. par. curtin' & vallenc' (Angl' a Suit of Curtains and Vallence) novem par. periſtromat. (Angl' Suit of Hangings) duabus ciſtellis (Angl' Cheſts of Drawers) quatuor picturis (Angl. Pictures) un' lanterna (Angl' Lantern) duabus duoden' vitrii (Angl' Glaſſes) un. par. andelar (Angl' Andirons) quinque par' catellor. ferreor. (Angl' Iron Dogs) tribus catellis ferreis quinque pec' tapet. (Angl' Tapeſtry) un. pec' ligni (Angl' vocat. a Horſe for drying Cloaths) un' ciſta pipar' (Angl' a Cheſt of Pipes) un. ſentina (Anglice, Cloſeſtool and Pan) undecim pec' ferri pro circulis (Anglice Irons for Hoops) quingent' faſcibus (Anglice, Fagots) & ſex lanternis (Anglice, Sconſes) ad valenc' quingent. librar. legalis monet. Angliæ, ut de pecun' bon' & catallis ipſor' Nicolai & Sabian' propr' Et ſic inde poſſeſſionat. exiſten' ipſi iidem Nicolaus & Sabian' poſtea ſcilicet eiſdem die & anno apud London prædict' in Paroch. & Warda prædict' pecun. bon. & catall' ill' extra manus & poſſeſſion. ſuas caſualit' perdider. & amiſer. Quæ quidem pecun. bon. & catall. poſtea ſcilicet eiſdem die & anno apud London præd' in Paroch' & Warda prædict' ad manus & poſſeſſion' pædict' Aliciæ Benjaminis Thomæ & Georgii per Invenc'on. devener' prædict. tamen Alicia Benjamin Thomas & Georgius ſcien. pecun. bon. & catall' præd' fore pecun. bon' & catall' ipſor' Nicolai & Sabian. propr' & ad ipſos Nicolaum & Sabian' de Jure ſpectare & pertinere machinan' tamen & fraudulent' intenden' eoſdem Nicolaum & Sabian' de pecun. bonis & catallis prædictis in hac parte callide & ſubdole decipere & defraudare pecun. bon. & catallis

prædict' licet ſæpius requiſit', &c. eiſdem Nicolao & Sabian' ſeu eorum alteri nondum deliberaver. nec eorum aliquis deliberavit Sed pecun. bon' & catall' ill' poſtea ſcilicet die & anno ult' præd' apud London. præd. in Paroch. & Warda præd. in uſus ſuos propr. converter & dipoſuer. ad dampnum ipſius Nicolai & Sabian' quingent. librar. Et inde producunt ſectam, &c.

Et prædict' Alicia Benjamin Thomas & Georgius per Carol' Draper Attorn' ſuum ven. & defend. vim & injur. quando, &c. Et quoad converc'on & diſpoſic'on' bonor' & catallor' ſequen' (parcell' bonor. & catallor. in Narr. præd' ſuperius mentionat') ad uſum ipſor. Aliciæ Thomæ Benjaminis & Georgii (viz.) decem pipas (Angl. Pipes) & quindecim lagen' (Anglice, Gallons) Vini Hiſpanici (Anglice vocat. Canary) duas Buttas (Anglice, Butts) & dimid' cadi (Anglice, half Hogſheads) Vini Hiſpanici (Anglice voc. Sherry) And ſo all the Particulars before-mentioned are to come in here verbatim. — quingent' faſces (Anglice, Faggots) & ſex lanternas (Anglice, Sconſes) iidem Alicia Thomas Benjamin & Georgius dicunt quod præd' Nicolaus Lechmere & Sabian. Coles ac'con' ſuam præd' inde verſus eos habere ſeu manutenere non debent quia dicunt quod Termino Sancti Michaelis Anno regni Domini Jacobi Secundi nuper Regis Angl', &c. ſecundo coram ipſo nup' Rege apud Weſtm' in Com' Midd' exiſten' Nicolaus Lechmere & Sabian' Coles mercator. per Johannem Smith tunc Attorn' ſuum ven. & protuler. in Cur. dicti Domini nuper Regis tunc ibidem quanda' billam ſuam verſus Benjamin. Thorowgood Mil' Thomam Kinſey Mil' Aliciam Toplady & Georgium Benſon in cuſtod' Marr', &c. de placito Tranſgr. Et tunc fuer. pleg' de proſequend. ſcilicet Johannes Doe & Ricardus Roe per quam quidem Billam prædict' Nicolaus Lechmere & Sabian' Coles mercator. querebant de Benjamine Thorowgood Mil' Thoma Kinſey Mill' Alicia Toplady & Georgio Benſon in cuſtod' Marr' Mareſchal' Domini nuper Regis coram ipſo nuper Rege exiſten. de eo quod ipſi tertio die Junii Anno Regni dicti Domini Jacobi ſecundi nuper Regis Angl', &c. ſecundo vi & armis, &c. bon' & catall' ipſor' Nicolai & Sabian' Coles ſequen. videlicet, decem pipas (Angl' Pipes) & quindecim lagen' (Anglice, Gallons) Vini Hiſpanici (Anglice vocat' Canary) duas Buttas (Anglice, Butts) & dimid' Cadi Anglice half Hogſhead Vini Hiſpanici (Angl' vocat' Sherry) duas Buttas Vini Hiſpanici (Anglice vocat. Malaga) Here follow all the before-mentioned Goods —— undecim pec' ferri pro circulis (Angl' Iron for Hoops) quingent' faſces (Angl' Fagots) & ſex lanternas (Angl' Sconſes) ad valenc' quingent libr' legalis monet' Angl' apud London, videlt' in Paroch' Sancti Dunſtani in Occidente in Warda de Farringdon extra adtunc & ibidem invent' ceper' & aſportaver. Et al' enormia eiſdem Nicolao & Sabian. adtunc & ibidem intuler. contra pacem dicti Domini nuper Regis, &c. ad dampnum ipſoru' Nicolai

The Defendant pleads a Recovery in an Action of Treſpaſs in Bar. The Particulars of the Goods.

Actio non.

Action brought in the King's Bench.

The Declaration.

Treſpaſs for taking away of the Goods.

Contra pacem nuper Regis.

Nicolai & Sabian' quingent' & vigint' librar. Et inde produc' ſectam, &c.

Imparlance. Et poſtea ſcilicet die Lunæ prox. poſt Octab. Sancti Hillar. tunc prox. ſequen' uſque quem diem prædict' Alicia Benjamin Thomas & Georgius habuer. licenc' ad Billam præd' interloquend' & tunc ad reſpondend, &c. coram Domino Rege apud Weſtm' ven. tam præd. Nicolaus & Sabian. per Attorn. ſuum præd. quam prædict' Alicia Benjamin Thomas & Georgius per Ant. Ward attorn' ſuum & Not guilty pleaded. iidem Alicia & Georgius tunc defend. vim & injur' quando, &c. Et dixer. quod ipſi non fuer. inde culpabil' & de hoc poſuer. ſe ſuper Patriam Et prædict' Nicolaus & Sabian. ſimilit, &c. Per quod Præcept' fuit Vic' quod Venire fac. coram dicto Domino nuper Rege apud Weſtm' die Veneris prox' poſt Craſt. Purification. Beatæ Mariæ Virginis duodecim, &c. Per quos, &c. Et qui nec, &c. ad Recogn', &c. quia tam, &c. idem dies dat' fuit partibus præd. ibidem, &c. Poſtea continuat' fuit inde proceſſ. inter partes prædict. de placito prædict' per Jur. poſit' inde inter eas in reſpect' coram Domino Rege apud Weſtm' uſq; diem Mercur. prox. poſt Quinden. Paſchæ extunc prox. ſequen' Niſi dilect' & fidel' Domini Regis Edwardus Herbert Mil' Cap. Juſtic' Domini Regis ad placita in Cur' ipſius Domini Regis coram ipſo Rege tenend' Aſſign' prius die Martis decimo quinto die Februar. apud Guildhald' London per formam Statuti, &c. ven' pro defect' Jur', &c. Ad quem quidem diem Martis ſcilicet decimum quintum diem Februar. ven' coram dicto Domino nuper Rege tam prædict. Nicolaus & Sabian' per attorn' ſuum prædict' quam prædict. Alicia Thomas Benjamin & Georgius per attorn. ſuum prædict' Et præfat. Capital' Juſtic' dicti Domini nuper Regis coram quo, &c. miſ. hic record' ſuum coram Return of the Poſtea. eo habit' in hæc verba Poſtea die & loco infracontent' coram præd. Edwardo Herbert Mil' Capital' Juſtic' infraſcript. aſſociat. ſibi Ricardo Philips gen. per formam Statut', &c. ven. partes prædict. per attorn. ſuos prædict. Et Jur. Jurat. unde infra fit mentio exact. quidam eorum, videlicet, Thomas Barnſley Joſephus Baggs Johannes Reynolds Ricardus Beauchampe Joſephus Canne Ric. Browne Johannes Bernard & Thomas Mills ven. & in Jur. ill. Jurat exiſtunt & quia reſid. Jur. ejuſdem Jure. non comparuer. Ideo al de circumſtantibus per Vic. Civit. London, infraſcript' ad hoc elect' ad requiſic'on prædict. Nicolai & Sabian. ac per mandat. Capi- Tales. tal. Juſtic. prædict. de novo apponunt. Quorum Nomina panello infraſcript. affilantur ſecundum formam Statut. in hujuſmodi caſu inde nuper edit. & provis. Et Jur. ſic de novo appoſit' videlt' Nicolaus Bendy Jacobus Woods Edwardus Falkingham & Kenelm' Smith exact' ſimilit. ven. & in Jur. ill. Jurat. exiſtunt Qui ad veri- The Jury find a ſpecial Verdict. tat' de infracontent. ſimulcum al. Jur. prædict. prius ad hoc impanellat. & Jurat. dicend. elect. triat. & Jurat. dixer ſuper' Sacram' ſuum quod diu ante præd. tempus quo, &c. ſcilicet viceſimo octavo' die Aprilis Anno Regni Domini noſtri Regis nunc ſecundo quidam

Johannes Toplady adtunc & diu antea exiſtẽ negotiator (Anglice, a Trader) uten' & exercen' negotium (Anglice, Trade) Vinarii (Anglice, a Vintner) & viam & modum ſuum vivendi emendo & vendendo & adtunc exiſtẽ indebitat' diverſis perſon' in diverſis magnis denar' Summis ultra ducent' libr' legalis monet' Angl' præd. viceſimo octavo die Aprilis deveniſſet Decoctor (Anglice, a Bankrupt) infra Statut' fact. contra Decoctores (Anglice, Bankrupts) Et Jur. prædict' ulterius ſuper Sacram' ſuum præd. dicunt quod Termino Paſchæ anno regni dicti Domini Regis nunc primo quoddam Judicium & recuperac' in Cur' Domini noſtri Regis nunc coram ipſo Rege apud Weſtm' præd. habit' fuer' pro mille libr' de debito necnon ſeptuagint' & tribus ſolid' & quatuor denar' de dampn̄ p̄ut p̄ record' Judic' præd' in Cur' dicti Domini Regis coram ipſo Rege apud Weſtm' remanen' plenius liquet & apparet. Et Jur' præd' ulterius ſuper Sacram' ſuum præd. dicunt quod quoddam breve de Fieri fac' Jur' præd. modo hic in evidenc' oſtenſ. ſuper Judicium præd. per præfat' Aliciam Toplady emanat' & proſecut' fuiſſet Vic' London direct' per quod quidem breve mandat' fuit Vic' London quod de bon' & catall' præd. Johannis Toplady in baliva ſua Fieri fac' tam præd. mille libr' de debito quam præd. ſeptuagint' tres ſolid' & quatuor denar' qui eidem Aliciæ in eadem Cur' coram dicto Domino Rege adjudicat' fuer' p̄ dampnis ſuis quæ ſuſtin' tam occaſion' detencon̄ debiti illius quam pro miſis & cuſtag' ſuis p̄ ipſum circa Sectam ſuam in hac parte appoſit' & denar' ill' haberent coram dicto Dom' Rege apud Weſtm' die Lunæ prox. poſt Crin' Aſcencon̄ Domini ad reddend' præfat' Aliciæ pro debito & dampn' prædict' Quod quidem breve de Fieri fac' poſtea ſcilicet viceſimo nono die Aprilis anno ult' ſupradict' deliberat' fuit per præd. Aliciam p̄fat' Benjamin' Thorowgood & Thomæ Kinſey tunc Vic' London exiſtẽ in forma Jur' exequend' quodque prædict' Benjamin Thorowgood & Thomas Kinſey & prædict' Georgius Benſon tunc exiſten' un' Servien' ad Clav' eorundem Vic' per eor' Warrant' ſup̄ præd. breve de Fieri fac' & per ordin' & direction' præd. Aliciæ poſtea ſcilicet eodem viceſimo nono die Aprilis & non antea bona & catalla in Narr. ipſor' Nicolai & Sabian' mencionat' in cuſtod' ipſor' Benjaminis & Thomæ Kinſey receperunt aſportaver' & ſeiſiver. Et Jur' præd. ulterius ſuper Sacram' ſuum præd. dixer' quod duran' tempore quo bon' & catall' præd' ſic fuer' in cuſtod' prædicta Vic' ac ante aliquam vendicon vel diſpoſicon' inde fact' quidem Proceſſ. (vocat' an Extent) extra Cur' Dom' Regis de Scacc' apud Weſtm' verſus præd. Johannem Toplady proſecut' fuiſſet Tenor cujus quidem proceſſ. Jur' præd' modo hic in evidenc' oſtenſ. ſequitur in hæc verba ſ. Jacobus Secundus Dei gratia Angl' Scot' Franc' & Hiberniæ Rex fidei defenſor' &c. Vic' London ſalutem. Cum Ricardus Holder & Edwardus Cooke ambo Mercat' de Roodlane & Ricardus Powney Wine-cooper de Marklane London p̄ ſcriptum ſuum obliga-

That the Owner of the Goods was a Vintner,

And became a Bankrupt,

And a Judgment recover'd againſt him for 1000 l.

A Fieri fac' iſſued out upon it,

And delivered to the Sheriff.

A Serjeant at Mace, by Order and Direction of the Sheriffs, ſeize the Goods in Execution. That after Seizure and before Sale, a prerogative Proceſs iſſued out againſt the Goods. The Writ found inter verba.

obligator. ſigillis ſuis ſigillat' geren dat' ſeptimo die Novembr' anno regni noſtri primo deven' tent' nob in quadragint' libr' bonæ & legalis monet' Angl' ſolvend' ad certum diem p'terit' & eas nob' nondum ſolver' nec ſolvi fecer' ut dicitur Cumq; p quanda' Inquiſic'on' indentat' capt' apud Guildhall Civit' Lond' ſituat' in Paroch Sancti Laurentii in veteri Judaiſmo in Warda de Cheape ejuſdem Civitat' primo die Maii anno regni noſtri ſecundo coram vobis præfat' Vic' Civit' London virtute brevis noſtri de extend' ſub ſigillo Scaccarii noſtri verſus præfat' Ric' Holder vobis direct' compert' exiſt' per Sacram' Daniel' Man & al' probor' & legal' hom' Civit' prædict. quod quidam Johannes Toplady de London Clothier prædict' die caption' præd. Inquiſic'on' indebitat' exiſt' præfat' Ricardo Holder in ſumma Centum & ſexagint' librar' bonæ & legalis monet' Angl' p tant' denar' debit' p Vin' per eundem Ric' Holder præd. Johanni Toplady vendit' & deliberat'. Quam quidem ſummam Centum & ſexagint' librar' præd. vos p'fat' Vic' dicto die caption' Inquiſition' præd. virtute brevis præd. in manus noſtras cap' & ſeiſiri feciſtis prout p breve præd. & retorn' ejuſdem & præd' Inquiſic'on' eidem brevi annex' in Scacc' noſtrum certificat' & ibid' in cuſtod' Rememoratoris noſtri remanen' plenius apparet Noſq; de dictis Centum & ſexagint' libr' nobis jam debit' omni celeritate quo poter' ſatisfieri volen' quod eſt Juſtum vob p'cipimus quod non omitt' propter aliquam libertat' quin' in ead' ingred' & tam p Sacram' p'borum & legal' hominum de baliva veſtra vel aliter p Sacram' & teſtimonium aliquorum proborum & legalium hominum de eadem baliva veſtra per quos rei veritas melius ſciri poterit quam omnibus al' viis mediis & modis quibus melius ſciveritis aut poteritis diligenter inquir' quas terr' & quæ ten' & cujus annui valoris prædict' Johannes Toplady habuit in dicta baliva veſtra dicto primo die Maii anno regni noſtri ſecundo quo die nobis primo debitor inde devenit ſeu unquam poſtea hucuſq; necnon quæ & cujuſmodi bon' & catall' & cujus pretii. Ac quæ debit' credit' ſpecialit' & denar' ſum' prædict' Johannes Toplady modo habet in dicta baliva veſtra eaq; omnia & ſingula prædict' bon' & catall' terr' & tenementa debit' credit' ſpecialit' & denar' ſum' in quorumcunque man' jam exiſt. per Sacram' p'fat' proborum & legalium hominum diligent' appretiari & extendi ac manus in noſtras capiatis & ſeiſiri fac' ut ea quouſque nobis de debit' præd' plene ſatisfact' fuit habeamus juxta formam Statut' pro hujuſmodi debit' noſtris recuperand' inde nuper edit' & proviſ. Ac vobis ulterius p'cipimus & poteſtat' damus per p'ſentes ad quaſcunque perſon' in p'miſſis exiſtimari idon' coram vobis advocand' ac de & in eiſdem præmiſſis diligent' examinand' ne hoc p'ſens mandat' noſtrum reman' ulterius exequend' & qualiter hoc Præcept' noſtr' fuerit execut' Baron' de Scaccario noſtro apud Weſtm' octavo die inſtan' menſis Maii diſtinct' & apte conſtare fac' & habeatis ibi hoc breve proviſo quod bon' & catall' ill' quæ in manus

Inquiſition found.

The Bankrupt indebted.

Ad Inquirend' what Goods and Chattels, Lands and Tenements;

And to extend them in quibuſcunque manibus.

noſtras occaſione hujus brevis noſtri ceperitis ea non vendatis nec vendi faciatis quouſq; aℓ de nob habuer. in mandat. Teſte Edwardo Atkyns Miℓ apud Weſtm' quarto die Maii anno regni noſtri ſecundo per breve & Inquiſicon' p̄d' ac p̄ p̄d' Actum in Parliament' anno triceſimo tertio nuper Regis Henrici octavi tent' edit. ac per Warrant' Baron. Jenner & Baron Ayloffe Executio iſtius brevis patet in quadam Inquiſic̄ huic brevi annex. Reſpons̄ Thomæ Kinſey Miℓ & Benjamin. Thorowgood Mil. Vic', London ff. Inquiſitio indentat. capt. apud Guildhall Civitat. London ſituat' in paroch S. Laurentii in veteri Judaiſmo in Warda de Cheape ejuſdem Civitat. ſexto die Maii anno regni Dom̄ noſtri Jacobi ſecundi Dei gratia Angℓ Scot. Franc. & Hiberniæ Regis fidei defenſor', &c. ſecundo coram Thoma Kinſey Miℓ & Benjamin. Thorowgood Miℓ Vic̄ Civit̄ Lond' præd' Virtute cujuſdam brevis dicti Domini Regis eiſdem Vic. direct. & huic Inquiſicon' annex' ad inquirend' de & ſuper quibuſdam materiis in eodem brevi content' & ſpec' per Sacram' Danielis Man Willielmi Church Ricardi Beauchampe Philippi Perrey Johannis Philips Johannis Pope Johannis Tayler Joſiæ Tulley Johannis Dodd Willielmi Haywood Johannis Middleton & Thomæ Pounſett p̄borum & legalium hominum de Baliva p̄fat' Vic' qui dicunt ſup̄ dictum Sacram' ſuum quod Johannes Toplady in dicto brevi nominat' quarto die inſtant' Maii poſſeſſionat' fuit & dicto die caption' hujus Inquiſicon' poſſeſſionat' exiſt' ut de bon' & catallis ſuis propr' in baliva præfat' Vic' de diverſis bon' & catall' in quadam Schedula ſive Inventorio huic Inquiſicon' annex' mentionat' attingen' in toto ſecundum valorem ſuper ea appoſit' ad ſummam Centum octogint. & trium librar. Quæ quidem bon' & catall' prædict' Nos præfat' Vic' prædict' die caption. hujus Inquiſicon. Virtute brevis præd' in manus dicti Domini Regis capi & ſeiſiri fec̄ Ac Jur. p̄d' ſupra dict' Sacram. ſuum ulterius dicunt quod præd' Johannes Toplady nulla aℓ ſive plur. habet bon' ſeu catall' nec habet aliqua debit' credit. ſpecialit. ſeu denar. ſum. nec die in dicto brevi mentionat. quo dicto Domino Regi de debit. in dicto brevi ſpec. primo devenit Debitor ſeu unquam poſtea hucuſq; al. habuit terras ſeu tenementa in baliva p̄fat' Vic. ad notic. eorundem Jur. quæ modo extendi appretiari vel in manus dicti Domini Regis cap. ſeu ſeiſiri poſſunt in cujus rei Teſtimonium tam præfat. Vic. quam Jur' præd. huic Inquiſition. ſigilla ſua apponi fecerint die & anno primo ſupradict. Si nullus venerit & clamaverit proprietat. bon. & catall. ſupramentionat. citra diem Veneris decimum quartum diem Maii hoc Termino fiat breve de vendition' exponas̄ per Cur'. Butler. **An Inventory of the Goods and Chattels of John Toplady of London, Vintner, ſeiſed by Sir Thomas Kinſey Knight, and Sir Benjamin Thorowgood Knight, Sheriffs of London, by Virtue of his Majeſty's Writ of Extent unto them directed,**

Proviſo.

Return of the Writ.

The Inquiſition.

The Bankrupt found poſſeſſed.

Nulla alia bona, &c.

A Proclamation to claim.

An Inventory of the Goods ſeiſed by the Sheriffs.

directed, for One hundred and ſixty Pounds found by Inquiſition, as the Debt of one Richard Holder; which Writ is returnable
Appraiſment. before the Barons of his Majeſty's Exchequer at Weſtminſter, on the eighth Day of this inſtant May, and appraiſed the Fourth of this inſtant May, One thouſand ſix hundred eighty-ſix. Imprimis, Five Pipes of New Canary at One hundred and twenty Pounds: Item, Two Pipes of old Canary at thirty Pounds: Item, One Butt of new Sherry at twelve Pounds: Item, Three Hogsheads of Galliack at twenty-one Pounds. Et Jurator. præd. ulterius ſuper Sacr. ſuum præd' dicunt quod præd. quinq; Pipæ Vini (vocat. New Canary) & p̄d' duæ Pipæ Vini (vocat. Old Canary) & p̄d' un' dolium (Anglice, Butt) Vini (vocat. New Sherry) & p̄d. tria dolia (Anglice, Hogsheads) (voc̄ Galliack) ſunt parcell. Vinorum in Narr. præd. mentionat. Quodq; bona p̄d' in Inquiſic' præd' menc̄ Virtute cujuſdam brevis dict' Domini Regis de vendic̄on. ex-
The Money paid to the Party. ponas e Cur. Scaccarii præd. emanat. ſuper Extent. præd per Vic. Civitat. præd. vendit. & barganizat. fuer. pro Centum & ſexagint.
Petition to the Lord Chancellor for a Commiſſion of Bankruptcy. libr. & denar. ill. præd. Ricardo Holder ſolut. & deliberat per Vic. p̄d. prout p̄ breve præd. & retorn. inde in evidenc hic oſtens̄ conſtat & apparet. Et Jur. præd. ulterius ſuper Sacr. ſuum dicunt qd. ſup̄ quandam Petition. Dom. Magno Cancellar. Angl. exhibit. & Jur. p̄d. modo hic in evident. oſtens̄ quædam Commiſſio Bankrupc̄on. ſub Magno ſigillo Angl̄ poſtea ac antequam aliqua venditio
The Commiſſion ſued out. bonor. & catall. præd. vel alicujus inde parcell. fact. fuit vel aliqua levatio debit. Domini noſtri Regis ſup̄ p̄ceſſum Scaccarii p̄d. habit. fuit ſcilicet quinto die Maii anno ſecundo ſupradict. verſus ipſum Johannem Toplady obtent. & proſecut. fuit ad Sectam creditor. p̄d. Johannis Toplady debita Jur. forma & ſecundum formam & effect.
Commiſſioners named. Statutor. contra Decoctores (Anglice, Bankrupts) Antonio Upton Willielmo Hall Arm̄ Matthæo Petley Johanni Smith & Johanni Cole Gen̄ direct. p̄ quam quidem Commiſſion. dictus Dominus Rex nominavit aſſignavit & conſtituit ipſos Special. Commiſſionar. duos ſive quatuor vel tres eor. quorum prædict. Antonius Upton vel Willielmus Hall foret unus plen. & ſufficien. authoritat. facere & exequi omnia & ſingula de & concernen. præd. Johanne Toplady & creditoribus ſuis ſecundum formam & effectum Statut. prædict. vel eorum alicujus prout per Commiſſion. præd. plenius liquet & apparet. Et Jur. præd. ſuper Sacr. ſuum præd. ulterius dicunt qd̄ præd. Johannes Toplady præd. tempore quo ipſe ut præfertur devenit Decoctor ac poſtea fuit poſſeſſionat. de præd. Vinis bon. & catall. in Narr. præd. mentionat. ut de bon' ſuis propr. quodque p̄d. Willielmus Hall Matthæus Petley & Johannes Smith poſtea ſcilicet tertio die Junii anno ſecundo ſupradict. ut Commiſſionar. &
The Commiſſioners aſſign to the Plaintiffs. in proſecution. Commiſſion. præd. & Statut p̄d. per Indentur. ſuam Jur. præd. in evidenc. monſtrat. barginazaver. vendider. ordinaver. & aſſignaver. præd. Nicolao Lechmere & Sabian. Coles adtunc

duobus creditoribus præd' Johannis Toplady omnia & ſingula vina bona & catalla in Narr. præd' mentionat' habend' tenend' & recuperand' in fiducia pro uſu & beneficio proprio prædict' Nicolai & Sabian' Coles & tal' al' creditor' prædict' Johannis Toplady qual' adtunc præantea adveniſſent vel poſtea in debito tempore veniant ad quærend. relevium ſecundum formam & effectum Statut. præd' Virtute cujus ipſi præd' Nicolaus Lechmere & Sabian' Coles poſſeſſionat' fuerint prout lex poſtulat de vinis bon. & catall. in Narr. præd. mentionat. Sed utrum ſuper tota materia in forma præd. compert' videretur Cur. dicti Domini Regis coram ipſo nuper Rege quod præd' Benjamin Thomas Alicia & Georgius fuer. culpabil' aut eorum aliquis fuit culpabil' de tranſgr. infraſcript' modo & forma prout præd. Nicolaus & Sabian. interius inde verſus eoſdem Benjaminem Thomam Aliciam & Georgium querebantur Necne Jur' præd. dixer. quod penitus ignorabant & inde pet' adviſament. Cur. dicti Dom̃ Regis coram ipſo nup Rege & ſi ſup tota materia præd. per Jur. præd' in forma præd' compert' videretur Cur. dicti Domini Regis coram ipſo nuper Rege quod præd. Benjamin Tho. Alicia & Georgius fuer. culpabil' modo & forma put præd. Nicolaus & Sabian̄ interius inde verſus eoſdem Benjamin' Thomã Aliciã & Georgium querebantur tunc Jur. ill' dixer. ſuper Sacram̃ ſuum prædict. quod p̃d. Benjamin Thomas Alicia & Georgius fuer. culpabil' de tranſgr. præd. modo & forma prout præd. Nicolaus & Sabian' interius inde verſus eoſdem Benjaminem Thomam Aliciam & Georgium querebantur tunc aſſidebant dampnum ipſorum Nicolai & Sabian̄ occaſione inde ultra miſ & cuſtag ſua p̃ ipſos circa Sectam ſuam in hac parte appoſit. ad quadringent. & treſdecim libras. Et p̃ miſ & cuſtag ill' ad quinquagint tres ſolid & quatuor denar. Sed ſi ſuper tota materia præd. per Jur. præd. in forma præd' compert' videretur Cur' dicti Dom̃ Regis coram ipſo Rege quod præd. Benjamin Thomas Alicia & Georgius non fuer. culpabil' de Tranſgr. præd' tunc Jur. præd. dixer. ſuper Sacram̃ ſuum præd. quod præd. Benjamin Thomas Alicia & Georgius non fuer' culpabil' de Tranſgr' ill' modo & forma prout ipſi præd. Benjamin Thomas Alicia & Georgius interius pro ſe placitando allegaver. Sed quia Cur. dicti Domini Regis nunc hic de Judicio ſuo de & ſuper præmiſſ. reddend' nondum adviſatur dies inde dat. fuit partibus p̃d' coram Domino Rege apud Weſtm̃ uſque diem Veneris prox' poſt Craſtin. Sanct. Tinitat' de Judicio ſuo inde audiend' eo qd' Cur. dicti Domini Regis hic inde nondum, &c. ad quem diem coram Domino Rege apud Weſtm̃ ven̄ partes præd p̃ Attorn̄ ſuos præd. Sed quia Cur' dicti Domini Regis nunc hic de Judicio ſuo de & ſuper p̃miſſ. reddend. nondum adviſatur dies inde dat' fuit partibus præd' coram Domino Rege apud Weſtm̃ uſq; diem Lunæ prox' poſt tres Septiman̄ Sancti Michaelis de Judicio ſuo inde audiend' eo quod Cur. dicti Domini Regis nunc hic inde nondum, &c. Ad quem diem coram Domino Rege

The Aſſignees poſſeſs'd.

Et utrum ſuper tota materia the Defendants are guilty or no, the Jurors know not.

If the Court ſhall adjudge them guilty, they find for the Plaintiff,

If not, for the Defendants.

Continuances.

Further Continuances.

Further Continuance. Rege apud Weſtm̃ ven̄ partes præd. p̄ Attorn̄ ſuos præd' Sed quia Cur' dicti Domini Regis nunc hic de Judicio ſuo de & ſup̄ p̄miſſ. reddend. nondum adviſabatur dies inde dat̄ fuit partibus prædict' coram Domino Rege apud Weſtm' uſque diem Lunæ prox' poſt Octab̄ Sancti Hillar. de Judicio ſuo inde audiend' eo quod Cur. dicti Domini Regis nunc hic inde nondum, &c. Ad quem diem coram Dom' Rege apud Weſtm' ven̄ partes præd p̄ Attorn. ſuos p̄d' Sed quia Cur' dicti Dom' Regis nunc hic de Judicio ſuo de & ſuper præmiſſ. reddend. nondum adviſabatur dies inde dat̄ fuit partibus præd̄ coram Domino Rege apud Weſtm' uſq; diem Mercur' prox' poſt Quinden' Paſchæ de Judicio ſuo de & ſuper præmiſſ. audiend. eo quod Cur' dicti Domini Regis nunc hic inde nondum, &c. Ad quem diem coram Domino Rege apud Weſtm' ven' partes præd̄ p̄ Attorn' ſuos p̄d' Sed quia Cur̄ dicti Dom̄ Regis nunc hic de Judicio ſuo de & ſuper p̄miſſ. reddend' nondum adviſabatur dies inde dat' fuit partibus præd' coram Domino Rege apud Weſtm' uſque diem Veneris prox' poſt Craſtin. Sanctæ Trinitat' de Judicio ſuo inde audiend' eo qd̄ Cur' dict' Domini Regis nunc hic inde nondum, &c. Ad quem diem coram Domino Rege apud Weſtm' ven' partes præd̄ p̄ Attorn' ſuos præd' Sed quia Cur' dicti Domini Regis nunc hic de Judicio ſuo de & ſuper præmiſſ. reddend' nondum adviſabatur dies inde dat' fuit partibus præd. coram Dom' Rege apud Weſtm' uſq; diem Martis prox' poſt tres Septiman' Sancti Mich' de Judicio ſuo inde audiend' eo quod Cur' dicti Domini Regis nunc hic inde nondum, &c. Ad quem diem coram Dom̄ Rege apud Weſtm' ven' partes præd' per Attorn' ſuos præd' Sed quia Cur. dicti Domini Regis nunc hic de Judicio ſuo de & ſuper præmiſſ. reddend' nondum adviſabatur dies inde dat̄ fuit partibus præd. coram Domino Rege apud Weſtm' uſque diem Mercur. prox' poſt Octab̄ Sancti Hillar' de Judicio ſuo inde audiend' eo qd' Cur' dicti Dom' Regis nunc hic inde nondum, &c. Poſtea ſcilicet a die Paſchæ in quindecim dies extunc prox' ſequen̄ uſq quem diem Record' & Proceſſ. præd. (antea remanen' ſine die) Virtute cujuſdam Actus Parliam' confect' apud Weſtm' decimo tertio die Februar. anno regni Domini Willielmi & Dom' Mariæ nunc Regis & Regin' Angl', &c. primo revivificat' continuat̄ & ordinat̄ fuer̄ coram eiſdem Domino Rege & Domina Regin̄ apud Weſtm̃ ven̄ partes præd' p̄ Attorn̄ ſuos præd' Sed quia Cur. dict' Domini Regis & Dominæ Regin' nunc hic de Judicio ſuo de & ſuper præmiſſ. reddend' nondum adviſabatur dies inde dat̄ fuit partibus præd. coram Domino Rege & Domina Regin̄ apud Weſtm' uſque diem Veneris prox' poſt Craſtin' Sanctæ Trinitatis de Judicio ſuo inde audiend' eo quod Cur' dict' Domini Regis & Dom' Regin' nunc hic inde nondum, &c. Ad quem diem coram Domino Rege & Domina Regin' apud Weſtm' ven̄ partes præd. per Attorn' ſuos præd. Super quo Vis̄ & per Cur' dicti Dom' Regis

Further Continuance.

Further Continuance.

Further Continuance.

Further Continuance.

The Loquela remaining ſine die was revived and continued by Act of Parliament.

Further Continuance.

Judgment for the Defendants.

& Dominæ Regin' nunc ibidem plenius intellectis omnibus & ſingulis p̃miſſ. maturaq; deliberacon' inde habita videbatur Cur' dict' Domini Regis & Dom' Regin' nunc ibidem quod præd. Benjamin Thomas Alicia & Georgius non fuer' culpabil' de Tranſgr' præd' modo & forma' prout præd. Benjamin Thomas Alicia & Georgius pro ſe placitando allegaver. Ideo conſ fuit quod præd. Nicolaus & Sabian' nil' caperent per billam ſuam præd' Sed quod ipſi p̃ falſo clamore ſuo forent inde in miſericordia, &c. Et præd' Benjamin Thomas Alicia & Georgius irent inde ſine die, &c. Et ulterius conſ. fuit quod præd. Benjamin Thomas Alicia & Georgius recuperarent verſus præd. Nicolaum & Sabian' ſeptemdecim libr' pro miſ. & cuſtag. ſuis per ipſos circa defencon. ſuam in hac parte ſuſtent' eiſdem Benjamini Thomæ Aliciæ & Georgio juxta formam Statut' p̃ Cur' dict' Domini Regis & Dominæ Regin' nunc ibidem ex aſſenſu ſuo adjudicat' Et quod præd. Benjamin Thomas Alicia & Georgius haberent inde Execution', &c. prout per Record' & Proceſſ. inde in Cur' dict' Dom' Regis & Dominæ Regin' nunc coram ipſis Rege & Regin' apud Weſtm' præd. reſidend' plenius apparet quod quidem record' in pleno robore & vigore ſuis adhuc remanet minime reverſat' ſeu annihilat'. Et iidem Benjamin Thomas Alicia & Georgius ulterius dicunt quod bon' & catall' in billa & record' prædict' per ipſos Nicolaum & Sabian' verſus præd Benjaminem Thomam Aliciam & Georgium in Cur' dicti Domini nuper Regis coram ipſo nuper Rege ut præfertur exhibit' in accon' Tranſgr' præd' mencionat. Et præd. bon' & catall' ſuperius hic recitat' & mencionat' ad manus præd. Benjamiñ Thomæ Aliciæ & Georgii & converſio in Narr' prædict. Nicolai & Sabiañ hic mentionat' unde verſus eos inde narraver' ſunt uñ & eadem non alia neque diverſa quodq; diſpoſitio boñ & catall' in accoñ Tranſgr' prædict' mentionat' & conceſſio præd' boñ & catall' præd' hic ſuperius recitat' ſunt uñ & eadem captio aſportatio adventio diſpoſitio & converſio & non alia neq; diverſa cauſa accon. Unde ipſi præd. Nicolaus & Sabiañ verſus ipſos Benjaminem Thomam Aliciam & Georgium quoad præd. parcell' boñ & catall' hic ſuperius mencionat' modo narraver. Et cauſa accoñ unde ipſi præd. Nicolaus & Sabiañ in Narr' ſua in accoñ Tranſgr. præd' ſuperius recitat' narraver. eſt uñ & eadem & non alia neque diverſa quodq; Nicolaus & Sabian. quer. in actioñ Tranſgr' in billa & record' præd' nominat' & præd. Nicolaus & Sobiañ modo quer. fuit un. & eædem perſonæ & non aliæ neque diverſæ quodque præd Benjamin Thomas Alicia & Georgius quatuor defend' in accoñ Tranſgr. præd. mencionat' & p̃d Benjamin Thomas Alicia & Georgius modo defend' ſunt uñ & eædem perſoñ & non aliæ neque diverſæ. Et hoc parat' ſunt verificare unde petunt Judicium ſi præd' Nicolaus & Sabiañ action. ſuam p̃d. verſus eos habere ſeu manutenere debeant, &c. Et quoad reſid' Tranſgr. convertion. & diſpoſition. reſid. bon. catall. & pecun. in

Qui nil Cap' per Billam.

Sine die.

Execution adjudged.

Averment, that the Judgment is in Force.

Averment, that the Goods in the Action of Treſpaſs, and in this of Trover, are the ſame.

Averment as to the Converſion.

That the Cauſe of Action was the ſame in both.

Averment, that the Plaintiffs and Defendants are the ſame.

The Concluſion of the firſt Plea.

Narr.

Not guilty to the Reſidue of the Goods.

Narr. prædict. ſuperius mentionat. iidem Alicia Thomas Benjamin & Georgius dicunt quod ipſi non ſunt inde culpabil. Et de hoc pon' ſe ſuper Patriam Et præd. Nicolaus & Sabian. ſimiliter, &c.

Creſwell Levinz.

Demurrer.

Et præd. Nicolaus & Sabian. dicunt quod ipſi per aliqua per præd' Aliciam Benjaminem Thomam & Georgium modo & forma ſuperius placitand. allegat' ab action' ſua p̄d̄ inde verſus eos habend̄ præcludi non debent quia dicunt quod placitum præd' per ipſos Aliciam Benjaminem Thomam & Georgium modo & forma præd. ſuperius placitat' materiaque in eodem content' minus ſufficien. in lege exiſt. ad ipſos Nic. & Sabian' ab actione ſua præd' inde verſos ipſos Aliciam Benjaminem Thomam & Georgium habend' p̄cludend̄ ad quod quidem placitum ipſorum Aliciæ Benjaminis Thomæ & Georgii iidem Nicolaus & Sabian. neceſſe non habent nec p̄ legem terræ tenentur reſpondere & hoc parat' ſunt verificare Unde pro defect' ſufficien. reſponſ. ipſorum Aliciæ Benjaminis Thomæ & Georgii in hac parte iidem Nicolaus & Sabian' petunt Judicium & dampna ſua occone convertion' & diſpoſition. & catall. ill. ſibi adjudicari, &c.

Joinder in Demurrer.

Et præd̄ Alicia Benjamin Thomas & Georgius dicunt quod placitum præd̄ ipſorum Aliciæ Benjaminis Thomæ & Georgii modo & forma præd̄ ſuperius placitat' materiaque in eodem content' bon. & ſufficien. in lege exiſt. ad ipſos Nicolaum & Sabian. ab action. ſua præd' verſus ipſos Aliciam Benjaminem Thomam & Georgium habend̄ p̄cludend. quod quidem placitum materiamq; in eodem content. ipſi iidem Alicia Benjamin Thomas & Georgius parat. ſunt verificare Et quia præd' Nicolaus & Sabian. ad placitum ill. non reſpond. nec ill. hucuſq; aliqualit' dedic. ſed verification. ill. admittere omnino recuſant iidem Alicia Benjamin Thomas & Georgius (ut prius) petunt Judicium Et quod præd. Nicolaus & Sabian. ab action. ſua præd. inde verſus eos habend. p̄cludentur, &c. Et quia Juſtic' hic ſe adviſare volunt de & ſup p̄miſſ. priuſquam Judicium inde reddant dies inde dat' eſt tam præd. Nicolao & Sabian. quam præd. Aliciæ Benjamini Thomæ & Georgio hic uſque in Octab. Sancti Hillar. de audiend. inde Judicio ſuo eo quod iidem Juſtic. hic inde nondum, &c.

Lechmere *verſus* Toplady.

IN an Action of Trover by Lechmere and others againſt Alice Toplady, Sir Benjamin Thorowgood and others, where the Plaintiffs declared, That they were poſſeſſed de ducent' viginti & quinque libris legalis monet Angl in pecuniis numerat, and of ten Pipes and fifty Gallons of Canary, and of divers other Things in the Declaration mentioned, which they loſt, and which came afterwards to the Poſſeſſion of the Defendants, and they converted them to their own Uſe. 1 Show. 146. Raym. 172. 2 Mod. 318, 519. 3 Mod. 1, 2. 1 Danv. 724, 725. Vide infra.

The Defendants, as to divers of the Goods in the Declaration mentioned (which they particularly recite in their Plea) plead in Bar, That in Michaelmas-Term, in the ſecond Year of the late King James the Second, the ſaid Plaintiff commenced an Action againſt the now Defendants in the King's Bench, de placito Tranſgr. ſuper caſum; where they declared, That the Defendants Vi & Armis took the ſaid Goods and Chattels in the Declaration now mentioned and pleaded to, apud London, &c. ceperunt & aſportaverunt. To which the Defendants pleaded Not guilty, and went to Trial upon that Iſſue. Upon which the Jury found a Special Verdict, which the Defendants ſet forth in their Plea verbatim, together with the whole Record, in the King's Bench; and that upon that Special Verdict the Court gave Judgment, that the Plaintiffs nil capiant p billam, and that the Defendants irent inde ſine die put p Recordum & Proceſſ. inde in Cur. dicti Domini Regis & Dominæ Reginæ nunc coram ipſis Rege & Regina apud Weſtm reſiden plen apparet quod quidem Recordum in plenis robore & vigore ſuis adhuc remanent minime reverſat ſeu annihilat; and avers, that the Goods and Chattels in both Declarations were the ſame, and the Taking, Carrying away and Diſpoſing of the ſaid Goods in the ſaid Action of Treſpaſs, and the coming of the ſaid Goods to the Hands of the Defendants, and the Diſpoſition and Converſion thereof in this Declaration mentioned, are the ſame, and the Cauſe of Action the ſame, &c. and as to the Reſidue of the Goods and Chattels in the now Declaration mentioned, the Defendants plead Not guilty, and Iſſue thereupon, and to the Bar pleaded, the Plaintiffs demurred.

It was argued by Serjeant Tremayne againſt the Bar, That the Actions were of a different Nature, and that in many Caſes Trover would lie where Treſpaſs Vi & armis would not. 1 Cro. 667. Ferrars and Arden: Where 'tis ſaid, If one deliver Goods to another to keep, and brings Treſpaſs and is barred, he may after bring Detinue, becauſe he miſtook his Action. Vide 6 Co. 7. And he relied upon the Caſe of Putt and Royſton, Paſch. 34 Car. 2. Raym. 472. 2 Mod. 318. 3 Mod. 1. Pollexf. 634. 3 Lev. 124, B. R. 179.

B. R. Rot. 422. where, in an Action of Treſpaſs upon a Not guilty, Verdict was for the Defendant and Judgment; and there the Plaintiff brought Action of Trover for the ſame Matter, and the former Judgment was pleaded in Bar, and upon a Demurrer it was adjudged for the Plaintiff.

Serjeant Pemberton contra. 'Tis taken for a Rule in Sparry's Caſe, 5 Co. 61. Nemo bis vexari debet ſi conſtet Cur. quod ſit p una & eadem cauſa. He agreed, that Trover would lie in many Caſes where Treſpaſs would not; but here it appears to the Court, by the Matter diſcloſed in the Pleading, (the Special Verdict and whole Record being ſet forth) that the Plaintiff was barred before, not for having miſtaken his Action, but upon the Rights and Merits of the Cauſe, and this (he ſaid) differed this Caſe from that of Putt and Royſton; (Note, That Caſe was adjudged when Sir Francis Pemberton was Chief Juſtice of the King's Bench) for there the Verdict being upon the General Iſſue in Treſpaſs, it could not appear upon the Record, but that the Verdict was againſt the Plaintiff upon the Miſtake of the Action; whereas here it appears upon the Matter at large ſet forth in the Special Verdict, that Judgment was given againſt the Plaintiffs upon the Merits of the Cauſe.

And the Court were of Opinion, That the Plea in Bar was good in this Caſe; but they took the Caſe of Putt and Royſton to be a Caſe of the ſame Nature. For tho' the Iſſue were General, yet in regard of the Averments which in every ſuch Plea there muſt be, it appears to the Court that the Matter was the ſame, as well as here it doth upon the Special Verdict; and if it were not the ſame, ſo that the Plaintiff was barred to the former by miſtaking the Nature of his Action, the Averment might be traverſed: Therefore by Reaſon of that Caſe adjudged, and the Importunity of the Plaintiffs, Leave was given by the Court to ſpeak further to the Caſe the next Term.

The Earl of Mountague *verſus* The Lord Preſton.

IN an Action on the Caſe, for the Profits of the Office of Maſter of the King's Wardrobe, the Plaintiff declared, That King Charles the Second, in the 23d Year of his Reign, granted him a Patent to hold the ſaid Office for Life, reciting a former Grant thereof to the Earl of Sandwich, and the Surrender of that Grant. And that the Defendant by Colour of a Patent granted to him in the firſt Year of the late King James had entered upon the Office, and taken the Profits, and had deprived the Plaintiff of the whole Benefit and Profit of the Office.

Upon Not guilty pleaded, it came to a Trial at the Bar this Term, and it was inſiſted upon for the Defendant, That the Plaintiff's Patent having recited a former Grant, that they muſt prove that Grant to have been ſurrendred.

To which it was anſwered, That if they took Advantage of the Recital, they muſt admit all that was recited, as well the Surrender as the Grant. And of that Opinion was the Court.

Then the Defendant produced the Earl of Sandwich's Patent; and this the Court held would put the Plaintiff to prove a Surrender: And a Surrender was ſhewn in Evidence accordingly.

Note, It was ſaid in an Action of this Nature, that it is not neceſſary to ſhew every particular Sum received by the Defendant: But it is a good Evidence for the Damage to ſhew the Profit of the Office communibus annis.

Anonymus.

After an Extent upon a Statute, and a Liberate out of this Court, the Writ was Habere fac terr' & tenementa, inſtead of Liberari facias; and it was moved to amend the Word Habere in the Writ, and to make it Liberari. Antea 46, 49, 130, 152. Poſtea 173. 3 Salk. 30.

And after divers Motions the Court ordered the Amendment to be accordingly; becauſe it is a judicial Writ. 8 Co. 157. a. 1 Cro. 709. A Writ of Enquiry was awarded to the Sheriffs of London, and it was quod Inquirat inſtead of Inquirant, and it was amended. Vide the Caſe of Walker and Riches. 3 Cro. 162. and the Caſe of Keer and Guyn, Hob. 90. but in that Caſe the Roll was wrong in a very material Thing; for it was not ſaid in the Elegit, the Lands and Tenements of the Defendant.

Anonymus.

An Action of Debt was brought in this Court, for a Sum of Money recovered in the Hundred-Court; and the Defendant was admitted to wage his Law, tho' at firſt the Court doubted. Vide Mo. 276. for a Wager of Law to an Action of Debt, brought for an Amercement in a Court-Baron. 2 Mod. 140. 2 Salk. 684.

Note, When the Defendant hath his Hand upon the Book, before he is ſworn, the Plaintiff is to be called, and he may be nonſuited. 2 Salk. 682.

The Defendant is to bring his Compurgators; but they may be leſs than eleven, and they are ſworn de credulitate. Co. Lit. 295. contra.

Anonymus.

Cro. El. 834. 1 Roll. Ab. 42, 73. cont. 1 Danv. 143. pl. 17. 3 Salk. 326.

AN Action was brought for Speaking of theſe Words of the Plaintiff, He broke my Houſe, like a Thief. And upon Not guilty pleaded, A Verdict was found for the Plaintiff.

And the Court held the Words not to be actionable.

Anonymus.

3 Lev. 166. 2 Jones 235. 3 Salk. 325.

IN an Action for Words ſpoken of the Plaintiff in ſaying, He was a Clipper and Coiner.

After Verdict, upon Not guilty pleaded, it was moved in Arreſt of Judgment, that the Words did not charge him with Clipping and Coining of Money; and Clipping and Coining might be applied to many other Things.

But the Court held the Words to be actionable in regard of the ſtrong Intendment; and ſuch Words are underſtood, by thoſe that hear them, to mean Clipping and Coining of Money.

Anonymus.

Cro. Jac. 586. 1 Danv. 111. pl. 3, 4, 5. 3 Salk. 328.

AN Attorney brought an Action, for that the Defendant ſaid of him, He is a Cheating Knave, and not fit to be an Attorney.

After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That there was no Communication of his Profeſſion, and the Words did not neceſſarily relate to his Practice.

But the Court held the Action would lie; for ſaying, That he was not fit to be an Attorney, ſhewed plainly, that Cheating Knave had Reference to that.

Anonymus.

UPon a Motion for a new Trial it appeared, that the Solicitor for the Plaintiff (who alſo was an Attorney) had wrote two Letters to two of the Jury before the Trial, importuning them to appear, and ſetting forth the Hardſhips that his Client had ſuffered in the Cauſe, and how he had Verdicts for his Title. 6 Mod. 18, 22, 307. 1 Salk. 273, 359. 2 Salk. 644, to 648, 650.

The Court ſet aſide the Trial for this Cauſe, and committed the Solicitor to the Fleet for this Misdemeanor, being Embracing of a Jury; and before his Diſcharge, made him pay ten Pounds to the Party towards the Charges of the Trial.

Pretious *verſus* Robinſon.

THE Cauſe being at Iſſue in Hillary-Term laſt, a Venire was awarded, and a Jury returned upon it; and in Eaſter-Term after another Venire was awarded, and a Trial was by a Jury returned upon the two Venires. Inſt. Leg. 33, 35.

Upon this the Court ſet aſide the Verdict; for there was no Authority for the two Venires, ſo all the Proceedings thereupon are void, and not aided by the Statute of 16 Car. 2.

Cooke *verſus* Romney.

AN Action of Covenant was brought againſt Two, and it was quod teneat conventionem inſtead of teneant; and after a Writ of Error brought it was moved, that it might be amended and made teneant. Antea 46, 49, 130, 152, 171.

It was objected, That falſe Latin in an Original could not be amended, as hos breve for hoc breve; ſo in Waſte, deſtrictionem for deſtructionem, Blackmore's Caſe, 8 Co. 159. 3 Salk. 30.

But the Court granted the Motion, and ordered the Amendment. And it was ſaid, Of late Days it had been done in Caſe of a Word miſtaken in an Original, as in Ejectment, diviſit for dimiſit. Vide in Blackmore's Caſe the like, 159. b. Imaginavit for imaginatus eſt was amended.

Anonymus.

Anonymus.

IN Trover and Converſion for a Mare.

Upon Not guilty pleaded, and a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Mare was laid ad valentiam, and it ſhould have been pretii.

1 Sid. 39. Cro. Jac. 130, 654. Sed non allocatur. After Verdict (2 Cro. 307. Style 174, 182. 2.) the Plaintiff declares, that he was poſſeſſed de quadam equa ut de catallis ſuis propriis, and that catalla prædict. caſualiter perdidit, and that coming to the Defendant's Hands, he converted catalla prædict' to his own Uſe, ſo that there is no expreſs Converſion of the Mare.

The Court ſaid, That the Declaration was inartificial, but good after a Verdict; for catalla prædict. muſt refer to the Mare, for nothing elſe is mentioned before.

Tunſtall *verſus* Brend.

IN an Ejectment, upon Not guilty a Special Verdict was found, upon which there aroſe ſeveral Points of Law; but it was moved for the Defendant, that the Declaration was of Michaelmas-Term, 2 Jac. 2. and the Demiſe is laid to be 30 Octob. 2 Jac. and ſo after that Term began.

Note, The Declaration recited an Original, and an Original was produced Teſte 2 Novembris, which was after the Demiſe. And the Prothonotary informed the Court, that this was frequently allowed, and that no Memorandum of the Originals, bearing Teſte within the Term, was uſed to be made upon the Record.

Highway *verſus* Darby.

Antea 73. IN an Action of Treſpaſs, Quare clauſum fregit, & ſolum, & fundum, (viz.) duas acras terr. fod' ſubvert & aſportavit.

Upon Not guilty pleaded, and Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Declaration was inſufficient as to the Digging and Carrying away of the Soil; for duas acras terr' doth not expreſs the Quantity of Earth, but the Meaſure and Extent of the Ground where the Digging was.

And for this Cauſe the Judgment was ſtayed, by the Opinion of the whole Court.

Note, If the Sheriff return a Reſcous, it is not traverſable; but an Attachment goes againſt the Reſcoulers, and a Fine uſually ſet. Tho' it appears by Dyer, ſuch Return was allowed to be traverſed in C. B. but not practiſed of late. 2 Jones 39.

Termino Sanctæ Trinitatis, Anno 2 Will. & Mar.

In Communi Banco.

Sherbon *verſus* Colebach.

IN an Indebitat' Aſſumpſit, for 20 l. loſt by the Defendant, to the Plaintiff at a certain Play, called Hazard. 3 Lev. 188, 261. 1 Danv. 28.

Upon Non Aſſumpſit, after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that to play at Dice is an unlawful Game, and ſo the Conſideration is inſufficient. 1 Show. 35. 3 Mod. 239. 5 Mod. 13. 3 Salk. 175.

But to that the Court ſaid, That they could not intend that this was Play at Dice, tho' there is a Play called Hazard at Dice, known amongſt Gameſters; neither is Play at Dice in it ſelf unlawful, tho' prohibited by ſeveral Statutes to certain Perſons, and to be uſed in certain Places.

Then it was moved, That the Declaration was too general; for tho' there have been divers Actions maintained for Money won at Play, yet they uſe to declare, that in Conſideration the Plaintiff promiſed, That if the Game went on the Defendant's Side, he would pay ſo much to the Defendant; the Defendant promiſed, That if it went on the Plaintiff's Side, to pay ſo much to him.

But the Court ſaid, That of late it had been the Uſage to declare generally, and it might be as well as an Indebitatus pro opere & labore. And Judgment was given for the Plaintiff. Qu. If this Judgment was not revers'd. Adjudg'd, *Indebitatus Aſſumpſit* don't lie for Money won at Play. 1 Lutw. 180. 3 Lev. 118. Eggleton and Lewin. Sed vide 5 Mod. 13, 14. Walker and Walker.

Note, Juſtice Powell cited in the Caſe ſupra the Lord North's Caſe, 2 Leon. 179. where Queen Elizabeth had granted the Fines to him and his Heirs, pro licentia concordandi, within a certain Place; and he brought an Indebitat' Aſſumpſit for ſuch Fine, and it was held, that it would lie.

And alſo a Caſe adjudged in the King's Bench the laſt Term, that an Indebitat' Aſſumpſit would lie for a Dropping Fine, in one Shuttleworth's Caſe.

Pyne

Pyne *verſus* Woolland.

Debt for Rent againſt an Executor, upon a Leaſe parol.

Civit' Exon' THomaſina Woolland nuper de Civitat' Exon' in Com' Civitat' Exon' Vid' Executrix teſtament' Iſaaci Woolland ſum' fuit ad reſpondend' Mariæ Pyne Vid' de placito quod reddat ei octoginta & ſex libras duos ſolid' un' denar' & un' obolum quos ei injuſte detinet, &c. Et unde eadem Maria p Nathanielem Salter Attorn' ſuum dic' qd' cum prædicta Maria decimo die Maii anno Domini milleſimo ſexcenteſimo octogeſimo tertio apud Civitat' Exon' præd' in Com' ejuſdem Civitat' dimiſiſſet præfat' Iſaaco in vita ſua quartam partem duorum molendinorum granaticorum & unius molendini braſiatorii (ſub uno tecto Angl' Roof) vocat' ſive cognit' per nomen de Cuckingſtool Mills ſituat' jacen' & exiſten' in Exland in Paroch' Sancti Edmundi in Com' Civit' Exon' prædict' ac quartam partem domus molendin' ſive tenementi cum pertin' adinde prox' jacen' ex boreali latere eorundem necnon quartam partem medietatis paſturæ unius parcell' terræ pone dicta molendina not' ſive cognit' per nomen de Bonhay eiſdem molendinis pertin' ſive pertinen' habend' & occupand' eidem Iſaaco à primo die ejuſdem menſis Maii uſq; finem & terminum unius anni integri extunc prox' ſequen' & plenar' complend' & finiend' & ſic de anno in annum quamdiu ambabus partibus placeret reddend' & ſolvend' p̄inde eidem Mariæ ad finem cujuſlibet menſis (ſecundum computacon' viginti & octo dierum pro quolibet menſe) quo idem Iſaacus eadem dimiſſa præmiſſa teneret reddit' ſexaginta ſolidor' quatuor denar' & unius oboli legalis monet' Angliæ Virtute cujus dimiſſionis idem Iſaacus in quartas partes prædictas intravit & fuit inde poſſeſſionat' ac eaſdem quartas partes uſq; nonum diem Septembr' anno Domini milleſimo ſexcenteſimo octogeſimo nono habuit & occupavit ac quinquaginta ſeptem libr. ſeptem ſolid' un' denar' & un' obol' (de prædictis octoginta ſex libris duobus ſolid' un' denar' & un' obol' parcell') ſuper eodem nono die Septembris Anno Domini milleſimo ſexcenteſimo octogeſimo nono ſupradicto p reddit' dimiſſorum præmiſſorum pro novemdecim menſibus ſecundum computacon' prædict' adtunc finit' eidem Mariæ aretro fuer. & non ſolut' per quod acco accrevit eidem Mariæ exigend' & habend' de præfat' Iſaaco in vita ſua & de prædict' Thomaſina poſt ipſius Iſaaci mortem prædictos quinquaginta ſeptem libras ſeptem ſolid' un' denar' & un' obol' (de prædictis octoginta ſex libris duobus ſolidis un' denar' & un' obol' parcell') Ac etiam cum præd. Maria eodem decimo die Maii anno Domini milleſimo ſexcenteſimo octogeſimo tertio apud Civit' Exon' præd. in Com' ejuſdem Civit' dimiſiſſet eidem Iſaaco quartam partem duorum molendinorum Fullonicorum cum pertin' in Paroch' Sancti Edmundi prædict' habend' &

Demiſe to the Teſtator.

Quarta pars molendini, &c.

Habend'.

Pro uno anno, Et ſic de anno in annum.

The Rent payable monthly.

Rent unpaid. Actio accrevit.

Another Demiſe at Will laid, De quarta parte molendini Fullonici. Habend'.

occupand' eidem Iſaaco a primo die ejuſdem Maii uſque finem & terminu' unius anni integri & ſic de anno in annu' quamdiu ambabus partibus placeret Reddend' & ſolvend' eidem Mariæ pro prædicta quarta parte duorum molendin' Fullonicoru' ill' cum pertin' durante tempore quo idem Iſaacus eandem quarta' partem haberet & teneret annual' reddit. viginti libraru' ad quatuor maxime uſual' Feſta ſcilicet ad Feſta Sancti Michaelis Arch'i Nativitat. Domini noſtri Dei Annunciationis beatæ Mariæ Virginis & Nativitatis Sancti Johannis Baptiſtæ p æquales porc'ones ſolvend' Virtute cujus dimiſſionis idem Iſaacus in eandem quartam partem ult' menc'onat' intravit & fuit inde poſſeſſionat' ac eandem quartam partem uſque nonu' diem Septembr. Anno Domini milleſimo ſexcenteſimo nono habuit & occupavit ac viginti & quinque libræ (de p'd' octoginta ſex libris duobus ſolid' un. denar & un. obolo al' parcell') pro reddit' prædict' quartæ partis ult. menc'onat' pro uno anno integro & un. quarter. unius anni finit. ad Feſtum Nativitatis Sancti Johannis Baptiſtæ Anno Domini milleſimo ſexcenteſimo octogeſimo nono eidem Mariæ aretro fuer' & non ſolut. per quod acc'o accrevit eidem Mariæ ad exigend. & habend. de præfat. Iſaaco in vita ſua & de p'fat' Thomaſina poſt ipſius Iſaaci mortem prædictas viginti & quinque libras (de prædictis octoginta ſex libris duobus ſolid. un' denar. & un obol. al. parcell') Ac etiam cum prædict' Maria eodem decimo die Maii Anno Domini milleſimo ſexcenteſimo octogeſimo tertio apud Civit. Exon. prædict. in Com. ejuſdem Civit. dimiſiſſet eidem Iſaaco quarta' partem unius Stabuli & novæ Structuræ ſuper veteri Stabulo in paroch Sancti Edmundi præd. Habend. & occupand. eidem Iſaaco a primo die ejuſdem Maii uſq; finem & terminu' unius anni integri extunc prox. ſequen' & ſic deanno in annum quamdiu ambabus partibus placeret reddend' & ſolvend' proinde eidem Mariæ duran' tempore quo idem Iſaacus eandem quarta. partem haberet & teneret annual. reddit. quinquaginta ſolidorum ad quatuor maxime uſual' Feſta ſcilicet ad Feſta Sancti Michaelis Archi Nativitatis Domini noſtri Dei Annunciac'onis Beatæ Mariæ Virginis & Nativitatis Sancti Johannis Baptiſtæ per æquales porc'ones ſolvend' Virtute cujus dimiſſionis idem Iſaacus in eandem quarta' partem ult' menc'onat intravit & fuit inde poſſeſſionat' ac eandem quartam partem uſq; nonum diem Septembris Anno Dom' milleſimo ſexcenteſimo octogeſimo nono habuit & occupavit ac ſexaginta duo ſolidi & ſex denar. de prædict' octoginta ſex libris duobus ſolidis un' denar. & un. obol' al. parcell') pro reddit. prædict. quarte partis ult. menc'onat. pro uno anno integro & uno quarter. unius anni finit. ad Feſtum Nativitatis Sancti Johannis Baptiſtæ Anno Domini milleſimo ſexcenteſimo octogeſimo nono eidem Mariæ aretro fuer' & non ſolut' per qd. acc'o accrevit eidem Mariæ ad exigend' & habend' de p'fat. Iſaaco in vita ſua & de præfat Thomaſina poſt ipſius Iſaaci mortem prædict. ſexaginta duos ſolid' & ſex denar. (de præd' octoginta ſex libris duobus ſolidis un. denar. & un. obol.

De anno in annum.

Entry.

Rent arrear.

Actio accrevit.

Another Demiſe at Will.

Habend.

Pro uno anno, &c.

Reddend.

Entry and Poſſeſſion.

Rent arrear.

Actio accrevit.

Another Demiſe at Will laid.

Of a Treble Mill.

Pro uno anno, &c. Reddend.

Ad quatuor Feſta.

Entry and Poſſeſſion.

Rent arrear.

Actio accrevit.

Teſtator in vita, nor the Executrix poſt mortem, have not paid.

The Defendant pleads in Abatement, that the Party died Inteſtate, and that Adminiſtration was granted to her.

Died inteſtate.

Letters of Adminiſtration granted.

The Defendant ought to be ſuch as Adminiſtratrix, and not as Executrix.

al' parcell' Ac etiam cum præd' Maria decimo die Maii Anno Dom' milleſimo ſexcenteſimo octogeſimo tertio apud Civit'Exon' præd' in Com' ejuſdem Civit' dimiſiſſet eidem Iſaaco quartam partem cujuſdam al' molendini (vocat. a Treble Mill) in Paroch. Sancti Edmundi p'd. habend' & occupand' eidem Iſaaco a primo die ejuſdem Maii uſque finem & termin' unius anni integri extunc prox' ſequen' & ſic de anno in ann' quamdiu ambabus partibus placeret reddend' & ſolvend' eidem Mariæ pro eadem quarta parte ult' menc'onat' duran. tempore quo idem Iſaacus eandem quartam partem haberet & teneret annual' reddit' decem ſolidorum ad quatuor maxime uſual' Feſta ſcilicet ad Feſta Sancti Michaelis Arch'i Nativitatis Domini noſtri Dei Annunciationis Beatæ Mariæ Virginis & Nativitatis Sancti Johannis Baptiſtæ per æquales porc'ones ſolvend' Virtute cujus dimiſſionis idem Iſaacus in quartam partem ill' intravit & fuit inde poſſeſſionat' ac eandem quartam partem uſque nonu' diem Septembris Anno Domini milleſimo ſexcenteſimo octogeſimo nono habuit & occupavit ac duodeci' ſolid' & ſex denar' (de prædict' octoginta ſex libris duobus ſolid' un' denar' & un' obol' reſid') pro reddit' p'd. quartæ partis ult' menc'onat' pro uno anno integro & uno quaterio unius anni finit' ad Feſtum Nativitatis Sancti Johannis Baptiſtæ Anno Domini milleſimo ſexcenteſimo octogeſimo nono eidem Mariæ aretro fuer' & non ſolut' per quod acc'o accrevit eidem Mariæ ad exigend' & habend' de præfat' Iſaaco in vita ſua ac de præfat' Thomaſina poſt mortem ejuſdem Iſaaci præd. duodecim ſolid. & ſex denar' (de p'd' octoginta ſex libris duobus ſolid' un' denar. & un' obol' reſid') p'd. tamen Iſaacus in vita ſua ac præd. Thomaſina poſt mortem ejus licet ſæpius requiſit. præd. octoginta ſex libras duos ſolidos un. denar. & un. obol. ſeu aliquem inde denar. eidem Mariæ nondum reddider. nec eorum alt. reddidit ſed ill' ei reddere omnino contradixer. ac prædicta Thomaſina ill' ei reddere adhuc contradic. & injuſte detinet Unde dic. quod deteriorat. eſt & dampnum habet ad valentiam quadraginta librarum. Et inde produc. ſectam, &c.

Et prædicta Thomaſina per Thomam Clarke Attorn' ſuum ven. & dic. quod præd. Iſaacus Woolland apud Civit. Exon. p'd. obiit inteſtat. poſt cujus mortem Edvardus Lake Clericus Sacræ Theologiæ Profeſſor Archidiac' Exon. legitime conſtitut. apud Civit. Exon. præd. per Literas ſuas Adminiſtratorias commiſit eidem Thomaſinæ Adminiſtrac'onem omnium bonorum & catallorum quæ fuer. prædict' Iſaaci tempore mort' ſuæ qui quidem' Edvardus adtunc habuit plena' Authoritatem ad Adminiſtrac'onem illam in ea parte committend. in quo caſu p'd. Maria ipſam Thomaſinam Adminiſtratricem bonorum & catallorum quæ fuer. præd. Iſaaci & non Executricem Teſtamenti ipſius Iſaaci in brevi ſuo præd. nominare debuit & hoc parat. eſt verificare Unde pet. Judic. de brevi illo. Et qd. breve illud caſſetur.

Et prædicta Maria dic' qd' breve ſuum præd' ratione præallegat' caſſari non debet. Quia dic. quod poſt mortem p̃fat Iſaaci & ante commiſſionem Adminiſtrationis præd' eidem Thomaſinæ in forma prædicta ſcilicet decimo octavo die Septembris anno regni Domini Regis & Dominæ Reginæ nunc primo præfat' Thomaſina diverſa bona & catalla quæ fuer' præfat' Iſaaci tempore mortis ſuæ ut Executrix teſtamenti ipſius Iſaaci adminiſtravit videl't apud paroch Sancti Edmundi præd' Et hoc parat' eſt verificare Unde pet' Judicium & debitum ſuum præd' unacum dampnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c.

The Plaintiff Replies, that the Defendant adminiſtred as Executrix before the granting of the Adminiſtration to her.

Et prædicta Thomaſina dic' quod p̃d' placitum p̃d' Mariæ ſuperius replicando placitat' materiaque in eodem content' minus ſufficien' in lege exiſtunt ad actionem ipſius Mariæ p̃d' verſus ipſam Thomaſinam habend' manutenend' quodq, ipſa ad placitu' ill' modo & forma præd' placitat' neceſſe non habet nec per legem terræ tenetur reſpondere. Et hoc parat' eſt verificare unde pro defectu ſufficien' placiti præd' Mariæ in hac parte eadem Thomaſina pet' Judicium. Et quod breve ipſius Mariæ caſſetur, &c.

Demurrer to the Replication to the Plea in Abatement.

Et prædicta Maria dic' quod placitum præd' per ipſam Mariam ſuperius replicando placitat' materiaque in eodem content' bon' & ſufficien' in lege exiſtit ad actionem ipſius Mariæ verſus p̃fat' Thomaſinam habend' manutenend' quod quidem placitum materiaque in eodem content' ipſa eadem Maria parat' eſt verificare & probare prout Cur', &c. & quia eadem Maria ad placitum illud non reſpond' nec ill' hucuſque aliqualit' dedic' ipſa eadem Maria ut prius pet' Judicium & debitum ſuum p̃d' unacum dampnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſ. priuſquam Judicium inde reddant dies dat' eſt partibus prædict' hucuſque in Craſtino Sanctæ Trinitatis de audiendo inde Judicio ſuo eo quod iidem Juſtic' hic inde nondum, &c.

Joinder in Demurrer.

Pyne *verſus* Woolland.

IN an Action of Debt againſt the Defendant, as Executrix of her Husband for Arrears of Rent due from the Teſtator.

The Defendant pleaded in Abatement of the Writ, that after the Death of her Husband, Adminiſtration of his Goods and Chattels was granted to her, and that ſhe ought to have been named Adminiſtratrix in the Writ, and not Executrix, unde pet' Judicium de brevi & quod breve iſtud caſſetur.

1 Lut. 30, Young and Caſe. 1 Lutw. 891. 5 Mod. 136, 145. 1 Salk. 297.

The Plaintiff replied, that after the Death of the Husband, and before the Administration committed, the Defendant administred divers Goods and Chattels of her Husband's at such a Day and Place, &c.

Hob. 49. Cr. Car. 83. Plow. Com. 282. a. 3 Leon. 131. Kellew. 127 Cr. El. 102, 565, 810. Owen 132. 2 And. 172. Mod. 132.

To this the Defendant demurred, and Judgment was given for the Plaintiff. For she sets not forth the Day when Administration was committed, so it might be after the Writ brought: And besides, if she disposed of the Goods as Executrix of her own wrong, the Taking of Administration afterwards, though before the Writ brought, will not hinder the Plaintiff from charging her as Executrix of her own wrong. And the Difference is taken in the Case of Williamson and Norwich, Stil. Rep. 337. 1 Ro. 923. where an Action of Debt was brought upon a Contract against the Defendant, as Executor of his own wrong. The Defendant pleads the Party was indebted to him upon Bond, and died intestate; and that he afterwards took out Letters of Administration to him (which appeared to be after the Writ brought) and pleads a Retainer for his own Debt: And the Plaintiff demurred, and Judgment was given for the Defendant, that such Administrator might retain for his own Debt, tho' he had been before Executor of his own wrong. But such Taking of Administration should not abate the Plaintiff's Writ, Kellew. 127. a. Vid. 5 Co. Coulter's Case, an Executor of his own wrong cannot retain.

Anonymus.

TRespass Quare clausum fregit, and declared of divers other Trespasses.

The Defendant pleaded Not guilty as to the clausum fregit, and justified as to the other Trespasses: which upon the Issue was found for the Defendant, and as to the clausum fregit it was found for the Plaintiff.

22 & 23 Car. 2. c. 9. Antea 48. Postea 195.

The Court held it a clear Case within the late Statute, that the Plaintiff should have no more Costs than Damages, the Damages being under 40 s.

Alleſon *verſus* Marſh.

A Prohibition was prayed to the Court of Admiralty, to ſtay a Suit commenced there by ſome of the Mariners in a Ship againſt two of the Part-owners, for their Wages, upon a Suggeſtion that the Contract was made with them upon Land.

1 Vent 146, 343. 1 Lev. 60. Ray. 3. 3 Mod. 244. 6 Mod. 24, 25, 100, 424. and the Stat. 4. 5 Annæ cap. 16. Sect. 18, 19, 20.

It was ſaid, that tho' Suits had ſometimes been permitted there for Mariners Wages, yet that was when they all joined in the Suit, to avoid the Putting them to ſue ſeverally, as they muſt do at Law. But here there is but Part of them that ſue, and then they appear to be Officers in the Ship that ſue, and ſo not to have this Privilege of the Common Seamen to ſue; for it was alledged, that this Practice had obtained but of late, and in Favour to them; and here it appears, that the Contract for the Wages was joint with the Owners, and they have ſued but two of them, and ſo they ſhall be charged with the whole.

But the Court denied the Prohibition; for they have been ever allowed to proceed for Mariners Wages; and tho' the Plaintiff's have an Employment in the Ship, as Purſer, Boatſwain or the like, they are Mariners as well as others, and may ſue in the Admiral-Court for their Wages, and they having Juriſdiction ſhall proceed in their own way, tho' different from our Law as to the Joining of all the Plaintiffs or Defendants; and if the Proceeding be not according to their Law, the Remedy lies there.

The Maſter of the Ship is never allow'd to ſue in the Admiralty for his Wages; for he contracts on the Credit of the Owners; but the Mate of the Ship may, for he contracts with the Maſter for his Wages, as the reſt of the Mariners do. 1 Salk. 33.

Note, It was ſaid by one of the Admiralty, that tho' the Suit be againſt ſome of the Owners, the Courſe there is not to charge them with the whole, but according to their proportionable Parts.

Adams *verſus* Croſs.

IN a Replevin againſt Croſs and two others, for taking of divers Goods at Ware, in quodam loco vocat' a Meſſuage there.

The Defendants made Conuſance as Bailiffs of Jane Croſs, and they ſay, that before the Caption ſhe was ſeized in her Demeſn as of Fee, at the Will of the Lord of the Manor, according to the Cuſtom of the Manor of and in the aforeſaid Meſſuage; which ſaid Meſſuage is, and Time out of Mind hath been, Parcel of the ſaid Manor, and demiſed and demiſable by Copy of Court-Roll, &c. and being ſo ſeized 24 June 1687. ſhe demiſed the ſaid Meſſuage to the ſaid Adams from thenceforth at Will, reſerving for ſo long Time as the ſaid Adams ſhould hold it, the Yearly Rent of 8l. by equal Quarterly Payments: By Virtue of which Demiſe the ſaid Adams entred, and was, and yet is poſ-

poſſeſſed; and for 14 l. (being a Year and three Quarter's Rent, ending at the Feaſt of the Nativity of St. John Baptiſt laſt paſt) they, as Bailiffs to the ſaid Jane, diſtrained the ſaid Goods, being in the Houſe, &c.

To this Avowry the Plaintiff pleaded an inſufficient and frivolous Bar, and now took Exceptions to the Avowry; for that the ſaid Jane Croſs is therein ſet forth to have been ſeized in Fee of the ſaid Meſſuage at the Will of the Lord, according to the Cuſtom of the Manor, and ſheweth no Admiſſion from the Lord; whereas a Copyholder cannot plead his Eſtate, without ſetting forth an Admiſſion or Grant from the Lord. 4 Co. 22. b.

But the Court reſolved in this Caſe, there need not be ſhewn any Admittance; for the Tittle did not come in Queſtion.

If one pleads a particular Eſtate for Life or Years generally, the Commencement of it is to be ſhewn, but if a Leſſee for Years let for a leſſer Term, reſerving a Rent, in an Action of Debt for the Rent, he may ſet forth, that at the Time of the Leaſe he was poſſeſſed of the Land pro termino diverſorum annorum adtunc & adhuc ventur'; and being ſo poſſeſſed, demiſed to the Defendant, &c. without ſhewing the Beginning of his Term, and how derived; for 'tis but an Inducement to the Action. And Judgment was given for the Avowant.

1 Sid. 279. 3 Lev. 19. Cro. Car. 571. 2 Salk. 562. Cro. Jac. 438.

Clarke *verſus* Tucket.

IN an Action of Treſpaſs, for entering of his Houſe and taking four Pewter Diſhes of the Plaintiff's.

3 Lev. 281. Vide 5 Co. 64.

The Defendant pleaded the Letters Patents of Edward the 4th, whereby the Company of Taylors in the City of Exeter were incorporated, and by the ſaid Letters Patents they were to keep a Feaſt every Year, upon the Feaſt-Day of St. John the Baptiſt, in ſome Place of the City belonging to them, and there to make Orders and By-Laws, &c. And that the ſaid Corporation, at a Meeting held the 20th of March, in the 21ſt Year of the Reign of the late King Charles the Second, did make an Ordinance or By-Law, that if any Perſon (being Maſter, or one of the Chief Wardens of the Corporation aforeſaid) at any of their Aſſemblies, ſhould reproach or revile the Maſter, or any of his Brethren, or any of the Common Council of the Corporation, he ſhould forfeit 6 s. and 8 d. And if any other Perſon or Perſons of the ſaid Bodies ſhould revile or uſe any unhandſom Speech of the Maſter, Wardens, or any of the ſaid Council, he ſhould forfeit 3 s. and 4 d. the ſaid Fines to be levied by Diſtreſs upon a Warrant under the Corporation-Seal, and by ſale of the Offender's Goods, after Four Days Notice given of the Fine ſo ſet forth, and an Allowance of the By-Law by the Juſtices of Aſſize, according to the Statute of Henry the 7th.

And further ſaith, that the Plaintiff being a Member of the ſaid Corporation, and having Notice of the ſaid By-Law, did, at an Aſſembly of the ſaid Maſter and Wardens in the Common Hall, ſay of the ſaid Maſter and Wardens in the ſaid Corporation theſe Words, (viz.) The Maſters (ipſos Magiſtrum & Cuſtod' innuendo) are all a Company of Pick-pocket Rogues; and divers other very ſcurrilous and reproachful Words were ſet forth to have been there ſpoken of the ſaid Maſter and Wardens by the Plaintiff; whereby the Plaintiff forfeited 3 s. and 4 d. by the ſaid By-Law; which was demanded of him, and by him neglected to be paid by the Space of ſix Days. Whereupon the ſaid Maſter made his Warrant, directed to the Defendant, commanding him to levy the ſaid 3 s. and 4 d. by Diſtreſs and Sale of the Goods of the Plaintiff. And the Defendant (by Virtue of the ſaid Warrant) did enter into the Plaintiff's Houſe (being then open) and took the Goods in the Declaration mentioned, Nomine diſtrictionis prout ei bene licuit. And to this Plea the Plaintiff demurred, and Judgment was given for the Plaintiff.

For a Corporation cannot make a By-Law to have a Forfeiture levied by the Sale of Goods, 8 Co. 127. nor for Forfeiture of Goods: And here, tho' the Defendant only diſtrained, neither is the Defendant charged with ſelling the Goods in the Declaration; yet the By-Law being void as to the Selling, is void in toto, and no Juſtification can be upon it. 5 Co. 64. 3 Salk. 76.

It was alſo ſaid at the Bar, that the Diſtreſs was exceſſive, to diſtrain ſo many Diſhes for 3 s. and 4 d. Indeed a Man cannot ſever a Diſtreſs, and therefore in ſome Caſes a Diſtreſs of great Value, as a Cart and Horſes, may be taken for a ſmall Matter, becauſe not ſeverable; but here he might have taken ſome of the Diſhes.

But the Court did not regard that Exception, becauſe it did not appear of what Value the Diſhes were.

Again it was ſaid, that they ought to have made the By-Law upon St. John Baptiſt's Day. To which it was anſwered, that they were not tied to the Time, but the Place; it was ibidem facere Ordinationes, and not adtunc & ibidem.

But the Court gave Judgment upon the firſt Matter.

Newport

Newport *verſus* Godfrey.

3 Lev. 267. 1 Mod. 175. 3 Mod. 115. 4 Mod. 44. 5 Co. 82. Cro. El. 409. 2 Saund. 49. Vaugh. 94, 95. 1 Sid. 21. 3 Salk. 161.

THE Plaintiff brought an Action of Debt in the Detinet against Godfrey, Executor of Stephen Turner for 70 l. arrear of Rent, and declared upon ſeveral Demiſes upon the 28th of September 1685. to the ſaid Turner, reſerving ſeveral Rents, of which there became arrear to the Plaintiff, in the Life Time of the ſaid Turner, 70 l. and it appeared by the Declaration that the Leaſes ended in the Life of the ſaid Turner.

In Bar of which the Defendant pleaded ſeveral Bonds entred into by the Teſtator, to divers Perſons, for the Payment of Money, which he avers to be all for true and juſt Debts, and that he had adminiſtred all, beſides Goods, to the Value of 40 l. which he retained towards Satisfaction of the ſaid Bonds, &c.

To which the Plaintiff demurred, and it was argued laſt Term for the Defendant, that a Debt upon Specialty was to be preferred before Debt for Rent upon a Leaſe Parol, Stil. Rep. 61. Rolle

1 Salk. 326.

ſaid, that a Specialty was of an higher Nature, than Rent reſerved upon a Leaſe by Deed. Indeed it is made a Quære in Roll. Abr. 1 part, 927. but if Rent ſhould be preferred where the Leaſe was continuing after the Death of the Teſtator, in regard the Teſtator's Goods are liable to be diſtrained for it, which the Executor cannot withſtand; yet there is not the like Reaſon when the Leaſe expires in the Life of the Teſtator; and the Caſe was adjourned to this Term for the Judgment of the Court.

And the whole Court were of Opinion, that Judgment ſhould be for the Plaintiff. For tho' the Leaſe be determined, yet the Debt ſtill ſavours of the Realty, and is maintained in regard of the Profits of the Land received; inſomuch that no Wager of Law lies in Debt for Rent, tho' brought after the Leaſe determined. A Bond given for Rent will not drown it, 11 H. 4. 75. b. an Action lies againſt the Executors of an Aſſignee of a Leaſe for Rent in the Teſtator's Time, and yet the Aſſignee is chargeable only in reſpect of the Leaſe. Vid. 13 H. 4. 1. a. Office of Executors 209, 210, 211, &c.

4 Mod. 44. 3 Lev. 267.

A Writ of Error was brought upon this Judgment, and in Trin. 3 W. & M. the Judgment was affirmed.

Godfrey

Godfrey *verſus* Ward.

IN an Action of Debt for Rent,

The Defendant pleaded the Statute of Limitations, and that Cauſa Actionis prædictæ, &c. accrevit above ſix Years before the Writ brought. 3 Lev. 283.

To this the Defendant demurred, and the Cauſe of the Demurrer was upon the late Statute for reviving of Proceſs, anno primo Willelmi & Mariæ, by which it is provided, in regard there was an Interruption of the Government and Proceedings of Law, from the 11th of December 1688, to the 13th of February following, that the Time within thoſe Days ſhould not be accounted as any Part of the ſix Years to bar an Action by the Statute of Limitations, or of the ſix Months for bringing a Quare Impedit, &c. ſo as it was urged, that the Defendant ſhould have ſhewn, that ſix Years and ſo many Days were elapſed as are between the 11th of December and the 13th of February. For the ſix Years may be paſſed, yet the Plaintiff may be within Time by Reaſon of the ſaid Statute. Poſtea 193, 197, 259.

But the Court were of Opinion, That the Defendant's Plea was well, and this ſhould be ſhewn of the Plaintiff's Part; for the Statute does not alter the Form of Pleading, but that ſhall be as it was before; and the Plaintiff (if the Matter will bear it) is to help himſelf upon the ſaid Statute.

The old Way upon the Statute of Limitations was, for the Defendant to plead the Statute at large; but of late Years, the General Pleading of Non aſſumpſit infra ſex annos has been allowed.

Warren *verſus* Sainthill.

Devon. ſſ. SAmuel Sainthill nuper de Bradmuch in Com' prædict' Armig & Johannes Savery nuper de Bradmuch in Com. prædict. Husbandman attach' fuer' ad reſpondend' Thomæ Warren Gen̄ de placito Tranſgr' ſuper Caſum, &c. Et unde idem Thomas per Johannem Prowſe Attorn̄ ſuum queritur quod cum prædict. Thomas viceſimo nono die Septembris anno regni Domini Regis & Dominæ Reginæ nunc primo & continuè poſtea uſq; primum diem Januarii tunc px' ſequen' fuit poſſeſſionat' & inhabitans de & in quodam antiquo Meſſuagio ſituat' & jacen' in villa de Waterſtaffe infra paroch' de Bradmuch præd. ac p totum tempus ill' quandam viam pedeſtrem ducen̄ à Villa de Waterſtaffe prædict' in per & trans' quædam Clauſa (vocat. Crollands, Smiths Downs and Culver Park) infra paroch de Bradmuch præd.

Caſe for Stopping up of a Foot way. 1 Vent. 275, 319. 6 Mod. 2, 3. Antea 138, 239. The Plaintiff ſays, That he was poſſeſs'd of, and Inhabitant in an ancient Meſſuage. And that habuit & habere debuit a Footway for himſelf and his Servants.

præd. uſque ad villam de Bradmuch in Bradmuch prædict. pro ſe & ſervientibus ſuis ad eundem & redeund' omnibus temporibus ad libitum ejus tanquam ad Meſſuag' præd. ſpectan' & pertinen' habuit & de jure habere debuit præd. Samuel' & Johannes machinan' & intenden' ipſum Thomam minus rite perturbare & ipſum de via præd. impedire & deprivare præd. viceſimo nono die Sept. Anno primo ſupradicto apud paroch de Bradmuch quædam Foſſa & Trencheas ex tranſverſo viæ præd. inter Villas de Waterſtaffe & Bradmuch præd. fodier' & fecer' ac etiam viam ill' ibidem cum quibuſdam ſepibus & ſenſuris ex tranſverſo viæ præd. eject' obſtruxer. & præcluſer. per quod idem Thomas à via præd. in forma præd' habend' à præd. viceſimo nono die Septembris uſque præd. primum diem Januarii Anno primo ſupradicto penitus impedit' & deprivat' fuit ad dampnum ipſius Thomæ quadragint' librar. Et inde producit ſectam, &c.

As belonging to his Meſſuage.

The Defendant, to diſturb him in the Way, dug Ditches and Trenches croſs the Way. And erected Hedges and Fences croſs it. Whereby he was hindred of his Way.

To this the Defendant pleaded a frivolous Plea, and the Plaintiff demurs; and the Defendant joined in the Demurrer, and Judgment was given for the Plaintiff.

Warren *verſus* Sainthill.

3 Lev. 266. 4 Mod. 418. Strode and Birt.

IN an Action upon the Caſe for Stopping of a Way, the Plaintiff declared, That he was poſſeſſed, and an Inhabitant of and in a certain ancient Meſſuage the 29th of Sept. in the firſt Year of the now King and Queen, and ſo continued to the firſt Day of January then next following; and for all that Time had a Footway over the Defendant's Ground, tanquam ad Meſſuag præd' ſpectant' & pertinent' & de jure habet, **and that the Defendant ſtopped it up** ad damnum, &c.

The Defendant pleaded a frivolous Plea, to which there was a Demurrer.

Antea 73, 174. 3 Lev. 261. Poſt. 277. 1 Vent. 356. 3 Salk. 12. 278, 9. 393.

It was objected on the Defendant's Part, That the Declaration was inſufficient, becauſe the Plaintiff did not preſcribe for the Way, nor otherwiſe entitle himſelf to it, than by a Poſſeſſion of the Meſſuage, and that he had and ought to have a Way to the ſaid Meſſuage belonging. And a Difference was taken between this and Dent and Oliver's Caſe, 2 Cro. 43. **where one alledged himſelf to be ſeiſed in Fee of a Manor, and had a Fair there, and that the Defendant diſturbed him to take Toll. And in** 2 Cro. Stackman and Weſt **there is a Preſcription laid in the Dean and Chapter (who had the Fee) for the Way: But it was objected, That a Corporation could not preſcribe in a** Que Eſtate; **but it was held well, being but an Inducement to the Action.**

And the Court here held the Declaration ſufficient, being but a poſſeſſory Action. And a Caſe was ſaid to be adjudged in this Court between the ſame Parties Anno primo Jacobi ſecundi. Vide the Caſe of Saint John and Moody upon the like Point. Antea 148. 1 Vent. 274, 275, 319.

If the Defendant had demurred ſpecially, yet ſome of the Court held, the Declaration would have been good. 3 Lev. 266.

Woodward & al' *verſus* Fox.

IN an Indebitat' Aſſumpſit for 200 l. for ſo much Money received by the Defendant for the Uſe of the Plaintiffs. Poſtea 213, 267.

The Defendant pleaded Non Aſſumpſit, and upon that a Special Verdict was found, That in the Year 1681. before the Promiſe ſuppoſed, &c. John Hammond was, and yet is, Archdeacon of Huntingdon, within the Dioceſe of Lincoln, and that the Biſhop of Lincoln is Patron of the Archdeaconry, and that the Office of Regiſter of the Court of Archdeaconry was Time out of Mind grantable by the Archdeacon for the Term of three Lives; and that the ſaid John Hammond in the ſaid Year 1681. for 100 l. ſold and granted to Simon Michael and John Juce, for their Lives, the ſaid Office of Regiſter, it being an Office concerning the Adminiſtration of Juſtice, and that by Colour thereof they enjoyed the Office till Juce died, which was in 1687. and ſoon after in the ſame Year, the ſaid Simon Michael died in the Poſſeſſion of the ſaid Office, and that Hammond was no Ways convicted of Selling the ſaid Office upon any Proſecution at Law, or otherwiſe. And they further ſaid, That Thomas, Biſhop of Lincoln, in the ſaid Year 1687. after the Death of Juce, and ſome Time before the Death of Michael, granted the ſaid Office of Regiſter to the Defendant Fox, and ſet forth the Grant in hæc verba, which mentioned the ſaid Regiſter's Office to be void by the Statute of the 5 & 6 Ed. 6. againſt Sale of Offices, and that thereupon it belonged to the ſaid Biſhop to grant the ſaid Office, by Virtue of which the ſaid Fox became ſeiſed of the ſaid Office prout lex poſtulat. And they find afterwards, that in the ſame Year that Juce and Michael died, Hammond being Archdeacon (as aforeſaid) granted the ſaid Office to the Plaintiffs, Woodward, Maſters and Gilbert, for their Lives; and that they entred upon the ſaid Office, and became ſeiſed thereof put lex poſtulat. And they find that the Biſhop's Grant was afterwards confirmed by the Dean and Chapter; and they find, that afterwards, (viz.) the 22d of Octob Anno regni Willielmi & Mariæ primo, the ſaid King and Queen, by their Letters Patents under the Great Seal, reciting that the ſaid Office appertained to their Majeſties to grant by the ſaid Statute of Edward the 6th, did grant the ſaid Office of Regiſter to the ſaid Plaintiffs Woodward, Maſters and Gilbert, for their Lives, and that by Virtue thereof they entred upon, and exerciſed the ſaid Office, and 3 Lev. 289, 290.

received divers Fees and Profits thereunto belonging; and that the Defendant having Notice thereof, did take divers Fees and Profits of the said Office amounting to 30l. claiming them to his own Use, &c. and if upon the whole Matter, &c.

Upon this Special Verdict there were these Points moved:

The first Point was, Whether this Office of Register could be granted for Lives?

This was not much insisted on by the Defendant's Counsel, it having been usually granted, and so found by the Verdict. 3 Cro. Young and Fowler's Case, a Grant in Reversion of the Register's Office was allowed, being warranted by Usage; and so in 3 Cro. Young and Stoel. But unless there have been such Usage, 'tis not grantable in Reversion. Vide 3 Cro. Walker and Sir John Lamb.

The second Point was, Whether the Grant of this Office, in Consideration of Money, is void by the Statute of 5 & 6 Ed. 6. against the Sale of Offices?

That Point was also waived, it being resolved in Dr. Trevor's Case, 12 Co. 78. 2 Cro. 269. forasmuch as it concerned Administration of Justice.

The third Point was, That the Statute of 5 Ed. 6. enacting, That the Person who takes any Money for any Office, shall lose and forfeit all his Right to any such Office, &c. Whether the King or the Bishop shall take Advantage of this Forfeiture, in regard the Statute doth not express who shall dispose of the Office in such Case?

And it was said on the Part of the Plaintiff, That when a Statute gives a Forfeiture, and not said to whom, the King shall have it, 11 Co. 60. a. unless there be a particular Party grieved; as upon the Statute of 2 Ed. 6. of Tithes; and yet it was for
Co.Lit.159.a. some Time before it was settled, that the Parson should have the treble Value in that Case. And this agrees with the Reason of the Common Law; Things that are nullius in bonis, the King shall have them as extraparochial Tithes, 11 H. 4. 17. Vide 5 Co. in Sir Henry Constable's Case, The Soil of navigable Rivers and derelict Lands was with this Difference; If the Sea leaves the Land gradatim, and for but a little Quantity, the Owner of the Land shall have it; but if in a great Quantity at a Time, it goes to the King, Davis Rep. 5, 6. Vide Sid. 86. Dyer 126. 'Tis true, at the Common Law, where a Person hath an Interest in that which is forfeited, he shall have the Benefit of it; as if a Park-keeper forfeit, it shall go to the Owner of the Park. And in Sir John Breon's Case, Bridgm. 27. where the Earl of Lancaster gave License to make a Park in his Forest, and the Party forfeited

his Office, the Earl had the Advantage of it. In those Cases the Thing is forfeited to him from whom it was granted; as a Copyholder forfeits to his Lord, and Tenant for Life to him in Reversion; but here the Bishop hath nothing to do with the Office of Register, he cannot dispose of it in the Time of Vacancy of the Archdeaconry. The Verdict finds, that his Office is to register the Acts in the Court of the Archdeacon, and he must answer for his Register as his Superior: And as this Verdict is found, it may be taken as an Archdeaconry by Prescription, and then it has no Dependance upon the Bishop, but wholly exempt. Godolphin 61. and 5 Co. 15. in Cawdry's Case. Q. 2 Lev. 71, 290.

Levinz contra. Generally Forfeitures given by the Statute go to the King, unless a common Person be grieved or particularly concerned; but here the Archdeacon has disabled himself to grant this Office of Register, and the Archdeacon himself is an Officer to the Bishop; for the Bishop hath the Care of the whole Diocese, and the other are but subordinate Officers to him; an Archdeacon may be deprived by the Bishop. The Addition of a Parson is Clerk; because they were the Bishops Clerks or Curates. This Crime of coming into an Office for Money, is Simony by the Ecclesiastical Law. In the Vacancy of the Archdeaconry, if the Register's Office becomes void, the Bishop puts him in; but perhaps the succeeding Archdeacon shall remove him, because he must answer for him: As the Case of the Exigenter in Dyer, Scrogg's Case; and vide 39 H. 6. 32.

And the Case was adjourned for further Argument upon this last Point: But the Court held the other Matters to be clear. Postea 213, 267.

Carr *versus* Donne.

Norf. ss. Robertus Donne nuper de South Creake in Com. prædicto Gen̄ attach̄ fuit ad respondend. Willielmo Carr de placito quare vi & armis in ipsum Willielmum apud South Creake præd. insult̄ fecit & ipm' verberavit vulneravit imprisonavit & maletractavit & eū in Prisona diu detinuit Ita quod de vita ejus desperabatur Et al' enormia ei intulit ad grave dampn' ipsius Willielmi & contra pacem Jacobi secundi nup̄ Regis Angl', &c. Et unde idem Willielmus per Warner Dawes Attorn̄ suum queritur quod præd̄ Robertus primo die Maii anno regni dicti Domini Jacobi secundi nuper Regis Angl', &c. quarto vi & armis videlicet gladiis baculis & cultellis in ipm̄ Willielmum apud South Creake præd. insult̄ fecit & ipsum verberavit vulneravit imprisonavit & maletractavit & eum sic in Prisona diu videlicet per spatiū unius mensis & quatuor dierum tunc p̄x' sequen' detinuit, ita quod de vita ejus desperabatur Et alia enormia, &c. ad grave dampn', &c. Et

Trespass, Assault, and False Imprisonment.

The Count.

Et contra pacem, &c. Unde dic' quod deteriorat' eſt Et dampn' habet ad valentiam ducentar. librarum Et inde ꝓduc' ſectam, &c.

As to the Vi & Armis & vulnerationem, Not guilty.

Et præd' Robertus in propria perſona ſua venit & defendit vim & injuriam, &c. Et quoad venire vi & armis necnon vulnerationem ipſius Willielmi prædict' ſuperius fieri ſuppoſit' idem Robertus dic' quod ipſe in nullo eſt inde culpabilis Et de hoc pon' ſe ſuper

And Iſſue thereupon.

Patriam Et præd. Willielmus inde ſimilit' Et quoad reſid' tranſgr' inſult' & impriſonament' prædict' ſuperius fieri ſuppoſit' idem Robertus dic' quod prædict' Willielmus actionem ſuam præd. inde verſus eum habere non debet quia dicit quod diu ante præd. tempus quo ſupponitur præd. reſid' tranſgr' inſult' & impriſonament' præd' ſuperius fieri ſcilicet Termino Sanctæ Trinitatis Anno Regni dicti nuper Regis ſecundo ipſe idem Robertus in Cur' ipſius nuper Regis de Banco hic ſcilicet apud Weſtm' in Com' Midd' per conſiderationem ejuſdem Curiæ recuperaſſet verſus eundem Willielmum octo libras & decem ſolidos qui in eadem Curia adjudicat' fuer' eidem Roberto tam pro dampnis ſuis quæ habuiſſet occaſione non performationis ſeparal' promiſſion' & aſſumption' eidem Roberto per præfatum Willielmum antetunc fact' quam pro miſis & cuſtag ſuis per ipſum circa ſectam ſuam in ea parte appoſit' unde convict' fuit ſed Judicium illud poſtea ſcilicet Termino Paſchæ Anno Regni dicti nuper Regis quarto per eandem Curiam de Banco hic ſcilicet apud Weſtm præd. certis de cauſis eidem Curiæ adtunc moventibus evacuat' & adnullat' fuit & adhuc adnullat' exiſtit quodque idem Robertus ꝓ citiori obtentione dampnorum illorum ac miſ & cuſtag prædict' poſt Judicium prædict' in forma prædicta obtent' & ante adnullationem ejuſdem ſcilicet viceſimo tertio die Junii Anno Regni dicti nuper Regis ſecundo ſupradicto impetraſſet & proſecut' fuiſſet extra præd. Cur. dicti nuper Regis de Banco hic ſcilicet apud Weſtm' præd' quoddam breve ipſius nuper Regis de Capias ad ſatisfaciend' de & ſuper Judicio illo verſus ꝑfatum Willielmum tunc Vic' Norf. direct' per quod quidem breve Dom nuper Rex eidem tunc Vic ꝑcepit quod caperet eundem Willielm ſi invent' foret in baliva ſua Et eum ſalvo cuſtod. Ita quod haberet corpus ejus coram Juſtic' ipſius nuper Regis apud Weſtm die Sabbati prox' poſt tres ſeptimanas Sancti Michaelis tunc prox' ſequen' ad ſatisfaciendum eidem Roberto de dampnis illis Et quod haberet ibi breve illud Quod quidem breve poſtea & ante retorn' ejuſdem ſcilicet viceſimo ſexto die Junii Anno Regni dicti nup Regis ſecundo ſupradict' apud South Creak prædict. deliberat' fuit cuidam Roberto Nightingale Mi' adtunc Vic Com Norf. exiſtem in debita Juris forma exequend' qui quidem Vic adtunc & ibidem ad requiſitionem ipſius Roberti mandavit executionem inde cuidam Willielmo Drage Arm' balivo libertatis dicti nuper Regis Ducat' ſui Lancaſtriæ in prædicto Com eo quod executio inde extra eadem libertatem fieri non potuit qui

As to the Reſidue of the Treſpaſs he pleads, that he recover'd Judgment againſt the Defendant, and had him taken upon a Cap. ad ſatisf. Recovery in the Common Bench.

Upon an Indebitat' aſſumpſ.

And the Judgment ſet aſide and vacated.

But before it was vacated a Cap. ad ſatisf. was ſued out thereupon.

Directed to the Sheriff.

And delivered to him. Who made his Warrant to the Bailiff of the Liberty. Note, This Warrant ought to be ſub ſigillo, and ſo pleaded.

quidem ballivus adtunc habuit & adhuc habet plenam executionem & retorn. omn. Warrant. p̄cept̄ & Mandat̄ infra eandem libertatem quodq; Virtute mandat̄ illius præd̄ Willielmus Drage poſtea & ante retorn. ejuſdem brevis ſcilicet decimo octavo die Octobris anno regni dicti nuper Regis ſecundo ſupradicto apud South Creake prædict' in præd' Com. Norf. & infra libertatem præd. ad requiſitionem ipſius Roberti manus ſuas ſup̄ eundem Willielm̄ Carr mollit̄ impoſuit ac ipm' Willielm' Carr adtunc & ibidem p̄ Corpus ſuum cepit & aſportavit ac eundem Willielm' Carr in cuſtodia ſua ad inſtantiam ipſius Roberti ibidem habuit & detinuit p̄ ſpatium un. menſis & quatuor dier̄ tunc prox' ſequen' in executione p̄ dampn. mis & cuſtag illis ſcilicet quouſq; idem Willielmus Carr ibidem ſolvit eidem Willielmo Drage ad uſum ipſius Roberti dampna mis & cuſtag illa quæ ſunt idem reſid̄ tranſgr̄ inſult̄ & impriſonament̄ p̄d̄ unde præd' Willielmus Carr ſuperius ſe modo queritur abſque hoc quod ipſe idem Robertus eſt culpabilis de reſid' tranſgr' inſult̄ & impriſonament̄ præd. ſeu aliqua inde parte ad̄ aliquod tempus ante emanationem brevis præd. ſeu poſt retorn. ejuſdem Et hoc parat̄ eſt verificare unde idem Robertus petit Judicium ſi p̄d. Willielmus Carr actionem ſuam præd. inde verſus eum habere debet, &c.

Et præd' Willielm' quoad præd. placit̄ præd' Roberti quoad p̄d̄ reſid' tranſgr. inſult̄ & impriſonament̄ præd. dic. quod ipſe per aliqua in eodem placito p̄allegat̄ ab actione ſua præd' inde verſus ipſum Robertum habend' p̄cludi non debet Quia dic' quod præd. Robertus præd' Termino Sanctæ Trinitatis anno regni Domini Jacobi ſecundi nuper Regis Angl̄. &c. ſecundo & diu antea & adhuc eſt un. Attorn. Cur. de Banco hic quodque ipſe præd. Robertus ratione officii ſui Attorn. ejuſdem Cur. ad intrand. Narration' placita & Judicia in eadem Cur. in Rotulis ejuſdem Cur. de tempore in tempus per eandem Cur. creditus fuit (Anglice, Truſted) quodque præd' Robertus ſic creditus exiſten' falſo fraudulent̄ & contra officii ſui debit̄ & in deceptionem ejuſdem Cur. in Rotulis ejuſdem Cur̄ de præd. Termino Sanctæ Trinitatis præd' intrari fecit quod ipſe idem Robertus per conſiderationem ejuſdem Cur. recuperaret verſus eundem Willielm̄ octo libras & decem ſolid' qui in eadem Cur. adjudicat̄ fuer̄ eidem Roberto tam p̄ dampnis ſuis quæ habuiſſet occaſione non performationis ſeparal̄ p̄mis & aſſumption' eidem Roberto per p̄fat̄ Willielm' antetunc fact' quam pro mis & cuſtag ſuis p̄ ipſum circa ſectam ſuam in ea parte appoſit̄ ubi revera null' tale Judicium̄ in eadem Cur̄ verſus eundem Willielm' intrari debuiſſet ſuper qua quidem falſa intratione ipſe præd. Robertus ante præd̄ tempus præd̄ reſid' tranſgr' inſult̄ & impriſonament̄ falſo & improvide proſecut̄ fuit quoddam breve de Capias ad ſatisfaciend' verſus eundem Willielm' tunc Vic̄ Norf. direct' Colore cujus quidem brevis ipſe præd. Robertus præd. tempore quo, &c. de Injur' ſua p̄pr. vi & armis in ipſum Willielm' inſult̄ fecit & ipſum verberavit impriſonavit & ma-

Who had Execution or Precepts.

The Bailiff takes the Defendant thereupon.

And had him a Month in Cuſtody until he paid the Money.

Quod eſt idem Rend' tranſgr' & impriſonament', &c. And traverſes, that he is not guilty of any other Treſpaſs before the Suing out, and after the Return of the ſaid Writ.

The Plaintiff replies, That the Plaintiff in the Judgment was an Attorney, whoſe Duty it is to enter Judgments fairly and honeſtly, and that he in Deceit of the Court entred the Judgment when he ought not to have done it.

The Judgment adjudged void.

maletractavit Ita quod de vita ejus desperabatur prout ipse supius versus eū narravit Et idem Willielmus ulterius dic qd postea scilt prædict' Termino Paschæ Anno regni dicti Domini Jacobi secundi nup Regis Angl' quarto supradicto examination' & consideration' de Intration' præd. per eandem Cur. hic habita eandem Intrac fuisse ab initio inde vacua & p nullo Judicio per eand. Cur. adjudicat & declarat fuit Et hoc parat est verificare Unde ex quo p'd Robertus transgr' insult & impriſonament præd supius cognovit idem Willielmus petit Judicium & dampna sua occasion' transgr' insult & imprisonament præd sibi adjudicari, &c.

The Plaintiff in the Judgment confesseth the Matter; but saith that the Fault was in the Clerk, who entred the Judgment.

Et præd' Robertus dic. quod bene & verum est quod ipse idem Robertus in Rotulis dictæ Cur. nuper Regis de Banco intrari fecit Judicium in placito præd. Roberti mentionat scilicet qd' ipse idem Robertus per Consideration. ejusdem Cur. recuperaret versus præd Willielm octo lib & decem solid qui in eadem Cur adjudicat fuer eidem Roberto tam p dampnis suis quæ habuisset occasion. non performation' separal p mis & assumption. eidem Roberto per præfat. Willielm. fact. quam pro mis & custag suis p ipsum circa sectam suam in ea parte apposit prout præd' Willielm. superius inde replicando allegavit Idemq; Robertus ulterius in facto dic. quod præd' Robertus appunctuavit intration' Judicii illius in Rotulis præd' fieri debite & secund' cursum & consuetud' ejusdem Cur scilicet apud Westm. præd. sed per negligentiam Clerici qui Judicium illud intravit evenit quod Judicium illud in aliquibus circumstantiis intrat fuit irregularit & contra quandam regulam ejusdem Cur sine notitia ipsius Roberti ac ratione hujusm. irregular. intrac. ill. p'd. Termino Paschæ Anno regni dicti nuper Regis quarto supradicto per eandem Cur de Banco evacuat fuit & adnullat prout idem Robertus superius inde placitando allegavit absque hoc quod Intrac ill. facta fuit per ipsum Robertum falso fraudulent' ac in deceptionem ejusdem Cur. modo & forma prout præd. Willielmus superius inde replicando allegavit Et hoc parat est verificare Unde ut prius petit Judicium Et quod præd. Willielmus ab action' sua præd. inde versus eum habend' præcludatur, &c.

He appointed the Judgment to be duly entred.

But by the Default of that Clerk it was entred irregularly. And traverses that it was entred falso & fraudulenter in deceptionem Curiæ.

The Plaintiff demurs to the Rejoinder.

Et præd Willielmus dic. quod ipse per aliqua per præd. Robertum superius rejungen allegat ab action' sua præd. inde versus ipsum Robertum habend. p'cludi non debet quia dic. quod placit prædict' per eundem Robertum modo & forma præd. superius rejungen' placitat materiaq; in eodem content minus suffic. in lege existunt ad ipsum Willielmum ab action. sua præd. versus p'fat Robertum habend p'cludend' Ad quod idem Willielmus necesse non habet nec per legem terræ tenetur respondere Et hoc parat. est verificare Unde pro defectu sufficien. respons in hac parte idem Willielm petit Judicium & dampna sua prædict' sibi adjudicari, &c.

Et præd' Robertus ex quo ipſe ſufficien' materiam in lege ad præd. Willielm' ab action' ſua præd. verſus ipſum Robertum habend' p̄cluden' ſuperius rejungen' allegavit quam ipſe paratꝰ eſt verificare quam quidem materiam præd. Willielm' non dedic' nec ad eam aliqualiꝰ reſpond ſed verificationem ill' admittere omnino recuſat ut prius petit Judicium. Et qd p̄d' Willielm' ab action' ſua præd. verſus eum habend' p̄cludatur, &c. Et quia Juſtic̄ hic ſe adviſare volunt de & ſup p̄miſſis præd' unde partes præd. poſuer' ſe in Judic̄ Curꝰ priuſquam Judic̄ inde reddant dies datꝰ eſt partibus præd. hic uſq; a die Paſchæ in quindecim dies ad audiend' inde Judic̄ eo quod iidem Juſtic' hic inde nondum, &c. The Defendant joins in Demurrer

Carr *verſus* Donne.

IN an Action of Treſpaſs the Plaintiff declared upon an Aſſault, Battery, Wounding and Impriſonment. 2 Saund. 182. 1 Nelſ. Abr. 431.

The Defendant, as to the Vi & armis & vulnerationem, pleaded Not guilty; & quoad reſid' tranſgr. inſult & impriſonament' he juſtified, for that he obtained Judgment againſt the Plaintiff in the Common Bench, and that a Capias ad ſatisfaciend' was thereupon awarded to the Sheriff, which being delivered to the Sheriff, he, at the Requeſt of the Defendant, Mandavit Executionem inde cuidam Willielmo Broge baliv' libertatis Domini Regis Ducatus ſui Lancaſtr. eo quod executio inde extra eandem libertatem fieri non potuit, &c. Which ſaid Bailiff had the Return and Execution of all Warrants, Precepts, Mandates, &c. by Virtue of which the ſaid Bailiff, molliter manus impoſuit upon the Plaintiff, and arreſted him, &c.

Upon a Demurrer it was adjudged for the Plaintiff, for an apparent Fault in the Plea, which was, That he had not pleaded to the Battery. Powell ſaid, That the Plea was alſo naught, becauſe it ſets forth a Mandate to the Bailiff of the Liberty, and did not ſhew that it was under the Hand and Seal of the Sheriff. 2 Roll. Ab. 104. 2 Mod. 259. 3 Keb. 351. 2 Lev. 111. 3 Lev. 404. 2 Lutw. 929.

Norwood *verſus* Woodly.

IN an Indebitat' aſſumpſit for Goods ſold.

The Defendant pleaded the Statute of Limitations. Antea 185. Poſtea 197.

The Plaintiff replied, That before the ſix Years were out he brought an Original in Treſpaſs againſt the Defendant, ea intentione to declare againſt the Defendant in an Aſſumpſit, ſecund' conſuetud Curꝰ de tempore cujus, &c. The Defendant ſaid, That there was no ſuch Record; and the Plaintiff produced an Original in Treſpaſs brought within the Time againſt the Defendant and two others, and it was in Treſpaſs and Inſult in London.

And it was moved, that this Record did not make good the Replication; for 'tis against three, and it should have been in a Clausum fregit; for that was said to be the Course of the Court, to declare in any Thing upon such a Writ.

Postea 259. But the Prothonotary informed the Court, that the Original being in London, the Custitor would not make a Clausum fregit into London; (for which no Reason was given) and that therefore, tho' in other Counties it is to be a Clausum fregit, yet Trespass and Insult would do in this Case, and so was the constant Practice. And the Plaintiff's Replication is, That he brought an Original in Trespass generally; so it may be applied to this, and 'tis not material tho' others be joined in the Writ with the Defendant.

But the Court doubted of the Practice.

Anonymus.

AN Attachment was granted against an Attorney for a Misdemeanor in Practice, and upon a Rule of Court it was referred to the Prothonotary to tax Costs for the Party grieved which were taxed accordingly; and then came out the Act of General Pardon, which discharged the Contempt.

The Court inclined, That the Costs were also discharged, tho' taxed before the Pardon; for that they are not Costs upon a judicial Proceeding, but a Kind of Composition with the Offender, who submits to pay Costs to the injured Party, to be eased of the Penalty for his Contempt; and so not like Costs taxed in the Ecclesiastical Court pro reformatione morum, as in 5 Co. 51. and in 3 Cro. 6.

Nota, In the Dutchy-Court this Term, in a Suit in Equity, Costs were taxed (upon a Contempt) to the Party grieved before the Pardon.

And the Opinion of the Lord Chief Baron Atkyns and Justice Ventris, who attended there as Assistants, was, That the Costs were not discharged.

But that was in a Court of Equity, where Costs are at the Pleasure of the Judge.

Anonymus.

IN an Action of Treſpaſs, Quare clauſum fregit; where as to ſome Part there was Not guilty pleaded, and as to the other a Special Juſtification; and a Verdict upon the General Iſſue for the Plaintiff, and upon the Special Iſſue for the Defendant.

The Court took this to be within the late Statute, for the Plaintiff to have no more Coſts than Damages; becauſe the Iſſue upon the Matter ſpecially pleaded, was found for the Defendant; and ſo the ſame Thing if the General Iſſue had been only pleaded, and found for the Plaintiff. Antea 180.

Fagg *verſus* Roberts & al'.

NOta, Upon a Trial at Bar in an Ejectment, where two were made Defendants, and had entred into the Common Rule, and at the Trial one appeared and confeſſed Leaſe, Entry, &c. but the other did not. And after Evidence given the Plaintiff was nonſuited, and Coſts taxed for the Defendants. 1 Vent. 359.

The Court ſaid, That both theſe Defendants were entitled to theſe Coſts, and he that did not appear might releaſe them to the Plaintiff; but they ſaid, That if there ſhould appear to be Covin between the Leſſor of the Plaintiff and the Defendant, who did not appear to releaſe the Coſts; the Court ſuppoſed that they might correct ſuch Practice, when it ſhould be made appear.

Bright *verſus* Addy.

AN Action of Treſpaſs, Quare clauſum fregit, was brought by Baron and Feme.

Pollexfen, Chief Juſtice, was of Opinion, That the Feme could not be joined, tho' it was her Land.

Ventris contra. For this Action will ſurvive, and they have Election either to join, or to bring it alone, 1 Brownl. 21. 1 Ro. Abr. 348. Hob. 189. 1 Cro. 96. 3 Cro. Tregniel and Reeve, Mo. 5. In an Action of Forcible Entry upon the Wife's Land after the Coverture, ſhe was joined with her Huſband. Adjornatur.

Anonymus.

IN an Aſſumpſit againſt the Adminiſtratrix, the Defendant pleaded quod ipſa non aſſumpſit inſtead of the Inteſtate.

After Verdict a Repleader was awarded, and no Coſts to either Party upon a Repleader.

Marks *verſus* Nottingham.

6 Mod. 142. 1 Salk. 8. and 315.

THE Defendant pleaded in Abatement, that the Plaintiff was dead at ſuch a Place before the Action brought.

The Court doubted, Whether ſuch Plea could be received? but upon View of Raſtal's Entries 161. pl. 6. where the like Plea was, Powell and Ventris conceived it to be a good Plea.

Pollexfen, Chief Juſtice, and Rokeby ſaid, That that in Raſtall differed, becauſe there were two Plaintiffs, ſo that Iſſue might be joined with the other Plaintiff. Sed vide librum, where the Replication to that Plea is, that W. H. & præd. R. B. Attornat' præd. J. (which J. was pleaded to be dead) nomine & pro ipſo J. Magiſtro ſuo dicit, quod breve præd. ratione præallegat' caſſari non debet quia dicit quod præd. J. ſuperſtes & in plena vita exiſtit, (viz.) apud L. in Com' N. & non mortuus prout præd. W. ſupius allegavit & hoc petit quod inquiratur p Patriam & præd. W. ſimiliter, &c. Adjornatur.

Haſelwood *verſus* Mansfield.

IN Debt for 150 l. the Plaintiff declared upon a Charter-party, which contained divers mutual Agreements; and in performatione conventionum præd' ex parte dicti Magiſtri ipſe obligaſſet ſe dicto Mercatori in penali ſumma 150 l. & ad performationem conventionum præd. ex parte dicti Mercator' obligaſſet ſe dicto Magiſtro, &c. in ſimili penali ſumma 150 l. &c. And this Action was brought by the Maſter of the Ship againſt the Merchant.

The Defendant pleaded an inſufficient Plea, to which there was a Demurrer.

1 Lutw. 234. Antea 141.

But it was moved, That the Declaration was inſufficient; for when it comes to the Penalty on the Merchant's Part, it is only obligaſſet ſe, omitting ipſe, or ipſe præd' Mercator obligaſſet ſe; ſo 'tis not expreſly declared that the Defendant was bound.

And of that Opinion were Pollexfen, Chief Juſtice, Powell and Rokeby.

Ventris contra. For it is obligaſſet ſe dicto Magiſtro, ſo none but the Merchant can be underſtood to be bound; and if it were ipſe obligaſſet, it had been good, and that is underſtood.

But Judgment was given for the Defendant.

Snode *verſus* Ward.

IN an Indebitat' aſſumpſit for Goods ſold.

The Defendant pleaded quod ipſe infra ſex annos pxime ante diem impetrationis Brevis Originalis ipſius Quer' non aſſumpſit. Antea 185, 193. 3 Lev. 283. Poſtea 259.

To which the Plaintiff demurred.

1. Becauſe the late Statute of 1 Willielmi & Mariæ, for reviving of Proceſs, doth enact, That the Time from the 11th of December 1688. to the 13th of February then next following, ſhould not be accounted as any Part of the Time upon the Statute of Limitations. And therefore the Defendant ſhould have pleaded, that he did not aſſume within ſix Years and ſo many Days as were between the 11th of December and the 13th of February. And it was ſaid, ſo had the Pleading been ever ſince the ſaid Statute. Antea 185, 193.

But the Court reſolved, That the Pleading might be ſtill in ſuch Manner as before the Statute: For the Statute is, that thoſe Days ſhall be no Part of the Time; and therefore pleading Non aſſumpſit infra ſex annos is to be underſtood of ſix Years excluſive of thoſe Days between the 11th of December and the 13th of February.

2. Another Exception was taken to the Plea, for that it is ante impetrationem Brevis Originalis ipſius Quer. and doth not ſay præd. brevis, and ſo it may be referred to ſome other Writ the Plaintiff might have.

Pollexfen, Chief Juſtice, inclined, That it was naught for this Cauſe. Adjornatur.

Vide 8 Co. 57. The Earl of Rutland's Caſe: He pleads, that he was ſeiſed of the Park of Clipſham, and granted officium Parci ſui, and not ſaid præd' Parci; and held it good. Vide 2 Cro. 288. Burton and Eyre.

Humphreys

Humphreys *verſus* Bethily.

Poſtea 222. IN an Action of Debt upon a Penal Bill, where the Defendant was to pay 10s. upon the 11th of June, and 10s. more upon the 10th of July next following, and ſo 10s. every three Weeks after, till a certain Sum were ſatisfied by ſuch ſeveral Payments. And for the true Payment thereof the Defendant obliged himſelf in the Penal Sum of 7 l.

The Plaintiff in facto dicit pleaded, That the Defendant did not pay the ſaid Sum, or any Part thereof, upon the ſeveral Days aforeſaid, unde actio accrevit for the 7 l.

The Defendant pleaded, That he paid 10s. upon the 11th of June, & hoc paratus eſt verificare, &c.

The Plaintiff replied, That he did not pay it, & hoc petit quod inquiratur per Patriam. To which the Defendant demurred.

The Plea was held altogether inſufficient.

But then Pollexfen, Chief Juſtice, obſerved, That the Declaration was naught; for he ſhould have declared, that the Defendant failed in Payment of one of the Sums, which would have been enough to have entitled him to the Penalty; but he ſays, The ſaid ſeveral Sums of Money, or any of them, and this is double; and he inclined that it was not aided by anſwering over, or by the
Kellew. 68. a. General Demurrer. Adjornatur.
Poſtea 222. Vide Saunders and Crowley, 1 Ro. 112.

Thompſon *verſus* Leach.

3 Lev. 284. See 1 Show. this Caſe 296. 2 Salk. 576, 618. 3 Mod. 296, 301. Parl. Caſes 150, 151. IN an Ejectment by Thomas Thompſon againſt Sir Simon Leach and divers other Defendants, upon the Demiſe of Charles Leach, of the Manor of Bulkworthy, and divers Meſſuages, Lands and Tenements.

Upon Not guilty pleaded, a Special Verdict was found to this Effect, viz.

That Nicholas Leach was ſeiſed in Fee of the ſaid Manors, Lands and Tenements in the Declaration; and by his Laſt Will in Writing, bearing Date the 9th Day of December, in the 19th Year of the Reign of the late King Charles the Second, deviſed the Premiſſes to his Brother Simon Leach for Life, Remainder to the firſt Son of the Body of the ſaid Simon, and the Heirs Males of the Body of ſuch firſt Son, and in like Manner to the ſecond, third Son, &c. and for Want of Iſſue of the ſaid Simon Leach, the Remainder to Sir Simon Leach and the Heirs Males of his Body; and for Default of ſuch Iſſue, to the right Heirs of Nicholas the

Teſtator for ever; and that the ſaid Nicholas died ſeiſed of the Premiſſes, and after his Deceaſe the ſaid Simon Leach entred and became ſeiſed for Life, with Remainders over, as aforeſaid; and being ſo ſeiſed made a Deed, bearing Date the 23d of Auguſt, in the 25th Year of the Reign of the ſaid King Charles, ſealed and delivered to the Uſe of the ſaid Sir Simon Leach (but he was not preſent) which Deed the Verdict ſets forth in hæc verba; and by it he granted and ſurrendred to the ſaid Sir Simon Leach, his Heirs and Aſſigns, the ſaid Manor and Premiſſes, the Reverſion and Reverſions, Remainder and Remainders of the ſame: To have and to hold the ſame to the ſaid Sir Simon Leach and his Heirs, to the Uſe of him and his Heirs; and they find that the ſaid Charles Leach, Leſſor of the Plaintiff, the firſt Son of the ſaid Sir Simon Leach was born the firſt of November, in the 25th Year of the Reign of the ſaid King Charles, and not before; and that Simon Leach, from the Time of his Sealing the Deed to the 25th of May, in the 30th Year of the ſaid King Charles, continued poſſeſſed of the Premiſſes, and that then, and not before, Sir Simon Leach accepted and agreed to the ſaid Surrender, and entred into the Premiſſes; and that afterwards the ſaid Simon Leach, Brother of the ſaid Nicholas the Teſtator, died, and the ſaid Charles Leach his Son, after his Deceaſe entred into the Premiſſes, and demiſed them to the Plaintiff, who by Virtue thereof entred and became poſſeſſed, and ſo continued till the ſaid Sir Simon Leach and the other Defendants, by his Command, ejected him. But whether, upon the whole Matter, the ſaid Simon Leach did ſurrender the ſaid Manor and Premiſſes to the ſaid Sir Simon Leach, before the ſaid Charles Leach was born; and if he did not ſurrender before the Birth of the ſaid Charles Leach, then they find the Defendants guilty; and if he did ſurrender them before the Birth, then they find for the Defendants.

And Pollexfen, Chief Juſtice, Powell and Rokeby, were of Opinion that here was no Surrender till ſuch Time as Sir Simon Leach had Notice of the Deed of Surrender, and agreed to it, and ſo the Remainder was veſted in Charles the Son; and it was not defeated by the Agreement of Sir Simon, after his Birth, to the Surrender. 3 Mod. 269.

But Ventris differed, and his Argument was as followeth:

Upon this Record the Caſe is no more than thus; Simon Leach, Tenant for Life, Remainder to his firſt Son, Remainder in Tail to Sir Simon Leach. Simon Leach before the Birth of that Son, by Deed, ſealed and delivered to the Uſe of Sir Simon, (but in his Abſence and without his Notice) ſurrenders his Eſtate to Sir Simon, and continues the Poſſeſſion until after the Birth of his Son; and then Sir Simon Leach agrees to the Surrender, Whether this

Surrender

Surrender shall be taken as a good and effectual Surrender before the Son born?

There are two Points which have been spoken to in this Case at the Bar.

First, Whether by the Sealing of the Deed of Surrender the Estate immediately passed to Sir Simon Leach? for then the contingent Remainder could not vest in the after-born Son, there being no Estate left in Simon Leach his Father to support it?

Secondly, Whether after the Assent of Sir Simon Leach, tho' it were given after the Birth of the Son, doth not so relate as to make it a Surrender from the Sealing of the Deed, and thereby defeat the Remainder which before such Assent was vested in the Son?

I think these Points include all that is material in the Case, and I shall speak to the second Point, because I would rid it out of the Case. For as to that Point I conceive, that if it be admitted, that the Estate for Life continued in Simon Leach till the Assent of Sir Simon, that the Remainder being vested in Charles the second Son before such Assent, there can be no Relation that shall devest it.

I do not go upon the General Rule, That Relations shall not do wrong to Strangers.

'Tis true, Relations are Fictions in Law, which are always accompanied with Equity.

But 'tis as true, that there is sometimes Loss and Damage to third Persons consequent upon them; but then 'tis what the Law calls Damnum absq; injuria, which is a known and stated Difference in the Law, as my Brother Pemberton urged it. But I think there needs nothing of that to be considered in this Point.

But the Reason which I go upon is, That the Relation here, let it be never so strong, cannot hurt or disturb the Remainder in Charles Leach in this Case; for that the Remainder is in him by a Title antecedent and paramount to the Deed of Surrender, to which the Assent of Sir Simon Leach relates, so that it plainly over-reaches the Relation.

If an Estate in Remainder, or otherwise, ariseth to one upon a Contingency or a Power reserved upon a Fine or Feoffment to Uses, when the Estate is once raised or vested, it relates to the Fine or Feoffment, as if it were immediately limited thereupon, 1 Co. 133, 156. So this Remainder, when vested in Charles, he is in immediately by the Will, and out of Danger of his Remainder being devested by any Act done since, as the Surrender is.

I will put one Case, I think full to this Matter, and so dismiss this Point.

It cannot be denied, but that there is as strong a Relation upon a Disagreement to an Estate, as upon an Agreement, where the Estate was conveyed without the Notice of him that afterwards agrees or disagrees; if the Husband discontinues the Wife's Estate, and then the Discontinuee conveys the Estate back to the Wife in the Absence of the Husband, who (as soon as he knows of it) disagrees to the Estate, this shall not take away the Remitter which the Law wrought upon the first Taking the Estate from the Discontinuee. And so is Litt. cap. Remitter. Co. 1 Inst. 356. b. The true Reason is, because she is in of a Title paramount to the Conveyance to which the Disagreement relates, tho' that indeed was the Foundation of the Remitter, which by the Disagreement might seem to be avoided. This therefore I take to be a stronger Case than that at the Bar: So that if there were no Surrender before the Birth of Charles the Son, there can be none after by any Construction of Law; for that would be in Avoidance of an Estate settled by a Title antecedent to such Surrender, whereas Relations are to avoid mesne Acts; and I believe there can be no Case put upon Relations that go any further, and it would be against all Reason if it should be otherwise. Jones 78.

But as to the first Point, I am of Opinion, that upon the Making of the Deed of Surrender, the Freehold and Estate of Simon Leach did immediately vest in Sir Simon, before he had Notice, or gave any express Consent to it; and so it was a Surrender before Charles was born, and then the contingent Remainder could never vest in him, there being no particular Estate to support it.

A Surrender is a particular Sort of Conveyance that works by the Common Law. And it has been agreed, and I think I can make it plainly appear, that Conveyances at the Common Law do immediately (upon the Execution of them on the Grantor's Part) devest the Estate out of him, and put it in the Party to whom such Conveyance is made, though in his Absence, or without his Notice, till some Disagreement to such Estate appears. I speak of Conveyances at the Common Law; for I shall say nothing of Conveyances that work upon the Statute of Uses, or of Conveyances by Custom, as Surrenders of Copyholds, or the like, as being guided by the particular Penning of Statutes, and by Custom and Usage, and Matters altogether foreign to the Case in Question.

In Conveyances that are by the Common Law, sometimes a Deed is sufficient (and in Surrenders sometimes Words without a Deed) without further Circumstance or Ceremony; and sometimes a further Act is requisite to give them Effect, as Livery of Seisin, Attornment, and sometimes Entry of the Party, as in Case of Exchanges; and as well in those Conveyances that require a

Deed only, as those which require some further Act to perfect them, so soon as they are executed on the Grantor's Part, they immediately pass the Estate. In Case of a Deed of Feoffment to divers Persons, and Livery made to one Feoffee in the Absence of the rest, the Estate vests in them all till Dissent, 2 Leon. 23. Mutton's Case. And so 223. an Estate made to a Feme Covert by Livery, vests in her before any Agreement of the Husband, Co. 1 Inst. 356. a. So of a Grant of a Reversion after Attornment of the Lessee, passeth the Freehold by the Deed, Co. 1 Inst. 49. a. Litt. Sect. 66. In Case of a Lease, the Lessee hath Right immediately to have the Tenements by Force of the Lease. So in the Case of Limitation of Remainders and of Devises, (which tho' a Conveyance introduced by the Statute, yet operates according to the Common Law) the Freehold passeth to the Devisee before Notice or Assent. I do not cite Authorities, which are plentiful enough in these Matters, because they that have argued for the Plaintiff have in a Manner agreed, that in Conveyances at the Common Law, generally the Estate passeth to the Party, till he devests it by some Disagreement.

Antea 199. Post. 208.

But 'tis objected, That in Case of Surrenders, an express Assent of the Surrendree is a Circumstance requisite; as Attornment to a Grant of a Reversion, Livery to a Feoffment, or Execution by Entry, in Case of an Exchange.

To which I answer, That an Assent is not only a Circumstance, but 'tis essential to all Conveyances; for they are Contracts, actus contra actum, which necessarily suppose the Assent of all Parties: But this is not at all to be compared with such collateral Acts or Circumstances, that by the positive Law are made the effectual Parts of a Conveyance; as Attornment, Livery, or the like; for the Assent of the Party that takes, is implied in all Conveyances, and this is by Intendment of Law, which is as strong as the Expression of the Party, till the contrary appears; stabit præsumptio donec probetur in contrarium.

But to make this Thing clear, my Lord Coke in his first Institutes, fol. 50. where he gives Instances of Conveyances that work without Livery, or further Circumstance or Ceremony, puts the Cases of Lease and Release, Confirmation, Devise and Surrenders, amongst the rest; whereas if an express Assent of the Surrendree were a Circumstance to make it effectual, sure he would have mentioned it, and not marshall'd it with such Conveyances, as I have shewn before need no such Assent, nor any Thing further than a Deed.

The Case of Exchanges has been put as an Instance of a Conveyance at Law, that doth not work immediately; but that can't be compared to the Case in Question, but stands upon its particular Reasons; for there must be a mutual express Consent,

because in Exchanges there must be a reciprocal Grant, as appears by Littleton.

Having, I hope, made out (and much more might have been added, but that I find it has been agreed) that Conveyances work immediately upon the Execution of them on the Part of him that makes them, I will now endeavour to shew the Reasons, why they do so immediately vest the Estate in the Party without any express Consent; and to shew that these Reasons do hold as strongly in Case of Surrenders, as of any other Conveyances at Law; and then consider the Inconveniences and ill Consequences that have been objected, would ensue, if Surrenders should operate without an express Consent; and to shew, that the same are to be objected as to all other Conveyances, and that very odd Consequences and Inconveniences would follow, if Surrenders should not operate without an express Consent of the Surrendree; and then shall endeavour to answer the Arguments that have been made on the other Side, from the putting of Cases of Surrenders in the Books, which are generally mentioned to be with mutual Assent, and from the Manner of Pleading of Surrenders.

The Reasons why Conveyances do devest the Estate out of the Grantor, before any express Assent or perhaps Notice of the Grantee, I conceive to be these Three:

First, Because there is a strong Intendment of Law, That for a Man to take an Estate it is for his Benefit, and no Man can be supposed to be unwilling to that which is for his Advantage; 1 Rep. 44. Where an Act is done for a Man's Benefit an Agreement is implied, till there be a Disagreement. This does not only hold in Conveyances, but in the Gift of Goods, 3 Co. 26. A Grant of Goods vests the Property in the Grantee before Notice. So of Things in Action; A Bond is sealed and delivered to a Man's Use, who dies before Notice, his Executors may bring an Action. Dyer 167. An Estate made to a Feme Covert vests in her immediately, till the Husband disagrees. So in my Lord Hobart 204. in Swain and Holman's Case. Now is there not the same Presumption and Appearance of Benefit to him in Reversion in Case of a Surrender? Is it not a palpable Advantage to him to determine the particular Estate, and to reduce his Estate into Possession? And therefore, why should not his Assent be implied, as well as in other Conveyances?

Smalman and Agborough. 1 Salk. 301, 307.

Secondly, A second Reason is, Because it would seem incongruous and absurd, that when a Conveyance is compleatly executed on the Grantor's Part, yet notwithstanding the Estate should continue in him. The Words of my Lord Coke (1 Inst. 227. a.) are, That it cannot stand with any Reason, that a Freehold should remain in a Man against his own Livery when there is a Person able to take it. There needs only a Capacity to take, his Will

to take is intended. Why should it not seem as unreasonable, that the Estate should remain in Simon Leach, against his own Deed of Surrender? For in Case of a Surrender, a Deed, and sometimes Words without a Deed, are as effectual as a Livery in Case of a Feoffment.

Thirdly, The third and principal Reason, as I take it, why the Law will not suffer the Operation of a Conveyance to be in Suspence, and to expect the Agreement of the Party to whom 'twas made, is to prevent the Uncertainty of the Freehold. This I take to be the great Reason why a Freehold cannot be granted in futuro, because that it would be very hard and inconvenient that a Man should be driven to bring his Præcipe or real Action first against the Grantor, and after he had proceeded in it a considerable Time, it should abate by the Transferring the Freehold to a Stranger, by Reason of his Agreement to some Conveyance made before the Writ brought; for otherwise there is nothing in the Nature of the Thing against Conveying a Freehold in futuro; for a Rent de novo may be so granted; because that being newly created, there can be no precedent Right to bring any real Action for it. Palmer 29, 30.

Now in this Case, suppose a Præcipe had been brought against Simon Leach, this should have proceeded, and he could not have pleaded in Abatement till Sir Simon Leach had assented; and after a long Progress in the Suit he might have pleaded, that Sir Simon Leach assented Puis darrein continuance, and defeated all. So that the same Inconvenience, as to the Bringing of real Actions, holds in Surrenders, as in other Conveyances.

And to shew that it is not a slight Matter, but what the Law much considers, and is very careful to have the Freehold fixed, and will never suffer it to be in Abeyance, or under such Uncertainty, as a Stranger that demands Right should not know where to fix his Action.

A Multitude of Cases might be cited; but I will cite only a Case put 1 H. 6. 2. a. because it seems something of a singular Nature, Lord and Villain, Mortgagor and Mortgagee, may be both made Tenants.

But it will be said here, That if a Præcipe had been brought against Sir Simon Leach, might not he have pleaded this Disagreement, and so abated the Writ by Non-tenure?

'Tis true; but that Inconvenience had been no more than in all other Cases, a Plea of Non-tenure, and it must have abated immediately; for he could not have abated it by any Dissent after he had answered to the Writ. Whereas I have shewn it in the other Case, it may be after a long Progress in the Suit.

Again, It's very improbable that he should dissent; whereas on the other Side, an Assent is the likeliest Thing in the World; so the Mischief to the Demandant is not near so great, nor the hundredth Part so probable.

Now I come to consider those Inconveniences that have been urged that would ensue, if a Surrender should work immediately.

It has been said, That a Tenant for Life might make such Deed of Surrender, and continue in Possession, and suffer a Recovery; and this might destroy a great many Recoveries, and overthrow Marriage-Settlements, and defeat Charges and Securities upon his Estate after such Deed of Surrender.

These, and a great many more such like Mischiefs, may be instanced in Surrenders; but they hold no less in any other Conveyances, whereby a Man may (as hath been shewed before) devest himself of the Estate, and yet continue the Possession; and in this Case the Assent of the Surrendree, tho' he doth not enter, would (as it is urged of all hands) vest the Estate in him, Hutton 95. Br. Tit. Surrender 50. tho' he cannot have Trespass before Entry, and that Assent might be kept as private, and let in all the Mischiefs before-mentioned as if no such Assent were necessary.

And this I think sufficient to answer to the Inconveniences objected on that Side.

Now let us see what Inconveniences and odd Consequences would follow, in Case a Surrender could not operate till the express Assent of the Surrendree, then no Surrender could be to an Infant at least, when under the Age of Discretion; for if it be a necessary Circumstance, it cannot be dispensed with no more than Livery or Attornment. So tho' an Infant of a Year old is capable to take an Estate, because for his Benefit he could not take a particular Estate, upon which he had a Reversion immediately expectant, because it must enure by Surrender. If there be Jointenants in Reversion, a Surrender to one of them enures to both, 1 Inst. 192, 214. a. so there, as to one Moiety, it operates without Assent or Notice.

Suppose Tenant for Life should make Livery upon a Grant of his Estate to him in Reversion and two others, and the Livery is made to the other Two in the Absence, and without the Notice of him in Reversion, should the Livery not work immediately for a third Part of the Estate? and if it doth, it must enure as a Surrender for a third Part. So is Bro. Tit. Surrender, and 3 Co. 76.

If

If Tenant for Life should by Lease and Release convey the Lands held by him for Life, together with other Lands to him in Reversion who knows nothing of the Sealing of the Deed; should this pass the other Lands presently, and the Lands held for Life not till after an express Assent, because as to those Lands it must work as a Surrender? Plainly an express Assent is not necessary. For if the Grantee enters, this is sufficient.

I come in the last Place to answer those Arguments that have been made from the Manner of putting the Case of Surrenders in the Books, and the Form of pleading Surrenders. Co. 1 Inst. 337. b.

First, A Surrender is a Yielding up of the Estate, which grows by mutual Agreement between them. Tenant for Life, by Agreement of him in Reversion, surrenders to him; he hath a Freehold before he enters. And so Perkins, in putting the Case of a Surrender, mentions an Agreement; and divers other Books have been cited to the same Purpose.

To all which I answer:

No doubt but an Agreement is necessary. But the Question is, Whether an Agreement is not intended where a Deed of Surrender is made in the Absence of him in the Reversion? whether the Law shall not suppose an Assent, till a Disagreement appears?

Indeed, if he were present, he must agree or disagree immediately; and so 'tis in all other Conveyances. The Cases put in Perkins, Sect. 607. 608, 609. are all of Surrenders made to the Lessor in Person; for thus he puts them: The Lessee comes to the Lessor, and the Lessee saith to the Lessor, I surrender, saith he, if the Lessor doth not agree, 'tis void; Car il ne poit surrender a luy maugre son dents. And that is certainly so in Surrenders, and all other Conveyances; for a Man cannot have an Estate put into him in Spight of his Teeth.

But I cannot find any of the Books cited that come to this Point, That where a Deed of Surrender is executed without the Notice of him in Reversion, that it shall pass nothing till he consents; so that it cannot be said, that there is any express Authority in the Case.

Now, as to the Form of Pleading of a Surrender, it has been objected, That a Surrender is always pleaded with Acceptance; and many Cases have been cited of such Pleadings, Rastal's Entries 176, 177. Fitzh. Tit. Barre 262. which are Cases in Actions of Debt for Rent, and the Defendant in Bar pleads, That he surrendred before the Rent grew due, and shews, that the Plaintiff accepted the Surrender: So in Waste brought, a Surrender pleaded with the Agreement of the Plaintiff.

These and the like Cases have been very materially, and I think fully answered at the Bar by my Brother Pemberton; That those Actions being in Disaffirmance of the Surrender, and implying a Disagreement, the Defendant had no way to bar and avoid such Disagreement, but by Shewing an express Agreement before.

The Case of Peto and Pemberton in 3 Cro. 101. that has been so often cited, is of the same Sort: In a Replevin the Avowry was for a Rent-charge; in Bar of which 'tis pleaded, That the Plaintiff demised the Land out of which the Rent issued, to the Avowant. The Avowant replies, That he surrendred dimissionem præd. to which the Plaintiff agreed. This is the same with Pleading in Bar to an Action of Debt for Rent: But when the Action is in Pursuance of the Surrender, then it is not pleaded.

So is Rast. Entries 136. The Lessee brought an Action of Covenant against the Lessor, for entring upon him, and ousting of him. The Defendant pleads a Surrender in Bar, and that without any Agreement or Acceptance.

In Fitzherbert, Tit. Debt 149. where the Case is in an Action of Debt for Rent, the Defendant pleaded in Bar, that he surrendered, by Force of which the Plaintiff became seised: There is no mention of Pleading any Agreement, notwithstanding that the Action was in Disaffirmance of the Surrender.

Therefore as to the Argument which has been drawn against the Form of Pleading, I say, that if an Agreement be necessary to be pleaded: Then, I say,

First, That 'tis answered by an implied Assent, as well as an express Assent. I would put the Case; Suppose a Lessee for Life should make a Lease for Years, reserving Rent; and in Debt for the Rent the Lessee should plead, That the Plaintiff before the Rent grew due surrendred to him in Reversion, and he accepted it, and Issue is upon the Acceptance; and at the Trial it is proved, That the Plaintiff had executed a Deed of Surrender (as in this Case) to him in Reversion in his Absence; would not this turn the Proof upon the Plaintiff, that he in Reversion disagreed to this Surrender? for surely his Agreement is prima facie presumed, and then the Rule is, stabit præsumptio donec probetur in contrarium.

Again, I say it appears by the Cases cited that it is not always pleaded, and when pleaded 'tis upon a special Reason, as I have shewn before, i. e. to conclude the Party from Disagreeing; and it would be very hard to prove in Reason, that an Agreement (admitting an express Assent to be necessary) must be pleaded; for if it were a necessary Circumstance to the Conveyance, why then 'tis implied in Pleading sursumreddidit; for it cannot be a Surrender without it.

In

In Pleading of a Feoffment it is enough to say Feoffavit, for that implies Livery; for it cannot be a Feoffment without it.

Now why should not sursumreddidit imply all necessary requisites, as well as Feoffavit? and therefore I do not see that any great Argument can be drawn from the Pleading. For,

1. It is not always to be pleaded.

2. It cannot be made out to be necessary so to plead it; for if Assent be a necessary requisite, then 'tis implied by saying sursumreddidit, as Livery is in Feoffavit; and then to add the Words of express Consent is as superfluous, as to shew Livery after saying Feoffavit.

And again, If it were always necessary, it is sufficiently answered by an Assent intended in Law; for Presumptions of Law stand as strong till the contrary appears, as an express Declaration of the Party.

3 Mod. 296, 301. Note, A Writ of Error was brought in the King's Bench upon this Judgment, and it was there affirmed by the unanimous Consent of the whole Court.

Memorand. Anno quarto Willielmi & Mariæ; this Case was brought by Writ of Error into the House of Lords, and the Judgment was there reversed upon the Reasons in the aforesaid Argument.

It appeared afterwards, that *S. L.* was *Non compos mentis* at the Time of the Surrender; and 'twas adjudged in *B. R.* that a Surrender made by one *Non compos mentis* was void, so that the particular Estate remain'd in the Surrenderor, and the contingent Remainder vested in the Son. 2 *Salk.* 576. 3 *Mod.* 301. which was affirm'd in the House of Lords. *Parl. Cases* 151. *Thomson* and *Leach.*

Termino Sancti Michaelis, Anno 2 W. & M.

In Communi Banco.

Coghill *verſus* Freelove.

IN an Action of Debt for Rent the Plaintiff declared for 78 l. upon three ſeveral Demiſes againſt the Defendant, as Adminiſtratrix to Thomas Freelove her late Husband in the Detinet. 3 Mod. 325. 4 Mod. 71. 1 Sid. 338. 1 Lev. 215. Raym. 162. Keighly and Buckley. 1 Salk. 81. Show. 340. 3 Lev. 295. Poſt. 234. Pitcher and Tovey.

The Defendant pleaded, that after the Letters of Adminiſtration granted to her, and before the Rent became due, ſhe aſſigned to Samuel Freelove the Indenture of Demiſe, and all her Eſtate and Intereſt in the Premiſſes, and that Samuel entred and was poſſeſſed, and that the Plaintiff had Notice of the Aſſignment before the Action brought. 1 Vent. 271.

To this the Plaintiff demurs.

It was ſaid for the Plaintiff, that the Action being brought in the Detinet, the Aſſignment was no Plea; for the Adminiſtratrix is charged upon the Contract of the Inteſtate, and liable (ſo far as there is Aſſets) tho' there be no Aſſignment. And tho' in the 3 Co. and in the 1 Cro. 555. Overton and Syddal's Caſe ſeems the contrary; and ſo Marrow and Turpin's Caſe in the 1 Cro. 715. and that the Privity of Contract is determined by the Death of the Leſſee, yet an Ironmonger and Newſom's Caſe in Latch 260. the contrary was reſolved. (Note, it did not appear by Latch to be reſolved; but the Chief Juſtice ſaid it was reſolved.) So in 17 Car. 2. Siderfin 266. in Heylar and Casbord's Caſe it was reſolved, that the Action lay againſt the Executor upon the Contract, after an Aſſignment, where it was held alſo, that an Executor cannot wave a Term, unleſs he renounceth the whole Executorſhip. 1 Lev. 127. 1 Keb. 923.

After hearing Arguments at the Bar, the Court gave Judgment for the Plaintiff, (Powell abſente.) As to Overton and Syddal's Caſe, it appears by Mo. 352. that Popham and Fenner were againſt Gawdy and Clench. Vide Poph. Rep. 121. Yel. 163. Mod. 351, 352.

It appears that the Action was brought in the Debet and Detinet, and by a Prebendary upon the Leaſe of his Predeceſſor; and then an Aſſignment will be a Bar; which Matters indeed do not appear to be urged in the Caſe, as cited by my Lord Coke, and reported by Cro. Eliz. 355. But they go upon the Privity of Contract ſaid to be diſſolved by the Death of the Leſſee. Sed vid. Latch 261. that Caſe ſaid not to be reſolved, as cited by Co.

and ſo Noy's Rep. 77. And for Marrow and Turpin's Caſe there is an Acceptance of the Rent of the Aſſignee pleaded, as appears by 1 Cro. 715. tho' that doth not appear to be inſiſted on by the Books which report the Caſe; however the later Authorities are clear, that the Action lies in the Detinet after an Aſſignment, as appears by the Caſes cited. Judicium pro Quer.

Note, The Court was moved upon the Caſe of Perſons Outlawed upon Meſne Proceſs before the late Act of General Pardon, 2 Willielmi & Mariæ, it being provided by the ſaid Act, that no Proceſs of Outlawry, at the Suit of any Plaintiff, ſhall be ſtayed or avoided, unleſs the Defendant appears and puts in Bail (where by Law Bail is neceſſary) and takes forth a Writ of Scire Facias againſt the Party at whoſe Suit he was outlawed.

Whether the Defendant, before he can have the Benefit of this Pardon, muſt pay the Coſts to the Plaintiff of the Outlawry, there being no Mention of any Thing, but his appearing and putting in of Bail?

The Court were of Opinion, that he muſt pay the Coſts, and to take the Act otherwiſe would be a great Prejudice to the Plaintiff, who did no wrong.

And Pollexfen, Chief Juſtice ſaid, that the Practice had been ſo upon the General Act of Pardon, 25 Car. 2. cap. 5. and yet in that Statute the Clauſe concerning Outlawries is to the ſame Purpoſe, and no Mention made of the Coſts of the Party.

Denny *verſus* Mazey.

Replevin. Eſſex' ſſ. SIMON MAZEY nuper de Bocking in Com' prædict' Clothier ſum' fuit ad reſpondend' Samueli Denny de placito quare cepit un' Equul' ipſius Samuelis & cum injuſte detinuit contra vadios & pleg', &c. Et unde idem Samuel per Johannem Meriton Attorn' ſuum queritur quod p'dict' Simon viceſimo ſexto die Septembris anno regni Dom' & Dominæ Regis & Reginæ nunc primo apud Bocking in quodam loco ibidem (vocat' Townfield) cepit un' Equul' nigr. (Anglice, Black Horſe-Colt) ipſius Samuelis & eum injuſte detinuit contra vad' & pleg' quouſque, &c. unde dic' quod deteriorat' eſt & dampn' habet ad valentiam decem librarum & inde produc' ſectam, &c.

Avowry pur Damage Feaſant. Et præd. Simon per Stephan. Hales Attorn' ſuum ven. & defend' vim & injur. quando, &c. & bene advocat captionem Equuli prædict' in prædicto loco in quo, &c. & juſte, &c. quia dic' quod ante prædict tempus quo ſupponitur captionem Equuli prædicti

J. S. ſeized in Fee. quædam Elizabetha Mann Vid' fuit ſeiſit. de prædict. loco in quo, &c. in dominico ſuo ut de feodo & ſic ſeiſit. exiſten. prædicta Elizabetha

Elizabetha ante p̄d. tempus quo, &c. ſcilicet viceſimo die Septembr. anno regni Dom. & Dominæ Regis & Reginæ nunc primo apud Bocking præd dimiſit eidem Simoni locum præd. in quo, &c. habend. & occupand. eidem Simoni abinde per ſpacium unius anni tunc prox. ſequen' & ſic de anno in annum quamdiu ambabas partibus placer' Virtute cujus dimiſſionis idem Simon poſtea & ante præd' tempus quo, &c. ſcilicet viceſimo primo die ejuſdem menſis Septembr. in p̄d. loco intravit & fuit inde poſſeſſionat' Ipſoque Simone ſic inde poſſeſſionat. exiſten. quia Equul. prædict. præd. tempore quo, &c. fuit in prædicto loco in quo, &c. herbam ſuam ibidem tunc creſcen. depaſcen. & dampn' ibidem facien. idem Simon bene advocat capc'onem Equuli præd. in prædicto loco in quo, &c. Et juſte, &c damn' ibidem ſic facien. Et hoc parat. eſt verificare unde. pet. Judic. & retorn. præd. Equuli una cum dampnis mis' & cuſtag ſuis in hac parte appoſit. juxta formam Statuti in hujuſmodi caſu edit' & provis' ſibi adjudicari, &c.

And demiſed to the Avowant at Will.

The Avowant entred and was poſſeſſed.

And took the Colt Damage-feſant.

Prays Judgment and a Return, and Coſts and Damages, according to the Statute.

Et prædict' Samuel dic' qd' præd. Simon ratione præallegata capc'onem Equuli præd. in præd. loco in quo, &c. juſtam advocare non debet quia dic. quod præd. Elizabetha Mann Vid. ante præd. tempus quo, &c. fuit & adhuc eſt ſeiſit. de præd. Clauſo in quo, &c. cum pertin. int. alia in dominico ſuo ut de feodo Et ſic inde ſeiſit. exiſten. eadem Elizabetha ante p̄d. tempus quo, &c. ſcilicet quinto die Junii anno regni dictoru' Dom' Regis & Dominæ Reginæ nunc primo ſupradicto apud Bocking p̄d. dimiſit præfat. Samueli idem Clauſum cum pertin. in quo, &c. inter alia habend. a ſecundo die Martii tunc ult' p̄terit. pro ſex annis ab eodem ſecundo die Martii prox. ſequen. Virtute cujus dimiſſionis idem Samuel ante p̄d. tempus quo, &c. in Clauſum illud in quo, &c. inter alia intravit & fuit & adhuc exiſtit inde poſſeſſionat' & ſic inde poſſeſſionat. exiſten. idem Samuel ante præd. tempus quo, &c. poſuit Equul' præd. in idem Clauſum in quo, &c. ad herbam ibidem tunc creſcen. depaſcend. Et Equulus ille prædicto tempore quo, &c. fuit in eodem Clauſo in quo, &c. Herbam ibidem tunc creſcen. depaſcen' quouſque prædictus Simon prædicto viceſimo ſexto die Septembris anno primo ſupradicto apud Bocking præd' in prædict' Clauſo (vocat. Townfield) cepit Equulum illum & eum injuſte detinuit contra vad. & pleg' quouſque, &c. prout ipſe idem Samuel ſuperius verſus eum queritur Abſque hoc quod præd. Elizabetha Mann dimiſit præd. Simoni prædict' loc. in quo, &c. modo & forma prout p̄d. Simon per advocat' ſu'm præd' ſuperius ſupponit. Et hoc parat' eſt verificare unde ex quo præd. Simon capc'onem Equuli prædicti in prædicto Clauſo in quo, &c. ſuperius cogn. idem Samuel pet. Judicium & dampna ſua occ'one capc'onis & injuſtæ detenc'onis Equuli illius ſibi adjudicari, &c.

The Plaintiff pleads in Bar to the Avowry, that J. S. demiſed to him, and traverſes the Demiſe to the Avowant. Confeſſing the Seiſin in Fee. Demiſe to the Plaintiff for ſix Years.

The Plaintiff entred and was poſſeſſed.

And the Defendant took his Colt there.

Abſque hoc that J. S. deviſed to the Avowant modo & forma, as he hath ſet forth in his Avowry. Petit Judicium & dampna, &c.

Demurrer to the Plea.

Et prædict' Simon dic. quod præd. placitum prædict' Samuel. ſuperius replicand. placitat' materiaq; in eodem content' minus ſufficien' in lege exiſtunt ad ipſum Samuel' acc'onem præd' verſus eum habend. manutenend. quodque ipſe ad placitum illud modo & forma præd. replicand. placitat. neceſſe non habet nec per legem terræ tenetur aliquo modo reſpondere & hoc parat. eſt verificare unde pet' Judicium ſi præd. Samuel acc'onem ſuam præd. inde verſus eum habere debeat, &c.

Joinder in Demurrer.

Et prædict' Samuel ex quo ipſe ſufficien' materiam in lege in replicatione ſua prædicta ad acc'onem ſuam præd' verſus præfat. Simonem habend. manutenend' ſuperius allegavit quam ipſe parat. eſt verificare quam quidem materiam idem Simon non dedic' nec ad ill' aliqualit. reſpondet ſed verification. ill. admittere omnino recuſat idem Samuel ut prius pet. Judicium & dampna ſua occ'one capc'onis & injuſtæ detentionis Equuli illius ſibi adjudicari, &c. & quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſis priuſquam judicium inde rendant dies dat' eſt partibus predictis hicuſque — ad audiend' inde Judicium ſuam eo quod iidem Juſtic' inde nondum, &c.

Denny *verſus* Mazey.

IN a Replevin the Plaintiff declared of taking of his Horſe-Colt at S. in quodam loco vocat. Townfield.

The Defendant ſaith, that before the Taking, one Elizabeth Mann was ſeiſed in Fee de præd' loco in quo, &c. and 20 Septemb. Anno primo Willielmi & Mariæ demiſed the Premiſſes to him for a Year then next enſuing, and that he entred, and allowed the Taking of the Plaintiff's Horſe Damage-Feſant.

The Plaintiff replied, that the ſaid Elizabeth Mann was ſeiz'd of the Premiſſes in Fee, and before the Leaſe to the Avowant, (viz.) the 5th of June, in the ſaid firſt Year of the King and Queen, ſhe demiſed to the Plaintiff the Premiſſes, habend. from the ſecond Day of March then laſt paſt for the Term of ſix Years; by Virtue of which he entered, and put his Horſe into the Premiſſes, and traverſeth the Leaſe made to the Avowant.

To this the Avowant demurred generally.

2 Lutw. 1558, 1632. 2 Cr. 221. H. b. 81, 103. Traverſe where the Matter is confeſſed and avoided.

Pollexfen, Chief Juſtice, inclined, that the Traverſe was no Cauſe of Demurrer, tho' it might have been omitted. He ſaid there were divers Authorities againſt Heylar's Caſe in the 6 Co. 24. which is reported to the ſame Effect in Mo. 551. 1 Cro. 658. as 1 Cro. 754. Covert's Caſe; and the Books generally are only that there need be no Traverſe, as the Biſhop of Salisbury and Hunt in 3 Cro. 581. and Kellend and White, 3 Cro. 494. The other Juſtices doubted, relying upon the Authority of Heylar's Caſe, and Rice and Harveſton's Caſe, 2 Cro. 299, and Yelv. 151, 221. where 'tis ſaid, that ſuch a Traverſe makes the Plea vitious,

Vid. Mo. 557. But here the Demurrer being general, 'tis but Matter of Form, and clearly aided by the Statute of 27 Eliz. where if one confess and avoid and traverse, 'tis in Nature of a double Plea. Vid. that it is good upon a general Demurrer, Edwards and Woodden, 3 Cro. 323. So Judgment was by the whole Court given for the Plaintiff.

Woodward *versus* Fox.

Quod vide antea ultimo Termino.

THE Case was this Term argued again by Serjeant Pemberton for the Defendant, and by Serjeant Powell for the Plaintiff; upon the Point, Whether the Nomination to the Office, being forfeited by the Statute of Ed. 6. it did belong to the King, or the Bishop (in whose Diocese the Archdeaconry was) to make the Register? Antea 187. 3 Lev. 289. Postea 267.

But Pollexfen, Chief Justice, desired them to consider, Whether the King (admitting he had a Right by the Statute) could grant this Office of the Register, before Office found of the Forfeiture?

Note, In Case of Simony the Presentation vests in the King without Office. Adjornatur. Vide post. 267. Q. antea 39.

Morgan *versus* Hunt.

IN Covenant the Plaintiff declared, that the Defendant let to him a certain House and Lands, and covenanted that he should quietly and peaceably enjoy it, without any Manner of Interruption, Molestation or Disturbance; and that by Virtue of the said Demise he entred, and some Time after the Defendant exhibited a Bill against the Plaintiff in the Court of Chancery, wherein he charged the Plaintiff with ploughing up Meadows, and the committing of divers Wastes; and did obtain an Injunction out of the said Court against the Plaintiff, whereby he was interrupted in his Ploughing, &c. and that afterwards the said Bill was dismissed with 20l. Costs, and so the Defendant had broken his Covenant.

After a Verdict for the Plaintiff (I know not upon what Issue) it was moved in Arrest of Judgment.

First, that here was no sufficient Breach set forth. It was said that the Law does not take Notice of Proceedings in Chancery, Poph. 205. it is said, if one be possessed of Lands by Extent, and by a Decree in a Court of Equity he is forced to pay a Rent out

out of the Lands, this ſhall not be a legal Eviction or Recovery for ſo much.

Secondly, The Suit in Chancery here is not touching the Leſſee's Eſtate or Title, but for Waſte, which he ought not to do; and tho' the Suit might be groundleſs, yet it not relating to his Title or Poſſeſſion, was no Breach of Covenant.

The Judgment was ſtayed by the Opinion of the whole Court, for the laſt Reaſon; for this was no Interruption or Diſturbance within the Covenant, the Subject Matter of the Suit being for Waſte.

1 Vent. 195. 2 Cro. 68. But the Court will take Notice of a Suit in Chancery, and 1 Cro. 768. an Aſſumpſit in Conſideration of deſiſting from exhibiting a Bill in Chancery was held a good Conſideration.

Anonymus

IN a Covenant, that the Defendant ſhould keep in good Repair the Houſe, Outhouſes and Stables; and the Breach aſſigned was, that the Defendant had permitted the Racks in the Stable to be in Decay.

After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that the Plaintiff had not ſet forth that the Racks were fixed in the Stable, and ſo Part of the Freehold; for they might be in the Stable and lie looſe.

Pollexfen, Chief Juſtice, was of Opinion, that it ought to have been ſhewn in the Declaration, that the Racks were ſet up and fixed.

But the other Juſtices conceived, that it ſhould be intended that they were Racks fixed for Uſe in the Stable; and it would be very remote to give it any other Conſtruction. And ſo Judgment was given for the Plaintiff.

Moore *verſus* Furſdon.

1 Show. 342. IN an Ejectment it was moved in Arreſt of Judgment, that the Plaintiff had declared of two Demiſes, (viz.) That J. S. demiſed 10 Acres of Land to him, and that J. N. had demiſed 10 other Acres of Land to him, Habend' for the Term of five Years, &c. and that he entered into the Premiſſes demiſed to him by J. S. and J. N. in forma prædict'.

After Verdict, upon Not guilty for the Plaintiff, it was objected, that in one of the Demiſes there is no certain Term or Eſtate; for the Habend' can be referred only to the Demiſe of J. S. for that begins a new Sentence.

But the Court held, that the Habend' should be a good Limitation of both Demises for five Years; and when 'tis shewn, that the Plaintiff entred into the Premisses demised to him in forma prædict', that is an Averment that all was demised for five Years, for that is the forma præd'; as Lands let to A. for his Life, Remainder to B. in forma præd', this is an Estate to B. for Life, and so Judgment was given for the Plaintiff.

Afterwards a Writ of Error was brought upon this Judgment which was entred, Hill. 3 W. & M. Roll. 364. in B. R. and Judgment was thereupon affirmed.

Anonymus.

Hue and Cry.
2 Saund. 423.
2 Salk. 614.
3 Salk. 184.
Farsl. 157.
1 Sid. 11.

IN an Action upon the Statute of Hue and Cry, it was after Verdict moved in Arrest of Judgment, that in the Recital of the Statute there were Variances from the Statutes and Omissions.

First, There was no Mention of Burning of Houses in the Recital, but that it is in the Statute.

Non allocatur: For 'tis not necessary to set forth more in the Declaration than is pertinent to the Action.

Secondly, The Statute is, that the Country should answer for the Bodies of the Malefactors; and the Recital is, Qd' patria respondeat p̄ Malefactoribus, the Sense of which is, that the Country should stand in their Stead: Whereas the Meaning of the Statute is, that they should produce their Persons.

Sed non allocatur: For it is in the Recital of the Declaration, it well answers the Sense of the Statute.

Anonymus.

IN an Action of Trespass, quare Clausum fregit, and digging up and carrying away of his Trees.

It appeared upon the Evidence, that the Defendant had entered into the Plaintiff's Close, and digged up several Roots of his Trees, and removed them to a Place on the same Ground, about two Yards Distance off.

And the Question was, whether this were such a Carrying away, as that the Plaintiff should have full Costs, or only Costs according to the late Statute, where the Damages are under 40s. as was in this Case?

1 Salk. 193.
5 Mod. 313

Pollexfen, Chief Justice, and Rokeby (Powell absente,) were of Opinion, that the Plaintiff was to have full Costs, because the Roots were carried from the Place where they were digged, tho' not removed off from the Ground; and they said, that it had been adjudged Felony to take and remove Things with an Intent to steal them, tho' laid at a small Distance from the Place, and not carried out of the House, or the like.

Ventris

Ventris conceived, that the Taking of the Roots and Laying them a little way off in the ſame Man's Ground, could not be taken as an aſportavit, and it differed from the Caſe of Stealing; for Taking Goods as a Thief is the Felony, and it doth not lie in the carrying them off, but in the Felonious Intent in the Taking.

But by the Opinion of the other two the Plaintiff had his full Coſts.

Anonymus.

IT was moved for a Prohibition to the Eccleſiaſtical Court, to ſtay a Suit for Dilapidations, by the Succeſſor againſt the Executor of the former Incumbent, upon the late General Act of Pardon; for that all Suits for Offences of Inceſt, Simony or Dilapidations, are excepted in the Act, unleſs commenced and depending before ſuch a Day, (viz.) the 20th Day of March laſt; and this Suit was commenced ſince.

Q. Inſt. Leg. 540, 541. The whole Court, upon hearing of Counſel at the Bar, and Conſideration of the Matter, conceived, that the Parliament never intended to take away the Succeſſor's Remedy for Dilapidations; for that would be to eaſe the Executor of the laſt Incumbent, who was the Wrong-doer, and tranſlate the Charge to the Succeſſor: But they would intend this Exception of ſuch Suits as might be in the Eccleſiaſtical Court ex Officio againſt the Dilapidator himſelf, to puniſh it as a Crime againſt the Eccleſiaſtical Law, and to pardon it, unleſs there were Proſecution before the Day aforeſaid. And ſo the Prohibition was denied.

Note, If a Sheriff of a County in a City be in Contempt, the Attachment is to go to the Coroner, and not to the Mayor or Chief Officer of the Corporation in ſuch City or Town: And if the Offender be out of his Office, the Attachment ſhall be directed to the new Sheriff.

Gawden *verſus* Draper.

IN an Action of Covenant the Plaintiff declared upon a Deed of Covenant by Indenture, made between the Defendant and him, whereby the Defendant covenanted with the Plaintiff, That Sarah (Wife of the Defendant) ſhould be permitted to live ſeparate from the Defendant, until the Defendant and the ſaid Sarah by Writing under their ſeveral Hands, atteſted by two Witneſſes, ſhould give Notice to each other, that they would again cohabit. And further covenanted, That he the Defendant, during the Coverture, and until ſuch Notice ſhould be given of their Deſires to cohabit, as aforeſaid, would pay to the Plaintiff for the Maintenance of the ſaid Sarah, 300 l. per Annum, at four quarterly Payments; and ſets forth, That the ſaid Sarah, from the Date of the ſaid Indenture to the Time of the ſaid Suit, did live ſeparate from the Defendant, and no Notice of Cohabitation, as aforeſaid, had been given during that Time, of either Side: And for 75 l. for one Quarter's Payment of the ſaid 300 l. which was to be paid at our Lady-day laſt, the Action is brought.

The Defendant pleads in Bar, That after the Indenture aforeſaid, and before the Action brought, another Indenture was made between the Defendant and the ſaid Sarah his Wife, of the one Part, and the Plaintiff of the other Part, which the Defendant pfert hic in Cur. reciting the ſaid firſt Indenture; and further reciting, That the Defendant and the ſaid Sarah did then intend to cohabit, and did at that Time cohabit, and expreſſing that it was the true Intent and Meaning of all the ſaid Parties to the ſaid Indenture produced, ut ſupra, by the Defendant, That ſo long as the Defendant and the ſaid Sarah ſhould agree to cohabit, the ſaid annual Payment ſhould ceaſe. And the Plaintiff did by the ſaid laſt mentioned Indenture, by the Appointment of the ſaid Sarah, as appointed by her, being Party thereunto, and her Signing, Sealing and Delivery thereof, covenant and agree with the Defendant, That ſo long as the Defendant and the ſaid Sarah ſhould cohabit, he ſhould be ſaved harmleſs from the ſaid 300 l. annual Payment; and that it ſhould be lawful for him (during ſuch Cohabitation) to detain the ſame, ut per dictam Indenturam plenius apparet, and averreth, That ever ſince the laſt mentioned Indenture they did cohabit, and demands Judgment of the Action.

The Plaintiff replies, That they did not cohabit modo & forma prout the Defendant placitando allegavit, & hoc petit quod inquirat, &c. And to that the Defendant demurred.

Birch, Serjeant; argued for the Defendant, That this later Indenture, which sets forth a mutual Agreement to cohabit, and that they did cohabit, which is alledged in the Bar, and confessed by the Demurrer, had dispensed with those Circumstances, (viz.) A Writing mutually subscribed, attested by two Witnesses, giving Notice of each Party's Intention so to cohabit; and this Covenant, That it should be lawful for the Defendant to detain the same so long as such Cohabitation should continue, as is therein mentioned, might well be pleaded in Bar to the Action brought upon the first Indenture.

1 Salk. 573. Show. 46. Debt for Rent on a Lease for Years; Defendant pleads in Bar a Covenant by the Lessor, that the Lessee should deduct so much for Charges; and adjudged, that the Covenant being in the same Deed, may be well pleaded in Bar, the Thing being executory; and the Party shall not be put to Circuity of Action to bring Covenant. 1 Lev. 152. Johnson and Carne.

But by the Opinion of the whole Court Judgment was given for the Plaintiff; for they held, That unless the Cohabitation had been according to the first Indenture, it was no Bar; for the last Deed had not taken away the Effect of the former; a later Covenant cannot be pleaded in Bar of a former. But the Defendant must bring his Action upon the last Indenture, if he would help himself.

Anonymus.

A Fieri facias was taken out, which was executed after the Party was dead upon the Goods in the Hands of the Executor; but the Teste was before his Death. But it appeared, that the Delivery to the Sheriffs, and Endorsment thereupon, according to the new Statute of 29 Car. 2. was after his Death.

1 Mod. 188. 1 Salk. 320. 1 Show. 173. Antea 89. Note, A Fi. fa. does not abate by the Plaintiff's Death. 1 Salk. 322.

The Court held, That at the Common Law the Execution had been clearly good: But the Statute is, That the Property of the Goods shall be bound from the Delivery of the Writ to the Sheriff.

And the Court rather inclined, That the Execution was good, and that the Statute was made for the Benefit of Strangers, who might have a Title to the Goods between the Teste of the Writ of Execution, and Time of the Delivery thereof to the Sheriff. But as to the Party himself, the Goods were bound from the Teste ever since the Statute of Vicesimo nono Car. 2. But it was ordered to be further spoken to.

Watmough *verſus* Holgate.

Eborum ſſ. WIllielmus Holgate nuper de Sawley in Com̃ prædict' Yeoman alias dictus Willie⁹ Holgate de Sawley in Com̃ Eborum Yeoman ſum̃ fuit ad reſpondend' Roberto Watmough Radulpho Duxbury & Willielmo Swire de placito quod reddat eis quadraginta libras quas eis debet & injuſte detinet, &c. Et unde iidem Robertus Radulphus & Willielmus Swire per Robertum Scater Attorn' ſuum dic' quod cum prædict' Willielmus Holgate ſecundo die Auguſti anno regni Domini Regis Jacobi ſecundi Angl', &c. quarto apud Gisborne per quoddam ſcriptum ſuum obligatorium conceſſiſſet ſe teneri p̃fat̃ Roberto Radulpho & Willielmo Swire in præd' quadraginta libris ſolvend' eiſdem Roberto Radulpho & Willielmo Swire cum inde requiſit. fuiſſet præd. tamen Willielmus Holgate licet ſæpius requiſit. præd' quadraginta libras eiſdem Roberto Radulpho & Willielmo Swire nondum reddidit ſed ill. eis hucuſque reddere contradixit & adhuc contradicit unde dic. qd. deteriorat. ſunt & dampn' habent ad valentiam viginti librar. Et inde produc' ſectam, &c. Et p̃ferunt hic in Cur. ſcriptum præd. quod debitum præd. in forma præd. teſtatur cujus dat̃ eſt die & anno ſupradicto, &c. Debt upon a Bond.

Et prædict' Willielmus Holgate per Johannem Mitchel Attorn' ſuum ven̄ & defend. vim & injur. quando, &c. Et pet. auditum ſcripti præd & ei legitur, &c. petit etiam auditum Conditionis ejuſdem ſcripti & ei legitur in hæc verba ſſ. **The Condition of this Obligation is ſuch, That if the above-bounden William Holgate, his Heirs, Executors and Adminiſtrators, for his and their Parts and Behalves, ſhall and do in all Things well and truly ſtand to, obey, abide, perform, fulfil and keep the Award, Order, Arbitrament, final End and Determination of** Ambroſe Pudſey **of** Colton, **Eſq; and** Thomas Parker **of** Crouſeholme **Eſq; Arbitrators indifferently elected and named, as well on the Part and Behalf of the above-bounden** William Holgate, **as of the above-named** Robert, Ralph **and** William Swire, **to arbitrate, award, order, judge and determine, of and concerning all and all Manner of Action and Actions, Cauſe and Cauſes of Actions, Suits, Bills, Bonds, Specialties, Judgments, Executions, Extents, Quarrels, Controverſies, Treſpaſſes, Damages and Demands whatſoever, at any Time heretofore had, made, moved, brought, commenced, ſued, proſecuted, done, ſuffered, committed or depending, by or between the ſaid Parties, ſo as the ſaid Award be made and put into Writing, and ready to be delivered to the Parties in Difference, or ſuch of them as ſhall deſire the ſame, on or before the eleventh Day of** November **next, then this Obligation to be void, or elſe to ſtand** The Defendant craves Oyer of the Condition. Which is for the Performance of an Award.

The Defendant pleads, That the Arbitrators made no Award.

in Force. Quibus lectis & auditis idem Willielmus Holgate dic. qd. præd Robertus Radulphus & Willielmus Swire actionem ſuam præd. inde verſus eum habere non debent quia dic. qd. præd. Ambroſius Pudſey & Thomas Parker Arbitratores præd' poſt confectionem ſcripti præd' ad vel ante prædict' undecimum diem Novembris in Conditione ſcripti præd mentionat' nullum fecer. arbitrium inter partes præd' in Conditione prædict' ſuperius mentionat' de & in præmiſſis in Conditione prædict. ſuperius ſpec'. Et hoc paratus eſt verificare unde petit Judicium ſi præd' Robertus Radulphus & Willielmus Swire actionem ſuam præd' inde verſus eum habere debeant, &c.

The Plaintiff replies, and ſets forth the Award.

Et præd. Robertus Radulphus & Willielmus Swire dicunt quod ipſi p aliqua per p'fat. Willielmum Holgate ſuperius placitando allegat' ab actione ſua præd. verſus eum habend. p'cludi non debent Quia dic. quod prædicti Ambroſius Pudſey & Thomas Parker Arbitratores in Conditione prædict' ſuperius nominat' accepto ſuper ſe onere arbitrandi inter partes præd' de & ſuper præmiſſis in Conditione prædicta ſuperius mentionat' poſt confectionem ſcripti præd. & ante prædictum undecimum diem Novembris in Conditione p'd. ſuperius ſpec' ſcilicet decimo die Novembris anno regni Domini Jacobi ſecundi nup Regis Angliæ quarto apud Gisborne præd. fecer. quoddam arbitrium ſuum in ſcriptis ſub manibus & ſigillis ſuis de & ſuper p'miſſis præd. adtunc & ibidem partibus præd. parat. fore deliberand. per quod quidem arbitrium iidem Arbitratores arbitraver' & ordinaver' de & ſuper præmiſſis in Conditione præd. ſuperius ſpec' modo & forma ſequen', videlicet, quod præd Willielmus Holgate bene & veracit' ſolveret ſeu ſolvi cauſaret eiſdem Roberto Watmough Radulpho Duxbury & Willielmo Swire vel eorum alicui ſummam quindecim librar. legalis monetæ Angliæ ad vel ante primum diem Decembris tunc p'x' ſequen' qui Arbitratores præd. judicaver. præd. Robertum Radulphum & Willielmum Swire ſuſtinuiſſe in cuſtag' & dampnis ratione cujuſdam ſectæ ſine cauſa per dict' Willielmum Holgate verſus ipſos Robertum Radulphum & Willielmum Swire proſecut'. Et ulterius Arbitratores p'd. ordinaver. quod omnes ſectæ & differentiæ inter dict' Willielm' Holgate ex una parte & ipſos dictos Robertum Radulphum & Willielmum Swire ex altera parte quæ mot' habit' ſive depend' fuer' ante diem dat' ſcripti Obligatorii præd. abſolut. ceſſarent vacuæ forent & determinarentur prout per idem arbitrium inter alia plenius liquet & apparet. Et præd' Robertus Radulphus & Willielmus Swire proteſtando quod præd Willielmus Holgate non obſervavit performavit perimplevit vel cuſtodivit aliquod in arbitrio prædicto ſuperius ſpec' ex parte ipſius Willielm' Holgate obſervand' performand' perimplend' ſeu cuſtodiend'. In facto iidem Robertus Radulphus & Willielmus Swire dicunt quod præd Willielmus Holgate non ſolvit prædict' Roberto Radulpho & Willielmo Swire vel eorum alicui ſummam quin-

The Award made in Writing,

That all Suits ſhould ceaſe.

A Breach of Non-payment aſſigned in the Award.

decim librarum ſuper prædict. primum diem Decembr. tunc prox. ſequen. dat. arbitrii præd' quas eis vel eorum alicui ſuper eundum diem ſolviſſe debuit ſecundum formam & effectum arbitrii prædict. Et hoc parat. ſunt verificare unde pet Judic. & debitum ſuum præd unacum dampnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c.

Et præd. Willielmus Holgate dic. quod placitum præd. prædict. Roberti Radulphi & Willielmi Swire modo & forma ſupius replicand' placitat minus ſufficien. in lege exiſtit ad prædict' Robertum Radulphum & Willielmum Swire ad actionem ſuam p̄d. verſus ipm̄ Willielmum Holgate habend' manutenend' quodq; ipſe ad replicationem illam modo & forma præd. placitat neceſſe non habet nec p̄ legem terræ tenetur reſpondere Et hoc parat eſt verificare unde p̄ defectu ſufficien' replicationis in hac parte idem Willielmus Holgate pet Judic' & quod præd Robertus Radulphus & Willielmus Swire ab actione ſua prædicta verſus eum habend' præcludantur, &c. The Defendant demurs.

Et præd. Robertus Radulphus & Willielm' Swire ex quo ipſi ſufficien' materiam in lege ad actionem ſuam præd' verſus p̄fat Willielmum Holgate habend manutenend ſuperius replicando allegaver. quam ipſi parat ſunt verificare Quam quidem materiam prædict' Willielm' Holgate non dedic' nec ad eam aliqualit. reſpondet ſed verificationem illam admittere omnino recuſavit iidem Robertus Radulphus & Willielm̄ Swire ut prius pet Judic' & debitum ſuum præd' unacum dampnis ſuis occaſione detentionis debiti illius eis adjudicari, &c. Et quia Juſtic. hic ſe adviſare volunt de & ſup p̄miſſis priuſquam Judic̄ ſuum inde reddant dies dat eſt partibus p̄d hic uſq; a die Sancti Michaelies in un' menſem de audiendo inde Judicio ſuo eo quod iidem Juſtic' hic inde nondum, &c. The Plaintiffs join in Demurrer.

Watmough & al' *verſus* Holgate.

AN Action of Debt upon a Bond of 40 l.

The Condition was to perform an Award to be made of all Matters between them. S. C. 3 Lev. 293. 2 Danv. 246.

The Defendant pleaded no Award-made.

The Plaintiffs replied, and ſet forth an Award to have been made de præmiſſis, (viz.) That the Defendant ſhould pay to the Plaintiffs 15 l. at or before the firſt Day of December then next enſuing, which the Arbitrators did judge the Plaintiffs to have ſuſtained in Coſts and Damages, by Reaſon of a Suit without Cauſe commenced by the Defendant againſt the now Plaintiffs. 1 Saund. 326, 327. 2 Lutw. 550, 570.

And

And further the Award was, That all Suits and Differences between the ſaid Parties, which were depending before the Date of the Bond, ſhould ceaſe and determine; and in facto dicunt, that the Defendant had not paid the ſaid 15 l. upon the 1ſt Day of December in the ſaid Award mentioned.

And to this the Defendant demurred.

It was argued, Firſt, That the Award was all of one Side; for it doth not appear that there was any Difference between the Parties, ſaving the Suit upon which the Coſts are awarded, (viz.) 15 l. and that was the Suit of the now Defendant; and what Benefit hath he by Staying his own Suit, and paying 15 l. for Coſts?

Judgment was given for the Defendant, for tho' he did not pay it on the 1ſt of December, he might have paid it before the 1ſt of December; and tho' Payment before the Day is good Payment at the Day, where Payment at the Day is pleaded; yet in Pleading the Parties ought to purſue the Words of the Condition. 3 Lev. 293. this Caſe.

Secondly, They aſſign the Breach, that the 15 l. was not paid upon the 1ſt Day of December, ſo it might be paid before; and the Award is to pay it ad vel ante primum diem Decembris.

It was anſwered to the firſt, That there might be well intended other Differences, tho' not ſet forth.

Again, For ought appears, the Plaintiff in the Action mentioned in the Award might be ſubject to have Coſts tared at the Proſecution of the then Defendant, whereas this Award ſtops the Defendant from applying to the Court for Coſts.

As to the Second, If Iſſue be taken upon ſolvit ad diem, Payment before the Day maintains the Iſſue.

The Court inclined, that the Award was good. Sed adjornatur.

Humphreys *verſus* Bethily.

Quod vide antea, ultimo Termino.

Antea 198.

THE Court now delivered their Opinions, That the Doubleneſs in the Declaration was cured by Anſwering, and no Exception can be taken to it upon the General Demurrer. And the Caſe in 1 Roll. Rep. 112. Saunders and Crowley, is the ſame with this. Judicium pro Quer'.

The Lord Lexington *verſus* Clarke and his Wife.

Trin. 1 Willielmi & Mariæ, Rot. 1539.

IN an Aſſumpſit the Plaintiff ſet forth, That the 25th of March 1685. he had demiſed to William Brady, the former Husband of the now Defendant's Wife, divers Lands at the Rent of 320l. per Annum to hold at Will, and that there was due from the ſaid Brady 160l. for Half a Year's Rent, and that he died poſſeſſed of the Premiſſes, and that the Wife of the now Defendant, while ſhe was ſole, and ſoon after the Death of the ſaid Brady her late Husband, in Conſideration that the Plaintiff would permit her to hold and enjoy the Premiſſes till our Lady-day next enſuing the Deceaſe of her ſaid Husband, and permit her to remove divers Poſts, Rails and other Things, fixed and placed upon the Premiſſes by her ſaid Husband, did promiſe to the Plaintiff, That ſhe as well the aforeſaid 160l. that then was in arrear (as aforeſaid) in the Life of her late Husband, as alſo 260l. more, would well and truly pay; and ſhews, that ſhe did enjoy the ſaid Premiſſes by the Permiſſion of the Plaintiff till Lady-day aforeſaid: And that he ſuffered her alſo to take away the Things before-mentioned; yet ſhe, when ſhe was ſole, nor the Defendant or ſhe, ſince her Marriage, did not pay the ſaid Sums of Money, or any Part of them, &c.

Upon Non Aſſumpſit pleaded, a Special Verdict was found;

That the Defendant's Wife did make the Promiſe prout, and that ſhe enjoyed the Lands, and took away the Poſts, &c. as in the Declaration is ſet forth; and that ſince ſhe had paid the 160l. to the Plaintiff; but had not paid the 260l. or any Part thereof; and they find, that the ſaid Promiſe, nor any Memorandum or Note thereof, was not put into Writing, or ſigned by the Wife of the Defendant, or any Perſon authorized by her to do it; and they find that ſhe paid the 160l. before the Action brought, and they find the Act of Parliament in 29 Car. 2. againſt Frauds and Perjuries; whereby it is enacted, That no Action ſhould be brought to charge an Executor or Adminiſtrator upon any ſpecial Promiſe to anſwer of his own Eſtate, or upon any Promiſe to anſwer for the Debt, Default or Miſcarriage of any other Perſon, &c. unleſs the Agreement, or ſome Memorandum or Note thereof, were by the Perſon, or ſome other empower'd by him, put into Writing, ſigned, &c. prout in Statuto; and made the general Concluſion.

It

Antea 151. 3 Salk. 373.

It was argued for the Plaintiff, That altho' as to the Payment of the 160 l. which was the Debt of her the Defendant's late Husband, the Promise might be void in regard it was not in Writing, according to the said Statute; yet as to the Payment of the 260 l. the Promise is not within the Statute, for that is upon a good Consideration, and her own proper Debt; and Damages are only given for that the 160 l. is found to have been paid.

But by the Opinion of all the Court Judgment was given for the Defendant; for the Promise as to one Part being void, it cannot stand good for the other: For 'tis an entire Agreement, and the Action is brought for both the Sums, and indeed could not be otherwise, without Variance from the Promise.

Note, It did not appear by the Record that the Wife was Executrix or Administratrix to her former Husband.

Kemp *versus* Cory & al'.

Replevin.

Cornub' ff. Johannes Cory nuper de West-Putford in Com' Devon' Gen. Johannes Cocke nuper de ead. Yeoman & Willielmus Cocke nuper de Launceston in Com̃ Cornub præd. Yeoman sum̃ fuer' ad respondend. Willielm̃ Kempe Edvardo Laundry & Edvardo Cheapman de placito quare cepunt averia ipsorum Willielmi Kempe Edvardi Laundry & Edvardi Cheapman & ea injuste detinuer. contra vad. & pleg', &c. Et unde iidem Willielmus Kempe Edvardus Laundry & Edvardus Cheapman p̃ Willielmum Crowne Attorn' suum queruntur quod præd. Johannes Cory Johannes Cocke & Willielmus Cocke decimo nono die Junii anno regni Domini Regis & Dominæ Reginæ nunc primo apud Blisland in quodam loco ibidem (vocat. Fludder Park alias Bladder Park) ceper. averia, videlicet, tres Juvencos quatuor Juvencas & unam Equulam ipsorum Willielmi Kempe Edvardi Laundry & Edvardi Cheapman & ea injuste detinuer. contra vad. & pleg. quousq; &c. Unde dic. qd. deteriorat. sunt & dampn. habent. ad valenciam decem librarum & inde produc' sectam, &c.

Tres Juvencos & unam Equulam.

Avowry and Conusance for Rent by the Heir of the Lessor, upon a Lease of a third Part of a Farm for 99 Years, if A. B. & C. or either of them shall so long live. The Avowant's Father seised in Fee of a third Part of a Messuage, &c.

Et præd' Johannes Cory Johannes Cocke & Willielmus Cocke p̃ Thomam Horwell Attorn. suum ven. & defend. vim & injuriam quando, &c. Et idem Johannes Cory in jure suo p̃prio bene advocat & p̃d Johannes Cocke & Willielmus ut Balivi præd. Johannis Cory bene cogn̄ captionem averiorum prædict. in præd. loco in quo, &c. Et juste, &c. quia dic. pd. idem locus in quo supponitur captionem averiorum illorum fieri continet & præd. tempore quo supponitur captionem averiorum illorum fieri continebat in se viginti acras terræ cum p̃tin' in Blisland præd. quodq; diu antea p̃d. tempus quo, &c. quidam Johannes Cory Gen. pater præd' Johannis Cory modo Advocan̄ fuit seisit̃ in dominico suo ut de feodo de & in tertia parte cujusdam messuagii & tenementi (vocat. Trewint in

Blifland) præd. unde præd viginti acræ terræ in quibus, &c. fuit & p̄d tempore quo, &c. Necnon à tempore cujus contrarium memoria hominum non exiſtit fuer' parcell' prædictoq; Johanne Cory patre ſic inde ſeiſit' exiſten' ipſe idem Johannes Cory pater ante præd. tempus quo, &c. ſcilicet triceſimo die Septembris anno regni Dom' Caroli ſecundi nuper Regis Angl' decimo nono apud Bliſland præd' dimiſit & ad firmam tradidit cuidam Jacobo Robyns Executoribus Adminiſtratoribus & Aſſign' ſuis præd. tertiam partem præd' meſſuagii & tenementi (vocat' Trewint) ſituat' jacen' & exiſten' infra paroch' de Bliſland alias Bliſton in Com' Cornub' & nuper in tenura & occupatione Johannæ Smith Vid' Aſſign' vel Aſſign' ejus habend' & tenend' p̄d Jacobo Robyns Executoribus Adminiſtratoribus & Aſſign' ſuis p̄ & duran' pleno tempore & Termino nonaginta & novem annorum tunc p̄x' ſequen' plenar' complend' & finiend' ſi Thomaſina Robyns & Maria Robyns fil' præd. Jacobi Robyns ac Johannes Robyns filius Roberti Robyns Gen' defunct' fratris præd' Jacobi Robyns vel aliquis vel alter eor' tam diu vivere contingeret reddend' & ſolvend' p̄inde annuatim durante dicto Termino præd. Johanni Cory patri Hæredibus & Aſſign' ſuis annual' reddit' vel ſummam triginta & trium ſolidorum & quatuor. denar' legalis monet' Angl' ad quatuor Feſta vel dies ſolutionis reddit' in anno maxime uſual' videlicet Natalis Dom' Dei Annunciationis Beatæ Mariæ Virginis Nativitatis Sancti Johannis Baptiſtæ & Feſti S. Michaelis Archi per æquas & æquales portiones fore dividend' & ſolvend' durante dicto Termino Virtute cujus dimiſſionis præd. Jacobus Robyns in prædictam tertiam partem tenementorum prædictorum cum pertin. intravit & fuit inde poſſeſſionat' prædictoque Jacobo de prædicta tertia parte tenementorum prædictorum cum pertin. poſſeſſionat' exiſten' ac præd. Johanne Cory patre de reverſione inde ſic ut p̄fertur ſeiſit' exiſten' idem Johannes Cory pater poſtea & ante præd' tempus quo, &c. apud paroch de Bliſland præd. de reverſione præd tertiæ partis tenementorum prædictorum cum pertin' unde, &c. obiit inde ſeiſit' p̄ quod reverſio præd' tertiæ partis tenementorum prædictorum cum p̄tin' unde, &c. deſcendebat præd. Johanni Cory modo Advocan' ut filio & hæredi præd. Johannis Cory patris per quod idem Johannes Cory modo advocan' fuit & adhuc eſt de reverſione præd. tertiæ partis tenementorum prædictorum cum pertin' unde &c. ſeiſit. Et quia tres libr' ſex ſolid' & octo denar. de præd. reddit' triginta & trium ſolidor' & quatuor denar' p̄ duobus annis finitis ad Feſtum Natalis Dom' Anno Do'ni MDCLXXXVIII. ante prædict' tempus quo, &c. necnon eodem tempore quo, &c. eidem Johanni Cory modo Advocan' aretro fuer' & non ſolut' idem Johannes Cory in Jure ſuo p̄prio bene advocat Et præd. Johannes Cocke & Willielmus ut Ballii p̄d' Johannis Cory modo Advocan' bene cogn' captionem averior' prædictor' in præd. loco in quo, &c.

And demiſed for 99 Years, if A. B. &c. or either of them ſhould ſo long live.

Reddendum.

Entry into the Premiſſes.

The Father being ſeiſed of the Reverſion, died ſeiſed.

Deſcent to the Avowant as Heir at Law.

Who is ſeiſed of the Reverſion.

And for Rent arrear diſtrained.

In the Lands ſubject to the Diſtreſs.

ut in & ſuper præd. tertiam partem tenementorum prædictorum eidem Jacobo Robyns ut p̃fertur dimiſſ. pro eiſdem tribus libris ſex ſolid' & octo denar' de reddit' præd. in forma præd. aretro exiſten'

An Averment of the Leſſee's Life.

Et juſte, &c. Cum hoc qd' iidem Johannes Cory Johannes Cocke & Willielmus verificare volunt qd' præd. Johannes Robyns adhuc ſuperſtes & in plena vita exiſtit videlicet apud paroch de Bliſland præd', &c.

Bar to the Avowry.

Et præd' Willielmus Kempe Edvardus Laundry & Edvardus Cheapman dicunt quod nec præd' Johannes Cory modo advocan' ratione p̃allegat' captionem averiorum prædictorum juſtam advocare neque prædict' Johannes Cocke & Willielmus Cocke eadem ratione ut Ballii ipſius Johannis Cory captionem averiorum præd.

Confeſſes the Seiſin of the Father of one Third.

in præd. loco in quo, &c. juſtam cognoſcere debent quia dicunt qd̃ bene & verum eſt quod præd. Johannes Cory pater præd. Johannis Cory modo advocan' ſeiſit' fuit in dominico ſuo ut de feodo de & in tertia parte præd. meſſuagii & tenementi (vocat' Trewint) put iidem Johannes Cory modo Advocan' Johannes Cocke & Willielm' Cocke ſuperius allegaver' ſed iidem Willielmus Kempe Edvardus

And that J. S. was ſeiſed of the other two Parts.

Laundry & Edvardus Cheapman dicunt quod ante præd. tempus quo, &c. quidam Willielmus Spry Gen' ſeiſit' fuit in dominico ſuo ut de feod' de & in duabus aliis tertiis partibus præd meſſuagii ſive tenementi (vocat' Trewint) unde præd. viginti acr' terræ in quibus, &c. ſunt & præd. tempore quo, &c. necnon a tempore cujus contrarium memoria hominum non exiſtit fuer' parcell' p̃dictoq; Willielmo Spry ſic inde ſeiſit' exiſten' ipſe idem Willielmus Spry

And that J. S. licenſed the Defendants to put in their Cattel.

ante præd. tempus quo, &c. ſcilicet primo die Martii anno regni Domini Regis & Dom̃ Reginæ nunc primo ſupradicto apud Bliſland præd' dedit licentiam eiſdem Willielmo Kempe Edvardo Laundry & Edvardo Cheapman ad ponend' averia præd. in præd. loco in quo, &c. ad herbam ibidem creſcen' depaſcen' Virtute cujus licentiæ iidem Willielmus Kempe Edvardus Laundry & Edvardus Cheapman ante præd. tempus captionis averiorum præd', &c. poſuer' averia ſua præd' in præd̃ locum in quo, &c. ac averia illa fuer' in præd. loco in quo, &c. quouſq; præd. Johannes Cory modo

Which they did.

Advocan' Johannes Cocke & Willielmus Cocke decimo nono die Junii anno regni Domini Regis & Dom̃ Reginæ nunc primo apud Bliſland præd. ceperunt eadem averia ipſorum Willielmi Kempe Edvardi Laundry & Edvardi Cheapman videlicet in prædicto loco (vocat' Fludder Park al' Bladder Park) & ea injuſte detinuer' contra vad' & pleg' quouſq; &c. prout præd̃ Willielmus Kempe Edvardus Laundry & Edvardus Cheapman ſuperius verſus eos quer̃ Et hoc parat' ſunt verificare unde ex quo prædict' Johannes Cory Johannes Cocke & Willielmus Cocke captionem averiorum præd' cogn' iidem Willielmus Kempe Edvardus Laundry & Edvardus Cheapman petunt Judicium & dampna ſua occaſione captionis

& injuſtæ detentionis Averiorum prædictorum ſibi adjudicari, &c.

Et præd' Johannes Cory Johannes Cocke & Willielmus Cocke dicunt quod prædictum placitum prædictorum Willielmi Kempe Edvardi & Edvardi ſuperius ad advocare ipſius Johannis Cory & ad cognitionem ipſorum Johannis Cocke & Willielmi Cocke modo & forma præd' ſuperius in barram placitat. minus ſufficien. in lege exiſtunt ad ipſum Johannem Cory ab advocare ac ad præd. Johannem Cocke & Willielmum Cocke à cognitione ſua præd. verſus præfat. Willielmum Kempe Edvardum & Edvardum habend. præcludend. quodq; ipſi ad placitum illud modo & forma prædict' placitat. neceſſe non habent nec p legem terræ tenentur reſpondere Et hoc parat. ſunt verificare unde pro defectu ſufficien. placiti in barram ad advocare & cogn. prædict' in hac parte iidem Johannes Cory Johannes Cocke & Willielmus Cocke pet' Judicium & retorn averiorum prædictorum unacum dampnis, &c. ſibi adjudicari, &c. Demurrer to the Bar.

Et præd. Willielmus Kempe Edvardus Laundry & Edvardus Cheapman ex quo ipſi ſufficien. materiam in lege ad præd. Johannem Cory ab advocare ſuo præd. & ad prædict. Johannem Cocke & Willielmum Cocke à juſte cognoſcend. captionem averiorum prædictorum in prædicto loco in quo, &c. præcludend. ſuperius allegaver. quam ipſi parat. ſunt verificare Quam quidem materiam prædict' Johannes Cory Johannes Cocke & Willielmus Cocke non dedic nec ad eam aliqualit reſpond. ſed verificationem ill. admittere omnino recuſant pet. Judicium & dampna ſua occaſione captionis & injuſtæ detentionis averiorum præd ſibi adjudicari, &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſis præd. priuſquam Judicium inde reddant dies dat. eſt partibus prad' hic uſque a die Sancti Michaelis in tres Septimanas de audiend. inde Judicio ſuo eo quod iidem Juſtic. hic inde nondum, &c. Joinder in Demurrer.

Kempe *verſus* Cory & al'.

IN a Replevin the Plaintiff declared for the Taking of his Cattle the 29th of June 1 Willielmi & Mariæ at D. in a Place called Fludder-Park. 2 Danv. 643. pl. 40. Poſt. 283.

The Defendant avows; for that the Locus in quo containeth twenty Acres, and ſaith that he was ſeiſed of a third Part of a Meſſuage and Tenement called Trewint, of which the ſaid twenty Acres are, and for Time whereof, &c. were Parcel; and that he being ſo ſeiſed long before the Taking, demiſed the ſaid third Part of the ſaid Meſſuage and Tenement to one James Robyns, to have and to hold for ninety-nine Years at the yearly Rent of 1 l. 13 s. and 4 d. payable quarterly during the ſaid Demiſe. And that Raym. 472. 2 Mod. 318, 319. 3 Mod. 1, 2, &c.

the ſaid Robyns entered, and for two Years Rent arrear at the Feaſt of the Nativity, in the Year of our Lord 1688. he diſtrained the Cattel in the Declaration.

The Plaintiff replied in Bar of the Avowry, and confeſſed the Seiſin of a third Part of the ſaid Meſſuage and Tenement, and the Leaſe prout, &c. but ſaith, That before the Taking, one William Spry was ſeiſed in his Demeſne as of Fee, of the other two Parts of the ſaid Meſſuage and Tenement called Trewint, of which the ſaid twenty Acres are Parcel. And he being ſo ſeiſed, the ſaid William Spry, before the Time of the Taking, did give Licence to the Plaintiff to put his Cattle into the ſaid twenty Acres, and he put them in by the ſaid Licence; where they continued till the Plaintiff took them, and detained them prout, &c.

To this the Avowant demurred.

It was held clear by the Court, That the third Part and two Parts, being undivided, the Avowant could not diſtrain the Cattle of him that had the two Parts, or the Cattle of any one which were put in by his Licence upon any Part of the Land.

But Pollexfen, Chief Juſtice, doubted, in regard the Avowry was of the Taking in præd' loco in quo ut in & ſup præd tertiam partem tenementi præd, Whether the Plaintiff ſhould not have traverſed abſq; hoc, that the Taking was in tertia parte tantum, and ſhewn in the Inducement to ſuch Traverſe how they held in Common? Vide More and Newman's Caſe in Hobart 80, 103. Adjornatur.

Tovey *verſus* Pitcher.

Covenant againſt an Aſſignee of an Executrix.

Midd'x ff. THomas Pitcher nuper de Weſtm. in Com. præd' Gen. Aſſign. Suſannæ Gill Executric. Teſtamenti & ult. volunt. Ricardi Gill nuper dict' Ricardi Gill, of the Pariſh of St. Martin's in the Fields in the County aforeſaid, Vintner, ſum fuit ad reſpond. Chriſtianæ Tovey de placito quod teneat ei conventionem inter præd. Chriſtian. & præfat. Ric. in vita ſua factam ſecundum vim formam & effectum quarundam Indenturarum inde inter eos confect. &c. Et unde eadem Chriſtiana per Carolum Draper Attorn. ſuum dicit quod cum ipſa præd' Chriſtiana decimo quinto die Julii Anno Domini milleſimo ſexcenteſimo octogeſimo & extunc hucuſq; fuit & adhuc exiſtit poſſeſſionat. de duobus meſſuag. ſive tenement. cum pertin. in paroch' Sancti Martini in Campis in Com. Midd. præd. pro majori Termino tunc & adhuc ventur. Et ſic inde poſſeſſionat. exiſten. præd. Chriſtiana poſtea ſcilicet eodem decimo quinto die Julii Anno milleſimo ſexcenteſimo

The Plaintiff poſſeſſed of a Term for Years yet in Being.

octogeſimo ſupradict' apud præd paroch. Sancti Martini in Campis in Com. Midd' præd. per quandam Indentur' factam inter eandem Chriſtian. per nomen Chriſtianæ Tovey de paroch. Sancti Martini in Campis in Com. Midd. Vid. ex una parte Et præd. Ricardum Gill per nomen Ricardi Gill de Paroch. Sancti Martini in Campis præd. Antnet ex altera parte cujus alteram partem ſigillo præd. Ricardi ſignat' eadem Chriſtiana hic in Cur. profert cujus dat. eſt eiſdem die & anno pro & in conſideration' annual' & content' convention' poſtea in Indentur. præd. conſideration' annual' reddit' & ex tenen' vel leſſ. parte & vice ſolvend' faciend' & performand' dimiſiſſet conceſſiſſet & ad firmam tradidiſſet præfat. Ricardo Executor' Adminiſtrator' & Aſſign' ſuis totum ill' frontal' meſſuag' ſive tenement' cum ptin' ſicut idem tunc fuit in occupation' præd' Ricardi vocat' ſive cognit' per nomen vel ſignum de le Fleece ſituat' jacen' & exiſten' in Venella Sancti Martini (Anglice, St. Martin's Lane) in paroch' Sancti Martini in Campis præd. cum Romæis ſituat' ſupra viam Januæ (Anglice, Gate-way) ducen' in Aream (Anglice vocat' Hoo's Yard) quod quidem meſſuag' ſive tenement' abuttaſſet occidental' ſuper Venellam Sancti Martini p̄d' oriental' ſuper retrorſum meſſuag' (Anglice, a back Meſſuage) ſive tenement' extunc impoſterum dimiſſum boreal' ſuper meſſuag' ſive tenement' tunc in occupation' Radulphi Mayor Coach-maker, & auſtral' ſuper meſſuag' ſive tenement' tunc in occupation' Dowdall Campbell Sciſſor. Ac etiam totum ill' retrorſum meſſuag' (Anglice, a back Meſſuage) ſive tenement' cum ptin' tunc etiam in occupation' præd Ricardi ſituat' jacen' & exiſten' in oriental' partem (Anglice, the Eaſt-ſide) dicti Frontal' meſſuag' ſive tenement' & Frontal' aream præd' (Anglice vocat' Hoo's Yard) ſimul cum omnibus viis paſſag' luminibus eſiamen' aquarum proficuis commoditat' & pertin' quibuſcunque dictis meſſuag' ſive tenementis ſeu eorum alteri ſpectan' aut aliquo modo pertinen' Habend' & occupand' dicta Frontal' meſſuag' ſive tenement' & p̄miſſa cum pertin' adinde ſpectan' præfat' Ricardo Executor' Adminiſtrator' & Aſſign' ſuis a Feſto Annunciation' Beatæ Mariæ Virgin' tunc ult' præterit' antea dat' Indentur' præd' uſq; plenum finem & termin' viginti & unius annorum extunc p̄x' ſequen' & plenar' complend' & finiend' Ac etiam habend' & occupand' dicta retrorſum meſſuag' ſive tenement' & præmiſſa cum pertin' adinde ſpectan' præfat' Ricardo Executor. Adminiſtrator. & Aſſign' ſuis ab & immediate poſt finem & expiration' prior' dimiſſion' (Anglice, Leaſe) ejuſdem fact. Jacobo Supple quæ quidem dimiſſio determinaret & expiraret in vel ante Annum Domini noſtri Dei (ſecundum computation' in Angl' uſitat') milleſimum ſexcenteſimum octogeſimum primum uſq; plen' finem & terminum novemdecim annorum & unius quarter. anni ex tunc prox' ſequen' & plenar' complend' & finiend' reddend' & ſolvend' proinde annuatim

By Indenture demiſed to the Teſtator.

Habendum.

The Term.

Habend' for a further Term.

Reddendum.

annuatim & quolibet anno duran' tam longo tempore primi termini annorum quam dicta dimiſſ. (Anglice, Leaſe) p̄fat' Jacobo Supple facta continuaret eidem Chriſtianæ Executor' Adminiſtrator' vel Aſſign' ſuis annual' reddit' vel ſummam trigint' & quinq; librar' ad quatuor maxime uſual' Feſta ſeu terminos in Anno (videlicet) Nativitat' ſancti Johannis Baptiſtæ ſancti Michaelis Arch'i Natalem Domini noſtri Dei & Annunciation' Beatæ Mariæ Virginis p̄ æquas & æquales portion' Ac etiam reddend' & ſolvend' p̄inde annuatim & quolibet anno durante ultimo termino poſt finem & expiration' dimiſſion' (Anglice, Leaſe) conceſſ. p̄fat' Jacobo Supple eidem Chriſtian' Executor' Adminiſtrator' vel Aſſign' ſuis annual' reddit' ſive ſummam quadragint' librar' legalis monet' Angl' ad quatuor maxime uſual' Feſta ſive terminos in anno (videlicet) Natal' Domini noſtri Dei Annunciation' Beatæ Mariæ Virgin' Nativitat' Sancti Johannis Baptiſtæ & Sancti Michaelis Arch'i p̄ æquas & æqual' portion' prima ſolution' inde incipiend' & faciend' in tal' dict' Feſt' qual' primo & p̄x' accideret poſt finem & determination' dict' dimiſſion' p̄fat' Jacobo Supple factæ Proviſo ſemp̄ qd' ſi accideret dict' annual' reddit' trigint' & quinque librar' & quadragint' librar' aut eorum alterutr. ſeu aliq'm inde parcell' vel eorum alterutrius fore aretro & inſolut̄ per ſpatium quatuordecim dierum prox' ſup̄ vel poſt aliquos Feſtival' dies præd. quibus eadem ſolviſſe debuer' (exiſten' legitime demandat' qd̄ tunc & extunc eſſet & poſſit licitum fore ad & p̄ eadem Chriſtiana Executor' Adminiſtrator' & Aſſign' ſuis in dicta dimiſſ. præmiſſ. cum pertin' & in quamlibet vel aliquam partem eorundem in nomine totius totalit' reintrare & eadem rehabere retiner. & gaudere ut in ejus ſeu eorum primo & priori ſtatu ſeu ſtatubus (præd. Indentur' aut aliqua re in eadem content' in contrar' inde in aliquo non obſtan') Et prædict' Ricardus pro ſeipſo Executor' Adminiſtrator' & Aſſign' ſuis & pro quibuſlibet eorum conveniſſet promiſiſſet & conceſſiſſet ad & cum eadem Chriſtiana Executor' Adminiſtrator' & Aſſign' ſuis & eorum quibuſlibet per Indentur' præd' modo & forma ſequen' (videlicet) Quod ipſe prædict. Ricardus Executor' Adminiſtrator' & Aſſign' ſui de tempore in tempus & ad omnia tempora extunc impoſterum duran' dict' ſeparal' terminis per Indentur' prædict' conceſſ. bene & fidelit' ſolverent vel ſolvi cauſarent dicta ſeparal' reddit' annual' eidem Chriſtian' Executor' Adminiſtrator' & Aſſign' ſuis ſupra dictos ſeparal' Feſtival. dies & terminos in anno in quibus iidem ſolvi debuiſſent ſecundum veram intention' & p̄poſitum Indentur' præd. & ſeparal. reſervation' inde prout in eadem Indentura præantea mentionat' & ſpecificat' fuit Et per Indorſament' ſuper Indentur. præd' agreat' fuit per & inter partes p̄d' ad & ante ſigillation' & deliberation' ejuſdem Indentur' Et præd. Ricardus p̄ ſeipſo Executor' Adminiſtrator' & Aſſign' ſuis conveniſſet promiſiſſet & conceſſiſſet ad & cum eadem Chriſtiana

Proviſo.

Clauſe of Re-entry.

Covenants.

To pay the Rent.

Endorſement upon the Deed of Demiſe.

Executor' Adminiſtrator' & Aſſign' ſuis quod ipſe prædict' Ricardus Executor' Adminiſtrator' & Aſſign' ſui vel eorum aliquis ſup primū diem Januar' in quolibet anno annuatim duran' termino viginti & unius annorum in Indentur' præd. conceſſ. ſolverent & deliberarent vel ſolvi & deliberari cauſarent eidem Chriſtian. Executor' Adminiſtrator' vel Aſſign' ſuis apud vel in tunc domum manſional' ejuſdem Chriſtianæ ſituat' in paroch' Sancti Martini in Campis in Indentur' prædict. infraſcript' duodecim plen' quart' utres (Anglice, Bottles) boni & merchandizabil' Vini Hiſpanici (Anglice vocat' Canary) prout per eandem Indentur' & Indorſament' inde inter al' plenius liquet & apparet Virtute cujus dimiſſion' præd. Ricardus in vita ſua in prædict' dimiſſ. præmiſſ. intravit & fuit inde poſſeſſionat'. Et ſic inde poſſeſſionat' exiſten' prædict' Ricardus poſtea ſcilicet decimo ſeptimo die Julii Anno Domini milleſimo ſexcenteſimo octogeſimo ſupradicto apud Paroch' & Com' præd. condidit teſtament' & ult' voluntat' ſua in ſcript' & p eandem volunt. ſuam p'd' Suſannam Executric. ejuſdem Teſtamenti ſui conſtituit & ordinavit Et poſtea ſcilicet viceſimo primo die Octobr' eiſdem anno & loco ult' ſupradict' ipſe prædict' Ricardus obiit de & in prædict' dimiſſ. præmiſſ. cum pertin' poſſeſſionat' poſt cujus mortem præd' Suſanna onus execution' Teſtamenti præd ſuper ſe ſuſcepit Et ut Executrix Teſtamenti prædict. in præd' dimiſſ. præmiſſ. cum pertin' intravit & fuit inde poſſeſſionat' ratione execution' Teſtamenti prædict' Ipſaque Suſanna ſic inde poſſeſſionat' exiſten' eadem Suſanna poſtea ſcilicet quarto die Junii Anno Domini milleſimo ſexcenteſimo octogeſimo quinto apud paroch' & Com' prædict' conceſſit totum Stat' jus titulum intereſſe & termin' annorum ſuum quæ ipſa tunc habuit ventur' de & in prædimiſſ. p'miſſ. cum pertin' præfat' Thomæ Virtute cujus conceſſion' idem Thomas poſtea ſcilicet eiſdem die anno & loco ult' ſupradict' in p'dimiſſ. p'miſſ. cum pertin' intravit & fuit & adhuc exiſtit inde poſſeſſionat' Et eadem Chriſtiana p̄teſtando quod ipſa eadem Chriſtiana a tempore confection' Indentur' præd. hucuſq; bene & fidelit' obſervavit performavit & p̄implevit omnes & ſingulas convention' p̄miſſiones & conceſſion' in Indentur' prædict. ſuperius ſpecificat' ex parte ſua obſervand' performand' & perimplend' ſecundum formam & effectum Indentur' prædict' proteſtandoq; etiam quod præd' Thomas poſt conceſſion' prædict' ei ut p'fertur fact' hucuſque non obſervavit performavit ſeu perimplevit aliquas convention' promiſſion' ſeu conceſſion' in Indentur' præd ſuperius ſpecificat' ex parte ſua obſervand' performand' & perimplend' ſecundum formam & effectum Indentur' ill' in facto eadem Chriſtiana dicit quod poſt conceſſion' p'dict' eidem Thomæ ut p'fertur factam ſcilicet ad primum diem Januar' anno regni Domini Regis & Dom' Reginæ nunc primo vigint' & quatuor quartæ utr' Vini Hiſpanici (Anglice, Quart Bottles of Canary Wine) per

Entry and Poſſeſſion.
The Leſſee made his Will.
And made the Aſſignor his Executrix, and died.
She proved the Will and entred.
And aſſigned to the Defendant.
Who entered, and ſtill is poſſeſſed.
Breach aſſigned in the Non-payment of the Rent.

per Indorſament' ſuper Indentur' præd' reſervat' pro duobus annis finit' ad præd' primum diem Januar. anno primo ſupradicto eidem Chriſtian' aretro fuer' inſolut' & non deliberat' Et qd. ad Feſtum Annunciation. Beatæ Mariæ Virgin̄ anno regni dicti Domini Regis & Dom. Reginæ nunc ſecundo ſexagint' libr. de annual. reddit' quadragint' librar. præd' pro uno anno integro & dimid. unius anni finit. ad prædict. Feſtum Annunciation. Beatæ Mariæ Virgin. anno ſecundo ſupradicto eidem Chriſtianæ ſimilit. aretro fuer. & inſolut' quodque præd. Thomas non ſolvit nec deliberavit præd' viginti & quatuor quart. utr. Vini Hiſpanici (Anglice, Canary Wine) ſuper præd. primum diem Januar. anno primo ſupradicto nec prædict. ſexagint. libras ſeu aliquam inde denar. ad præd. Feſtum Annunciation. Beatæ Mariæ Virgin. anno ſecundo ſupradict. quas ei ad eundem diem & Feſtum ſolviſſe debuit ſecundum formam & effect. Indentur. præd'. Et ſic eadem Chriſtiana dicit quod præd' Thomas licet ſæpius requiſit. convention. ſuam præd. cum eadem Chriſtian. in hac parte factam non tenuit ſed infregit ac ill. ei tenere hucuſq; contradixit & adhuc contradicit Unde dic̄ quod deteriorat. eſt Et dampnum habet ad valenc. ſeptuagint. libr. Et inde produc̄ ſectam, &c.

The Defendant pleads, That he aſſigned over before any Rent due.

Et præd. Thomas per Willielmum Pocklington Attorn' ſuum ven. & defend. vim & injur. quando, &c. Et quoad fracc̄on. convention. præd. in non ſolution. duodecim quart. utr. Vini Hiſpanici parcell. præd' viginti & quatuor. utr. in Narr. præd. ſuperius ſpec. pro uno anno finit. ad primum diem Januar. Anno Domini milleſimo ſexcenteſimo octogeſimo octavo & viginț libr' de præd. ſexagint. libr. parcell. quæ devener. aretro & inſolut. pro dimid. unius anni finit. ad Feſtum Annunciation' Beatæ Mariæ Virgin. anno regni dictorum Domini Regis & Dom. Reginæ nunc primo ſupradicto idem Thomas dic̄ qd. ipſe non poteſt dedicere action. prædict. Chriſtianæ inde præd. nec qd. ipſe convention. præd. in ea parte quod ill. duodecim quart. utr. Vini Hiſpanici ac præd. vigint. libr. infregit in forma qua eadem Chriſtian. per Narration. ſuam præd. ſupius ſuppon. Et quoad fracc̄on. convention. p̄d̄ in non ſolution. duodecim quart. utr. Vini Hiſpanici reſid' præd̄ vigint. & quatuor quart. utr. Vini Hiſpanici necnon in non ſolvend. quadragint. libr. de p̄d̄ ſexagint' libr. reſid. in Narr. præd̄ ſpec. idem Thomas dic. quod præd. Chriſtian. acc̄on. ſuam præd. inde verſus eum habere non debet quia dic. quod antea iidem duodecim quart. utr. Vini Hiſpanici aut aliqua parcell. inde aut eædem quadragint. libr. pro reddit. Tenementorum præd' cum pertin. vel aliqua inde parcell. deven̄ debit' aretro ſeu ſolubil' ſcilicet decimo quarto die Junii anno regni Domini Regis & Dom. Reginæ nunc primo ſupradicto apud parochiam præd' in Com. præd̄ ipſe idem Thomas conceſſiſſet & aſſignavit cuidam Jacobo Mott de London. Gen. totum ſtatum

titulum intereſſe & termin. annoru' quæ idem Thomas adtunc habuit ventur. de & in Tenementis præd. cum pertin. Virtute cujus quidem aſſignation. idem Jacobus Mott poſtea ſcilicet eiſdem die & anno in Tenementa præd. cum pertin. intravit & fuit & adhuc eſt inde poſſeſſionat. pro reſid. præd Termini ſuperius in Narr. præd. ſpec. & hoc parat. eſt verificare unde pet' Judicium ſi præd' Chriſtiana action. ſuam præd inde verſus eum habere debeat, &c.

Et præd. Chriſtiana dicit quod placitum præd' Thomæ quoad fraction. convention. præd. in non ſolution. præd. duodecim quart. utr. Vini Hiſpanici reſid. præd' viginț & quatuor quart. utr. Vini Hiſpanici necnon in non ſolvend. præd' quadragint libr' de præd' ſexagint' libr. reſid. in narration præd' ſpecificat' ſuperius in barram placitat. materiaque in eodem content' minus ſufficien' in lege exiſtunt ad ipſam Chiſtian' ab action. ſua præd. verſus præfat. Thomam habend. præcludend' quodque ipſa ad placitat. illud modo & forma præd' placitat' neceſſe non habet nec per legem terræ tenetur reſpondere & hoc parat' eſt verificare unde pro defectu ſufficien' reſponſ. in hac parte eadem Chriſtian' pet' Judicium & dampna ſua occaſion. fraction. convention' præd' ſibi adjudicari, &c. Demurrer to Part.

Et præd' Thomas ex quo ipſe ſufficien' materiam in lege ad præd' Chriſtianam ab action' ſua præd' verſus præfat. Thomam quoad fraction' convention' p̃d' in non ſolution' p̃d' duodecim quart' utr' Vini Hiſpanici reſid' p̃d' viginti & quatuor quart' utr' Vini Hiſpanici necnon in non ſolvend. præd' quadragint' libr' de p̃d' ſexagint' libr' reſid. in Narration' p̃d' ſpecificat' habend' præcludend' ſuperius placitand' allegavit quam ipſe idem Thomas parat' eſt verificare Quam quidem materiam p̃d' Chriſtana non dedic' nec ad eam aliqualit' reſpond' ſed verification' illam admittere omnino recuſat idem Thomas pet' Judic' & qd' p̃d' Chriſtiana ab action' ſua præd' inde verſus ipſum Thomam habend' præcludatur, &c Ac p:o eo quod eadem Chriſtiana dampna ſua occaſione fractionis conventionis præd' in non ſolution prædictorum duodecim quart. utr. Vini Hiſpanici in placito ipſius Thomæ primo ſuperius mentionat' ac præd' viginti libr' per ipſum Thomam in forma præd' ſuperius cogn. Et quia conveniens eſt qd' unica fiat taxatio dampnorum pro totis præmiſſis in uno brevi ſpecificat' ſi contingat Judicium pro eadem Chriſtiana verſus præfat. Thomam quoad factionem conventionis præd' in non ſolution. prædictorum duodecim quart' utr' Vini Hiſpanici prædictorum viginti & quatuor quart' utr' Vini Hiſpanici reſid' ac prædictorum quadraginta librar' de præd' ſexaginta libris reſid' unde partes prædict' in Judic. Cur' hic ſuperius ſe poſuer' reddi Ideo ceſſet emanac' brevis de Inquirendo de dampnis occaſione fractionis conventionis præd' in non ſolutione prædictoru' duodecim quart. utr' Vini Hiſpanici in placito ipſius Thomæ primo ſuperius mentionat' ac prædictarum viginti librarum in eodem placito per ipſum Thomam in forma præd' ſuperius cogn. quouſq; materia in lege præd' unde partes prædict'

Joinder in Demurrer.

Judgment for the other Part.

Un' taxatio dampnorum.

Ceſſet breve de Inquirend. de dampnis quouſque, &c.

ſuperius in Judiciu' Cur' hic ſe poſuer. terminetur, &c. & quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſis unde partes præd' in Judicium Cur. hic ſuperius ſe poſuer' priuſquam Judicium inde reddant dies inde dat' eſt partibus præd' hic uſque — de audiendo inde Judicio ſuo eo quod iidem Juſtic' hic inde nondum', &c.

Tovey *verſus* Pitcher.

1 Sid. 338. 1 Lev. 215. 3 Lev. 295. 2 Keb. 260. Raym. 162. 1 Salk. 81. 4 Mod. 71. 1 Show. 340.

IN an Action of Covenant againſt the Defendant, as Aſſignee of Suſan Gill, Executrix of Elizabeth Gill, the Plaintiff declared of a Demiſe of a Meſſuage to Richard Gill, reſerving Rent; and that Gill entered and died poſſeſſed, and that after the ſaid Suſan (his Executrix) entered, and the 4th of June 1685. aſſigned the Leaſe to the Defendant, and ſhewed, that the Defendant had not paid half a Year's Rent due on the firſt of January 1689.

The Defendant pleads, that before the ſaid Rent became due, (viz.) the 4th of June 1689. he granted and aſſigned all his Eſtate and Intereſt in the Premiſſes to one James Mott of London, Gent, who entered by Virtue of the ſaid Aſſignment, and is yet poſſeſſed, &c.

And to that the Plaintiff demurred.

The ſole Queſtion was, Whether the Defendant ought to have given Notice to the Plaintiff of the Aſſignment? Et Adjornatur.

Note, Judgment was afterwards given for the Plaintiff againſt the Opinion of Ventris; but a Writ of Error was brought, and in Eaſter Term, 4 W. & M. the Judgment was revers'd upon the Matter in Law, (viz.) that Notice of the Aſſignment, &c. to the Plaintiff, &c. was not neceſſary: For by the Aſſignment the Privity of Eſtate was gone, and there was nothing elſe could ſupport the Action againſt the Defendant, being only an Aſſignee. Vid. 3 Mod. Rep. 338.

Lawſon *verſus* Haddock.

Debt upon a Sheriff's Bond.

Cumbr. ſſ. TIMOTHEUS HADDOCK nuper de Civit. Carliſle in Com' Cumbr' Mercer alias dict. Timotheus Haddock de Civitat' Carliol' in Comitat' Cumbr' Mercer ſum' fuit ad reſpond' Wilfrido Lawſon Bar. Vic' Com. prædicti de placito quod reddat ei quadraginta libras quas ei debet & injuſte detinet, &c. & unde idem Wilfridus per Thomam Brooke Attorn. ſuu' dicit quod cum prædictus Timotheus viceſimo primo die Aprilis anno regni Regis & Reginæ Willielmi & Mariæ ſecundo apud Carliſle præd' per quoddam ſcriptum ſuum obligatorium conceſſiſſet ſe teneri eidem Wilfrido per nomen Wilfridi Lawſon Bar. Vic' Com' prædicti in prædictis quadraginta libris ſolvend' eidem Wilfrido cum inde poſtea requiſit. eſſet præd' tamen Timotheus

licet ſæpius requiſit' prædictas quadraginta libras eidem Wilfrido nondum reddidit ſed ill' ei reddere omnino contradixit & adhuc contradic' unde dic. quod deteriorat' eſt & dampn' habet ad valentiam triginta librarum & inde produc' ſectam, &c. & profert hic in Cur' ſcriptum præd. quod debitum præd' in forma prædict' teſtatur cujus dat' eſt eiſdem die & anno ſupradictis, &c.

Et prædictus Timotheus per Johannem Pattiſon Attorn' ſuu' ven' & defendit vim & injuriam quando, &c. & pet' auditum Scripti prædict' & ei legitur, &c. petit etiam auditum Conditionis ejuſdem Scripti & ei legitur in hæc verba ſ. Conditio iſtius Obligationis talis eſt quod ſi ſuper' obligat' Timotheus Haddock compareat coram dict' Dom' Rege & Regina in Cancellar' apud Weſtm' in Quinden' Paſchæ prox' futur. ad reſpondend' dicto Domino Regi & Reginæ tam de quodam Contemptu per præfat. Timoth. dict. Domino Regi & Reginæ illat' quam de his quæ ſibi tunc & ibidem objicientur & ad faciend. ulterius & recipiend' quod dict. Cur. conſ. in hac parte qd' tunc hæc præſens Obligat. vacua foret & nullius vigoris aliter ſtet & permaneat in ſuo pleno robore vigore & effectu Quibus lectis & auditis idem Timoth. dic. quod præd' Wilfridus actionem ſuam præd' verſus eum habere non debet quia dic' qd' per quendam Actum factum in Parliamento Domini Henrici nuper Regis Angl', &c. ſexti tent. apud Weſtm' in Com' Midd' viceſimo quinto die Februarii anno regni ſui viceſimo tertio recitan. in eodem Actu qd' dictus Rex conſideran. magnam injuriam extortion' & oppreſſ. quæ tunc præantea fuerunt in Regno Angl. per ſuos Vic' Subvic' & eorum Clericos Coronatores Seneſchall. Francheſ. Ballivos & Cuſtod' Priſon. & al. Officiar. in diverſis Com. iſtius regni inter alia inactitat. fuit Authoritate ejuſdem Parliamenti in evitation. omn. tal' extortion. injuriar. & oppreſſion. qd. nullus Vic. ad firmam traderet in aliquo modo Com. ſuum nec aliqua Ballivarum ſuarum Hundred. nec Wapentack. Et qd' præd. Vic. & omnes al. Officiar. & Miniſtri præd. traderent extra Priſonam omnimod. perſon. per ipſos aut aliquem eoru' arreſtat' vel exiſten. in eoru' Cuſtod. virtute alicujus brevis Billæ ſive Warranti in aliqua actione perſonal. aut per cauſam Indictament. de Tranſgr. ſuper rationabili fidejuſſ. ſufficien. perſonaru' habend. ſufficien. infra Com. ubi tal. Priſonar. ſic forent tradit. ad balliv. ſive manucaptionem ad Cuſtod. eorum dies in talibus locis qual. præd. Brevia Billæ ſive Warrant. requirerent (tal. perſon. ſive perſonis quæ fuer. ſive forent in eorum Cuſtod. per Condemnation. Execution. Capias Utlagat. vel Exco'ication. ſecuritat. de Pace & omnibus talibus perſonis quæ fuer. ſive forent commiſſ. ad Cuſtodiam per ſpec. Mandat. alicujus Juſtic. & vagabund. recuſan. ſervire ſecundum formam Statut. de laboratoribus tantummodo except.) & quod null. Vic. nec aliquis Officiar. vel Miniſtror. prædict' caperent vel capi cauſarent ſeu facerent aliquam Obligationem pro

Defendant Frays Oyer of the Condition.

The Condition

The Statute of Hen. the 6th pleaded.

aliqua Cauſa ſupradicta vel colore eorum Officii ſed ſolummodo ſibimetipſis de aliqua perſona nec per aliquam perſonam quæ eſſet in eorum Cuſtod' per curſum legis niſi per nomen eorum Officii & ſuper condition' ſcript' quod præd' Priſonar' compareret ad diem content' in dictis brev' ſive Warrant' ac in talibus locis qual' præd' Brevia Billæ ſive Warrant' requirerent & ſi aliquis prædict' Vic' vel al' Officiar' aut Miniſtr' præd' facerent ſeu caperent aliquam Obligationem in aliqua alia forma colore Officiorum ſuorum quod vacua foret prout in eodem Actu (inter alia) plenius liquet & apparet Et idem Timoth' ulterius dic' pd' poſt editionem Actus præd' ac prædicto tempore confectionis ſcripti prædicti ſcilicet prædicto viceſimo primo die Aprilis anno ſecundo ſupradicto & diu antea prædictus Wilfridus Lawſon fuit Vic' prædict' Com' Cumbr' ad officium illud debit' elect' & præfect' quodque ante confection. ſcripti Obligatorii prædict' ſcilicet decimo octavo die Febr' anno regni Regis & Reginæ nunc ſecundo ſupradicto quoddam breve eorundem Regis & Reginæ de Attachiamento de Contemptu e Cur' Cancellar' ipſorum Regis & Reginæ apud Weſtm' in Com' Midd' tunc exiſten' Vic' præd' Com' Cumbr. direct' emanavit verſus eunde' Timoth' per quod quidem breve Præcept' fuit eidem Vic' quod attach' eundem Timoth' ita qd' haberet eum coram eiſdem Domino Rege & Domina Regina in Cancellar' ſua prædict' in Quindenam Paſchæ tunc prox' ſequen' ubicunque Cur' ill' tunc tent' foret in Angl' ad reſpondend' dictis Domino Regi & Dominæ Reginæ tam de quodam contemptu per p̄fat. Timoth' eiſdem Regi & Reginæ illat' quam de hiis quæ ſibi tunc & ibidem objicerentur & ad faciend' ulterius & recipend' qd. dicti Cur' conſideraret in ea parte quod quidem breve poſtea & ante retorn' ejuſdem ſcilicet primo die Aprilis anno regni Regis & Reginæ nunc ſecundo ſupradicto apud Carliſle prædict' in Com' prædicto deliberat' fuit eidem Wilfrido Lawſon adtunc Vic' ejus Com' in forma juris exequend. Virtute cujus quidem brevis idem Vic' poſtea & ante confection' ſcripti præd' ſcilicet eodem viceſimo primo die Aprilis anno ſecundo ſupradicto apud Carliſle prædict' eundem Timoth. per corpus ſuum attachiavit ac ipſum in cuſtod. ſua ibidem habuit & detinuit quouſq; ipſe idem Timoth. ac quidam Ricardus Letchat de Civitat. Carliol in eodem Com' gen' poſtea ſcilicet eodem viceſimo primo die Aprilis anno ſecundo ſupradicto apud Carliſle prædict' per ſcript. Obligatorium præd. ſigilis ſuis ſignat. & eidem Wilfrido ut factum ſuum deliberat. conjunctim & diviſim devener. tent. & obligat' eidem Wilfrido in præd' quadragint' libris ſub conditione præd' pro eaſiamento & favore eidem Timoth' de impriſonament' ſuo prædict. per prædict' Wilfridum demonſtrand' & pro deliberatione ſua ab impriſonamento illo habend' & obtinend' quod quidem ſcript. obligatorium idem Wilfridus colore Officii ſui præd' de eodem Timoth & præfat' Ricardo

Nota.

Attachment iſſued out of Chancery.

And delivered to the Sheriff.

The Defendant arreſted.

Ricardo contra formam Statuti præd' cepit & ſic idem Ricardus dicit qd' ſcriptum obligatorium ill in forma præd' & ex cauſa præd. fact. vigore Statuti præd' vacuum in lege exiſtit & hoc idem Ricardus parat. eſt verificare unde pet' Judicium ſi præd' Wilfridus actionem ſuam præd' verſus eum habere debeat, &c.

Et prædict' Wilfridus dic' qd' placitum præd prædict'. Timoth' ſuperius placitat' materiaq; in eodem content' minus ſufficien' in lege exiſtunt ad ipſum Wilfridum ab actione ſua præd' verſus præfat. Timotheum habend' præcludend. quodq; ipſe ad placitum illud modo & forma p̃d. placitat. neceſſe non habet nec per legem terræ tenetur reſpondere & hoc parat' eſt verificare unde pro defectu ſufficien' placiti in hac parte idem Wilfridus pet' Judicium & debitum ſuum prædict. una cum dampnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c. Demurrer to the Plea.

Et præd' Timotheus ex quo ipſe ſufficien' materiam in lege ad p̃d' Wilfridum ab actione ſua præd' verſus ipſum Timotheum habend' præcludend. ſuperius allegavit quam ipſe parat' eſt verificare quam quidem materiam præd. Timotheus non dedic. nec ad eam aliqualit. reſpondet ſed verificationem ill. admittere omnino recuſat ut prius pet. Judicium & quod præd. Wilfridus ab actione ſua præd. verſus ipſum Timotheum habend. præcludatur, &c. & quia Juſtic. hic ſe adviſare volunt de & ſuper præmiſſis prædictis priuſquam Juſtic. inde reddant dies dat' eſt partibus prædict' hic uſque a die Sancti Michaelis in tres Septimanas de audiendo inde Judicio ſuo eo quod iidem Juſtic. hic inde nondum, &c. The Plaintiff joins in Demurrer.

Lawſon *verſus* Haddock.

IN an Action of Debt upon a Sheriff's Bond, the Condition was, that the Defendant ſhould appear coram Rege & Regina in Cancellaria apud Weſtm. in Quinden. Paſchæ, which was the Return-Day of an Attachment iſſued out of Chancery againſt him for a Contempt.

The Defendant pleaded the Statute of 23 H. 6. which (inter alia) enacts, that the Sheriffs, &c. ſhould let to Bail ſuch Perſons as were arreſted and in their Cuſtody, by Virtue of any Writ, Bill or Warrant, in any Action Perſonal, or upon any Indictment of Treſpaſs. And upon Condition, that they ſhould appear at the Day and Place in the Writ, &c. mentioned; and that all Bonds taken in other Form ſhould be void.

And the Defendant further ſaith, that by an Attachment awarded out of Chancery againſt him, the Plaintiff, being then Sheriff, was commanded to have the Defendant coram Rege & Regina in Cancellar' in Quinden' ubicunque Cur. illa tunc foret in Anglia; and

and the Plaintiff took him by Virtue of the said Writ, and detained him till he had given the said Bond with Condition, as aforesaid, pro esiamento & favore, &c. Which said Bond the Plaintiff colore Officii took of the Defendant contra formam Statuti, &c. & sic dicit quod scriptum oblig' vigore Statuti, præd. vacuum in lege existit & hoc parat' est verificare, &c.

To this the Plaintiff demurred:

First, The Statute saith, that where the Party is in Custody by Virtue of any Writ, &c. in any Action, or upon any Indictment of Trespass: And an Attachment for Contempt out of Chancery is not within the Words of the Statute, in the 3 Cro. Johns and Stratford 309. Taken by a Serjeant at Mace upon Process out of the Grand Sessions, held not within the Statute, in the 3 Leon. 280.

Secondly, The Condition is to appear coram Rege in Cancellar' apud Westm' instead of ubicunque, as the Writ is: For this, vide Stil. 234. Burton and Law, and Mo. 430. Corbet and Downing.

Ventris 234. As to the first the Court inclined, that Attachments out of Chancery were within the Statute. 'Tis the Constant Practice for Sheriffs to take Bail in such Cases. Vid. Stil. 224. Rolle's Opinion according.

As to the second Point 'tis True, that such Bonds have been judged void; but of later Times, the Courts have not been so strict upon the Wording of such Bonds. And a Case was cited to have been in B. R. Trin. 22 Car. 2. Rot. 914. where the Condition of a Sheriff's Bond was to appear coram Justiciariis nostris de Banco, and not said apud Westm', and yet held good.

But the Court gave leave to speak further to the Case at Bar.

Williams *versus* Bond.

1 Vent. 3, 120, 235, 265, 274. 1 Mod. 167, 176. 3 Mod 268, 2 Lev. 179. A Prohibition to a Suit in the Ecclesiastical Court by the Defendant, Church-warden of the Parish-Church of St. Peter in Hereford, against the Plaintiff, charging him with the Repairs of the Chancel of the said Church, as Owner of the Priory House, to which Owner it hath belonged (as was pretended) Time out of Mind to repair the said Chancel; whereas there never was any such Custom as the Plaintiff suggested and set forth in his Declaration upon the Prohibition: And that he had so alledged and pleaded in the Ecclesiastical Court, to hinder the Proceedings upon and trying such Custom in the Court Ecclesiastical; which the Judge there refused to admit, but doth proceed to try, determine and give Sentence against the Plaintiff upon the said

ſaid pretended Preſcription, whereas all ſuch Cuſtom ought to be tried at Law, &c.

The Defendant after a Traverſe to any Proceedings after the Prohibition delivered pro Conſultatione habend' ſaith, that all the Proprietors of the ſaid Meſſuage called the Priory-Houſe, have repaired the ſaid Chancel Time out of Mind, & hoc parat' eſt verificare, &c. unde petit Judicium & breve de Conſultatione.

And to this the Plaintiff demurred.

And the Court were of Opinion, that a Conſultation ſhould be granted; for they may ſue upon this Preſcription and try it there, as a Suit may be in the Eccleſiaſtical Court for a Modus decimandi; and tho' the Parſon is of Common Right to repair the Chancel, yet it may be upon a particular Man's Eſtate by Preſcription. Vide 1 Brownl. 16. 1 Roll. 126. Poph. 197. and Latch 217.

1 Mod. 167. 1 Vent. 233, 265, 274. Cro. Car. 232. Hob. 247. 2 R. Abr. 283. 2 Lev. 187.

Judith Hanſon *verſus* Liverſedge.

Ebor. ſs. SAMUEL LIVERSEDGE nuper de Mitfield in Com' præd' Yeoman alias dict' Samuel Liverſedge de Mitfield in Com' Ebor. Panifix ſum' fuit ad reſpondend' Judithæ Hanſon Vid' de placito quod reddat ei centum libr. quas ei debet & injuſte detinet, &c. & unde eadem Juditha per Thomas Beaumont Attorn' ſuum dic' quod cum prædict Samuel viceſimo quinto die Julii Anno Domini milleſimo ſexcenteſimo octogeſimo nono apud Wakefield per quoddam ſcriptum ſuum obligatorium conceſſiſſ. ſe teneri eidem Judithæ in prædict' centum libr. ſolvend' eidem Judithæ cum inde requiſit' fuiſſ. præd' tamen Samuel licet ſæpius requiſit' præd' centum libr. eidem Judithæ nondum reddidit ſed ill' ei hucuſque reddere contradixit & adhuc contradic' unde dic' quod deteriorat' eſt & dampn' habet ad valenc' decem libr' & inde produc' ſectam, &c. & profert hic in Cur. ſcriptum prædict' quod debitum prædict' in forma præd' teſtatur cujus dat' eſt die & anno ſupradictis, &c.

Debt upon Bond. Vide poſt. 242.

Et p̃d' Samuel per Johannem Empſon Attornatum ſuum venit & defendit vim & injuriam quando, &c. & petit auditum ſcripti p̃d' & ei legitur, &c. pet' etiam auditum conditionis ejuſdem ſcripti & ei legitur in hæc verba. The Condition of this Obligation is ſuch, that if the above bounden Samuel Liverſedge, his Heirs, Executors and Adminiſtrators, for their Parts and Behalves, ſhall and do in all Things well and truly ſtand to, obey, abide, perform, fulfil and keep the Award, Order, Arbitrament, final End and Determination of Edward Deane of Batley in the County of York, Clerk, and Robert Radcliff of Adwalton in the ſaid County, Gent. Arbitrators indifferently

The Defendant craves Oyer of the Condition.

The Condition is for the Performance of an Award.

rently elected and named, as well on the Part and Behalf of the above named Samuel Liverſedge, as of the above named Judith Hanſon, to arbitrate, award, order, judge and determine, of and concerning all and all manner of Action and Actions, Cauſe and Cauſes of Actions, Suits, Bills, Bonds, Specialties, Judgments, Executions, Extents, Quarrels, Controverſies, Treſpaſſes, Damages and Demands whatſoever, at any Time heretofore had, made, moved, brought, commenced, ſued, proſecuted, done, ſuffered, committed or depending, by or between the ſaid Parties, or either of them, ſo as the ſaid Award be made either in Writing, or by Word of Mouth, and ready to be delivered to the Parties in Difference, (or ſuch of them as ſhall deſire the ſame) on or before ſeven of the Clock in the Afternoon to this preſent Day, then this Obligation to be void, or elſe to remain in full Force and Virtue. Quibus lectis & audit' idem Samuel dic' quod præd' Juditha action' ſuam p̄d' verſ. eum habere non debet quia dic' quod Arbitrator' præd' poſt confection' ſcripti præd' & ante præd' ſeptimam horam poſt meridiem præd' viceſimi quinti diei Julii Anno Domini milleſimo ſexcenteſimo octogeſimo nono ſupradicto nullu' fecer' Arbitrium int' ipſum Samuel' & præfat' Judith' de & ſuper præmiſſis in conditione præd' ſuperius ſpecificat. Et hoc parat' eſt verificare unde pet' Judicium ſi præd' Juditha action' ſuam præd' verſus eum habere debeat, &c.

The Defendant pleads, that the Arbitrators made no Award.

Et præd. Juditha dic' quod ipſa per aliqua præallegat' ab actione ſua præd' habend' præcludi non debet quia dic' qd' ipſa eadem Juditha diu ante confection' ſcripti præd' ſcilicet Term' Sanctæ Trin' anno regni Dom' Reg' & Dominæ Reginæ nunc primo in Cur. ipſoru. Reg' & Reginæ de Banco hic ſcilicet apud Weſtm' in Com' Midd' implacitaſſet ipſum Samuel' in quodam placito Tranſgr. ſuper Caſum pro eo quod idem Samuel' dixiſſ. de præfat' Juditha diverſa ſcandaloſa Anglicana verba qd' quidem placitum tempore confectionis ejuſde' ſcripti fuit penden' & indeterminat' qd'q; Arbitrator' præd' accept' ſuper ſe onere Arbitrii prædict' immediate poſt confection' ſcripti illius ſcilicet prædict' viceſimo quinto die Julii Anno Domini milleſimo ſexcenteſimo octogeſimo nono ſupradicto & ante ſeptimam horam poſt Meridiem ejuſdem diei apud Wakefield præd' Arbitrium ſuum ore tenus de & ſuper præmiſſis in Conditione præd' ſuperius mentionat' fecer' & publicaver' ac partibus prædict' ibidem ante horam illam declaraver' modo & forma ſequen' videlt. Quod præd' Samuel ſolveret eidem Judithæ duodecim pecias Auri cuneat. (vocat' Guineas) ac omnes tal' denar' ſumm' qual' eadem Juditha erogaſſet ſeu expendiſſet in & circa proſecution' plac' præd' quodque immediate poſt hujuſmodi ſolution' alt' tam prædicta Juditha quam prædict' Samuel' daret alteri eorum per ſcriptum general' relaxation' omnium action' cauſar' action' demand' quorumcunque

The Plaintiff ſets forth an Award made Ore tenus.

The Plaintiff impleaded the Defendant in the Common Bench.

The Award made Ore tenus.

cunque uſque præd' tempus confectionis Scripti præd. inter eos moven̄ Et eadem Juditha ulterius dic̄ qd. tempore confectionis ſcripti obligatorii præd̄ & Arbitrii præd. quælibet pecia hujuſmodi Auri (vocat̄, Guineas) ſe attingebat in valore ad viginti un̄ ſolid' & ſex denar' quodq; adtunc ac p̄d. tempore confection' Arbitrii præd. prædicta Juditha erogavit & expendidit in & circa proſecution' placiti præd. ſumm̄ undecim libr' ſeptem ſolid' & ſeptem denar̄ videlicet apud Wakefield præd' Unde p̄d̄ Samuel poſtea ſcilicet primo die Auguſti anno regni Regis & Reginæ nunc primo apud Wakefield p̄d. habuit noticiam poſteaq; ſcilicet viceſimo die ejuſdem Auguſti apud Wakefield p̄d. eadem Juditha requiſivit eundem Samuel' ad ſolvend' eidem Judithæ tam præd̄ duodecim pecias Auri vel valor. inde quam præd. undecim libr. ſeptem ſolid. & ſeptem denar. proteſtando autem quod præd. Samuel non ſolvit eidem Judithæ præd. ſummam undecim libr. ſeptem ſolid. & ſeptem denar' In facto eadem Juditha dic. quod præd̄ Samuel non ſolvit eidem Judithæ præd. duodecim pecias Auri cunat' (vocat' Guineas) ſeu valor' inde juxta formam & effectum Arbitrii illius Et hoc parat' eſt verificare Unde pet' Judicium & debitum ſuum præd' unacum dampnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c.

Notice of the Award.

And requeſted the Performance of it.

Et prædict. Samuel̄ dic. quod præd' placitum præd. Judithæ ſuperius replicando placitat̄ ac materia in eodem content̄ minus ſufficien̄ in lege exiſtunt ad præd. Judith. ad action' ſuam præd' verſus ipm̄ Samuel̄ habend' manutenend' quodque ipſe ad placitum illud modo & forma præd. replicat̄ neceſſe non habet nec p̄ legem terræ tenetur aliquo modo reſpondere. Et hoc parat̄ eſt verificare Unde pro defectu ſufficien̄ replicationis in hac parte idem Samuel ut prius pet̄ Judicium & quod præd. Juditha ab actione ſua præd' habend' p̄cludatur, &c.

Demurrer to the Replication.

Et præd. Juditha ex quo ipſa ſufficien' materiam in lege ad actionem ſuam præd̄ verſus p̄fat' Samuel̄ habend' manutenend' ſuperius replicando allegavit quam ipſa parat̄ eſt verificare Quam quidem materiam idem Samuel non dedic̄ nec ad eam aliqualit̄ reſpond' ſed verification' ill' admittere omnino recuſat ut prius pet̄ Judicium & debitum ſuum præd. unacum dampnis ſuis occaſione detentionis debiti ill' ſibi adjudicari, &c. Et quia Juſtic. hic ſe adviſare volunt de & ſup̄ p̄miſſis priuſquam Judicium inde reddant dies dat. eſt partibus præd. hic uſque à die Paſchæ in quindecim dies de audiend. inde Judicio eo quod iidem Juſtic. hic inde nondum, &c.

Joinder in Demurrer.

Judith Hanſon *verſus* Liverſedge.

1 Lev. 113. 2 Lev. 62. 1 Salk. 75. 6 Mod. 82, 160. 1 Sid. 160. 1 Danv. 27. pl. 3.

IN an Action of Debt upon a Bond, the Condition was to perform the Award of two Arbitrators in Writing, or by Word of Mouth.

The Defendant pleaded Nullum fecerunt arbitrium.

The Plaintiff replies, That at the Time of the Bond and Award ſhe had an Action againſt the Defendant for ſcandalous Words, and that the Arbitrators did make, declare and publiſh their Award in Manner and Form following, (viz.) That the Defendant ſhould pay to the Plaintiff twelve Guineas, and all ſuch Monies as ſhe had expended circa proſecutionem placiti prædicti; and that the Parties ſhould give mutual Releaſes of all Matters to the Date of the ſaid Bond, and ſaith, that ſhe laid out in the ſaid Suit 11 l. 7 s. and demanded the ſaid Sums of Money of the Defendant, and proteſtando that the Defendant had not paid her the 11 l. 7 s. dicit in facto that he had not paid the twelve Guineas awarded, as aforeſaid, & hoc paratꝰ eſt verificare, &c.

To this the Defendant demurred.

And Pemberton for the Defendant ſaid,

Firſt, This Award, as ſet forth, appears to be void; for 'tis to pay the Charges expended circa placit̃ præd̃, and the Award doth not mention any Suit before; and tho' the Plaintiff in her Inducement ſaith, That ſhe had an Action for Words againſt the Defendant then depending, that will not help it, for that is no Part of the Award; but the Award in the Form as 'tis ſet forth is unintelligible, there being no Suit mentioned before to refer placit̃ prædict̃ unto.

Secondly, 'Tis not ſufficient to award Payment of the Charges in ſuch a Suit, it being altogether uncertain what the Sum will amount to.

Thirdly, It ought to have been ſhewn, that the Plaintiff had a Cauſe of Action in the Action that is mentioned to have been brought againſt the Defendant for Slander; and ſo is Spigurnell's Caſe in 1 Sid. 12.

Curia. As to the Firſt, if the Award were in Writing in ſuch Form of Expreſſion, it could not be good; but he which ſets forth an Award by Parol is not tied to the Words, for the preciſe Words might be very difficult to prove; but 'tis ſufficient to ſhew the Effect and Subſtance of what was awarded by Word of Mouth, and 'tis ſufficiently ſhewn that this Award was made concerning that Action of Slander.

For the Second, the Court held, that the Award was good; for it may be eaſily reduced to a Certainty, when 'tis made appear what was laid out in that Suit, as in 1 Roll. Abr. 251. Beale and Beale, and in 3 Cro. 383. to pay the Charges of ſuch a Voyage, held a good Award. 3 Lev. 18. Linfeild and Ferne. 2 Lev. 3. Pinkney and Bullock.

Thirdly, The Plaintiff need not ſhew that there was Cauſe of Action, for that is left to the Arbitrators, and they have Power to award Charges thereupon, tho' in Point of Law there were no Cauſe of Action; for the Parties have made the Arbitrators their Judges. 3 Lev. 413. Bargrave and Atkins. Poſt. 249.

And the Court were not ſatisfied with the Opinion reported by Siderfin in Spigurnell's Caſe, and ſaid, he was then a young Reporter. Whereupon Judicium pro Quer'. 1 Sid. 12.

Major & probi homines de Guldeford *verſus* Clarke.

Surr' ſſ. JOhannes Clarke nuper de Guldeford' in Com' prædict' Dyer ſum' fuit ad reſpondend' Majori & probis hominibus Villæ de Guldeford' in Com' Surr' de placito quod reddat eis viginti libras legalis monetæ Angliæ quas eis debet & injuſte detinet, &c. Et unde iidem Major & probi homines Vill' de Guldeford' prædict. per Henr' Dyve Attorn' ſuum dic' quod cum prædict. Villa de Guldeford' in dicto Com' Surr' eſt antiqua Villa quodque probi homines ejuſdem Vill' à tempore cujus contrarium memoria hominum non exiſtit fuer' & adhuc exiſtunt corpus Corporat' & Politicum in re facto & nomine per nomen Majoris & proborum homin' Vill' de Guldeford in Com' Surr' & per idem nomen uſi fuer' placitare & implacitari reſpondere & reſponderi Cumque etiam infra Vill' habetur & à toto tempore ſupradict' cujus contrar' memoria hom' non exiſtit habebatur talis conſuetudo uſitat' & approbat' quod Major & probi homines Vill' prædict. pro tempore exiſten' vel major pars eorundem in Com' Concil' congregat' & aſſemblat' uſi fuer' & conſuever' facere & conſtituere leges & conſtitutiones pro bono regimine & gubernatione Vill' præd' & inhabitan' ejuſdem & pœnas & penalitat' ſuper perſonas contra leges & conſtitutiones ill' delinquen' imponere Cumque etiam infra Villam prædict. fuit antiquus Officiarius annuatim & quolibet anno ſuper diem Lunæ prox' poſt Feſtum Sancti Michaelis Archi' pro uno anno tunc ſequen' per Majorem & probos homines præd. elect' (vocat' Balliv' ejuſdem Vill') ad negotia ejuſdem Vill' peragend' Cumque etiam præd. Major & probi homines Vill' præd' ſecundo die Octobris anno regni Domini Caroli ſecundi nup Regis Angl', &c. triceſimo quarto apud Vill' de Guldeford' prædict. in Com' Concilio adtunc & ibidem congregat' & aſſemblat' ordina-

Debt upon a By-Law made by a Corporation by Preſcription.

Antiqua Villa.

A Corporation Time out of Mind. To implead and be impleaded,

A Cuſtom to make By-Laws

For good Government of the Corporation. And to impoſe Penalties. Cuſtom to elect a Bailiff annually.

The By-Law ſet forth.

verſ & ſtabiliver qd ſi aliquis inhabitañ ejuſdem Vill. tunc poſtea ſecundum antiquum uſuag & conſuetud ejuſdem Vill. foret debite elect. ad officium Ballivi ejuſdem Vill. & recuſaret acceptare & ſuper ſe ſuſcipere idem officium Ballivi ejuſdem Vill. ſive idem Officiñ exequi quod tunc ſuper vel recuſationñ ſive non acceptation. ejuſdem Officii quælibet talꝑ perſonñ forisfaceret & ſolveret Majori & probis hominibus præd. ſummam viginti librar. legalis monet. Angl. ad uſum incorporation. præd' Cumque poſt confection' ordinationñ præd. ſcilicet triceſimo die Septembris anno regni Domini Willielmi & Dom. Mariæ nunc Regis & Reginæ Anglꝑ, &c. primo apud Villam de Guldeford præd. præd. Johannes Clarke adtunc & diu antea & ſemper poſtea hucuſque exiſtenñ inhabitañ infra eandem Villam & liber homo ejuſdem Vill. ſecundum antiquum uſuag & conſuetud ejuſdem Vill. per Majorem & ꝑbos homines ejuſdem Vill. debite elect. fuit fore Ballivum ejuſdum Vill. pro anno tunc ꝑx. ſequenñ de quibus idem Johannes adtunc & ibid notic habuit & adtunc & ibidem requiſit. fuit ad Officium ill. acceptand. & exequend' quodq; idem Johannes adtunc & ibidem & abinde hucuſque ad Officium ill. acceptand. & exequend. omnino recuſavit & adhuc recuſat per quod actio accrevit eiſdem Major. & probis hominibus Villæ de Guldeford' præd. ad exigend. & habend. de ꝑfat. Johanne præd viginti libr. præd. tamen Johannes licet ſepius requiſit. prædict' viginti libr. ꝑfat. Majori & probis hominibus Vill. de Guldeford. præd. nondum reddidit ſed ill. eis hucuſque ſolvere omnino contradixit & adhuc contradic ad dampñ ipſorum Majoris & proborum hominñ Vill. præd. decem librarum Et inde produc ſectam, &c.

Forfeiture for the Breach. The Defendant elected Bailiff,

For the Year then next following.

The Defendant refuſed to execute the Office.

Et præd' Johannes Clarke per Robertum Waring Attorn. ſuum venñ & defend vim & injur quando, &c. Et dicit qd. præd Major & probi homines Vill. de Guldeford. præd' actionem ſuam præd' verſus eum habere non debent quia dicit qd. per quendam Actum in Parliamento Domini Car' Secundi nuꝑ Regis Anglꝑ apud Weſtm in Com. Midd. anno regni ſui tertiodecimo tent. edit. & provis inactitat fuit Authoritate ejuſdem Parliamenti inter alꝑ qd. Commiſſiones ante viceſimum diem Februarii tunc prox. emanat forent ſub Magno Sigillo Angl. talibus perſonis quales dictus nuper Rex appunctuaret ꝑ executione poteſtatum & authoritatum in eodem Actu poſtea expreſſ. & quod omnes & quælibet perſonæ nominat Commiſſionar. in præd. Commiſſionibus reſpective vigore præd. Actus forent Commiſſionat reſpective ꝑ & infra ſeparalꝑ Civitates Corporationes & Burgos & Quinque Portus & eorum Membra & alꝑ Villas portus habentes (Anglice, Port-Towns) infra Regñ Anglꝑ Dom. Walliæ & Villam de Berwick ſuper Twedam pro quibus ipſi reſpective nominarentur & appunctuarentur. Et ulterius per eundem Actum inactitat' exiſtit Authoritate præd. quod omnes

The Defendant pleads the Act of Parliament made 13 Car 2. and that he had not taken the Sacrament within a Year before his Election, ſo that he was not capable of his Office. The Act ſet forth.

perſonæ qui ſuper viceſimum quartum diem Decembris Milleſimo ſexageſimo primo forent Majores Aldermanni Recordatores Ballivi Clerici Vill. (vocat Town-Clerk) homines de Communi Conſilio (Anglice, Common Council-men) & al. perſonæ tunc geren. aliquod officium vel officia Magiſtratus (Anglice, of Magiſtrates) ſive locos vel fiducias vel al. negotium (Anglice, Employment) reſpicien. ad (Anglice, relating to) vel concernen gubernationem dictorum reſpectivorum Civitat Corporac & Burgor & Quinque Portuum & eorum Membrorum & al Villarum portus habentium ad aliquod tempus ante viceſimum quintum diem Martii Milleſimo ſexcenteſimo ſexageſimo tertio cum inde requirerentur per dictos reſpectivos Commiſſionarios vel aliquos tres vel plures eorum caperent Juramenta ligeanciæ & ſupremaciæ & ſacramentum in eodem Actu ſpecificat Ac etiam ad idem tempus publice ſubſcriberent coram eiſdem Commiſſionar. vel aliquibus tribus eorum Declaracon in eodem Actu ſpecificat Et ulterius per eundem Actum inactitat exiſtit Authoritate pd quod pd reſpectivi Commiſſionar. vel aliqui tres vel plures eorum reſpective haberent poteſtatem durante continuatione ſuarum reſpectivarum Commiſſionum adminiſtrare ſacr prædict' & offerre dictam declarationem dictis perſonis per eundem Actum requiſitis cape & ſubſcribere eadem ab & poſt expirationem dictarum reſpectiv. Commiſſion. (præd. tria ſacr & declarationes de tempore in tempus adminiſtrarentur & offerentur talibus pſonæ & perſonis quales p veram intentionem ejuſdem Actus vel alicujus Clauſulæ in eodem content capere deberent eadem p tales perſon vel perſonas reſpective quales p Chartas vel Uſuagia dictorum reſpectivorum Civitat Corporation & Burgor & Quinque port & eor Membror ſuorum & aliarum Villarum portus habentium deberent adminiſtrare Sacramentum p debita executione dictorum locorum ſive officiorum reſpective & in defalt talium per duos Juſticiarios Pacis dict' Civitat Corporacon & Burgor & Quinque port & eorum Membror. & al. Villar. portus habentium pro tempore exiſten' ſi qui tales forent vel aliter p duos Juſtic. Pacis pro tempore exiſten' reſpectivorum Comitat ubi præd. Civitates Corporationes vel Burgi ſive Quinque portus vel eorum Membra vel al. Villæ portus habentes eſſent) Ac per eundem Actum ulterius inactitat exiſtit authoritate præd. quod ab & poſt expiracon dictarum Commiſſion nulla perſona ſive nullæ perſonæ impoſter. extunc poſtea locaretur eligeretur ſeu deligeretur (Anglice, ſhould be Choſen) ſeu locarentur eligerentur ſeu deligerentur (Anglice, ſhould be Choſen) in vel ad aliqua Officia vel loca præd' quæ infr. unum annum px. ante talē election. vel delection. (Anglice, Choice) non cepiſſet ſeu cepiſſent Sacramentum Cœnæ Dominicæ ſecundum ritus Eccleſiæ Anglicanæ & qd. quælibet talis perſona & perſonæ ſic locata electa vel delecta vel locatæ electæ ſive delectæ ſimilit. caperet ſeu caperent prædict'

tria

tria ſacramenta & ſubſcriberent præd. declaration. ad idem tempus quando Sacramentum ꝑ debita Executione dictorum locor̃ & officior̃ reſpective adminiſtraretur Et in defal̃ inde quælibet tal̃ locatio electio & delectio per eundem Actum inactitat̃ declarat̃ exiſtit fore vacua Et per eundem Actum ulterius inactitat' exiſtit authoritate præd. quod poteſtates conceſſ. dictis Commiſſionariis virtute ejuſdem Actus continuarent & eſſent in vigore uſque viceſimum quintum diem Martii anno Domini Milleſimo ſexcenteſimo ſexageſimo tertio & non longius prout ꝑ eundem Actum plenius apparet Et idem Johannes Clarke ulterius dic̃ quod ipſe eſt & tempore præd' electionis ipſius Johannis fore Balliv' præd. Villæ de Guldeford' in Narratione p̃d. ſuperius fieri ſuppoſit̃ fuit ꝑteſtat̃ Subditus dict' Domini Regis & Dominæ Reginæ nunc diſſentiens ab Eccleſia Anglicana quodque ipſe idem Johannes Clarke ad aliquod tempus infr. unum annum ꝓx' ante tempus electioñ ipſius Johannis fore Ballivm̃ præd. Villæ de Guldeford' p̃d per Narrationem præd' ſuperius fieri ſuppoſit̃ non cepiſſet Sacramentum Cœnæ Dominicæ ſecundum ritus Eccleſiæ Anglicanæ per quod vigore præd. Statuti idem Johannes Clarke tempore electionis præd. in Narratione præd' ſuperius fieri ſuppoſit̃ fuit inhabil̃ & incapax fore eligend. ad præd. locum ſive officium Ballivi Villæ de Guldeford. præd. & præd' electio ipſius Johannis fore Ballivum ejuſdem Vill. ꝑ Narrationem præd ſuperius ſupponit̃ vigore Actus præd' fuit vacua Et hoc parat̃ eſt verificare Unde petit Judicium ſi præd' Major & probi homines de Guldeford' prædict. actionem ſuam prædict' verſus eum habere debeant, &c.

The Defendant hath not taken the Sacrament within a Year before his Election.

So that he is become incapable of it.

The Plaintiffs demur.

Et prædicti Major & probi homines Vill. de Guldeford' præd' dicunt quod prædict' placitum ipſius Johannis ſuperius in barram placitat̃ materiaq; in eodem content̃ minus ſufficieñ in lege exiſtunt ad ipſas Major̃ & ꝑbos homines Vill. de Guldeford' p̃d. ab actione ſua prædicta verſus p̃fat̃ Johannem habend. præcludend. quodque ipſi ad placitum illud modo & forma præd. placitat̃ neceſſe non habent nec ꝑ legem terræ tenentur reſpondere Et hoc parat̃ ſunt verificare Unde pro defectu ſufficien. placiti ipſius Johannis iidem Major̃ & probi homines Vill. de Guldeford' præd. pet̃ Judicium & debitum ſuum præd̃ unacum dampnis ſuis occaſione detentionis debiti ill. ſibi adjudicari, &c.

The Defendant joins in Demurrer.

Et præd. Johannes ex quo ipſe ſufficieñ materiam in lege ad p̃d' Major̃ & probos homines Vill. de Guldeford' præd' ab actione ſua præd. verſus ipm̃ Johannem habend. præcludend' ſuperius placitando allegavit quam ipſe parat̃ eſt verificare Quam quidem materiam præd' Major & probi homines Villæ de Guldeford' præd. non dedic. nec ad eam aliqualit̃ reſpond. ſed verification. ill. admittere omnino recuſant petit Judicium & quod præd. Major & probi homines Villæ de Guldeford' præd. ab actione ſua p̃d. verſus

ipſum Johannem habend' p̄cludentur, &c. Et quia Juſtic. hic ſe adviſare volunt de & ſuper p̄miſſis priuſquam Judiciū inde reddant dies dat' eſt partibus præd. hic uſque à die Sancti Michaelis in tres Septimanas de audiend' inde Judicio ſuo eo quod iidem Juſtic. hic inde nondum, &c.

Major & probi homines de Guldeford' *verſus* Clarke.

IN an Action of Debt by the Mayor and probi homines of Guldford againſt Clarke, they declared upon a Preſcription to make By-Laws p̄ bono Regim̄ & Gubernacone Vill' p̄d, and that there has been an antient Officer (called a Bailiff) of the ſaid Town elected for Time whereof, &c. upon the Monday next after Michaelmas-Day, and they ſet forth a By-Law made, That if any Inhabitant of the ſaid Town ſhould be duly elected to the ſaid Office of Bailiff, and ſhould refuſe to take it upon him, he ſhould forfeit and pay to the Corporation 20l. And that after the ſaid Law made, (viz.) upon the 30th of Sept. anno primo Willielmi & Mariæ, the Defendant being then an Inhabitant and Freeman of the ſaid Town, was choſen Bailiff, according to antient Uſage, for the Year following, and had Notice thereof; but he refuſed to take upon him the ſaid Office, unde actio accrevit Major. & prob homin̄ for twenty Pounds, &c. 2 Show. 66, 67, 68. Raym. 212. N. Lutw. 54. 2 Saund. 289.

The Defendant pleaded Actio non; for that by the Statute made 13 Car. 2. for regulating of Corporations, it was amongſt other Things enacted, That after the Determination and Expiration of the Commiſſion for regulating of Corporations (in the ſaid Act mentioned) no Perſon or Perſons ſhould for ever after be choſen into any of the Offices or Places (before-mentioned in the ſaid Act,) who within one Year next before ſuch Election had not received the Sacrament of the Lord's Supper, according to the Uſage of the Church of England; and that every Perſon elected ſhould take the Oaths, and ſubſcribe the Declaration (in the ſaid Act mentioned) at the ſame Time as the Oath, for the due Execution of the Office he is elected to, ſhall be adminiſtred; and in Default thereof, every ſuch Election to be void.

And the Defendant further ſaid, That he is, and at the Time of the ſaid Election he was, a Proteſtant Subject of the King and Queen, and a Diſſenter from the Church of England, and that he had not received the Sacrament within a Year before the ſaid Election, by Reaſon whereof he was not capable to be elected to the ſaid Office, and the Election, by Reaſon of the ſaid Act, was void, & hoc paratꝰ eſt verificare, &c.

To this Plea the Plaintiffs demurred.

In the Argument of this Caſe, Sir John Read's Caſe was cited, who ſeveral Years ſince was made Sheriff of Hertfordſhire, who was then under an Excommunication and ſo could not receive the Sacrament; and therefore after he had held the Office for three Months, left 2 Mod. 299.

left off, and did not attend at the Assizes, for which he was fined 500 l. and after Agreement in the Exchequer, where it was insisted on, that the Act of 25 Car. 2. made for preventing of Dangers that might arise from Popish Recusants, did avoid the said Office upon his not having taken the Sacrament, and he was disabled to do it by Reason of his Excommunication; yet he was adjudged in the Court of Exchequer to pay the 500 l. Fine.

But the Court held here, That the Matter pleaded by the Defendant was a good Bar; for in regard the Act of 13 Car. 2. had enacted, That none should be chosen who had not received the Sacrament within one Year before such Choice; and there could be no Refusal before the Election, it was plain the Defendant had not incurred the Penalty of the By-Law. And it differed from the Case of Sir John Read; for he was once actually in the Office, and obliged thereupon to do all Things necessary for his Proceeding in it: But here, in this Case, to make a Default in the Defendant, there must have been an Election antecedent, and the Election of such an one as the Defendant is, is absolutely prohibited by the Statute.

There were also two Exceptions taken to the Declaration.

First, The By-Law is said to have been, That if any Inhabi-
3 Lev. 293. tant should be chosen; whereas they cannot make By-Laws to bind all the Inhabitants of the Town, but only the Freemen or Members of the Corporation.

Secondly, The Usage is set forth, That the Election should be die Lunæ proxime post Festum Sancti Michael' Archi, and the Election of the Defendant is alledged to be upon the Monday, and that the Court can't take Notice of it, or Consult the Almanack, as this Case is, where it ought to have been set forth in Pleading.

And the Court held these Matters incurable, and so Judgment was given for the Defendant.

Note, Mich. 6 W. in B. R. an Information was brought against
4 Mod. 269. one Larwood refusing the Office of Sheriff of Norwich, he being
1 Salk. 167. thereunto duly elected by the City, &c. he pleaded this Statute of 13 Car. 2. The Attorney General replied, The Act of Uniformity whereby every Man is commanded to receive the Sacrament three Times in the Year according to the Church Liturgy.

To this he rejoins the new Statute of Toleration; and upon a Demurrer, the Rejoinder was held to be a Departure, for as the Question was meerly upon the Validity of the Plea, and it was adjudged that this Plea was no Excuse; for that no Man shall be received to disable himself, &c. And this Act was not made in Favour of Dissenters, but the contrary.

Dawney *verſus* Veſey.

THE Plaintiff as Executrix to William Dawney, her late Husband, brought an Action of Debt upon a Bond, wherein the Defendant was bound to the ſaid Teſtator, with Condition to perform an Award. Vide antea 242, 243.

The Defendant demanded Oyer of the Condition, and pleaded, That the Arbitrators made an Award, that the Defendant ſhould pay 30 l. to the ſaid William Dawney, or his Aſſigns, within two Months then next following, in full Satisfaction of all Treſpaſſes, Damages and Demands; and that the ſaid Parties upon Payment of the ſaid Money ſhould give mutual Releaſes; and ſheweth that the ſaid William Dawney after the ſaid Award, and within two Months, died, and demanded Judgment of the Action.

To this the Plaintiff demurred.

And Judgment was given for the Plaintiff; for tho' the Money was awarded to be paid to William Dawney, and no Mention of his Executors, yet the Money was to be paid to the Executors, for an Award creates a Duty. 1 Salk. 69. Freeman v. Barnard.

And it was objected, That if the Defendant ſhould pay the Money they could not compel the Plaintiff, who is Executrix, to releaſe.

The Court held, That ſhe ought to releaſe all Demands that the Teſtator had againſt the Defendant. Vide 1 Cro. 10. Kingwell and Knapman, 1 Ro. Rep. 197. 31 H. 6. Tit. Barre 59. 3 Leon. 12. 1 Roll. Abr. 420.

Harris *verſus* Parker.

Midd'x ff. SAmuel Parker nuper de Staples-Inn in Com' Midd' Gen. ſum' fuit ad reſpondend' Johanni Harris de placito quod reddat ei nonagint' & novem libr' quas ei debet & injuſte detinet, &c. Et unde idem Johannes Harris per Johannem Wood Attorn' ſuum dicit quod cum præd. Johannes Harris primo die Maii anno regni Domini Caroli ſecundi nuper Regis Angl', &c. triceſimo quinto apud paroch Sancti Martini in Campis in Com' Midd' præd. dimiſiſſet conceſſiſſet & ad firmam tradidiſſet præfat' Samueli un' meſſuag ſive tenementum cum pertin' continen' duas Romeas in una Area (Anglice, two Rooms on a Floor) & dua gardina & un' latrinam (Anglice, a Houſe of Office) eidem meſſuagio ſpectan' & un' ſtabulum dictis duobus gardinis prox' adjungen' quæ præmiſſa prædict' ſunt ſituat' jacen' & exiſten' in & ſuper acclivitatem de Hampſtead-Hill, (Anglice, the Riſe of Hampſtead)

Debt for Rent upon two ſeveral Demiſes by Leaſe Parol.

The firſt Demiſe.

ſtead) cum omnibus & ſingulis ædificiis ſtructur' pomar' gardinis areis (Anglice, Courts) curtilagiis viis aquis aquæcurſibus boſcis ſubboſcis commun commun paſtur' & turbar' eaſiament' commoditat' ꝑficuis emolumentis & advantagiis quibuſcunq; eiſdem meſſuag & tenement' gardin' ſtabulis & ꝑmiſ. jacen' ſpectan' vel aliqualiter ꝑtinen' vel cum eiſdem tunc vel frequent' habit' & dimiſſ. occupat' vel petit' aut adjudicat' accept' reputat' capt' vel cogn' fuiſſe ut pars parcel' ſive membrum inde aut eiſdem aliqualiter pertinen' (except' & ſemper reſervat' præd. Johanni Harris Executoribus Adminiſtratoribus & Aſſignatis ſuis omnibus taꝑ magnis arboribus (vocat' Timber-Trees) quaꝑ tunc ſteter' crever' & fuer' vel ad aliquod tempus poſtea ſtarent creſcerent vel forent in & ſuper præd' dimiſſ. præmiſſ. vel aliquam partem inde) habend' & tenend' ꝑmiſſa præd. (except' ꝑexcept') eidem Samueli Parker & Aſſign' ſuis a viceſimo quinto die Martii tunc ult' præterit' uſque plenum finem & terminum ſeptem annorum extunc ꝓx' ſequen' reddend' inde eidem Johan' Harris annual' reddit' ſive ſummam octodecim librar' legalis monet' Angliæ ſolvend' eidem Johan' Harris ad Feſta Sancti Johan' Baptiſtæ Sancti Michaelis Archangeli Natalis Domini Dei & Annunciation' Beatæ Mariæ Virginis in quolibet anno per æquas & æquales portiones duran toto termino annorum præd. virtute cujus dimiſſionis præd. Samuel Parker in ꝑmiſſ. præd. prædimiſſ. cum pertin' intravit & ill. a præd primo die Maii anno triceſimo quinto ſupradict' uſque ad Feſtum Sci Michaelis Archangeli anno regni Jacobi ſecundi nup Regis Angliæ, &c. quarto habuiſſet tenuiſſet & occupaſſet & quadraginta & quinque libr. de reddit' præd. pro duobus annis & dimid unius anni de ꝑd termino ſeptem annorum finit' ad præd' Feſtum Sancti Michaelis Archangeli anno quarto Jacobi ſecundi ſupradict' eidem Johanni Harris arretro fuer' & adhuc arretro exiſtunt & inſolut' ꝑ qd. actio accrevit eidem Johanni Harris ad exigend' & habend' de præfat. Samuel Parker præd' quadragint' & quinque libr' de præd. nonagint' & novem libr. parcel Cumq; etiam præd Johannes Harris viceſimo quinto die Martii anno regni dicti Domini Caroli ſecundi nup Regis Angliæ, &c. triceſimo quinto apud paroch Sci Martini in Campis præd. in Com. ꝑd dimiſiſſet conceſſiſſet & ad firmam tradidiſſet præfat. Samueli un. al. meſſuag. ſive tenement. cum ꝑtin. continen. duas romeas in una area (Angl, two Rooms on a Floor) & dua aꝑ gardin. & un' al. latrinam (Anglice, a House of Office) eidem meſſuagio ult. mentionat. ſpectan' & un. al. ſtabulum ꝓx' adjungen. dictis duobus gardinis ult. mentionat. quæ præmiſſa præd. ult. mentionat. ſunt ſituat. jacen. & exiſten. in & ſuper acclivitatem de Hampſtead (Anglice, the Riſe of Hampſtead-Hill) cum omnibus & ſingulis ædificiis ſtructur. ſtabulis pomariis gardinis areis (Anglice, Courts) curtilagiis viis æquæcurſibus boſcis ſubboſcis commun. commun. paſtur. turbar. eaſiament. commoditat. proficuis

Exception.

Habendum.

Reddendum.

Entry by Virtue of the Demiſe.

Rent arrear.

Actio accrevit.

The ſecond Demiſe.

emolumentis advantagiis quibuſcunque eiſdem meſſuagio & tenemento gardinis ſtabulis & p̄miſſis ult̄ mentionat̄ jacen̄ ſpectan̄ vel aliqualit̄ p̄tinen' vel cum eiſdem tunc vel frequent̄ habit̄ dimiſſ. occupat. vel petit̄ aut judicat̄ accept. reputat. capt. vel cogn' fuiſſe ut pars parcell' ſive membrum inde aut eiſdem aliqualit' pertinen' except. & ſemper reſervat' p̄d' Johanni Harris Executoribus Adminiſtratoribus & Aſſign' ſuis omnibus tal̄ magnis arboribus (vocat' Timber-Trees) qual' tunc ſteter' crever' & fuer' vel ad aliquod tempus poſtea ſtaret creſcerent vel forent in & ſuper prædict' dimiſſ. p̄demiſſ. ult̄ mentionat' vel aliquam partem inde Habend' & tenend' p̄dict' meſſuag' & p̄miſſ. ult̄ mentionat̄ cum pertin' (except' p̄except') p̄dict' Samueli Parker à p̄dict' viceſimo quinto die Martii anno triceſimo quinto dicti Domini Caroli ſecundi nuper Regis Angl', &c. ad voluntat' eorundem Johannis & Samuelis & quamdiu ambabus partibus p̄d' placuerit reddend' & ſolvend' proinde p̄dict' Johanni Harris reddit' ſive ſummam legalis monet' Angliæ ad ratam (Anglice, after the Rate) octodecim librar' per annum duran' continuation' dimiſſion' p̄dict' ult' mentionat' Virtute cujus quidem dimiſſionis ult' mentionat' idem Samuel Parker in p̄miſſ. p̄dict' p̄dimiſſ. cum pertin' ult' mentionat' intravit & a tempore dimiſſion' ill' ult' mentionat' uſque ad Feſtum Sancti Michaelis Archi' anno regni Domini Jacobi ſecundi nuper Regis Angl', &c. quarto habuiſſet & occupaſſet & quinquagint' & quatuor libr' reddit' p̄d pro tribus annis finit' ad p̄d' Feſtum Sancti Michaelis Archi anno quarto Jacobi ſecundi ſupradict' ad ratam (Anglice, after the Rate) octodecim' librar' per annum eidem Johanni Harris debit̄ arretro & inſolut̄ fuer' & adhuc arretro & inſolut' exiſtunt per quod actio accrevit eidem Johanni Harris ad exigend' & habend' de p̄fat' Samuele Parker eaſdem quinquagint' & quatuor libr' ult̄ mentionat' de p̄d' nonagint' & novem libr' reſid' p̄d' tamen Samuel Parker licet ſæpius requiſit', &c. p̄d' quadragint' & quinque libr' primo mentionat' ac p̄d' quinquagint' & quatuor libr' ult̄ mentionat' eidem Johanni Harris nondum reddidit nec aliquam inde parcell' ſed ill' ei hucuſq; reddere omnino contradixit & adhuc contradicit Unde dicit quod deteriorat' eſt & dampn' habet ad valenc' decem lib. Et inde producit ſectam, &c.

Exception

Habendum.

Reddendum.

Entry and Poſſeſſion.

Rent arrear.

Actio accrevit.

Et p̄dict' Samuel per Carolum Townſend Attorn' ſuum venit & defendit vim & injur' quando, &c. Et dicit quod p̄dict' Johannes Harris actionem ſuam p̄dict' verſus eum habere non debet Quia dicit quod p̄dict' Johannes Harris tempore dimiſſion' præd' ſuperius fieri ſuppoſit' nichil habuit in tenementis præd' cum pertin' unde ſuppon' dimiſſion' ill' fieri Et hoc parat̄ eſt verificare Unde petit Judicium ſi præd' Johannes Harris actionem ſuam p̄d' verſus eum habere debet, &c.

The Defendant pleads, that the Plaintiff nihil habuit in tenementis tempore dimiſſionis.

He ſhould have ſaid temporibus dimiſſionis.

The Plaintiff replies, that before the Demiſes, one J. S. demiſed to him for a Term of Years.

Et prædict' Johannes Harris dicit quod per aliqua per prædict' Samuelem Parker ſuperius placitando allegat' ipſe idem Johannes ab actione ſua præd. verſus eum habend' ꝓcludi non debet Quia dicit quod diu ante tempora prædict' ſeparal' dimiſſion' per ipſum Johannem ꝓfat' Samueli de tenementis prædict. ſuperius in Narratione prædict' mentionat' eſſe fact' ſcilicet decimo tertio die Novembris anno regni Caroli ſecundi nup Regis Angl' viceſimo ſexto ꝓnobilis Carolus Henricus Dom' Wotton Baro de Wotton in Com' Kanc' apud paroch' Sancti Martini in Campis in Com' Midd' præd. dimiſit conceſſit & ad firmam tradidit præfat' Johanni un' peciam ſive parcell' terræ unacum antiquo meſſuagio & horreo exiſten' ſuperinde ſituat' & exiſten' in Hampſtead præd' in Com' præd' continen' dimidium unius acræ terræ cum pertinen' unde tenement' præd. in Narratione ꝓd. mentionat' fore dimiſſa ſunt parcell' Hab' & tenend' ꝓmiſſ. ill' præfat' Johanni Harris Executoribus & Aſſign' ſuis a Feſto Sancti Michaelis Archi. tunc ult' ꝓterit' uſque ad plenum finem & terminum quadraginta & unius annorum extunc ꝑx' ſequen' plenar' complend' & finiend' (ꝓfat' Carolo Henrico Domino Wotton adtunc & ibidem plenam poteſtatem jus & titulum ad præd' peciam & parcell' terræ & præmiſſ. prædict' cum pertinen' dimittend' & concedend' pro præd. termino quadraginta & unius annorum habente) Virtute cujus quidem dimiſſionis idem Johannes Harris poſtea ſcilicet eodem decimo tertio die Novembr' anno regni dicti Domini Caroli ſecundi Regis viceſimo ſexto in præd. peciam ſive parcell' terræ meſſuag & horreum cum pertin' intravit & fuit inde poſſeſſionat' pro reſiduo præd' termini quadraginta & unius annorum Et ſic inde poſſeſſionat' exiſten' idem Johannes primo die Maii anno regni dicti Dñi Caroli Regis triceſimo quinto in Narratione præd. ſuperius mentionat' apud paroch' Sancti Martini in Campis præd. in Com' prædict. dimiſit præfat' Samueli tenementa præd' in Narratione præd. ſuperius mentionat' cum pertin' modo & forma prout idem Johannes ſuperius verſus eum narravit Et hoc parat' eſt verificare unde petit Judicium & debitum ſuum præd' una cum dampnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c.

J. S. demiſed to him,

For 41 Years.

J. S. having then good Right and Title to make ſuch Demiſe.

Entry and Poſſeſſion,

And demiſed to the Defendant.

The Defendant demurs to the Plaintiff's Replication.

Et præd' Samuel dic' quod prædictum placitum præd. Johannis ſuperius replicando placitat. materiaq; in eodem content' minus ſufficien' in lege exiſtunt ad præd. Johannem actionem ſuam præd. habend' manutenend' quodque ipſe ad placitum illud modo & forma præd. placitat' neceſſe non habet nec ꝑ legem terræ tenetur reſpondere Et hoc parat' eſt verificare unde ꝑ defectu ſufficien' repl' ipſius Johannis in hac parte idem Samuel pet' Judicium Et qd. ꝓd. Johannes ab actione ſua præd' verſus eum habend' ꝓcludatur, &c.

Henr. Trinder.

Et prædict' Johannes dicit quod placitum præd. per ipſum Johannem modo & forma præd' ſuperius replicando placitat' materiaque in eodem content' bon' & ſufficien' in lege exiſtunt ad præd Johannem actionem ſuam præd. habend' manutenend' Quod quidem placitum materiaque in eodem content' ipſe idem Johannes paratꝰ eſt verificare & probare prout Cur', &c. Et quia præd. Samuel' ad placitum ill' non reſpond' nec ill' hucuſque aliqualit' dedic' ipſe idem Johannes petit Judic' & debitum ſuum præd' cum unde dampnis ſuis occaſione detentionis debiti præd' ſibi adjudicari, &c. Sed quia Cur. hic de Judicio ſuo de & ſuper præmiſſis reddend' nondum adviſatur Dies inde datꝰ eſt partibus præd. coram Juſtic' Dom. Regis & Dom' Reginæ apud Weſtm' uſq; ——— de Judicio ſuo de & ſuper præmiſſis ill' audiend' eo quod Cur' hic inde nondum, &c. The Defendant joins in Demurrer.

Harris *verſus* Parker.

IN an Action of Debt for Rent the Plaintiff declared, That he demiſed, at the Pariſh of St. Martin in the Fields in the County of Middleſex, to the Defendant a Meſſuage, Barn and Gardens, with a Stable adjoining, quæ p̃miſſa præd ſunt ſituat' jacen' & exiſten in & ſuper acclivitatem de Hampſtead (Anglice, the Riſe of Hampſtead Hill) to hold to the Defendant for ſeven Years at 18 l. per Annum Rent, &c. and declared of another Demiſe at St. Martin's aforeſaid, of another Meſſuage, &c. ſituate as aforeſaid to the Defendant, to hold at Will at the like yearly Rent, &c. and for 90 l. ſet forth to have been due upon the ſaid ſeveral Demiſes, he brings the Action. Poſtea 270, 271. 4 Mod. 76. 1 Salk. 262.

The Defendant pleaded, That the Plaintiff tempore dimiſſionum præd. nihil habuit in Tenementis præd'. Vide antea 73.

The Plaintiff replied, That ante tempora præd. ſeparat' dimiſſ. the Lord Wotton demiſed to the Plaintiff the ſaid Meſſuage and Premiſſes for the Term of one and forty Years (ipſo Com' Wotton plenam poteſtatem jus & titulum ad præmiſſa & ea dimittend' pro termino præd. habente) and that the Plaintiff did enter by Virtue of the ſaid Demiſe, and being poſſeſſed of the Premiſſes made the ſeveral Demiſes to the Defendant prout, &c.

To this the Defendant demurred;

For that the Plaintiff in his Replication hath ſet forth no Title in the Lord Wotton, nor ſhewn what Eſtate he had, or that he had any Eſtate.

As to that the Court inclined, That the Replication was well enough, but they took the Bar not to be well pleaded; for the Plaintiff declared of two Demiſes, and the Bar is, that tempore dimiſſionum præd' nihil habuit, whereas it ought to have been diſtinctly

diſtinctly pleaded, that he had nothing at the Time of either of the Demiſes, for the Declaration is of two Demiſes, and the Time being put in the ſingular Number, it cannot be carried to both, and 'tis not like pleading Non Aſſumpſit to a Declaration, containing ſeveral Promiſes. Vide Palmer's Rep. A Quo Warranto was brought againſt a Corporation for ſeveral Franchiſes, and they pleaded a Preſcription to one, and a Charter as to another, &c. and concluded eo warr. clamant; and that was held good, and ſo Judgment there was given for the Plaintiff niſi cauſa.

But then it was moved at another Day, That the Declaration was not good for the Meſſuage and Premiſſes demiſed, for they are ſaid here to be ſituate in & ſup acclivitat' de Hampſtead, which is a Deſcription of the Situation; but here is no Will laid or lieu conus for a Jury, and of this the Court doubted. Poſtea 270.

Every *verſus* Carter.

Indebitatus Aſſumpſit upon ſeveral Promiſes,

Staff. ſſ. JOhannes Carter nuper de Burton ſuper Trent in Com' prædict' Dyer Attach. fuit ad reſpondend' Johanni Every Armig' de placito Tranſgr' ſuper Caſum, &c. Et unde idem Johannes Every per Iſaacum Hawkins Attorn' ſuum queritur quare cum prædict' Johannes Carter primo die Martii anno regni Dominorum Regis & Regin' nunc, &c. primo apud Turbury indebitat' fuiſſet eidem Johanni Every in cent' nonagint' & quinque libr' legalis monet' Angl' pro denar' per eodem Johanne Every & ad ejus uſum per prædict' Johannem Carter ante tempus ill' habit' & recept' & ſic inde indebitat' exiſten' idem Johannes Carter in conſ. inde ſuper ſe aſſumpſit & eidem Johanni adtunc & ibidem fidelit. promiſit quod ipſe Johannes Carter præd. centum nonagint' & quinque libr' eidem Johanni Every cum inde poſtea requiſit' eſſet bene & fidelit' ſolvere & contentare vellet Cumque etiam idem Johannes Carter poſtea ſcilicet eiſdem die & anno ult' mentionat' apud Turbury præd' indebitat' fuiſſet eidem Johanni Every in ducent' libris ſimilis legalis monet' Angl' pro denar. pro præd' Johanne Carter & ad ejus inſtanc' & requiſitionem per præd. Johannem Every ante tempus ill' depoſit' & ſolut' Et ſic inde indebitat' exiſten' idem Johannes Carter in conſ. inde ſuper ſe aſſumpſit & eidem Johanni Every adtunc & ibidem fidelit' promiſit quod ipſe idem Johannes Carter præd ducent' libr' ult' mentionat' eidem Johanni Every cum inde poſtea requiſit' eſſet bene & fidelit' ſolvere & contentare vellet Cumque etiam præd. Johannes Carter poſtea ſcilicet eiſdem die & anno ult' mentionat' apud Turbury prædict' indebitat' fuiſſet eidem Johanni Every in vigint' libr' legalis monet' Angl' pro denar' de eodem Johanne Every per præd. Johan' Carter ante

For Monies had and received to the Plaintiff's Uſe.

For Money laid out for the Defendant.

For Money borrowed of the Plaintiff.

ante tempus ill. habit. mutuat. & recept. & ſic inde indebitat. exiſten. idem Johannes Carter in cons̃ inde ſup. ſe aſſumpſit & eidem Johanni Every adtunc & ibidem fideliter promiſit qd. ipſe Johannes Carter præd' vigint. libr. eidem Johanni Every cum inde poſtea requiſit. eſſet bene & fideliter ſolvere & contentare vellet Cumque etiam præd. Johannes Carter poſtea ſcilicet die & anno ult. mentionat. apud Turbury p̃d indebitat. fuiſſet eidem Johanni Every in centum libr. ſimilis legalis monetæ Angliæ p̃ arreragiis debit̃ eidem Johanni Every per præd̃ Johannem Carter ſuper quodam compõ inter eundem Johannem Every & prædict' Johannem Carter ante tempus ill. habit. & fact' & ſic inde indebitat̃ exiſten. idem Johannes Carter in cons̃ inde ſuper ſe aſſumpſit & eidem Johanni Every adtunc & ibidem fideliter promiſit quod ipſe idem Johannes Carter præd. centum libr. eidem Johanni Every cum inde poſtea requiſit. eſſet bene & fidelit. ſolvere & contentare vellet præd. tamen Johannes Carter p̃d ſeparal. p̃miſſion. ac aſſumption. ſuas præd. min. curans ſed machinans & fraudulenter intendens eundem Johannem Every in hac parte callide & ſubdole decip̃e & defraudare præd' ſeparal. denar. ſummas eidem Johanni Every nondum ſolvit nec ipſum p̃ eiſdem aliqualiter hucuſq; contentavit licet adinde idem Johannes Carter poſtea ſcilicet ſecundo die Martii anno regni dictor. Dominor. Regis & Reg. nunc, &c. primo & ſæpius poſtea apud Turbury præd̃ per præd. Johan. Every requiſit. fuiſſet ſed ill. ei ſolvere aut aliqualiter pro eiſdem contentare omnino hucuſq; recuſavit. & adhuc recuſat ad dampnum ipſius Johannis Carter ſexcent. libr. Et inde produc̃ ſectam, &c.

For Money due to the Plaintiff for the Arrearages of an Account.

The Defendant non ſolvit the ſeveral Sums.

Et prædictus Johannes Carter per Thomam Porter Attornatum ſuum venit & defendit vim & injuriam quando, &c. Et quoad primam & ſecundam p̃miſſion. & aſſumption. ſupius mentionat. dic̃ quod prædict. Johannes Every actionem ſuam prædict. inde verſus eum habere non debet quia dic. quod ipſe idem Johannes Carter ad aliquod tempus infra ſex annos ante diem impetrationis brevis originalis ipſius Johannis Every non aſſumpſit ſuper ſe modo & forma prout prædict' Every ſuperius verſus eum queritur Et hoc paratus eſt verificare Unde petit Judicium ſi præd. Johan. Every actionem ſuam præd. inde verſus eum habere debeat, &c. Et quoad tertiam & quartam promiſſion' & aſſumption. in narratione ſuperius mentionat. idem Johannes Carter dicit quod ipſe non aſſumpſit ſup̃ ſe modo & forma prout præd. Johan. Every ſuperius inde verſus eum queritur Et de hoc ponit ſe ſuper patriam & præd. Johan. Every ſimiliter, &c.

As to the firſt and ſecond Promiſes, the Defendant pleads non Aſſumpſit infra ſex annos.

As to the third and fourth Promiſes he pleads non Aſſumpſit.

Et

As to the firſt and ſecond Promiſes the Plaintiff replies and ſets forth an Original ſued out in a Clauſum fregit within the ſix Years.

Et præd. Johan. Every quoad præd. placitū præd' Johan. Carter quoad primam & ſecundam ꝑmiſſion. & aſſumption. in narr. ꝑd ſuperius mentionat. dicit quod ipſe per aliqua in eodem placito præallegat. ab actione ſua præd. inde verſus eum habend. præcludi non debet quia dic. qd ipſe idem Johan' Every poſt promiſſion' & aſſumption. præd in forma prædicta fact' ſcilicet undecimo die Maii anno regni Domini Jacobi ſecundi nuper Regis Angliæ ſecundo pro recuperation. dampnorum ſuorum occaſion. non performation. promiſſion. & aſſumption. ill. proſecut. fuiſſet extra Cur. Cancellar.

The Suing out of the Original.

dicti nup Domini Regis quoddam breve original. dicti nuper Regis in hac parte verſus præd' Johannem Carter tunc Vic. Com. Staff. ford. direct. retornabil. coram tunc Juſtic. dicti nuper Regis apud Weſtm. in Craſtino Sanctæ Trinitatis tunc ꝓx' ſequen. reſpondend.

Ea intentione to declare againſt him,

eidem Johan. Every ea intentione quod præd' Johañ Carter caperetur & arreſtaretur & idem Johan. Every ſuper comparent. præd. Johan. Carter in eadem Curia ad ſectam ejuſdem Johannis Every ſecundum conſuetudinem Curiæ hic uſitat' & approbat. pro recuperation. dampnorum ſuorum occaſione non ꝓformation. ꝓmiſſion. &

And that he promiſed within the ſix Years.

aſſumption. ill. ſuperius mentionat. narraret quodque præd. Johan. Carter infra ſex annos ꝓx' ante diem impetrationis ejuſdem brevis original. in hac parte aſſumpſit ſuper ſe modo & forma prout idem Johan. Every ſuperius verſus eum queritur Et hoc peť quod inquiratur per Patriam.

The Defendant craves Oyer of the Original,

Et prædict' Johannes Carter peť auditum præd brevis original. præfat. Johan. Every ſupius replicando mentionat. Et ei legitur in hæc verba Jacobus ſecundus Dei gratia Angliæ Scotiæ Franciæ & Hiberniæ Rex Fidei defenſ. &c. Vic. Staff. ſalutem Si Johan. Every

And hath it.

Armig. fec. te ſecur. de clamore ſuo proš tunc pone ꝑ vad & ſalvos pleg Johan. Carter nup de Burton ſuper Trent in Com. tuo Dyer qd. ſit coram Juſtic. noſtris apud Weſtm. in Craſtino Sanctæ Trinitatis oſtenš quare vi & armis clauſum ipſius Johannis Every apud Turbury fregit & aꝑ enormia ei intulit ad grave dampnum ipſius Johannis Every & contra pacem noſtram & habeas ibi nomina pleg & hoc breve Teſte meipſo apud Weſtm̄ 11 die Maii anno regni noſtri ſecundo Elweſe. Johañ Doe pleg de proš Ricardus Roe Infranominat. Johan. nichil habet in balliva mea ꝑ quod attach. poteſt Jonath. Cope Arm. Vic. Quo lecto & audito idem Johan. Carter dic.

This Writ will not warrant this Declaration.

qd. præd. Johan. Every ad monſtrand. idem breve originale ſuperius replacitando mentionat. ad warrantizandum narrationem ſuam præd' modo verſus eundem Johan. Carter fact. & declarat. admitti ſeu recipi non debet Quia dic. qd breve originale unde ꝑd Johan. Every ſuperius modo narravit eſt de placito quare cum præd. Johañ Carter primo die Martii anno regni Dominorum Regis & Reginæ nunc, &c. primo apud Turbury indebitat. fuiſſet eidem Johan. Every in centum nonagint. & quinq; libr. legalis monetæ Angliæ pro denar. pro eodem Johanne Every & ad ejus uſum per præd. Johañ

Carter ante tempus ill' habit' & recept' & ſic inde indebitat' exiſten' idem Johan' Carter in cons' inde ſuper ſe aſſumpſit & eidem Johan. Every adtunc & ibidem fidelit' promiſit quod ipſe idem Johan' Carter præd. centum nonaginta & quinque libras eidem Johan. Every cum inde poſtea requiſit' eſſet bene & fidelit. ſolvere & contentare vellet Cumque etiam idem Johan. Carter poſtea ſcilicet eiſdem die & anno ult. menconat. apud Turbury præd. indebitat. fuiſſet eidem Johanni Every in ducent. libris ſimilis legalis monet. Angl' pro denar. pro prædict. Johan. Carter & ad ejus inſtanc. & requiſic'onem per præd. Johan. Every ante tempus illud depoſit' & ſolut. & ſic inde indebitat. exiſten. idem Johan. Carter in cons' inde ſuper ſe aſſumpſit & eidem Johan' Every adtunc & ibidem fidelit. promiſit quod ipſe idem Johan. Carter præd. ducent' libras ult' menc'onat. eidem Johan. Every cum inde poſtea requiſit. eſſet bene & fidelit' ſolvere & contentare vellet Cumque etiam præd. Johan. Carter poſtea ſcilicet eiſdem die & anno ult. menc'onat. apud Turbury præd. indebitat. fuiſſet eidem Johan. Every in viginti libr. legal' monet. Angl. pro denar. de eodem Johan. Every per præd. Johan. Carter ante tempus ill. habit. mutuat. & recept & ſic inde indebitat. exiſten. idem Johan. Carter in cons' inde ſup ſe aſſumpſit & eidem Johan' Every adtunc & ibid. fideliter promiſit qd. ipſe idem Johan. Carter præd. viginti libras eidem Johan. Every cum inde poſtea requiſit. eſſet bene & fidelit. ſolvere & contentare vellet Cumque etiam præd. Johan. Carter poſtea ſcilicet eiſdem die & anno ult. menc'onat. apud Turbury p̄d. indebitat. fuiſſet eidem Johan. Every in centum libris ſimilis legalis monet. Angl' pro arreragiis debit' eide' Johan. Every per præd. Johan. Carter ſup̄ quodam compo. int. eundem Johan. Every & p̄d. Johan. Carter ante tempus ill' habit. & fact' & ſic inde indebitat. exiſten' idem Johan. Carter in cons' inde ſup̄ ſe aſſumpſit & eidem Johan. Every adtunc & ibidem fidelit. promiſit qd' ipſe idem Johan. Carter præd. centum libras eidem Johan. Every cum inde poſtea requiſit. eſſet bene & fidelit. ſolvere & contentare vellet p̄d. tamen Johan. Carter ſeparal' promiſſion. & aſſumpc'on. ſuas p̄d. minime curans ſed machinans & fraudulent. intendens eundem Johan. Every in hac p̄te callide & ſubdole decipere & defraudare p̄d' denar. ſummas eidem Johan. Every nondum ſolvit nec ipm' pro eiſdem aliqualit. hucuſque contentavit licet adinde idem Johan. Carter poſtea ſcilicet ſecundo die Martii anno regni dictorum Dominorum Reg. & Regin' nunc, &c. primo & ſæpius poſtea apud Turbury p̄d. per p̄d. Johan. Every requiſit' fuit ſed ill' ei ſolvere aut aliqualit' pro eiſdem contentare hucuſq; omnino recuſavit & adhuc recuſat ad dampnum ipſius Johan' Every ſexcentaru' librarum, &c. Ad qd' quidem breve original' ipſe præd. Johan' Carter in Cur. hic ad ſectam p̄d' Johan' Every comparens præd. Johan. Every ſuperinde verſus eundem Johan. Carter de p̄d. placito in eode' brevi original' ult'

ſpec' narravit & non ſuper brevi originali præd' per prædictum Johannem Every ſuperius replicando ſuppoſit' & hoc parat' eſt verificare unde pet. Judicium ſi præd. Johannes Every ad monſtrandum prædictum breve originale ſuperius replicando menc'onat' ad warrantizandum narrac'on. ſuam præd' modo verſus eundem Johan. Carter fact' & declarat' admitti ſeu recipi debeat, &c.

And prays Judgment whether the Plaintiff ſhall be admitted to ſet forth that Writ.

Et præd' Johannes Every dicit quod placitum prædictum per præd' Johannem Carter modo & forma præd. ſuperius rejungendo placitat' materiaque in eodem content' minus ſufficien' in lege exiſtunt ad quod ipſe idem Johan' Every neceſſe non habet nec per legem terræ tenetur aliquo modo reſpondere. Et hoc parat' eſt verificare unde pro defectu ſufficien' rejunc'on' in hac parte ipſe idem Johannes pet' Judicium & dampna ſua occ'on' non performac'on promiſſion' & aſſumpc'on' ill' ſibi adjudicari, &c.

The Plaintiff demurs to the Rejoinder.

The Defendant joins in Demurrer.

Et præd' Johannes Carter ex quo ipſe ſufficien' materiam in lege ad præfat' Johan' Every ab acc'one ſua præd. verſus eum præcludend' ſuperius allegavit quam ipſe parat' eſt verificare Ac quam quidem materiam præd' Johannes Every non dedic' nec ad eam aliqualit' reſpond' ſed verificac'on ill' admittere omnino recuſat ut prius pet' Judicium & quod præd' Johannes Every ab acc'one ſua præd. inde verſus eum habend' præcludatur, &c. & quia Juſtic' hic ſe adviſare volunt de & ſuper præmiſſ. unde partes præd' poſuer' ſe in Judicium Cur. priuſquam Judicium inde reddant dies dat' eſt partibus præd' hicuſque a die Sancti Michaelis in tres Septimanas de audiendo inde Judicio ſuo eo quod iidem Juſtic' hic inde nondum, &c. & tam quoad triand' exitum præd' inter partes præd' ſuperius junct' per patriam quam ad inquirend' quæ dampna præd' Johan' Every ſuſtinuit occ'one præmiſſ. ſuperius menc'onat' unde partes præd' poſuer' ſe in Judicium Cur. ſi contingat Judic' inde pro præd' Johan' Every verſus præfat' Johannem Carter inde reddi Præcept' eſt Vic. quod Venire fac' hic a die Sanctæ Trinitatis in tres Septimanas duodecim, &c. per quos, &c. & qui nec, &c. Ad recogn', &c. quia tam, &c.

Every

Every *verſus* Carter.

IN an Indebitat' Aſſumpſit, the Plaintiff declared upon ſeveral Promiſes.

The Defendant pleaded the Statute of Limitations. Antea 185, 193, 197.

The Plaintiff replied, that before the ſix Years were elapſed he proſecuted an Original againſt the Defendant, returnable, coram tunc Juſticiariis Jacobi ſecundi nuper Dom. Regis apud Weſtm. ad reſpondend. eidem Johanni Every ea intentione qd. præd' Johannes Carter capiatur. Et idem Johannes Every ſup comparentiam præd. Johannis Carter in eadem Cur. ad ſectam ipſius Johannis pro recuperatione damnor' ſuor. occaſione non performationis promiſſ. illor. ſuperius mentionat' narraret qd'q; præd' Johannes Carter infra ſex annos proxime ante diem impetrationis ejuſdem brevis original. in hac parte aſſumpſit ſuper ſe modo & forma prout, &c. Et hoc petit quod inquiratur per patriam.

Et præd' Johan. Carter petit auditum præd' brevis original' & ei legitur in hæc verba. Jacobus ſecundus, &c. Vicecom' Staff. ſalutem ſi Johan. Every Ar. fec. te ſecurum de clamore ſuo proſequend' tunc pon' per vadios & ſalvos plegios Johannem Carter, &c. qd. ſit coram Juſticiariis noſtris apud Weſtm', &c. oſtens' quare vi & armis clauſu' ipſius Johannis Every apud Turbury fregit & alia enormia ei intulit ad grave dampnum, &c. Quo lecto & audito idem Johannes Carter dicit qd. præd. Johannes Every ad monſtrand' idem breve original' ſuperius replicando mentionat' ad warr. narrationem ſuam præd. modo verſus eundem Johannem Carter fact. admitti ſeu recipi non debet quia dicit quod breve original' unde præd' Johannes ſuperius modo narravit eſt de placito quare cum præd' Johannes Carter indebitatus fuiſſet eidem Johanni Every, &c. ad qd. quidem breve original' ipſo eodem Johanne Carter in Cur. hic comparente præd. Johannes Every ſuperinde verſus eund' Johannem Carter de placito in eodem brevi original' ult. ſpecificat' narravit & non ſuper breve original' præd' per pred. Johannem Every ſuperius replicando mentionat' ad warrantizand' narr' præd' & hoc parat' eſt verificare unde petit' Judic', &c.

To this the Plaintiff demurred; for it was ſaid, that it was according to the Courſe which of late Time had obtained in this Court, to declare in any Action upon a Clauſum fregit, as they do upon a Latitat in the King's Bench. Antea 194.

The Court agreed it was the Practice now ſettled in the Court, to take out ſuch Original in a Clauſum fregit, and to declare ſuper Aſſumpſit, or the like; but whether this were ſufficiently ſet forth in the Plaintiff's Replication, for he mentions nothing of the Courſe of the Court, but that he proſecuted ſuch a Writ ea intentione This is doubted in 1 Lutw. 269. but is now the ſettled Practice.

tentione to declare: And the Court being informed that there were a great many Precedents in this Manner, the Court appointed them to be looked into. Et Adjornatur.

Lade *verſus* Barker.

Antea 149. Poſt. 266, 267. 3 Lev. 291. 4 Mod. 149.

IN Replevin the Plaintiff declared of a Taking at a Place called the 14 Acres at Barham in Kent: The Defendant avowed, for that Robert Lade being ſeized in Fee of the ſaid 14 Acres by Indenture between him and Nicholas Marſh, in Conſideration of one hundred Pounds paid unto him by the ſaid Nicholas, granted a Rent of 8 l. per Annum, to the ſaid Nicholas and his Heirs out of the Premiſſes, with Power to diſtrain; and the ſaid Nicholas being ſeized in Fee of the ſaid Rent, by his Will in Writing deviſed the ſaid Rent to Richard Marſh, Son of the ſaid Nicholas, and his Heirs, and died ſeiſed as aforeſaid Anno 1675. And the ſaid Richard Marſh being ſeized in Fee of the ſaid Rent, by Virtue of the ſaid Deviſe by Indenture dated the 10th of Auguſt 32 Car. 2. nuper Regis, between him the ſaid Richard of the one Part, and Nicholas Marſh, Son of the ſaid Richard, of the other Part; which Indenture the Defendant produced in Court, in Conſideration of natural Love to the ſaid Nicholas his Son, and 5 l. in Money to be paid annually to the ſaid Richard during his Life; he did give and grant to the ſaid Nicholas Marſh, his Heirs and Aſſigns, the ſaid Rent of 8 l. per Annum, to the Uſe of the ſaid Nicholas Marſh, his Heirs and Aſſigns. And then the Defendant ſaith further in this Matter, Quæ quidem conceſſio ult' mentionat. nullo attornamento vel alia Executione ſuperinde fact exiſten. præter ſolam ſigillationem & deliberationem inde operavit per viam conventionis præd. Ricardi Marſh, ſtare ſeiſit. ad uſus in eadem conceſſione mentionat. per quod & vigore Statuti fact', &c. de uſibus in Poſſeſſionem transferen. præd. Nicolaus Marſh fuit & adhuc eſt ſeiſit. de præd. annuitate octo librarum in Dominico ſuo ut de feodo; and for 4 l. Arrear of the ſaid Rent as Bailiff to the ſaid Nicholas Marſh, he makes Conuſance, &c.

1 Vent. 137, 138, &c. 1 Mod. 175.

To this the Plaintiff demurred.

First, This is a Grant by Richard to Nicholas, and ſo void without Attornment or Enrollment, and being intended to enure as a Grant, ſhall not work as a Covenant to ſtand ſeized.

Secondly, The Defendant hath pleaded it as a Grant; and what he ſaith after in the Avowry, to ſet forth how the Deed ſhould work, is vain and idle.

As

As to the firſt Point, the Court held, this Deed having no Execution to make it work as a Grant, it ſhall operate as a Covenant to ſtand ſeized. 1 Mod. Rep. 178. Sanders and Savin's Caſe. A Grant of a Rent to his Kinſman for Life, there being no Attornment, it raiſed an Uſe by way of Covenant; but the Pleading the Court held impertinent, for inſtead of Pleading of this Grant according to the Effect of it in Law, (viz.) As a Covenant to ſtand ſeized, he ſets forth the Matter in Law, and how it ought to be conſtrued, and becauſe they would not countenance ſuch vain and improper Pleading, the Caſe was adjourned. Poſt. 266.

Biddulph *verſus* Daſhwood.

IN an Action of Debt for 90 l. The Plaintiff declared Quod cum recuperaſſet coram Juſticiariis de Banco apud Weſtm' 90 l. pro dam' againſt the Defendant, prout per record' & proceſſ. quæ Dom' Rex & Regina coram eis cauſa erroris in eiſd. corrigend. venire fac. & quæ in Cur. dicti Domini Regis & Dom' Reginæ in pleno robore & vigore remanent minime revocat. plen. apparet per quod actio accrevit, &c. 2 Lev. 397. 18 E. 4. f. 7. b. See 3 Salk. 397.

To this the Defendant demurred, ſuppoſing that the Judgment was ſuſpended ſo far that an Action of Debt could not be brought upon it, pending the Writ of Error: But the Court held, if the Defendant could inſiſt upon this, he ought not to have demurred; but to have pleaded ſpecially, and demanded Judgment, if the Plaintiff ſhould be anſwered pending the Writ of Error? So Judgment was given for the Plaintiff. So if he had pleaded in Bar of Abatement, that a Writ of Error had been pending, the Plea not been good. Show. 98, 146. 1 Rol. Abr. 600. 1 Mod. 121.

Termino

Termino Sancti Hillarii, Anno 2 & 3 W. & M.

In Communi Banco.

Anonymus.

Vide antea 67, 78.

TRespals quare clauſum fregit & diverſas pecias Maheremii cepit, &c. Judgment by Default upon the Writ of Enquiry returned, the Judgment was ſtayed for the Uncertainty of the Declaration.

Jane Tregonwell, Vid. & Executrix of John Tregonwell againſt Sherwin.

IN an Action of Debt for Rent, the Plaintiff declared in this Manner, that Frances Fen and John Tregonwell the 23d of January 24 Car. 2. did demiſe to the Defendant certain Lands for 21 Years, reſerving 20l. per Annum to the ſaid Frances during her Life, and after her Deceaſe to the ſaid Tregonwell, his Executors and Adminiſtrators, and ſet forth Frances to be dead; and that the ſaid Tregonwell being poſſeſſed of the Reverſion of the Premiſſes, pro Termino annor' adtunc & adhuc ventur. the 4th of May 30 Car. 2. made his Will, and thereof made the Plaintiff his Executrix and died, and that ſhe took the Executrixſhip upon her, and by Virtue thereof became poſſeſſed of the ſaid Reverſion, and for 30l. for a Year and half's Rent accruing after, ſhe brought the Action.

Q. antea 253.

The Defendant pleaded an inſufficient Plea, and the Plaintiff demurred.

And Judgment was given againſt the Plaintiff upon the Inſufficiency of the Declaration, for there is no good Title ſet forth to the Plaintiff for the Rent; for 'tis not ſaid that Tregonwell was at the Time of the Leaſe, poſſeſſed of the Lands pro Termino annorum, &c. but that at the Time of making his Will, and that might be upon the creating of ſuch Eſtate ſince, and the Rent might not belong to the Reverſion: And tho' it was ſaid his Reſerving the Rent to his Executors carried an Intendment, that he had a Term for Years only; yet that was held not to be ſufficient, and Judgment was given for the Defendant.

Sir Lionel Walden *verſus* Michell.

Aut' ſſ. JOHANNES MITCHELL nuper de Huntingdon in Com' præd' Mallſter attach. fuit ad reſpondend' Lionello Walden Mil' de placito Tranſgr. ſuper Caſum. Et unde idem Lionellus per Robertum Clarke Attorn' ſuu' queritur quare cum p̄d' Lionellus bonus verus pius fidelis & honeſtus ſubditus & ligeus Domini Regis & Dominæ Reginæ nunc exiſtit ac ut bonus verus pius fidelis & honeſtus ſubditus & ligeus eorundem Domini Regis & Dominæ Reginæ nunc & progenitorum ſuorum a tempore nativitat' ſuæ hucuſque ſe habuit geſſit & gubernavit bonorumque nominis famæ converſac'onis & geſturæ intaminat' quamplurimos venerabiles & fideles ſubdit' dictorum Dom' Regis & Dominæ Reginæ nunc & progenitorum ſuorum quam omnes vicinos ſuos per tot' tempus præd' habit' not' & reputat' fuerat & per tot' tempus præd' fuit & adhuc exiſtit verus profeſſor Religionis Proteſtan' & Reformat' per leges hujus regni Angliæ ſtabilit' ill' ſincere proficiend' & exercen' & Divina Servitia in Eccleſia in paroch' ſua ſeu aliqua' Eccleſia capello aut alio uſuali loco Communis precac'on' ſecundum uſum Eccleſiæ Anglicanæ lect' ſemper frequentans & audiens & Eccleſiæ Romanæ nunquam reconciliat' fuit neque Religionem Romanam unquam profeſſus fuit neque ad Miſſam unquam ivit. Cumque præd' Lionellus fuit & extitit un' Burgens' ſive Membr. Parliamenti pro Villa de Huntingdon' in Com' Hunt' in Parliamento Domini Caroli ſecundi nuper Regis Angl' inchoat' & tent' apud Weſtm' in Com' Midd' octavo die Maii anno regni ſui decimo tertio & ut hujuſmodi Burgens' ſive Membr. Parliamenti per tot' idem Parliament' uſque diſſoluc'on' inde juſte & fidelit' deſervivit & debitum fiduciæ & officii ſui Burgens' & Membr' ejuſdem Parliamenti per tot' idem tempus performavit Idemque Lionellus pro performac'one fiduciæ officii ſui præd' Burgens' ſive Membr' Parliamenti p̄d' & aliis Cauſis diverſa itinera ad Civitat' London & Weſtm' a Villa Hunt' prædict' fecit & performavit præd' tamen' Johan' præmiſſorum non ignarus ſed machinans & malitioſe intendens eundem Lionellum non ſolum in bonis nomine fama credenc' & reputac'one ſuis prædict' multiplicit' lædere detrahere & penitus deſtruere verum etiam ipſum Lionellum infra pœnas & pœnalitat' contra Papiſtas & ſubdit' hujus regni qui Miſſam frequentant vel audiunt per Statut' hujuſmodi regni Angliæ inde edit' & provis' inferre cauſare octavo die Decemb' anno Domini milleſimo ſexcenteſimo octogeſimo octavo apud Hunt' prædict' in Com' Hunt' præd' colloquium habens cum quodam Thoma Waddington tunc ſervien' ipſius Lionelli in aperto & publico mercat' ibidem tunc tent. de & concernen'

Action for Words, viz. Papiſt and Penſion, ſpoken of one who had been a Member of Parliament, in the Time of King Charles the Second.

The Plaintiff a Proteſtant,

And never a Profeſſor of the Romiſh Religion.

That he hath been a Member of Parliament.

And did his Duty therein juſtly.

Colloquium.

Of the Plaintiff, and of his being a Member of Perliament.

concernen. eode' Lionello & religione ſua' & de ejus exiſten' un' Burgens' ſive Membr. Parliament' præd' pro Villa de Hunt. præd. in præſentia & auditu quamplurimarum perſon. in eodem publico mercat' adtunc & ibidem congregat' & præſen' exiſten' hæc falſa ficta ſcandaloſa Anglicana verba ſequen' præfat' Thomæ Waddington ſervien' ipſius Lionelli tunc & ibidem exiſten' de eodem Lionello falſo & malitioſe palam & publice dixit retulit propalavit & alta voce publicavit & pronunciavit (videlicet)

The firſt Words.

Your Maſter (ipſum Lionellum innuendo) **is a Papiſt; when he** (ipſum Lionellum innuendo) **is at home, he** (ipſum Lionellum iterum innuendo) **goes to Church, but when he** (ipſum Lionellum iterum innuendo) **is at London, he** (ipſu' Lionellum iterum innuendo) **goes to Maſs:** (Miſſam in Eccleſia Romana performat' innuendo) **Sir** John Cotton (quendam Johan' Cotton de Stratton in Com' Bedf. Baronet' al' Burgens' ſive Membr' Villæ de Hunt' præd' in Parliamento prædict' innuendo) **and he** (ipſum Lionellum iterum innuendo) **were both Penſioners** (ipm' Johan' Cotton & Lionellum penc'ones habere de præd' nuper Rege Carolo ſecundo ad conſentiend' & voces ſuas dand' in Parliamento pro confecc'one legum & ſtatut' in oppreſſione ſubdit' ipſius nuper Regis innuendo) **all the Time of the long Parliament** (prædict' Parliament' in quo idem Lionellus & præd' Johannes ut p̃fertur fuerint Burgens' ſive Membr. innuendo) prædictuſq;

Ex ulteriori malitia.

Johan. ex ulteriori malitia ſua poſtea ſcilicet eiſdem die & anno ult. menc'onat. apud Hunt. prædict. ſuper qd. al' Colloquium adtunc & ibidem habit. cum prædict. Thoma Waddington adtunc & ibidem ſervien. ipſius Lionelli exiſten. de & concernen. eodem Lionello & Religione ipſius Lionelli & de ſuo exiſten' un' Burgens' ſive Membr. Parliamenti prædict' pro Villa de Hunt. præd. in præſentia & auditu quamplurimarum aliaram perſon' in publico & aperto mercat' ibidem aſſemblat' exiſten' ad intenc'on' prædict' hæc alia falſa ficta ſcandaloſa Anglicana verba ſequen' (præd' Thoma Waddington adtunc & ibidem ſervien' ipſius Lionelli ut præfertur exiſten) de eodem Lionello falſo & malitioſe palam & publice dixit retulit aſſeruit & alta voce publicavit & pronunciavit, (videlicet)

Other Words.

Your Maſter (ipſum Lionellum cujus ſervien' præd. Thom' ut præfertur tunc fuit innuendo) **is a Papiſt; when he** (ipſum Lionellum iterum innuendo) **is in the Country, he** (ipſum Lionellum iteru' innuendo) **goes to Church, but when he** (ipſum Lionellum iterum innuendo) **is at London, he** (ipſum Lionellum iterum innuendo) **goes to Maſs,** (ipſum Lionellum ad audiend' Miſſam in Eccleſia Romana performat' iviſſe innuendo) **Sir** John Cotton (prædict. Johan' Cotton' iterum innuendo) **and he** (ipſum Lionellum iterum innuend') **were both Penſioners all the Time of the long Parliament.** Quorum quidem falſorum fictorum ſcandaloſoru' & malitioſorum verborum dicc'on & propalac'on' prætextu idem Lionel-

nellus non ſolum in bonis nomine reputatione & fama ſuis præd. gravit' læſus & deterioratꝰ eſt verum etiam diverſas grandes denar' ſum̃ p̃ ſedatione quamplurimorum falſorum rumorum̃ de ipſo Lionello ſparſor' expendere & diverſos corporis ſui labores ſubire coact' & compulſus fuit ad dampnum ipſius Lionelli ducent' libr' & inde produc' ſectam, &c.

Et præd. Johannes p̃ Ricardum Lee Attorñ ſuum ven̄ & defend' vim & injur' quando, &c. Et dic' qd. ipſe in nullo eſt culpabilis de p̃miſſis ſuperius ei impoſit' modo & forma prout præd' Lionellus ſuperius verſus eum queritur & de hoc pon̄ ſe ſuper patriam & præd' Lionellus ſimiliter Ideo præcept' eſt Vic' qd Venire fac' hic a die Sanctæ Trinitatis in tres Septiman̄ duodecim, &c. per quos, &c. Et qui nec, &c. ad recogn̄, &c. quia tam, &c.

The Defendant pleads Not guilty.

Sir Lionel Walden *verſus* Mitchell.

THE Plaintiff declared in an Action for Words, That he was a true Profeſſor of the Proteſtant Religion according to the Reformation and Laws of England, and that he had been a Member of the Parliament, begun the 8th of May, 13 Car. 2. and that the Defendant p̃miſſor' non ignarus 8 Decemb. Anno Domini 1688. having Diſcourſe of the Religion of the ſaid Plaintiff, and of his having ſerved in the ſaid Parliament, ſaid to T. W. Servant of the Plaintiff, your Maſter is a Papiſt, when he is at Home he goes to Church but when he is at London he goes to Maſs; Sir John Cotton and he were both Penſioners (innuendo, that the ſaid Sir John Cotton and the Plaintiff received Penſions of King Charles the Second, for giving their Votes in Parliament for Laws and Statutes in Oppreſſion of the People) at the Time of the long Parliament, (innuendo, the Parliament in which the Plaintiff and Sir John Cotton ſerved) and upon Not guilty pleaded, a Verdict was found for the Plaintiff.

He is diſaffected to the Government; ſpoken of a Juſtice of Peace; held in the Houſe of Lords not to be actionable. Show. Parl. Ca. 12. Duvall and Price. Don't vote for him, for he is a Jacobite, and for bringing in the Prince of Wales, and Popery, to actionable.

deſtroy our Nation; ſpoken of a Juſtice of Peace and Deputy Lieutenant; held 2 Salk. 694. How and Prinn. Farr. 107.

It was moved in Arreſt of Judgment, That none of theſe Words were actionable. 1 Leon. 336. To call a Man Papiſt; ſaid by Wray, Chief Juſtice, there, That it is not actionable unleſs ſpoken of a Biſhop; ſo in Savage and Cook's Caſe, 1 Cro. El. 192.

'Tis true, where ſpoken of a Perſon in ſome eminent Office 'tis otherwiſe; as Sir John Knightly's Caſe, who was a Juſtice of Peace, and Deputy Lieutenant, Hill. 33 & 34 Car. 2. in C. B. Rot. 1518. He had Judgment in an Action for calling of him Papiſt, and it was affirmed in a Writ of Error brought in B. R. And the Caſe of Peake and Tucker, which was Trin. 1 Jac. 2. in B. R. Rot. 838. Where the Plaintiff was a Merchant, and the Defendant ſaid of him, He is a Rogue, a Papiſt Dog, never a Rogue in Town would have made a Bonefire, but he. (Note, theſe Words

Vide Raym. 482. 3 Lev. 30, 50, 68. 3 Mod. 26, 103. 3 Mod. 103.

were ſpoken the Day that King James came to the Crown, and the Time is ſuppoſed to have influenced the Opinion of the Court) and the Plaintiff had Judgment. After having heard the Caſe ſeveral Times ſpoken to, the Court gave Judgment for the Plaintiff principally for the Words, that he went to Maſs; for by the Statute of 23 Eliz. cap. 4. the Offender is to forfeit 100 l. and be impriſoned for a Year, ſo that they expoſe him to corporal Puniſhment. It is held, that to ſay a Man committed petit Larceny is actionable, Aleyn's Rep. 11.

The Chief Juſtice here ſaid, That where a Man had been in an Office of Truſt, to ſay that he behaved himſelf corruptly in it, as it imported great Scandal, ſo it might prevent his coming in to that or the like Office again, and therefore was actionable.

Note, The Time theſe Words were ſpoken was taken Notice of (viz.) between King James the Second's Deſertion of the Kingdom, and the Proclaiming of the King and Queen, when to call a Man Papiſt would have expoſed him to the Danger of the Rabble; whereupon Judicium pro Quer.

Lade *verſus* Parker.

Antea 149, 260. 3 Lev. 291. 4 Mod. 149.

VIde antea Termino Michael' ult. It was this Term moved again, That the Pleading dedit & conceſſ. Nicolao Marſh, filio ſuo annuitatem præd. habend. præd' Nicolao hæredibus & aſſignat' ſuis ad opus & uſum dicti Nicolai hæred. & aſſign. ſuor. per quod & vigore Statuti de uſibus in poſſeſſion. transferend, the ſaid Nicholas became ſeiſed, &c. was ſufficient, and the Words quæ quidem conceſſio, &c. quod vide antea, were to be rejected as Surpluſage: And of that Opinion were Powell, Rokeby and Ventris. *

* Nota, This Judgment was reverſed upon this very Point of Law. Vide antea 150, 151.

Vide 1 Lutw. 271, 356. 2 Saund. 96, 7. 1 Vent. 78.

But Pollexfen, Chief Juſtice, held ſtrongly to the contrary; and he agreed, this Deed being to the Son with an expreſs Conſideration of natural Affection, (tho' Money was alſo Part of the Conſideration mentioned) that it would work as a Covenant to ſtand ſeiſed: But then the Parties ought to have pleaded it as a Covenant to ſtand ſeiſed, according to the legal Conſtruction of

1 Vent. 137.

ſuch a Deed where there is no Execution at Law; whereas here they have pleaded it as a Grant at the Common Law.

The other Judges differing in their Opinion ſaid, It was ſufficient to plead the Deed as it was worded, and if there were ſufficient Matter to intitle the Avowant, Judgment ought to be given accordingly; and then the Avowant concludes, that he became ſeiſed by the Statute of Uſes, which ſhews he intended to take the Operation of the Deed that Way, ſo Judgment was given for the Avowant: Chief Juſtice contra.

Note, Serjeant Levinz cited the Pleading in Fox's Case, 8 Co. where the words Demise and Grant in Consideration of Money amounted to a Bargain and Sale, (it being of an Estate for Years without Enrolment) it was pleaded, dimisit concessit & ad firmam tradidit, and not barganizavit.

Woodward, &c. *versus* Fox. Vide antea 187, 213.

IN an Action sur Assumpsit for 200 l. received to his Use. Upon non Assumpsit a Special Verdict was found, (quod vide antea Term' Trin' ult.) and the Case this Term came to have the Resolution of the Court: The Case upon the Special Verdict is to this Effect; An Archdeacon maketh a Register of the Court, belonging to his Archdeaconry in Consideration of 100 l. The Bishop of the Diocese, who was also Patron to the Archdeacon (supposing the Office to have been void, by the Statute of 5 and 6 Ed. 6. against the Sale of Offices relating to the Administration of Justice) granted the said Office of Register to the Defendant; and the said Grant was confirmed by the Dean and Chapter; the Archdeacon, after the Death of that Person to whom he had sold the Office, ut supra, grants the said Office to the three Plaintiffs for their Lives, and the Life of the longer Liver of them; the Plaintiffs, before any Office found for the King, or any Record shewing the Sale of this Office, obtain a Grant of it from the now King and Queen. Antea 187, 213. 3 Lev. 289. 5 & 6 Ed. 6. c. 16.

The Court were all of Opinion for the Plaintiffs.

The Court did not speak to two Points stirred in the Case, (viz.) Whether this Office could be granted for three Lives, or whether it was within the said Statute of 5 and 6 Ed. 6. because they were in a Manner agreed at the Bar and the Points settled. But the two main Points in the Case which were spoken to are,

First, Where an Archdeacon sells the Office of Register in the Court of the Archdeaconry, whether by the Statute of 5 and 6 Ed. 6. the Grant and Nomination to this Office shall come to the Crown, or whether it shall go to the Bishop of the Diocese?

Secondly, Admitting the Right to be in the Crown, whether the King and Queen can make a Register till Office found, or that the Title appeareth by some Matter of Record?

1. It was resolved, That the Right of appointing the Register, it being forfeited by the said Statute of 5 and 6 Ed. 6. did come to the King and Queen.

It is a Rule laid down by Manwood Chief B. Mo. 238. That where a Statute giveth a Forfeiture either for Nonfeasance or Misfeasance, the King shall have it; so in 11 Co. 68. This follows the Reason of the Common Law, in case of Things which are nul-

lius in bonis; where no viſible Right appears, the Law giveth them to the King (Sid. 148, 86.) As derelict Land, Treaſure Trove, and a great Number of ſuch like Inſtances may be cited from the Books; ſo it is in extraparochial Tithes, tho' Things of an Eccleſiaſtical Nature, 2 Inſt. 646. Cawdry's Caſe, 5 Co. 18. May, if the Right lie equal between the King and Subject, the King's Title hath the Preference by Law, Detur digniori is a Rule, 9 Co. 24. in Caſe of Concurrence of Titles, between the King and Subject.

It was objected, That this held in valuable Things, and Matters of Profit to the Crown.

But the Court ſaid, There was no ſuch Diſtinction made in the Books, and many Prerogatives, &c. were given to the King, for the publick Good and Intereſt of the Government, as well as for Encreaſe of the King's Treaſure. There is no Exception out of this Conſtruction of Forfeitures upon Penal Statutes, unleſs they are in Recompence for the Damage ſuffered by a Subject, as the Statute of 2 Edw. 6. that giveth the Forfeiture of the treble Value for not ſetting out of Tithes, 2 Inſt. 650. And this follows the Reaſon of the Common Law, that Fines and Penalties for Offences at Law go to the King as the Head of the Government; and that was the ſecond Reaſon the Court went upon, that the Offence, for which this Forfeiture is inflicted, is principally againſt the King. By the Preamble of the Statute it appears to be made for avoiding of Corruption in Offices, and Abuſes in the Adminiſtration of Juſtice.

Now the King is the Fountain of Juſtice, and that Eccleſiaſtical as well as Civil. In the Caſe of Proxies, Davis's Rep. 4. it is ſaid the King has Power, and that by the antient Law of the Realm, to viſit, reform and correct all Abuſes, and Enormities in the Juriſdiction Spiritual; ſo that an Offence of this Nature is a Violation of the King's Juſtice, and a Tranſgreſſion of the Rules of his Adminiſtration.

This is indeed the Caſe of all Crimes of a publick Nature, the King is moſt evidently injured by them; the Indictments run contra coronam & dignitatem, &c. Now, who ſhould have the Forfeiture, but he that hath the greateſt Share in the Injury?

Again, by giving of this Forfeiture to the King, the End and Deſign of the Statute is like to be beſt anſwered. By the Preamble the Statute appeareth to be made, that worthy Perſons might be advanced to Places where Juſtice was to be adminiſtred; and who is beſt to be entruſted with this but the King?

The Court having given theſe Reaſons, they came to conſider what had been inſiſted on at the Bar in the Behalf of the Biſhop: It was ſaid, that all the Juriſdiction Eccleſiaſtical in the Diocele, was originally placed in the Biſhop, and the Caſe of Gaſtrill and Jones, 2 Rol. Rep. 646, 647. was cited, where it is ſaid, That the

judicial Power of the Archdeacon was derived from the Bishop; he is called Vicarius Episcopi, and Oculus Episcopi.

'Tis true, there are some Archdeacons that have Jurisdictions peculiar and exempt; but that is by Prescription or Custom; these are taken Notice of by Godolphin.

But there is nothing found of that in the Verdict, and so must be taken to be the common Case of an Archdeacon; and that was agreed.

It was said, this Offence was reckoned Simony in the Canon Law. And the Bishop had the Correction of it, as in Smith's Case, Owen's Rep. 87.

This was compared to the Cases of inferior and subordinate Officers; which when they are forfeited, the Superior takes Advantage, as in the Earl of Pembroke's Case, and Sir H. Bickly, Poph. 119. The Keeper of a Walk in a Forest forfeited, this went to him that had the Custody of the Forest; so in Bridgman's Rep. 27. He that hath Liberty of a Park in a Forest, when forfeited it goeth to the Lord of the Forest, 39 H. 6. 32. The Keeper of the Marshalsey of the King's Bench forfeited his Office, the Duke of Norfolk Great Marshal of England took Advantage of it.

To these Cases it was said by the Court, That they differed much from the Case at the Bar.

First, In the Cases cited, the inferior Officer is put in by the Superior, and in some Cases to answer for his Miscarriage ubi respondeat Superior; they are Offices incident, as the County-Clerk to the Sheriff, Mitton's Case, 4 Co. and Scroggs's Case, of the Exigenter to the Chief Justice of the Common Pleas, Dyer 175. But here the Bishop doth not put in the Register of the Archdeacon's Court; he may make one to supply that Place if it falls void when the Archdeaconry is vacant, but then the next Archdeacon removeth him and puts in another.

Secondly, The Forfeitures in the Cases cited were upon Breaches of Conditions in Law annexed to the Offices; and 'tis a Rule in Law, That the Grantor is to take Advantage of the Breach of all Conditions; but we are in Case of a Forfeiture, for offending against an Act of Parliament: And the Court said, tho' it might be supposed, originally the Jurisdiction within the Diocese was lodged in the Bishop; yet the Archdeacon's Court hath Time out of Mind been settled as a distinct Court, 4 Inst. 339. and the Statute of 24 H. 8. cap. 12. takes Notice of the Consistory Court, which is the Bishop's Court, and the Archdeacon's Court, from which there lies an Appeal to the Bishop's Court. In 2 Ro. Rep. 150. Chiverton's Case, the Archdeacon is said to have a Court of himself, and that the Courts of Westminster take Notice thereof: This may be resembled to the Case of the Town and Leet in the Country; the Leet is supposed to have

have been derived out of the Town, and yet upon the Forfeiture of a Leet, it shall not go to the Sheriff.

As to the second Point it was resolved by the Court, That the King might in this Case make a Register before Office found. It was agreed, that where an Estate of Freehold was forfeited to the King by Act of Parliament, that an Office would be requisite to vest it in the King, and that by the Stat. of 5 Ed. 6. against the Sale of Offices, all the Estate and Interest, &c. of the Offender is forfeited. But Pollexfen, Chief Justice, conceived, this was not an Estate in the Archdeacon, but only a Power to appoint a Register, and in the Nature of a Chose en Action, like the Case of Offices in the King, where the King may grant or nominate to the Office, but hath not the Office in him to use or execute. But he conceived, and with that the rest of the Court agreed, that however as to the present Vacancy the Right to supply that was a Chattel separate from the Inheritance, and the King might supply the present Avoidance before any Office found, tho' it be admitted, that the Right of Nomination in Point of Estate should not vest in the King before Office found. Where the King's Tenant dies seised of an Advowson, or in Case of an Outlawry, tho' the Estate is not in the King before Office; yet if the Church becomes void, the King shall present before Office, 20 Ed. 4. 11. The Case so put of an Advowson appendant, Staundf. Prerog. 54. B. 'tis a transitory Chattel, the present Avoidance, Lane's Rep. 43, 64. 1 Ro. Rep. 326. and Jones's Rep. 425. So the Body of the Ward is in the King before Office. In Case of Simony the King shall present without Office, (Sed nota 31 Eliz. giveth the Presentation pro hac vice only:) And the Court said, that the Verdict found, that the Plaintiffs had a Grant from the Archdeacon also; so that if nothing be in the King till Office, it must remain in the Archdeacon, so his Grant will be good till Office found: There are no disabling Words in the Statute, but only, shall lose and forfeit, so quacunque via data, the Plaintiffs ought to have Judgment.

Harris *versus* Parker. Antea ult. Term.

4 Mod. 76. 1 Salk. 262. Antea 253.

IN an Action of Debt for 99 l. Rent, the Plaintiff declared upon two Demises, which he laid at the Parish of St. Martin in the Fields in Middlesex of a Messuage, and divers Lands quæ præmissa sunt situat jacent & existent in & super acclivitatem de Hampstead (Anglice, the Rise of Hampstead-Hill,) to hold for seven Years, reserving upon each Demise eighteen Pounds yearly Rent.

The Defendant pleaded, Actio non, quia dicit quod præd. Johannes Harris, tempore dimissionis præd nihil habuit in Tenementis præd. unde, &c.

The Plaintiff replied, That long before the ſaid ſeveral Demiſes, (viz.) 13 Novemb. Anno 26 Car. 2. nuper Regis, the Lord Wotton demiſed the Premiſſes in Hampſtead præd. to the Plaintiff for forty Years, (the ſaid Lord Wotton adtunc & ibidem plenam poteſtatem jus & titulum ad præmiſſa dimittend. p præd. termino quadraginta & unius annorum habente) by Virtue whereof the Plaintiff entred and became poſſeſſed, and made the ſeveral Demiſes to the Defendant, &c. prout, &c.

To this the Defendant demurred:

And it was objected, That the Replication was inſufficient; for that he did not ſet forth what Eſtate the Lord Wotton had when he made the Demiſe to the Plaintiff, but only plenam Proteſtatem jus & titulum adtunc habente; whereas it ſhould have been ſhewn that he was ſeiſed in Fee, or of ſome other Eſtate, empowering him to make the Leaſe, Yelv. 228. Glaſſe's Caſe; where in Debt for Rent, the Defendant pleaded, the Plaintiff nil habuit, as in this Caſe, and the Plaintiff replied, quod habuit bonum & ſufficientem ſtatū unde he could demiſe, and Iſſue thereupon, and a Verdict for the Plaintiff: And upon a Writ of Error brought the Court held, That the Eſtate ought to be ſet forth, that the Court might judge whether the Plaintiff could make the Leaſe; but it being after a Verdict, in that Caſe they reſolved, it was aided by the Statute of Jeofailes: And the Court inclined in the Caſe at Bar, that it was not good upon a Demurrer.

Covenant brought for Rent on a Deed not indented; Defendant pleads, Nil habuit in tenementis: Repl. Quod habuit bon' titul. without ſhewing what Eſtate he had; and this was held to be ill on general Demurrer. 3 Lev. 193. Cro. Jac. 312.

But then an Exception was taken to the Bar, that it was tempore dimiſſionum prædictar. nil habuit; whereas there are two Demiſes in the Declaration, and the Plaintiff might have a Title, the Time when one was made and not the other, and tempore in the ſingular Number can be underſtood but of one of the Demiſes.

But the Court ſaid tempore would ſerve as well as temporibus, and non Aſſumpſit where there are divers Promiſes; or in a Quo Warranto he uſed ſeveral Franchiſes, and the Party entitles himſelf in his Plea to one by Preſcription, and to another by Charter, &c. he may conclude & eo Warr. clamat, &c. Palmer's Rep. 1, 2. Nevertheleſs it was reſolved, That the Bar was inſufficient, for he ought to have pleaded diſtinctly, (viz.) That the Plaintiff nil habuit at the Time of the firſt Demiſe, nor at the Time of the Second; for as it is pleaded the Conſtruction is dubious and incertain, whether he had Right when each of the Demiſes was made, or at either of them, and the Counſel for the Defendant ſeeing the Opinion of the Court, took Exceptions to the Declaration. Cro. Jac. 544. Cro. Car. 219.

For that no Place is laid for the Meſſuage and demiſed Premiſſes, only 'tis ſaid quæ p̄miſſa ſunt ſituat & exiſtent in & ſuper acclivitatem de Hampſtead (Anglice, the Riſe of Hampſtead-Hill,) and this could not be taken for a Hill, or Lieu conus out of a Hill; a Venire may come out of a Forreſt, &c. or Place known, but

but then it muſt be ſhewn to lie out of a Town or Pariſh. 1 Inſt. 125. Siderfin 226. Hutton 105.

Pollexfen, Chief Juſtice, was ſtrong of Opinion, That here was no Place ſufficiently laid for the Lands, as to the Manner of laying it: It ſeemed to be only a Deſcription of their Situation. He ſeemed to agree, that to lay a Thing apud acclivitatem de Hampſtead might be good, but to ſay Situat' in & ſuper, &c. varied wholly from the Form of Pleading the Place.

The other three Juſtices agreed, That the Place was ſufficiently laid, they did not take acclivitas de Hampſtead in this Caſe, for a Lieu conus, for that muſt indeed lie out of any Town or Pariſh; but here the Venue ſhall come out of Hampſtead, and Hampſtead ſhall be taken for the Hill, and they relied upon the Caſes, 1 Ro. Rep. 312. Atkinſon and Buckle, where a Delivery of Goods was alledged to be at Barton Haven, and not ſhewn where Barton Haven was, there it was intended, Barton was a Town, and the Haven there, ſo the Venire was out of Barton, Mo 695. Iſſue upon Delivery of Goods apud Portum de Blackney, the Venire was to Blackney, 2 Cro. 239. ſo Hampſtead is taken for the Town.

And as to the Form of Pleading, it ſeemed to the ſaid Juſtices not to be varying in Senſe from the common Form, and that in & ſuper might ſerve as well as apud; ſo by their three Opinions, Judgment was given for the Plaintiff.

In this Caſe 'twas held per Cur. that where Judgment is given for the Plaintiff, and the Defendant brings Error, there ſhall only be Judgment to reverſe the former Judgment; but where the Plaintiff brings Error, the Judgment ſhall not only be revers'd, but the Court ſhall alſo give ſuch Judgment as the Court below ſhould have given; for his Writ of Error is to revive the firſt Cauſe of Action, and to recover what he ought to have recover'd by the firſt Suit, wherein erroneous Judgment was given. 1 Salk. 262.

Note, This Judgment was afterwards, upon a Writ of Error, Mich. 3 W. & M. Rot. 27. in B. R. reverſed for two Cauſes, 1. For that the Reſervation of the Rent Secundum Ratam, &c. was a void Reſervation. And 2dly, becauſe the Venue (ſuper acclivitatem, &c.) was not ſufficient. 4 Mod. 80. 'tis ſaid the Court of *B. R.* concurr'd in Opinion with the Common Pleas.

Target *verſus* Lloyd.

Covenant.

Indentures made.

Midd'x ff. ELizabeth Lloyd nuper de parochia Sancti Jacobi Weſtm' in Com' prædict' Vid' alias dicta Elizabeth Lloyd of the Pariſh of St. James Weſtminſter in the County of Middleſex, Widow; ſum' fuit ad reſpondend' Willielmo Target Bricklayer de placito quod teneat ei conventionem inter prædict' Elizabetham & ipſum Willielmum ſecundum vim formam & effectum quarundam Indenturarum inter prædict. Elizabetham & præfat Willielmum factarum Et unde idem Willielmus per Willielm' Botteler Attorn' ſuum dic quod cum per quandam Indenturam apud parochiam Sanctæ Margaret Weſtm in Com præd. factam decimo ſexto Die Novembris anno regni Domini Jacobi ſecundi nuper Regis Angl, &c. quarto inter pfat Elizabetham p nomen Elizabethæ Lloyd de parochia Sancti Jacobi Weſtm in Com Midd' Vid. ex una parte & præd. Willielm per nomen Willielmi Target

de eadem parochia & comitat' Bricklayer ex altera parte & mentionat' fore factam inter præfat' Elizabetham Lloyd per nomen Elizabeth. Lloyd de parochia Sancti Jacobi Weſtm' in Com' Midd' Widow ex una parte & prædict' Willielm' Target per nomen Willielmi Target de eiſdem parochia & com. Bricklayer ex altera parte Cujus quidem Indenturæ alteram partem ſigillo præd. Elizabethæ ſigillat' dictus Willielmus hic in Cur. ꝓfert cujus dat' eſt eiſdem die & anno teſtatur quod prædict. Elizabetha pro & in conſideratione annual' reddit' & conventiõ in eadem Indentura reſervat' & content' & diverſis aliis bonis cauſis & conſiderationibus ipſam dictam Elizabeth' adinde movẽ dimiſiſſet conceſſiſſet & ad firmam tradidiſſet,&c. & ꝑ eandem Indenturam dimiſit conceſſit & ad firmam tradidit eidem Willielmo Executoribus Adminiſtratoribus & Aſſignẽ ſuis illa duo meſſuagia vel tenementa & parvas areas à fronte cum ſubliciis incluſ. ſituat' jacẽ & exiſtẽ in Market-Lane in parochia & Com' prædict. & tunc in occupatione ejuſdem Willielmi abuttañ ſuper viculum (vocat. Market-Lane) ex occidentali in meſſuagium vel tenementum in occupatione Willielmi Eades ex meridionali in parv. ingreſſum & paſſagium a viculo (vocat. Market-Lane) præd. ex boreali & in aream meſſuagii in occupatione Mariæ Tomlin ex orientali una cum omnibus viis paſſagiis luminibus proficuis eaſiamentis commoditatibus & appertinẽ qualitercunq; dictis meſſuagiis ſive tenementis & ꝑmiſſis ſpectan' vel in aliquo modo appertinen' ſeu cum eiſdem tunc uſis occupat' vel gaviſ. habend. & tenend. dicta meſſuagia ſive tenementa & omnia & ſingula alia præmiſſa prædimiſſa cum pertin' dicto Willielmo Target Executoribus Adminiſtratoribus & Aſſign' ſuis a Feſto die Annunciationis Beatæ Virginis Mariæ tunc prox' ſequen' datum dictæ Indenturæ uſque plenum finem & terminum viginti & quinq; annorum abinde prox' ſequẽ & plenarie complend' & finiend' reddend' inde & ſolvend' annuatim duran' præd. termino eidem Elizabethæ Lloyd Executoribus Adminiſtratoribus & Aſſign' ſuis ſummam ſive annual' reddit' viginti & quatuór librarum legalis monetæ Angl' ad quatuor maxime uſualia Feſta ſive Terminos in anno (videlicet) Feſtum Nativitatis Sancti Johannis Baptiſtæ Sancti Michaelis Arch Nativitatis Domini noſtri Dei & Annunciationis Beatæ Mariæ Virginis per æquas & æquales portiones Et idem Willielmus Target dic. quod ipſe præd. Willielmus Target pro ſeipſo Executoribus & Aſſign' ſuis convenit promiſit & conceſſit ad & cum eadem Elizabetha Executoribus Adminiſtratoribus & Aſſign' ſuis ꝑ eadem Indenturam modo & forma ſequen' (videlicet) qd. ipſe idem Willielmus Executores Adminiſtratores & Aſſign' ſui infra tres annos ꝓx' ſequen' dat' dictæ Indenturæ ad ejus & eorũ propr' onera & cuſtagia fabricarent & facerent vel fabricari & facere cauſarent ſupradicta ſingula meſſuagia ſive tenementa in duas duplices domus ſufficien' (Anglice, double ſufficient houſes)

Profert in Curia.

The Demiſe.

Habendum.

Reddendum.

The Covenants.

duas Romeas in aream continen'. Acetiam ad ejus & eorū propr. onera & cuſtagia repararent paſſagium dictis dimiſſis p̄miſſis pertinen', & (ſicut tunc fuit latitudinis trium pedum) latitudinis trium pedum & dimidii unius pedis in Clera (Anglice, the Clere) facerent (oſtio ad dom. paſſagium excep't) Et idem Willielmus ulterius dicit quod prædicta Elizabetha per eandem Indenturam pro ſeipſa Executoribus Adminiſtratoribus & Aſſignatis ſuis convenit promiſit & conceſſit ad & cum dicto Willielmo Target Executoribus Adminiſtratoribus & Aſſign' ſuis modo & forma ſequen' (videlicet) quod ipſa dicta Elizabetha Executores Adminiſtratores & Aſſign' ſui permitterent & tollerent dict' Willielm' Executores Adminiſtratores & Aſſign' ſuos ad ejus vel eorum propr' onera & cuſtag' facere aquæductale (Anglice, a Drain) ad aquam vacuam (Anglice, waſte Water) a dictis domibus in magnam canalem foſſam (Anglice, Main Shoze in Sir-Bell-Yard) abducend' prout p̄ eandem Indenturam inter alia plenius liquet & apparet Virtute cujus quidem dimiſſionis

The Plaintiff entered and was poſſeſſed.

idem Willielmus immediate poſt Feſtum Annunciationis Beatæ Mariæ p̄x' ſequen̄ datum dictæ Indenturæ in tenementa p̄d̄ cum pertin̄ intravit & fuit inde poſſeſſionat. Ipſoq; Willielmo ſic inde poſſeſſionat' exiſten̄ idem Willielm̄ de novo ædificavit erexit & fecit ſu-

And erected new Houſes according to his Covenant.

pradicta ſingula meſſuagia ſive tenementa cum p̄tin̄ in & per omnia ſecundum formam & effectum Indenturæ præd. Et idem Willielm̄

The Plaintiff avers Performance of all on his Part.

ulterius dicit quod licet ipſe præd̄ Willielm̄ omnes & ſingulas conventiones conceſſiones & agreamenta in Indentura prædict' ſuperius ſpecificat. ex parte ipſius Willielmi Executor' Adminiſtratorum & Aſſignator' ſuorum performand' & perimplend' bene & fidelit' juxta vim formam & effectum Indenturæ prædict. cuſtodivit & perimplevit præd. tamen Elizabetha conventionem præd. inter ipſam

The Breach aſſigned.

Elizabetham & præfat' Willielm' factam (Et quod ipſa eadem Elizabetha exiſtens poſſeſſionat' de termino viginti annorum & ultra adhuc ventur' & inexpirat' de & in quadam pecia terræ ac de & in diverſis ſtabulis ſituat' jacen' & exiſten' in Parochia Sancti Jacobi Weſtm' in Com' præd. inter præd. domos per præd̄ Willielm' modo & forma ſupradicta ædificat' & prædictam canalem foſſam (Anglice, Main Shoze in Sir-Bell-Yard) præd' & per quæ aquæductal' præd' currere debuit a præd. domibus in canalem foſſam

Demiſe to J. T. for Part of the Term.

prædict. apud Parochiam Sancti Jacobi Weſtm' prædict' in Com' prædict. conceſſit dimiſit & aſſignavit prædict. peciam terræ & ſtabula præd. cuidam Johanni Tomlinſon Executoribus Adminiſtratoribus & Aſſign' ſuis pro diverſis annis adtunc & adhuc ventur.

J. T. entered.

parcel' termini *Virtute cujus quidem conceſſionis dimiſſionis & aſſignationis idem Johannes Tomlinſon in vita ſua poſtea in præd̄ peciam terræ & ſtabul' prædict. intravit & fuit inde poſſeſſionat' Et ſic inde poſſeſſionat' exiſten' idem Johannes poſtea ſcilicet primo die Julii Anno Domini milleſimo ſexcenteſimo octogeſimo octavo

apud parochiam Sancti Jacobi Weſtm' in Com' præd de præmiſſis præd' ſic ut præfertur poſſeſſionat' obiit inteſtat' poſt cujus quidem Johannis mortem ſcilicet nono die Julii Anno Domini milleſimo ſexcenteſimo octogeſimo octavo Adminiſtratio omnium & ſingulor' bonorum & catallorum jur' & creditor' quæ fuerunt præd. Johannis tempore mortis ſuæ p Johannem Edisbury Legum Doctorem Reverend' Vir' Decani & Capituli Eccleſiæ Collegiat' Divi Petri Weſtm' loci illius Ordinar' Commiſſar' & Officialem legitime conſtitut' apud parochiam Sanct' Margaretæ Weſtm' præd' in Com' præd. cuidam Mariæ Tomlinſon nuper uxori præd' Johannis debita legis forma commiſſa fuit p quod præd. Maria poſtea ſcilicet die & anno ult' mentionat' in præd' peciam terræ & ſtabula præd. intravit & fuit inde poſſeſſionat' virtute conceſſionis & adminiſtrationis prædict. Ipſaq; Maria ſic inde poſſeſſionat' exiſten' poſtea ſcilicet primo die Septembris Anno Domini milleſimo ſexcenteſimo octogeſimo octavo ſupradicto apud parochiam præd. in Com' prædict' cepit in virum quendam Samuelem Carter per quod iidem Samuel & Maria in prædict' peciam terræ & ſtabula præd. intraverunt & fuerunt inde poſſeſſionat' Ipſiſq; Samuel & Maria ſic inde poſſeſſionat' exiſten' præd. Samuel & Maria dict' Willielm' ad ejus propr' onera & cuſtagia facere Aquæductale (Anglice, a Drain) ad aquam vacuam (Anglice, the waſte Water) a ſuis domibus in forma præd. ædificat' & fact' per prædict' peciam terræ & ſtabula prædict. in magnam canalem (Anglice, Main Shoze in Six-Bell-Yard) præd' abducend' juxta vim formam & effectum Indenturæ præd. non permiſerunt ſed præd Willielm' facere Aquæductale (Anglice, a Drain) ad aquam vacuam (Anglice, waſte Water) in dictis domibus per præd' peciam terræ ſtabula prædict' in magnam canalem (Anglice, Main Shoze in Six-Bell-Yard) præd' abducend' recuſaverunt & adhuc recuſant licet ad ill' permittend' iidem Samuel & Maria per eundem Willielm' Target poſtea ſcilicet primo die Auguſti Anno Domini milleſimo ſexcenteſimo octogeſimo nono apud parochiam Sancti Jacobi præd' in Com' præd' requiſit' fuerunt) non tenuit ſed infregit & ill' præfat' Willielmo hucuſq; tenere omnino contradixit & adhuc contradic' Unde dic' quod deteriorat' eſt & dampnum habet ad valentiam centum librarum Et inde produc' ſectam, &c.

And died poſſeſſed.

Adminiſtration of his Goods granted to his Widow.

Who entered and was poſſeſſed.

And took Husband.

The Husband and Wife entered and were poſſeſſed.

The Breach aſſigned.

Et prædict' Elizabetha per Johannem Tiſſar Attorn' ſuum venit & defendit vim & injur' quando, &c. Et dic' quod præd. Willielm' Target actionem ſuam præd. verſus eum habere non debet Quia dic' quod prædict. paſſagium dictis præmiſſis præfat' Willielmo dimiſſis pertinens eſt ſituat' in præd. parochia Sancti Jacobi Weſtm' prædict' & ducit à prædict' Dom' præfat' Willielmi ut præfertur dimiſſ. uſque ad Six-Bell-Yard præd. in præd' parochia Sancti Jacobi Weſtm' quodque quoddam Aquæductale (Anglice, a Drain)

The Defendant pleads, That he permitted the Plaintiff to make a Drain according to his Covenant.

ad aquam vacuam (Anglice, the waſte Water) a dictis dom. in prædict' magnam canalem foſſam (Anglice, Main Shoze in Sir-Bell-Yard) prædict. abducend' in & per paſſagium prædict' convenient' fieri potuit & poteſt quodq; ipſa eadem Elizabetha poſt confectionem dimiſſionis præd. præfat' Willielmo ut præfertur factæ ſcilicet præd decimo ſexto die Novembris anno regni dicti nuper Regis Jacobi quarto ſupradicto apud parochiam Sanctæ Margaretæ Weſtm. prædict' permiſit & libertatem dedit præfat' Willielm' ad ejus onera & cuſtagia facere Aquæductale in & per paſſagium præd. ad aquam vacuam à dictis dom' in præd' magnam canalem foſſam in Sir-Bell-Yard præd' abducend' per quod idem Willielmus aquæductale ill' in & p paſſagium præd' ad libitum ſuum facere potuiſſet ſi voluiſſet ſed hoc facere penitus recuſavit Et hoc parat' eſt verificare unde petit Judicium ſi præd Willielmus actionem ſuam præd. verſus eam habere debeat, &c.

That he permitted and gave Liberty.

But the Plaintiff refuſed it.

The Plaintiff demurs.

Et præd. Willielmus dicit quod præd. placitum præd. Elizabeth' ſuperius in Barram placitat' ac materia in eodem content. minus ſufficien' in lege exiſtunt ad ipſum Willielmum ab actione ſua præd verſus præfat. Elizabetham habend' præcludend' quodque ipſe ad placitum illud modo & forma præd. placitat' neceſſe non habet nec per legem terræ tenetur reſpondere Et hoc parat' eſt verificare Unde pro defectu ſufficien' reſponſ. præd. Elizabethæ in hac parte placitat' idem Willielmus pet' Judicium & dampna ſua occ. fractiõ conventionis præd. ſibi adjudicari, &c.

The Defendant joins in Demurrer.

Et præd. Elizabetha (ex quo ipſa ſufficien' materiam in lege ad præd Willielm' ab actione ſua præd' verſus ipſam Elizabetham habend' præcludend' ſuperius allegavit quam ipſa parat eſt verificare Quam quidem materiam præd' Willielmus non dedic' nec ad eam aliqualit' reſpond' ſed verification. ill' admittere omnino recuſat) pet Judicium Et quod præd' Willielmus ab actione ſua præd. verſus eam habend' præcludatur, &c. Et quia Cur' dicti Domini Regis & Dominæ Reginæ hic de Judicio ſuo de & ſuper præmiſſis reddend' nondum adviſatur dies inde dat. eſt partibus præd. hic uſque —— de audiendo inde Judicio ſuo eo quod Juſtic. hic inde nondum, &c.

Target *verſus* Lloyd.

IN an Action of Covenant, the Plaintiff declared, That by Indenture made at St. Margaret's in Weſtminſter between the Defendant, by the Name of Elizabeth Lloyd, of the Pariſh of St. Margaret's Weſtminſter, &c. and the Plaintiff, &c. Teſtatur, That the Plaintiff had demiſed to the Defendant all thoſe two Meſſuages, &c. lying and being in Market-Lane, in the Pariſh and County aforeſaid, with all Ways, Paſſages, &c. to hold for one and twenty Years, reſerving 24 l. yearly Rent, and the Plaintiff ſet forth divers Covenants in the Indenture to be performed on his Part, (viz.) That he ſhould repair and enlarge the Paſſage belonging to the Premiſſes, &c. and then ſets forth, that the Defendant by the ſaid Indenture for her ſelf, her Executors, Adminiſtrators and Aſſigns, did covenant with the Plaintiff; that ſhe, her Executors, Adminiſtrators and Aſſigns, would permit the Plaintiff at his proper Coſts to make a Drain, to convey the waſte Water from the ſaid Houſes demiſed as aforeſaid, to the main Shore in Six-Bell-Yard, put p Indentur' p'd plen' liquet, and then ſhewed that he entered and became poſſeſſed by Virtue of the ſaid Demiſe, and that the Defendant had broke the ſaid Covenant (eo quod,) that ſhe being poſſeſſed of a Term for Years, then and yet to come, of a certain Parcel of Land, and two Stables lying between the demiſed Premiſſes, and the ſaid main Shore in Six-Bell-Yard; and by which the Drain aforeſaid, ought to run from the ſaid Houſes into the main Shore aforeſaid; and then ſets forth, That the Defendant had aſſigned all her Term in the ſaid Piece of Ground and Stables to one Tomlinſon, by Virtue whereof he entered, and after died poſſeſſed of the ſaid Piece of Ground and Stables; and that Mary his Wife afterwards became poſſeſſed thereof as his Adminiſtratrix, and did after intermarry with one Barker, who became likewiſe poſſeſſed, and the ſaid Barker and Wife non pmiſerunt the Plaintiff to make a Drain, to carry the waſte Water from the Houſes demiſed as aforeſaid to the Plaintiff, through the ſaid Piece of Ground and Stables (aſſigned as aforeſaid) into the ſaid main Shore; but did refuſe, and do yet refuſe the Plaintiff to make the ſame, tho' requeſted thereunto, ſuch a Day and Year, &c. ſo the Defendant had broken her Covenant ad damnum cent. librarum.

See 6 Mod. 1, 2, 3. Antea 73, 174. 3 Lev. 261.

The Defendant pleaded, That the aforeſaid Paſſage belonging to the ſaid demiſed Premiſſes, is ſituate in the Pariſh of St. James aforeſaid, and leads from the Houſes demiſed to the Plaintiff as aforeſaid, to Six-Bell-Yard aforeſaid, and that a Drain to carry off the waſte Water from the ſaid Houſes, to the ſaid main Shore in Six-Bell-Yard, in and through the ſaid Paſſage, might have been, and

and ſtill may be conveniently made; and that the Defendant did permit the Plaintiff to make a Drain in and through the ſaid Paſſage, for the carrying off, &c. and if the Plaintiff would, he might have made it accordingly, but he refuſed to do it, and demands Judgment of the Action.

To this the Plaintiff demurred.

And it was argued at the Bar, That this Plea was inſufficient; for when the Defendant covenanted, that the Plaintiff ſhould be permitted to make a Drain from the demiſed Premiſſes to Six-Bell-Yard, he was at Election to make it through any Part of the Defendant's Ground that lay between, tho' the Ground were built upon, and ſo might be very inconvenient for the Defendant, and tho' there might be another Place to make the Drain in. And cited the Caſes of Election; as where a Feoffment is made of twenty Acres of ſuch a Wood, &c. the Feoffee may take which twenty he will in any Part of the Wood.

The Court were rather inclined, That in this Covenant there ſhould not be Election to make the Drain through the Parties Stables, or Buildings, in Caſe there were other Places proper and convenient to make the Drain in; for every Agreement muſt have ſome reaſonable Conſtruction that may be conſiſtent with the Intent of the Parties. But no Opinion was delivered as to this Point, becauſe there were divers Exceptions taken to the Declaration, ſome of which were fatal.

Note.

First, There is no certain Place laid for the Houſes demiſed, which are ſaid to be lying and being in the Pariſh aforeſaid; whereas there are two named before, (viz.) St. Margaret's and St. James's ſo it was altogether uncertain.

Secondly, The Breach is eo quod, they did not permit the Defendant; which is no poſitive Affirmation.

Devant. 139.

Thirdly, The Covenant is, That the Defendant, her Executors, Adminiſtrators and Aſſigns ſhall permit; and the Breach is laid in the Aſſignees not permitting; and it appears by the Pleading, that the Aſſignment was made to Tomlinſon divers Years before the Demiſe to the Plaintiff; and this Covenant cannot be extended only to the Aſſignees of the Defendant after the Demiſe made.

Fourthly, Here 'tis ſaid quod non permiſerunt; but no ſpecial Diſturbance, which ought to have been particularly ſet forth for the Court to judge of it.

The Court held all theſe Exceptions, but the ſecond, to be fatal, eſpecially for that the Diſturbance was laid to be by an Aſſignee which came in before the Demiſe; but as to the Pleading the Breach eo quod, they rather inclined that it was good. And ſo the Opinion of the Court ſeemeth to be in Cutler and Southern's Caſe in 1 Saund. 116. But for the other Exceptions, Judgment was given againſt the Plaintiff.

Priſcella Web *verſus* Moore.

Wilts' ſſ. FRanciſcus Moore nuper de paroch. de **Wooton-Baſſet** in Com' prædict. Armig. attach. fuit ad reſpondend. Priſcellæ Web Vid. de placito Tranſgr. ſuper Caſum, &c. Et unde eadem Priſcilla per Johannem Wilkyns Attorn. ſuum queritur quòd cum præd. Franciſcus primo die Martii anno regni Domini Jacobi ſecundi nuper Regis Angl' ſecundo apud **Wooton-Baſſet** indebitat. fuiſſet eidem Priſcillæ in ſumma quinquaginta ſolidorum legalis monet. Angliæ pro cado minori (vocat. a **Runlet**) Vini albi (Anglice, **White Wine**) & triginta & ſex ampullis vitreis (Anglice, **Glaſs Bottles**) ipſius Priſcillæ per ipſum Franciſcum de eadem Priſcilla ante tempus illud empt. habit' & recept. Et ſic inde indebitat. exiſten. prædict. Franciſcus poſtea ſcilicet eodem primo die Martii anno regni dicti nuper Regis ſecundo ſupradicto apud **Wooton-Baſſet** prædict' in conſideratione inde ſuper ſe aſſumpſit & eidem Priſcillæ adtunc & ibidem fidelit. promiſit quod ipſe præd. Franciſcus præd' quinquaginta ſolidos eidem Priſcillæ cum inde poſtea requiſit' fuiſſet bene & fidelit' ſolvere & contentare vellet Cumq; etiam præd. Franciſcus poſtea ſcilicet decimo die Januarii anno regni dicti nup Regis tertio apud **Wooton-Baſſet** præd indebitat. fuiſſet eidem Priſcillæ in ſummo octo librar. ſimilis legalis monet. Angl. tam pro eſculent' poculent. vino vino forti (Anglice, **Brandy**) nicotiano & foco (Anglice, **Fire**) ipſius Priſcill' p eodem Franciſco quam p fœno & pabulo ipſius Priſcill' p quodam equo ipſius Franciſci p ipſam Priſcillam ad ſpeciales inſtanc' & requiſitionem ipſius Franciſci ad ſeparal' tempora ante tunc invent' & proviſ. Et ſic inde indebitat' exiſten' præd Franciſcus poſtea ſcilicet eodem decimo die Januarii anno tertio ſupradicto apud **Wooton-Baſſet** præd. in conſideratione inde ſuper ſe aſſumpſit præfatæque Priſcill' adtunc & ibidem fidelit. promiſit quod ipſe prædict. Franciſcus eaſdem octo libras eidem Priſcill' cum inde poſtea requiſit. eſſet bene & fidelit. ſolvere & contentare vellet Cumque etiam præd. Franciſcus eodem decimo die Januarii anno regni dicti nuper Regis tertio ſupradicto apud **Wooton-Baſſet** prædict' in conſideratione quod præd. Priſcilla (communis Hoſpitatrix tunc exiſten') ad ſpeciales inſtanc. & requiſitionem ipſius Franciſci ſæpius inveniſſet & providiſſet ad onera & cuſtagia ipſius Priſcillæ propria tam eſculent. poculent. vinum vin. forte nicotian. & focum p eodem Franciſco quam fœnum & pabulum pro quodam equo ipſius Franciſci ſuper ſe aſſumpſit & eidem Priſcillæ adtunc & ibidem fidelit. promiſit quod ipſe præd. Franciſcus tant. denar. ſummas quant. eſculent. poculent. vinum vin forte

Indebitat. Aſſumpſit, the Defendant pleads an Outlawry in Bar.

Indeb' Aſſumpſ. for a Runlet of Wine.

Another Indebitatus, as well for Meat, Drink, Wine, Brandy and Tobacco, as for Horſe-meat.

A Quantum meruit for Meat, Drink, Wine, Brandy and Horſe-meat, found and provided by the Plaintiff as an Innkeeper.

forte nicotianum focum fœnum & pabulū ill' rationabilit' valebant eidem Priſcillæ cum inde ſimilit' poſtea requiſit' fuiſſet bene & fidelit' ſolvere & contentare vellet Et eadem Priſcilla in facto dicit qđ eſculent' poculent' vinum viñ forte nicotianum focum fœnum & pabulum p'ræd rationabilit' valebant ſcilicet octo libras ſimilis legalis monet' Angl' Cumq; etiam præd. Franciſcus eodem decimo die Januarii anno tertio ſupradicto apud Wooton-Baſſet præd. indebitat' fuiſſet eidem Priſcillæ in ſumma ſeptem librar. & decem ſolidor' ſimilis legalis monet' Angl' pro diverſis bonis mercimoniis & merchandizis ipſius Priſcillæ eidem Franciſco per præd' Priſcillam ad ſimiles ſpeciales inſtanc' & requiſitionem ipſius Franciſci ante tempus illud vendit' & deliberat': Et ſic inde indebitat' exiſten' prædict' Franciſcus poſtea ſcilicet eodem decimo die Januarii anno tertio ſupradicto apud Wooton-Baſſet prædict' in conſideratione inde ſup ſe aſſumpſit & eidem Priſcillæ adtunc & ibidem fidelit' p̄miſit quod ipſe prædict. Franciſcus eaſdem ſeptem libras & decem ſolid. eidem Priſcillæ cum inde ſimilit' poſtea requiſit' fuiſſet bene & fidelit' ſolvere & contentare vellet Cumque etiam præd' Franciſcus poſtea ſcilicet primo die Aprilis anno regni dicti nuper Regis quarto apud Wooton-Baſſet præd. computaſſet cum eadem Priſcilla de diverſis denar' ſummis eidem Priſcillæ per p̄fatum Franciſcum ante tempus illud debit' & adtunc inſolut' exiſten. & ſuper compo' illo præd. Franciſcus invent' fuit in arreragiis erga eandem Priſcillam in ſumma ſeptem librar' ſex ſolidor' & undecim denarior' ſimilis legalis monet' Angl. Et ſic in arreragiis præd. invent' exiſten' præd. Franciſcus poſtea ſcilicet eodem primo die Aprilis anno quarto ſupradicto apud Wooton-Baſſet præd. in conſideratione inde ſuper ſe aſſumpſit p̄fatæque Priſcillæ adtunc & ibidem fidelit' p̄miſit qđ ipſe præd Franciſcus præd. ſeptem libras ſex ſolid' & undecim denar. eidem Priſcillæ cum inde ſimilit' poſtea requiſit' fuiſſet bene & fidelit' ſolvere & contentare vellet Prædictus tamen Franciſcus ſeparales p̄miſſion' & aſſumption' ſuas præd. ſic ut p̄fertur fact' minime curañ ſed machinan' & fraudulent' intenden' eandem Priſcillam in hac parte callide & ſubdole decipere & defraudare præd' ſeparales denar' ſummas in toto ſe attingen' ad triginta & tres libras ſex ſolid' & undecim denar' ſeu aliquem denar' inde eidem Priſcillæ (licet ad hoc fac' præd. Franciſcus poſtea ſcilicet decimo die Aprilis anno quarto ſupradicto & ſæpius poſtea apud Wooton-Baſſet præd per eandem Priſcillam requiſit' fuiſſet) non ſolvit ſeu aliqualit' pro eiſdem contentavit ſed ill' ei hucuſq; ſolvere ſeu aliqualit' pro eiſdem contentare omnino recuſavit & adhuc recuſat ad dampn' ipſius Priſcillæ quadragint' librar' Et inde produc' ſectam, &c.

Another Indebitatus for Goods ſold.

An Inſimul computaſſet.

The Plaintiff ſays, That the Defendant hath not paid the ſeveral Sums.

Et præd. Franciſcus per Humfridum Wall Attorn' ſuum venit & defendit vim & injur' quando, &c. & dicit qd̃ præd. Priſcilla actionem ſuam præd' verſus eum habere non debet quia dicit qd' quidam Scarborough Chapman al' ſcilicet Termino Sanctæ Trinitatis anno regni dicti Domini nup̃ Regis tertio implacitavit præd̃ Priſcillam per nomen Priſcillæ Web nuper de Wooton-Baſſet in Com' Wilt' Vid. in Cur̃ dicti nup̃ Regis de Banco præd' hic de placito Tranſgr' prædictaq; Priſcilla pro eo quod non ven̄ in præd. Cur' de Banco præd' præfat' Scarborough inde reſponſur' ſecundum legem & conſuetud' hujus regni Angliæ in exigend' poſit̃ fuit ad utlagand' in Com' Wilts' præd. & ea ratione poſtea ſcilicet quintodecimo die Maii anno regni dicti nuper Regis quarto in Com' Wilts' prædict' debito juris modo ad ſectam præd. Scarborough waviat' fuit & adhuc waviat' exiſtit prout per Recordum & Proceſſ. inde in eadem Cur' dicti nuper Regis de Banco prædict' retornat' & modo reſiden̄ plenius liquet & apparet quæ quidem utlagar' adhuc in ſuis robore & effectu remanen̄ minime reverſat' ſeu annihilat' Et hoc parat' eſt verificare p̄ Recordum illud Unde petit Judicium ſi prædict' Priſcilla actionem ſuam præd. inde verſus eum habere debeat, &c.

The Defendant pleads an Outlawry in Bar.

J. S. impleaded the Plaintiff,

In the Common Pleas.

In an Action of Treſpaſs.

And for not appearing ſhe was waived.

The Outlawry yet in Force. Vide 1 Lutw. 111.

Et hoc parat. eſt verificare per Recordum.

Et præd' Priſcilla dic' quod præd. placitum præd' Franciſci ſuperius in Barram placitat' materiaq; in eodem content' minus ſufficien̄ in lege exiſtunt ad ipſam Priſcillam ab actione ſua prædict' verſus eundem Franciſcum habend' præcludend' quodq; ipſa ad placitum illud modo & forma præd̃ placitat' neceſſe non habet nec per legem terræ tenetur reſpondere Et hoc parat̃ eſt verificare Unde pro defectu ſufficien̄ reſponſ. præd. Franciſci in hac parte eadem Priſcilla pet̃ Judicium & damna ſua occaſione non perform' promiſſion' & aſſumption' præd' ſibi adjudicari, &c.

Demurrer to the Plea.

Et prædict. Franciſcus ex quo ipſe ſufficien̄ materiam in lege ad præd. Priſcillam ab actione ſua præd' verſus eum habend' p̄cludend̃ ſuperius allegavit quam ipſe paratus eſt verificare Quam quidem materiam præd' Priſcilla non dedic' nec ad eam aliqualit' reſpondit ſed verification' illam admittere omnino recuſavit ut prius pet̃ Judic̃ & quod præd' Priſcilla ab actione ſua præd. verſus eum habend̃ p̄cludatur, &c. Et quia Juſtic' hic ſe adviſare volunt de & ſuper p̄miſſis præd' priuſquam Judic' inde reddant dies dat' eſt partibus uſque a die Sancti Michaelis in tres Septimanas de audiendo inde Judicio ſuo eo quod iidem Juſtic' hic nondum inde, &c.

Joinder in Demurrer.

Priſcilla Web, Widow, *verſus* Moore.

Outlawry pleaded in Bar. See Co. Lit. 128. 2 Lutw. 1601, 1512, 1514 Inſtit. Leg. 405, 494, 540. 3 Salk. 282.

THE Plaintiff declared in an Action upon the Caſe upon five ſeveral Promiſes, one whereof was upon a Quantum meruit, for finding Meat and Drink for the Defendant at his Requeſt.

The Defendant pleaded in Bar an Outlawry of the Plaintiff in this Manner, (viz.) Quod quidam S. C. al' ſcilicet Termino Sanctæ Trinitat' anno regni nuper Regis Jacobi ſecundi tertio implacitavit præd Priſcillam in Cur' dicti nuper Regis de Banco hic de placito tranſgreſ. præd' quæ Priſcilla pro eo qd non venit in præd' Cur' de B. præd. pfat S. C. inde reſponſur' ſecundum legem & conſuetud' hujus regni Angl' in exigendo poſita fuit ad utlag' in Com' Wilts' & ea ratione poſtea ſcilicet quintodecimo die Maii anno regni dicti nuper Regis quarto in Com' Wilts' præd. debito juris modo ad ſectam præd S. C. waviata fuit adhuc waviata exiſtit put per recordum & pceſſum inde in eadem Cur' dicti nup Regis de Banco præd' retornat' & modo reſidens plen' liquet Quæ quidem Utlagaria adhuc in ſuis robore & effectu remanet minime reverſat' ſeu annihilat' & hoc parat' eſt verificare per Recordum illud unde pet' Judicium ſi actio, &c.

And to this Plea the Plaintiff demurred.

1. For the Outlawry could not be pleaded in Bar to an Aſſumpſit upon a Quantum meruit; for there is no Certainty of Debt appearing till the Thing comes to be valued, and ſo cannot be forfeited. It was doubted, Whether Debt upon a ſimple Contract was forfeited till 4 Co. Slade's Caſe?

4 Co. 95.

Held per Cur. that Outlawry can't be pleaded in Bar to Covenant for not repairing Houſes, &c. no more than to Treſpaſs for Battery; but it may be pleaded in Abatement. 2 Lutw. 1513.

But it was reſolved by the Court in this Caſe, That the Outlawry was a good Plea in Bar; for the Conſideration created a Debt, tho' that Debt was not reduced to a certain Sum. Markham and Pitt in 3 Leon. 205. Outlawry pleaded in Bar to Trover, where it lies all in Damages: But this Action aroſe upon a Property of Goods which would have been forfeited, 3 Leon. 197. where the King had granted all Forfeitures that accrued to him by the Outlawry of J. S. and the Grantee brought an Action.

But an Exception was taken to the Pleading of the Outlawry; for it ought to have been ſet forth, That the Plaintiff did not appear upon the Exigent, and upon that waviata fuit, & de debito juris modo is too general, Fitzherb. Account 91. Traverſe 31. Staundf. 148.

And of this the Court doubted, and appointed to ſearch Precedents of the Pleading. Et adjornatur.

Kempe *verſus* Cory & al'.

Quod vide antea ultimo Termino.

THE Caſe was now moved again, and as to the Matter in Law it was held clear, That where A. is ſeiſed of a third Part in Common, and B. of the other two Parts in Common with A. and A. lets his third Part, reſerving Rent, and B. puts in his Cattle, or a Stranger by his Licence, that ſuch Cattle are not diſtrainable for the Rent. But the Doubt was, becauſe the Avowry was in loco in quo ut in & ſuper præd. tertiam partem, &c. Whether the Plaintiff ſhould not have traverſed the Taking in tertia parte tantum? Vide the Caſe of Newman and Moor in Hob. 80. & 103. And note there, That the Traverſe was held unneceſſary. Antea 227.

And the Court held clearly, That it would have been impertinent to make a Traverſe in this Caſe; for the Matter in the Avowry was confeſſed and avoided. 2 Cro. 221.

CASES

Adjudged upon

Writs of ERROR

IN THE

Exchequer-Chamber,

Termino Sancti Michaelis, Anno 1 Will. & Mar.

BY

Pollexfen, Chief Juſtice. *Atkyns*, Chief Baron.
Powell, *Rokeby*, *Ventris*, Juſtices. *Nevill*, *Lechmore*, *Turton*, Barons.

Willows *verſus* Lydcot.

UPon a Writ of Error upon a Judgment in Ejectment in B. R. which was brought for a Meſſuage in St. Martin's in the Fields.

Upon the General Iſſue pleaded, and a Special Verdict found, the Point was to this Effect:

William Shelton was ſeiſed in Fee of the ſaid Meſſuage, and of divers other Meſſuages ſituate in the ſaid Pariſh of St. Martin, and other Pariſhes, and made his Will in Writing, and thereby deviſed his Houſes in the other Pariſhes to divers charitable Uſes, and then deviſed to one Edward Harris and Mary his Wife, the Meſſuage in Queſtion for their Lives; and then in the following Clauſe, the better to enable his Wife to pay his Legacies, he deviſed

3 Mod. 229. See 1 Lev. 130, 212. 1 Sid. 191. Raym. 97. 5 Mod. 63. 6 Mod. 106. 1 Salk. 228. and 234. Cole v. Rawlinſon & 236. Counteſs of Bridgwater v. D. of Bolton, & 239. Hopewell v. Ackland.

devised all his Messuages, Lands, Tenements and Hereditaments whatsoever, within the Kingdom of England, (not above disposed of) to have and to hold to her and her Assigns for ever; and made her Executrix. And the Verdict was found, That Edward Harris and Mary his Wife were dead, and that the Testator left sufficient to his Wife to pay his Legacies, without the Reversion of the said Messuages devised to Harris and his Wife: That the Lessor of the Plaintiff was Heir at Law to the Testator, and that the Defendants claimed from Anne, Wife of the Testator, &c. & si super totam materiam, &c. And Judgment was given in the King's Bench for the Plaintiff.

And upon a Writ of Error brought in the Exchequer-Chamber, it was this Term argued before the Justices and Barons, and by the Opinion of them all, the Judgment was reversed.

Vide 1 Lev. 212. Cooke and Gerrard.

For they held, That there were Words in the Devise to the Testator's Wife, that would carry the Reversion of this House as an Hereditament undisposed of. Vide the Case of Wheeler and Walroon in Aleyn's Rep. 28. who having a Manor and other Lands in Somersetshire, devised the Manor to A. for six Years, and Part of the other Lands to B. in Fee; and then comes this Clause, —and the rest of my Lands in Somersetshire, or elsewhere, I give to my Brother; and it was adjudged by the Word [Rest] the Reversion of the Manor passed as well as the Lands not devised before.

A Case about twenty Years ago was cited by the Counsel for the Defendant in the Writ of Error, between Bowyer and Milbanke, in a Borough where a Nuncupative Will would pass Lands by the Custom, a Man upon his Death-Bed being asked about his Will, said, I give all to my Mother, and repeated the Words twice or thrice. Raymond's Rep. fo. 97.

1 Sid. 191. 1 Lev. 130. 1 Keb. 719. Bowman and Millbanke.

It was held that would not pass the Land; for it was said, That it were hard that Lands should pass by a Parol Will by Custom, unless there be express and plain Words to shew the Intention.

Chapman *versus* Flexman.

The Style of the Court of the Exchequer-Chamber.

PLacita in Camera Scaccarii apud Westm' coram Thoma Street Mil. & Edwardo Lutwich Mil. duobus Justic. Domini Regis de Communi Banco & Thoma Powell Mil. un. Baron. de Scaccario Domini Regis de gradu de la Coife die Sabbati vicesimo quinto die Novembr. anno regni Domini Jacobi secundi Dei gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis Fidei defensor', &c. quarto.

Dom' Rex mandavit dilecto & fideli ſuo Roberto Wright Mil. Capitali Juſtic' ſuo ad placita coram ipſo Rege tenend' aſſign̄ breve ſuum Clauſum in hæc verba. Jacobus ſecundus Dei gratia Angliæ Scotiæ Franciæ & Hiberniæ Rex fidei defenſor. &c. Dilecto & fideli noſtro Roberto Wright Mil. Capital. Juſtic. noſtro ad placita coram nobis tenend' aſſign' ſalutem Cum in Statuto in Parliamento Dominæ Elizabethæ nuper Regin' Angliæ apud Weſtm' viceſimo tertio die Novembr. anno regni ſui viceſimo ſeptimo tent' edit' int' cætera inactitat' fuit authoritat' ejuſdem parliamenti quod ubi aliquod Judic' ad aliquod tempus extunc poſtea reddit' foret in Cur' de Banc̄ Regis in aliqua ſecta aut actione debiti detention' convention' compoti action' ſup̄ Caſum Ejection' firmæ aut Tranſgr' primum inchoat' aut primum ibidem inchoand' p̄terea tantum ubi nos foremus pars ſequen' aut defend' contra quam aliqd' tal' Judic' reddit. foret ad ſuam election' p̄ſequi poteſt extra Cur. Cancellar. ſpeciale breve de Errore deviſand. in dicta Cur. Cancellar. Capitali Juſtic. dict. Cur. de Banco Regis p̄ tempore exiſten. dirigend. mandan' ill. cauſare dict. Record. ac omnia concernen. dict. Judic. transferri coram Juſtic. de Communi Banco & Baron. de Scaccario in Camera Scaccarii ibidem examinand. per dictos Juſtic. de Communi Banco & Baron. præd. Qui quidem Juſtic' de Communi Banco & tales Baron. de Scaccario qui ſunt de gradu de la Coife aut ſex illorum ad minus virtute ejuſdem Actus ſup̄inde plenam poteſtat. & authoritat. habuerunt ad examinand. omnes tales error. qual. aſſignat. aut invent. fuerint in aut ſup̄ aliquod tale Judic. & ſuperinde reverſare aut affirmare dict. Judic. prout lex requiret p̄terquam pro erroribus aſſignand' aut invenien' p̄ro aut concernen. Juriſdictionem p̄d. Cur. de Banco Regis aut aliquem defect. form. in aliquo brevi retorn. querela billa declaratione aut in alio placito p̄ceſſu veredicto aut p̄cedentia quibuſcunq; Et quod poſtquam dict. Judic. affirmat. aut revocat. fuit dict. Record. ac omnia ill. concern. in dictam Cur. de Banco Regis removend. & reducend. erunt ut talis ulterior proceſſ. ſuperinde fiat tam pro execution. quam alit. prout pertinebit ſicut in dicto Statuto plenius continetur Ac quia in record. & p̄ceſſ. ac etiam in redditione Judic. loquelæ quæ fuit in Cur. noſtra coram nobis p̄ billam inter Rogerum Flexman & Johan. Chapman de quadam Tranſgr. ſup̄ Caſum eidem Rogero p̄ p̄fat' Johannem illat. ut dicitur error intervenit manifeſtus ad grave dampnum ipſius Johannis ſicut ex loquela ſua accepimus Qui quidem Error nullo modo tangit nos aut Juriſdiction. præd' Cur. noſtr. de Banco Regis prædict' aut aliquem defect. formæ in aliquo brevi retorn. querela billa Declaration' aut in alio placito vel procedentia quibuſcunq; ut accepimus Nos igitur volentes errorem ſi quis fuerit juxta formam Statut. præd. corrigi & partibus præd̄ plenam & celerem Juſtit. fieri in hac parte vobis mand. qd' ſi inde Judic. reddit. ſit tunc Record.

The Writ of Error.

&

& ꝑceſſ. præd. cum omnibus ea tangen' coram dictis Juſtic' de Communi Banco & Baron' de Scaccario noſtro præd' in Camera Scaccarii noſtri præd. die Sabbati (videlicet) viceſimo ſexto die inſtantis menſis Novembr' ven' fac' ut dicti Juſtic' & Baron vid. & examin' Record' & ꝑceſſ. præd. ulterius inde Fieri fac' quod de jure & ſecundum formam Statut' præd. fuerit faciend' Teſte meipſo apud Weſtm' xiii. die Novembr' anno regni noſtri tertio:

Davies.

The Return of the Writ.

Record' & proceſſ. præd. cum omnibus ea tangen' de quibus in brevi præd. fit mentio. ſequuntur in hæc verba.

Placita coram Dom' Rege apud Weſtm' de Termino Sancti Hill. annis regni Domini Jacobi ſecundi nunc Regis Angliæ, &c. ſecundo & tertio.

Rot' DCCCCLXIIII.

The Memorandum.

Devon' ſſ. Memorandum quod alias ſcilicet Termino Sancti Michaelis ult' ꝑterit' coram Domino Rege apud Weſtm' ven' Rogerus Flexman ꝑ Johannem Clifton Attorn' ſuum & protulit hic in Cur. dicti Domini Regis tunc ibidem quandam billam ſuam verſus Johannem Chapman in Cuſtod' Mar. &c. de placito Tranſgr' ſuꝑ Ca-

Declaration in a Special Action of the Caſe, brought by a Leſſee of an antient Mill, for not Grinding at his Mill.

ſum Et ſunt pleg' de proſ. ſcilicet Johan. Doe & Ric. Roe quæ quidem Billa ſequitur in hæc verba: Devon' ſſ. Rogerus Flexman queritur de Johanne Chapman in Cuſtod' Mar' Mareſc' Dom' Regis coram ipſo Rege exiſten' ꝑ eo videlicet qđ cum quidam Johan. Speccott Armig' ſecundo die Novembr' Anno Domini milleſimo ſexcenteſimo octogeſimo quinto & diu antea & continue poſtea hucuſque fuit & adhuc eſt ſeiſit' de & in Maner. & Burgo de Torrington in Com̃ p̃d ac de ſeptem antiquis molend' aquat' ſuffic' ad molend' omnia grana & braſium inhabitantium infra Manerium & Burgum p̃d

Seiſin of the Manor and Mills.

pro neceſſar' uſibus ſuis molit' & ibidem expendit' ſex eorum infra Manerium & Burgum de Torrington prædict' altero eorum extra Burgum præd' ſed infra prædict' Manerium præd. exiſten' Cumque etiam prædict' Rogerus Flexman prædict' ſecundo die Novembr' Anno Domini milleſimo ſexcenteſimo octogeſimo quinto ſupradict' & continue poſtea hucuſq; fuit & adhuc eſt tenens & firmar' præd'

The Plaintiff Farmer of the Mills.

Johannis Speccot ad voluntat' prædict. Johannis præd' ſeptem molendinorum aquaticorum granaticorum & deinde poſſeſſionat' Et

Et habuit & habere debuit the Toll.

tolnet. granorum & braſii in eiſdem molendinis molit' per tempus illud habuiſſet & habere debuit Cumque etiam omnes inhabitan' in aliquibus antiquis meſſuag' infra Manerium & Burgum prædict' exiſten' de jure debuerunt molirè ad prædict. ſeptem molendina aliqua ſive aliquod eorum infra Manerium præd' exiſten' omnia & omnimod' grana ſua & braſium infra Manerium & Burgum exiſten̄ poſt molitur' inde in præd meſſuag' ſuis expendit' (Anglice, ſpent)

ac ſolvere pro molitur' inde rationabile tolnet' excep' tantummodo tal' grana & braſium Inhabitantium prædict. in antiquis meſſuag' prædict' poſt' molitur' inde expendit' qual' per poſſeſſorem ſive poſſeſſores quorundam antiquorum molendinorum aquaticorum granaticorum (vocat. Wear Mills alias Weargifford Mills) jacen' extra Manerium & Burgum præd. videlicet infra paroch' de Weargifford in Com' prædict. pro tempore exiſten' per ſe vel ſervientes ſuos ſup un' equum oneratorium (Anglice, Loading Horſe) ſolummodo in ſervitio ill' ad un' tempus impens' p' aſportatione talium granorum & braſii ad prædict. molendin' (vocat. Wear Mills alias Weargifford Mills) & reportatione eorundem quando molit' onerari & portari poſſunt Cumq; prædict' Johannes Chapman præd. ſecundo die Novembr' Anno Domini milleſimo ſexcenteſimo octogeſimo quinto ſupradict' & diu antea & continue poſtea hucuſque fuit & adhuc exiſtit occupator & poſſeſſor unius antiqui meſſuag' (vocat. the Swanne) jacen' & exiſten' infra Manerium & Burgum prædict' ac per totum tempus præd. in eodem meſſuag' vixit commoravit & inhabitavit & adhuc vivit commorat & inhabitat p'd' tamen Johannes Chapman p'miſſ. non ignarus ſed machinans & intendens ipſum Rogerum in hac parte callide & ſubdole decipere defraudare & pejorare prædict. ſecundo die Novembr' anno regni dicti Domini Regis nunc primo erexit locavit & impoſuit quoddam molendin' manuarium (Anglice vocat. a Hand-Mill) infra Manerium' & Burgum præd. (videlicet) in præd' antiquo meſſuag' ipſius Johannis Chapman ibidem Et præd' ſecundo die Novembr' anno regni dicti D'ni Regis nunc primo ſupradicto & diverſis aliis diebus & vicibus poſtea & ante exhibition' Billæ ipſius Rogeri præd' mille modios Braſii ipſius Johannis Chapman infra Manerium & Burgum prædict. exiſten' & in prædicto antiquo meſſuag' prædict. Johannis Chapman poſt molituram inde expendit' in præd. molendino (vocat. the Hand-Mill) moluit ratione cujus præd. Rogerus tolnetum quod ipſe pro molitur' inde ad præd' molendina ipſius Rogeri lucrari potuit perdidit & amiſit ad dampnum ipſius Rogeri quadraginta librarum Et inde produc' ſectam, &c.

The Defendant, an Occupier of an antient Meſſuage, which ought to grind at his Mills.

The Defendant erected a Hand-Mill and ground therewith.

Ratione cujus the Plaintiff loſt his Toll.

Et modo ad hunc diem Lunæ prox' poſt Octab' ſancti Hillar' iſto eodem Termino uſq; quem diem præd. Johannes Chapman habuit licenc' ad Billam præd. interloquend' & tunc ad reſpond', &c. coram Domino Rege apud Weſtm' ven' tam præd' Rogerus p' Attorn' ſuum præd. quam præd' Johannes Chapman per Johannem Lugg Attorn' ſuu' Et idem Johannes Chapman defendit vim & injur' quando, &c. Et dic' quod ipſe non eſt inde culp. Et de hoc pon' ſe ſuper Patria' Et præd. Rogerus ſilit', &c. Ideo ven' inde Jur' coram Domino Rege apud Weſt' die Sabbati prox' poſt' Octab' Purificationis Beatæ Mariæ Et qui nec, &c. ad recogn', &c. Qui tam, &c. Idem dies dat' eſt' partibus præd. ibidem, &c. poſtea continuat' inde p'ceſſ. inter partes

The Defendant imparls,

And pleads Not guilty.

præd. de placito prædict' per Jur' poſit' inde inter eas in reſpect. coram Domino Rege apud Weſtm' uſq; diem Lunæ prox' poſt' tres Septimanas Sancti Michaelis extunc prox' ſequen' Niſi Juſtic' Dñi Regis ad Aſſiſas in Com' prædict. capiend' aſſign' prius die Martis viceſimo ſexto die Julii apud Caſtrum Exon' in Com' Devon' præd' per formam Statut', &c. ven' p defect. Jur', &c. ad quem diem cor' Domino Rege apud Weſtm' ven' præd. Rogerus per Attorn' ſuum prædicta Et præfat' Juſtic' Domini Regis coram quibus, &c. miſer' hic Record' ſuum coram eis habit' in hæc verba: ff. Poſtea die & loco infracontent' coram Roberto Wright Mil' Capital' Juſtic' Dñi Regis ad placita coram ipſo Rege tenend' aſſign' & Johanne Powell Mil' Juſtic' dicti Domini Regis ad placita coram ipſo Rege tenend' aſſign' Juſtic' ejuſdem dicti Domini Regis ad Aſſiſas in Com' Devon' capiend' aſſign' per formam Statut', &c. ven' infranominat' Rogerus Flexman p Attorn' ſuum infracontent' & infraſcript' Johannes Chapman licet ſolempnit' exact' non ven' ſed defalt' fecit Ideo Jur' unde infra fit mentio capiatur verſus eum per defalt' Et Jur' Juræ illius exact' quidam eorum videlt Willielmus Booth Andreas May Georgius Gregory Thomas Corrindon Thomas Rugg Samuel Hall Ambroſius Thomas & Petrus Clarke vener' & in Jur' ill' jurat' exiſtunt Et quia reſid' Jur' ejuſdem Jur' non comparuer' Ideo al' de circumſtantibus per Vic' Com' præd' ad hoc electi ad requiſition' prædict' Rogeri Flexman ac per mandat' Juſtic' præd. de novo apponuntur Quorum nomina Panello infraſcript' affilantur ſecundum form' Statut' in hujuſmodi caſu edit' & pviſ. ac Jur' ſic de novo appoſit' videlicet Hugo Bidwell Johannes Crauſcombe Willielmus Avent & Johannes Sprye exact' ſilit' ven' Qui ad veritatem de infracontent' ſimulcum al' Jur' prædict' prius impanelat' & jurat' dicend' elect' triat' & jurat' dicunt ſup Sacram' ſuum quod p'd' Johannes Chapman eſt culpabilis de p'miſſ. infraſcript' prout præd' Rogerus Flexman interius inde verſus eum queritur Et aſſidunt dampn' ipſius Rogeri Flexman occaſione inde ultra miſ & cuſtag' ſua per ipſ' circa ſectam ſuam in hac parte appoſit' ad un' denar' Et pro miſ. & cuſtag' ill' ad quadragint' ſolid. Ideo conſ. eſt quod prædict' Rogerus Flexman recuperet verſus præfat' Johannem Chapman dampna ſua præd. per Jur' præd. in forma præd. aſſeſ. necnon ſexdecim libras pro miſis & cuſtag' ſuis præd' eidem Rogero per Cur' dicti Domini Regis nunc hic ex aſſenſu ſuo de incrō adjudicat' Quæ quidem dampna in toto ſe attingunt ad octodecim libras & un' denar' Et præd. Johannes in miſericordia, &c.

Poſtea.

Tales.

Verdict for the Plaintiff.

The Judgment.

The Placita in the Exchequer-Chamber.

Placita in Camera Scaccarii apud Weſtm' cor' Edw. Atkyns Mil' Capital' Baron' de Scac' Dñi Regis de gradu de la Coife Tho. Jenner Mil' Ricardo Heath & Thoma Powell Mil' tribus al' Baron' de Scaccario Dn'i Regis de gradu de la Coife necnon Thoma Street Mil' Edv. Lutwich Mil' & Chriſtof. Milton Mil' tribus al' Juſtic' Dn'i Regis

de Communi Banco viceſimo ſexto die Maii anno regni Domini Jacobi ſecundi Dei gratia Angliæ Scot Franciæ & Hiberniæ Regis Fidei defenſor', &c. quarto.

Ad quem diem hic ven̄ præd' Johannes Chapman p̄ Johannem Lugg Attorn' ſuum Et dic' quod in record' & proceſſ. prædict' ac etiam in redditione Judic' præd' manifeſt' eſt errat' in hoc videlicet quod Judic' præd. in forma præd. reddit' reddit' exiſtit' pro præd. Rogero verſus p̄fat' Johannem Chapman ubi p̄ legem terræ hujus regni Angliæ idem Judicium reddi debuiſſet pro prædict. Johanne Chapman verſus prædict' Rogerum Ideo in eo manifeſte eſt errat' Et petit quod Judicium præd' ob errores præd. & alios in Record' & proceſſ. præd ac in redditione Judicii præd. exiſten' revocetur adnulletur & pro nullo penitus habeatur & quod ipſe ad omnia quæ occaſione Judic' præd. amiſit reſtituatur, &c. Et petit breve Domini Regis Vic' Devon' dirigend' ad p̄muniend' præfat' Rogero eſſendi hic auditur' record' & proceſſ. præd' & ei conceditur, &c. Ideo Præcept eſt Vic' quod probos, &c. Scire fac' p̄fat' Rogero quod ſit hic die ——— p̄x' futur' auditur' record' & proceſſ. præd' ſi, &c. Et ulterius, &c. Idem dies dat' eſt eidem Johanni Chapman hic, &c.

The general Errors aſſign'd.

And a Scire facias ad audiendum Errores prayed.

And awarded.

Et præd' Rogerus Flexman dic' quod nec in Record' & proceſſ. præd. nec in redditione Judic' præd. in nullo eſt erratum Et petit etiam quod Cur' Domini Regis & Dominæ Reginæ hic procedat ad examination' tā Record' & proceſſ. præd. quam præd. cauſæ per ipm̄ Johannem Chapman ſupius p̄ erroribus aſſign' & allegat' Et qd̄ Judic' p̄d̄ in omnibus affirmetur Et quia Cur' dicti Domini Regis & Dominæ Reginæ hic ſe adviſare vult de & ſuper præmiſſ. priuſquam Judic' inde reddat dies dat' eſt partibus præd' uſq; diem Sabbati —— prox' futur' de Judicio ſuo inde audiend' eo quod Cur' Domini Regis hic inde nondum, &c.

The Defendant in the Errors appears and pleads In nullo eſt Erratum.

Chapman *verſus* Flexman.

IN an Action upon the Caſe, in B. R. the Plaintiff declared, That one Jo. Specot 2 Novembr' 1685. & diu antea was ſeiſed of the Manor and Burgh of Torrington, and of ſeven antient Water Corn-Mills, ſufficient to grind the Corn of the Inhabitants, within the Manor and Burgh aforeſaid, for their neceſſary Uſes; and that the Plaintiff was the Day aforeſaid & continue poſtea, Tenant at Will to the ſaid Specot of the ſaid ſeven Mills, and had the Toll of Corn, which was ground in the ſaid Mills during the Time aforeſaid, & habere debuiſſet: And whereas all the Inhabitants of any antient Meſſuage, within the Manor and Burgh aforeſaid, de jure debuerunt molere ad p̄d̄ ſeptem molend' aliqua ſive aliqd̄ eorum omnia & omnimoda grana ſua infra Meſſ. præd'

1 Vent. 167. 2 Saund. 115. Coryton v. Lythebye. See 1 Danv. 5, 6. 2 Danv. 428. pl. 3. Hard. 67, 68. 1 R. Ab. 559.

præd. expendit' ac ſolvere pro molitura inde rationab' tolnetum. And whereas the ſaid Chapman the Day aforeſaid, & diu antea was Occupier of an antient Meſſuage, within the Manor and Burgh aforeſaid; the ſaid Chapman the 2d of November, &c. erected a certain Mill within the Manor and Burgh aforeſaid, and within his ſaid Meſſuage, wherewith he did grind divers, (viz.) 1000 Buſhels of Malt, which he ſpent in his ſaid Houſe; by Reaſon whereof, the ſaid Flexman loſt the Benefit of the Toll of the ſaid Malt which he ſhould have had, ad damnum, &c.

The Defendant pleaded Not guilty, and a Verdict was found for the Plaintiff, and Judgment that he ſhould recover in B. R.

And the Error now inſiſted upon was, That the Plaintiff had not ſet forth any Title in his Declaration to the Toll, or any Cuſtom or Preſcription, for the Inhabitants of thoſe antient Houſes, to bring their Corn to be ground there.

Antea 138, 139, 186.

But by the Opinion of all the Court, the Judgment given in the King's Bench was affirmed; for 'tis ſufficient to ſay in this poſſeſſory Action, that during the Time aforeſaid, he had and ought to have the Toll; and that the Inhabitants debuerunt molere. Vide the Caſe of Dent and Oliver, in 2 Cro. 43, 122. Vide Raſtall Tit. Molin, in Action ſur le Caſe, fol. 90. F. N. B. 123. for an antient Water-courſe ſaid currere conſuevit.

Note, That of Raſtal cited by Pollexfen Chief Juſtice 'tis ſaid, that the Inhabitants a toto tempore præd' molere conſueverunt, and the Prior and his Predeceſſors are alledged to be ſeiſed of the Mill Time out of Mind; ſo that that Precedent does not ſeem to warrant the Judgment in this Caſe.

Sarsfield *verſus* Witherly.

1 Show. 125. Vide 4 Mod. 242. Pearſon and Garrett.

FRancis Sarsfield brought an Action upon the Caſe, againſt Hamond Witherly in the King's Bench, wherein he declared to this Effect: Cū Civit Paris in regno Franc eſt & à toto tempore, &c. fuit antiqua Civitas Cumq; etiā Civitas London in hoc regno eſt & à toto tempore, &c. fuit antiqua Civitas Cumq; etiam duplex uſantia in aliqua bill. Excamb mentiōn int mercatores & al' pſon apud Paris præd. reſidēn negotiand & commercium habend & mercat & al' perſon' apud London præd reſiden. &c. & appunctuat fore ſolut apud London' præd. acceptat eſt & à toto tempore, &c. acceptat fuit p ſpatium duorum menſium à dat hujuſmodi primæ Billæ Excambii Cumq; etiam apud London p'd, (viz.) in parech, &c. exiſtit & à toto tempore, &c. habebatur antiqua conſuetudo int mercatores & al' perſon' apud Paris præd. reſiden' & negotian' & mercatores & al' perſon' apud London præd. reſiden' & negotian', (viz.) quod ſi aliquis mercator' ſive al' perſona apud Paris præd. reſiden.

ſiden. & negotian' fecerit primam Billã Excambii pro aliqua denar' ſumma & alicui aꝑ mercator' ſive aꝑ perſonæ apud London præd. reſidẽ & negotiañ direxit & requiſivit ad duplicem uſantiam hujuſmodi primæ billæ excambii ſecunda minime ſoluꝫ ad ſolvend' alicui al' mercat' ſive al' ꝑſon' vel ordini ſuo aliquam denar' ſum' ꝑ valore recept' de hujuſmodi mercator' ſive al' perſona cui vel cujus ordini hujuſmodi denar' ſumma per hujuſmodi prim̃ billã Excamb appunctuat' fuit ſolvendum & ante ſolutionem & ſatisfactiõ inde ꝑ Indorſamentũ in ſcriptis manu ſua propria ſubſcripꝫ & indorſaꝫ ſuꝑ hujuſmodi primam billã Excambii ordinavit hujuſmodi denar. ſum. ſolvi ordini alicujus alii mercator' in hujuſmodi indorſamenꝫ nominaꝫ valore recepto de illo Et ſi hujuſmodi mercator ſive aꝑ perſona cui vel cujus ordini hujuſmodi denar' ſumma per hujuſm' indorſament' appunctuaꝫ fuit ſolvend̃ per ſecund' indorſamenꝫ ſuper hujuſmodi primam billã Excambii ordinavit hujuſmodi denarꝫ ſumm' ſolvi ordini alicujus alii mercator' ſive aꝑ perſonæ ac ſi poſt hujuſmodi ſeparaꝑ indorſamenꝫ & notitiam inde daꝫ hujuſmodi mercatori ſive aꝑ ꝑſonæ cui hujuſmodi prima billa Excambii ſic fuit direct' & quod ille non ſolveret hujuſmodi denarꝫ ſumm' hujuſmodi mercator' ſive al' perſonæ cui per hujuſmodi ſecundum indorſamenꝫ prædicta ſolutio inde appunctuaꝫ fuit ſed pro defectu ſolutionis hujuſmodi mercatori ſive aꝑ perſonæ in hujuſmodi ſecundo indorſamento nominaꝫ ad finem duorum menſium à daꝫ hujuſmodi primæ billæ Excambii proteſtare ſive proteſtari cauſaret ſecund' præd. conſuetud' mercator' hujuſmodi primam billam Excambii Et ſi poſt hujuſmodi proteſtationem hujuſmodi mercator ſive aꝑ perſona in hujuſmodi primo indorſamento nominaꝫ ſolveret & ſatisfaceret hujuſmodi mercatori ſive aꝑ ꝑſonæ in hujuſmodi ſecundo indorſamento mentionaꝫ hujuſmodi denar' ſummam in prima billa Excambii contenꝫ quod tunc hujuſmodi mercator ſive aꝑ perſona qui hujuſmodi primam billam Excambii fecerit onaraꝫ & onerabiꝑ exiſtit per conſuetud' ad ſolvend' hujuſmodi denar' ſummam hujuſmodi mercatori ſive aꝑ perſonæ cui ſolutio inde per hujuſmodi primũ indorſamentum appunctuaꝫ fuit Cumq; etiam præd. Hammond Witherly die, &c. apud Civitaꝫ Paris præd. apud London præd. in Parochia & Warda ꝑd' reſidens & negotians & Mercator ibid' exiſtens eodem die, &c. Stylo novo apud Paris, &c. ſecundum conſuetud' mercator' præd. fecit quandam primam ſuam billam Excambii manu ſua propria ſubſcripꝫ gerẽ daꝫ, &c. cuidã T. W. in parochia & Warda ꝑd' reſidẽ & negotiañ direct' & ꝑ eandem requiſivit præd T. W. ad duplicem uſantiam dictæ ſuæ primæ billæ Excambii (ſecunda ſua minime ſoluꝫ exiſtẽ) ad ſolvendum cuidam W. Ellis ſive ordini plenam ſummam ſeptuaginta & quatuor librarum pro valore recepꝫ quam quidem billam poſtea & ante finem duorum menſium à daꝫ ejuſdem ſcilicet die, &c. apud, &c. præd. W. Ellis per indorſamentum manu ſua propria ſubſcripꝫ & indorſaꝫ ſecundum conſuetꝫ

&c.

&c. ordinavit præd ſeptuaginta & quatuor libras fore ſolut' ordini præd' Franciſci Sarsfield mercator' adtunc & ibidem exiſten. &c. valore de illo, &c. idemque Franciſcus ante ſolutionem Billæ præd' & ante finem duorum menſium à dat. &c. ſcilicet ——— die, &c. apud London, &c. p ſecundum indorſamentum manu ſua propria ſubſcript' ſuper illam primam Billam excambii ſecund' p'd' conſuetud' ordinavit præd 74 l. fore ſolut' ordini cujuſdam Johannis Comin mercat' adtunc & ibidem exiſtent' & qd' de præd ſeparal' indorſament' præd. Tho' W. poſtea ſcilicet die, &c. apud L. præd. notitiam habuit Et præd. Franciſcus Sarsfield in facto dicit quod præd. T. W. à fine duorum menſium & dat', &c. ſeu hucuſq; non ſolvit præd. Johanni Comin præd' 74 l. & quod p defectu ſolutionis præd' J. C. ad finem duorum menſium à dat', &c. ſcil' à die, &c. apud L. p'd' in Paroch, &c. proteſtavit ſeu proteſtari cauſavit præd' primam Billam Excambii ſecund' conſuetud', &c. & ulterius in facto dicit qd' ipſe idem Franciſcus poſtea ſcil' 20 die Septembr' Anno 1681. apud L. &c. ſolvit præfat' Johanni Comin præd. ſeptuagint' & quatuor libras ratione quorum quidem p'miſſ. & conſuetud' præd' præd Hamond Witherly onerat' & onerabil' eſt & p conſuetud' præd. onerab' & onerat' eſſe conſuevit ad ſolvend' præd. Franciſco præd. ſum' 74 l. in prædict. prima Billa Excambii mentionat' ac idem Hamond in conſideratione p'miſſor' poſtea ſcil' eodem 20 die Septembr' apud L. præd, &c. ſuper ſe aſſumpſit & eidem Franciſco adtunc & ibid' fideliter promiſit quod ipſe idem Hamond præd. 74 l. eid' Franciſco bene & fideliter ſolvere vellet Cumq; etiam præd. Hamond poſtea ſcilicet eodem die, &c. indebit' fuit eidem Franciſco in al' 74 l. pro conſim denar' ſumma p eundem Franciſcum ad requiſitionem ejuſd Hamond ante tempus illud erogat' & ſic inde indeb' exiſten' idem Hamond in conſideratione inde poſtea ſcil't eod' die, &c. apud L. &c. ſuper ſe aſſumpſit & eidem Franciſco adtunc & ibidem fideliter promiſit quod ipſe idem Hamond præd' 74 l. ult' mentionat' eidem Franciſco cum inde poſtea requiſit' eſſet bene & fideliter ſolvere & contentare vellet prædict' tamen Hamond' ſeparales promiſſ. & aſſumpſ. &c. minime curans ſed machinans, &c. præd. ſeparal' denar' ſummas in toto ſe attingen ad 148 l. ſeu aliquam partem eidem Franciſco non ſolvit, &c. licet ad hoc faciend. &c. ſæpius poſtea apud London', &c. requiſitus fuit, &c. Unde idem Franciſcus dicit qd' ipſe deteriorat' eſt & dampnum habet ad valentiam 60 l. & inde p. ducit ſectam, &c.

The Defendant as to the ſecond Promiſe pleaded, Non Aſſumpſit & quoad reſiduum præd Tranſgr' ſuper Caſum in narr' prædict. idem Hamond dicit qd' p'd' Franciſcus actionem ſuam habere non debet quia proteſtando non eorum aliqua ſuperius inde allegat' fore vera proteſtando etiam qd præd' narratio inde ac materia in eadem content' minus ſufficien' in lege exiſtunt ad actionem præd. manutenend' pro placito Hamond dicit quod ipſe eſt filius & hæres

3 apparens

apparen præd. Thomæ Witherly ſuperius nominat' quodq; ipſe idem Hamond p ejus meliore educatione videndo partes & gentes extraneas ac notando & intelligendo mores & linguas earum ante præd. tempus quo ſupponitur Billa Excambii præd. fieri ex licentia Domini Regis peregrinatus fuit ut generoſus Anglican' in part' Tranſmarin' ac dicto tempore quo, &c. fuit apud Civitat' Paris præd. ut hujuſmodi generoſus ac peregrinator ac nulla alia de cauſa abſq; hoc quod ipſe idem Hamond eſt vel unquam fuit Mercator ſeu perſona per viâ merchandizandi negotians int' Civit' Paris in part' Tranſmarin' & Civit' London' vel apud eorum alter vel alibi ubicunq; prout præd. Franciſc' ſuperius ſupponit & hoc parat' eſt verificare Unde petit Judicium ſi præd Franciſcus actionem, &c.

To this the Plaintiff demurred.

1. It was ſaid, that the Plea amounted to the General Iſſue; for if the Matter of it would avail the Defendant, it might be given in Evidence upon Non Aſſumpſit.

To which it was anſwered, That it was no general Rule, that a Matter could not be pleaded ſpecially, which might be given in Evidence upon the General Iſſue. In an Action of Debt for Rent, an Entry and Suſpenſion of the Rent may be given in Evidence upon Nil debet; yet 'tis always allowed to be pleaded, and ſo Nil habuit in tenementis; and wherever the Matter pleaded contains Matter of Law it is allowed to be pleaded, tho' it might be ſhewn upon the General Iſſue, Hob. 127. 1 Sid. 151. 1 Mod. 35. 118. 4 Mod. 73. 5 Mod. 18. 1 Vent. 258. 1 Salk. 155. 273.

And of that Opinion were the Court.

2. But then it was ſaid for the Plaintiff, That the Plea was inſufficient in the Matter of it; for the Cuſtom is laid for Merchants and other Perſons reſident and negotiating at Paris; and the very Drawing of the Bill of Exchange is a negotiating in it ſelf, and the Practice is ſo frequent between all Perſons, as well as Merchants, to negotiate by Bills of Exchange, that it would prove a great Inconvenience, if they ſhould not be of the ſame Effect between others as well as Merchants. Poſtea 310. 1 Salk. 125.

And the Court were all of Opinion, That the Plea of the Defendant was inſufficient, and that he having drawn this Bill was obliged by it, according to the Courſe of Bills of Exchange; and whereas Judgment was given in the King's Bench upon this Record for the Defendant, they reverſed the ſaid Judgment, and gave Judgment for the Plaintiff. Judgment was given in B. R. on the Remittitur.

Judgment was given in *B. R.* for the Defendant: Writ of Error was brought in the Houſe of Lords, who revers'd the Judgment; and the Court of *B. R.* was mov'd to enter up the Judgment given by the Houſe of Lords: But the Court agreed they could not enter up a new Judgment for the Plaintiff, becauſe when they have given Judgment on the Original, they have executed their whole Authority; and there is no Precedent that *B. R.* ever enter'd a new Judgment where the Judgment given there was revers'd in Parliament. 1 *Salk.* 403. Show. 127. Vide Yelv. 74.

Termino

Termino Paſchæ, Anno 2 Willielmi & Mariæ.

In Scaccario.

Cramlington *verſus* Evans & Percival.

The Placita in the Exchequer-Chamber.

PLacita in Camera Scaccarii apud Weſtm' coram Roberto Atkyns Mil' Capital' Baron' de Scaccario Domini Regis & Dominæ Reginæ de gradu de la Coife Henrico Pollexfen Mil' Capital' Juſtic. Domini Regis & Dominæ Reginæ de Communi Banco Johanne Powell Mil' Johanne Rokeby Mil' & Peyton Ventris Mil' tribus al' Juſtic' Domini Regis & Dom. Reginæ de Communi Banco necnon Edvardo Nevill Mil' & Johanne Turton Mil' duobus al' Baron' de Scaccario Domini Regis & Dominæ Reg' de gradu de la Coife die Sabbati decimo quinto die Junii anno regni Domini Willielmi & Dominæ Mariæ Dei gratia Angl' Scot' Franc' & Hiberniæ Regis & Reginæ Fidei defenſor', &c. primo.

The Writ of Error.

Dominus Rex & Domina Regina mandaver' dilecto & fideli ſuo Johanni Holt Mil' Capital' Juſtic' ſuo ad placita in Cur' ipſorum Dom̃i Regis & Dominæ Reginæ coram ipſis Domino Rege & Dom̃a Regina tenend' aſſign' breve ſuum Clauſum in hæc verba: ſſ. Gulielmus Tertius & Maria ſecunda Dei gratia Angl' Scotiæ Franciæ & Hiberniæ Rex & Regina Fidei defenſor', &c. dilecto & fideli noſtro Johanni Holt Mil' Capital' Juſtic' noſtro ad placita coram nobis tenend' aſſign' ſalutem Cum in Statuto in Parliamento Dominæ Elizabethæ nuper Reginæ Angl' apud Weſtm' viceſimo tertio die Novembris anno regni ſui viceſimo ſeptimo tent' edit' int' cætera inactitat' fuit authoritat' ejuſdem Parliamenti qd' ubi aliquod Judicium ad aliquod tempus extunc poſtea reddit' foret in Cur' de Banco Regis in aliqua ſecta aut actione debiti detention' convencon̄ comput' Action' ſuper Caſum Ejection' firmæ aut Tranſgreſſionis primum inchoat' aut primum ibidem inchoand' p̄terea tantum ubi nos foremus pars querens aut defendens contra quem aliquod tale Judicium reddit' foret ad ſuam election' proſequi poteſt extra Cur' Cancellar' ſpecial' breve de Error' deviſand' in dictam Cur' Cancellar. Capital. Juſtic. Cur. de Banco Regis pro tempore exiſten' dirigend' mandans ill' cauſare dict' record' ac omnia concernen' dict' Judicium transferri coram Juſtic' de Communi Banco & Baronibus de Scaccario in Camera Scaccarii ibidem examinand'

per dictos Juſtic' de Communi Banco & Barones prædictos Qui quidem Juſtic' de Communi Banco & tales Barones de Scaccario qui ſunt de gradu de la Coife aut ſex illorum ad minus Virtute ejuſdem Actus ſuperinde plenam poteſtat' & authorita' habebunt examinand' omnes tales errores qual' aſſign' aut invent' fuerint in aut ſup aliquod tale judicium & ſuperinde reverſare aut affirmare dictum judicium prout lex requiret ꝑterquam pro Erroribus aſſign' aut inveniend' pro aut concernen' juriſdictionem prædict' Cur' de Banco Regis aut aliquem defectum formæ in aliquo brevi retorn' querela billa declaration' aut in alio placito proceſſu veredicto aut procedentia quibuſcunque Et quod poſtquam dictum judicium affirmat' aut reverſum fuerit dictum record' ac omnia illud concernen' in dictam Cur' de Banco Regis removend' & reducend' erunt ut talis ulterior proceſſus ſupinde fiat tam pro executione quam aliter prout ꝑtinebit ſicut in dicto Statuto plenius continetur Ac quia in record. & proceſſu cujuſdam loquelæ quæ fuit in Cur' Domini Jacobi ſecundi nuper Regis Angl', &c. coram ipſo nuper Rege per Billam inter Stephanū Evans & Petrū Percival & Lancelot' Cramlington de quadam Tranſgr' ſuper Caſum eiſdem Stephano & Petro per præfat' Lancelot' illat' necnon in reddition' Judicii ejuſdem loquelæ verſus ꝑfat' Lancelot' in Cur' noſtra coram nobis ut dicitur error intervenit manifeſtus ad grave dampnū ipſius Lancelot' ſicut ex querela ſua accepimus Qui quidem error nullo modo tangit Nos aut Juriſdiction' præd. Cur' noſtræ de Banco Regis præd. aut aliquem defectum formæ in aliquo brevi retorn' querela billa declaratione aut in alio placito proceſſu veredicto aut procedentia quibuſcunq; ut accepimus Nos igitur volentes errorem ſi quis fuerit juxta formam Statuti præd. corrigi & partibus præd. plenam & celerem Juſticiam fieri in hac parte vobis mandamus quod ſi Judiciū inde reddit' ſit tunc record. & proceſſ. prædict' cum omnibus ea tangen' coram dictis Juſtic' de Communi Banco & Baronibus de Scaccario noſtro prædict' in Camera Scaccarii noſtri prædict' die Sabbati (videlicet) decimo quinto die inſtantis Menſis Junii venire fac' ut dicti Juſtic' & Barones vis & examinat' record' & proceſſ. præd. ulterius inde fieri fac' qd de jure & ſecundū formam Statut' præd' fuerit faciend. Teſte nobis ipſis apud Weſtm' quarto die Junii anno Regis noſtri primo.

Fiſh.

Record' & Proceſſ præd. cum omnibus ea tangen de quibus in Brevi prædict' fit mentio ſequitur in hæc verba: The Return of the Writ of Error.

Placita coram Domino Rege apud Weſtm' de Termino Paſchæ anno regni Dom' Jacobi ſecundi nunc Regis Angl', &c. ſecundo. The Placita.

Rot CXCII.

The Memorandum.

London ſſ. Memorand' qd al' ſcilicet Termino ſancti Hillar' ult' p'terit' coram Domino Rege apud Weſtm' ven' Stephanus Evans & Petrus Percival p Johannem Normanſell Attorn' ſuum Et protuler' hic in Cur' dicti Dom' Regis tunc ibidem quandam Billam ſuam verſ. Lancelot' Cramlington in Cuſtod' Mar. &c. de placito Tranſgr. ſup Caſum Et ſunt pleg de proſequend' ſcilt Johan' Doe & Rich Roe Quæ quidē Billa ſequitur in hæc verba: **ſſ. London ſſ.** Steph Evans & Petr' Percivall queruntur de Lancel' Cramlington in Cuſtod Mar' Mareſc' Domini Regis coram ipſo Rege exiſten' pro eo videlt quod cū infra hoc regn Angl' videlt in paroch Beatæ Mariæ de Arcubus in Warda de Cheape Lond' præd' habetur & fuit quædam conſuet' int' mercator' & al' p'ſon' infra hoc regn' Angl' reſiden' & commerciū habentes uſitat' & approbat' videlt quod ſi aliquis mercator vel al' perſon' infra regn' Angl' reſiden' fecerit aliq' Billam excambii ſecund' uſū mercator' & hujuſmod' Billam excambii ſua p'pr' manu ſubſcripſ. & eandem Billam excambii ſecund' uſum mercator' alicui al' mercat' ſive al' p'ſonæ infra hoc regn' Angl' direxit & p eand' Billam excambii requiſivit hujuſm. mercator' ſive al' p'ſon' cui hujuſm. Billa excamb. ſic fuerit direct' ad ſolvend' aliquam denar' ſum' in hujuſm. Billa excambii mentionat. ad aliqd' tempus in hujuſm. Billa excamb' limitat' alicui al' mercatori ſive p'ſon' in hujuſm' Billa excambii nominat' vel ordini ſuo p uſu alicujus al' mercator' ſive perſon' in hujuſm. Billa nominat' p conſimili valore in hujuſm' Billa mentionat' fore recept' de aliquo al' mercat' ſive p'ſon' in hujuſm' Billa excamb nominat' & ad locand hujuſm' denar' ſum' ad comput' put p adviſam. Et ſi hujuſm' mercat' ſive al' perſon' cui hujuſm' Billa excambii ſic direct' foret ſup viſu' hujuſm' Billæ excambii acceptaret hujuſm' Bill' excambii ſecund' uſu' mercat' ad ſolvend' hujuſm' denar' ſum' in hujuſm' Billa mentionū ſecund' tenor' hujuſm' Billæ excambii Et ſi hujuſm' mercat' ſive al' p'ſon' cui vel cujus ordini ſoluēo hujuſm' denar' ſum' in hujuſm' Billa excambii menc' appunct' fuerit fiend p indorſ. hujuſm' Billæ excamb ordinavit content' hujuſm' Billæ excamb ſolvend aliquibus al' mercat' ſive al' p'ſon' in hujuſm. Indorſ. nominat' vel ordini eorū p valore in hujuſm' Indorſament' mention' fore recept' de hujuſm' perſonis in hujuſm' Indorſ. nominat. Ac ſi hujuſm' mercat' ſive al' perſon' qui hujuſm' Bill' excamb ſic acceptaverit poſtea recuſav' ſolvere hujuſm' denar' ſum' in hujuſm' Billa excambii mentionat' hujuſm' mercat' ſive al' perſonis in hujuſm' Indorſament' hujuſm' Billæ excambii nominat' quibus vel quorū ordini ſoluēo inde p hujuſm' Indorſ. hujuſm' Billæ excambii appunctuat' foret fiend' ſecund' tenorem hujuſm' Billæ excambii tunc hujuſm' mercat' ſive al' perſon' qui hujuſm' Billam ſic fecit ſup noticiā hujuſm' recuſation' onerabilis exiſtit & à toto tempore ſupradict. onerabilis exſtitit & onerat' eſſe conſuevit ſolvere hujuſm' denar' ſum' in hujuſm' Billa excambii menc' hujuſm' mercat' ſive al' p'ſonis in hujuſmodi indorſament' hujuſm. Billæ excambii nominat'

Declaration upon an Inland Bill of Exchange. The Cuſtom ſet forth.

Any Merchant, or other Perſon.

Vel ordini ſuo.

Super viſum acceptavit. Et ſic per Indorſamentum appunctuaret, &c. Pro valore in hujuſmodi Indorſamento. Upon Refuſal to pay.

Then the Merchant to become chargeable.

quibus vel quorū ordini ſoluc̄ inde p̄ hujuſm. Indorſ. hujuſm. Billæ excambii ſic ut p̄fertur appunct' foret fiend. Ac iidem Steph. & Petrus in facto dic' qd' præd. Lancelot̄ Cramlington infra hoc regn' Angl' ſcilt apud Villam & Com̄ Novi Caſtri ſup̄ Tinam reſiden' & mercator̄ exiſtēn decimo die Novembris Anno Dom̄ MDCLXXXV. apud Villam & Com' Novi Caſtri præd' ſecundum uſum mercator' prædict' fecit quandam ſolam Billā ſuam excambii in ſcriptis geren dat̄ eiſdem die & anno & eand' Billam manu ſua propr' ſubſcripſit & eandem Billam cuidam Willielmo Ryder adtunc in Lond' præd' in paroch & warda præd' reſidēn & artem Mercatoris ibidem exerc' direxit & p̄ eandem Billam excambii idem Lancelot̄ Cramlington adtunc & ibidem requiſivit p̄d̄ Willielm' Ryder ad viginc̄ & quinq; dies poſt dat̄ ejuſdem ſolæ Billæ ſuæ excambii ſolvere cuidam Thomæ Price (adtunc apud Londō p̄d̄ in paroch & ward p̄d̄ reſiden' & mercator' ibidem exiſten') vel ordini ſuo quingenc̄ libr̄ p̄ uſu Fel̄ Calvert Armig̃ pro conſimili valore recepc̄ ibid' (ſcilt apud Villam & Com' Novi Caſtri p̄d') de Magiſtro Fran' Clever & locare ill' ad compuc̄ prout p̄ adviſament. Quodq; Billa excambii præd. poſtea ſcilt decimo quarto die Novembr' anno ſupradicto apud Lond' p̄d' in paroch & ward' præd' præfat̄ Willielmo Ryder præſentat̄ fuit idemq; Willielm' Ryder eandem Billam adtunc & ibidem ſcilt eodem decimo quarto die Novembr' anno ſupradicto apud Lond' p̄d̄ in paroch & ward' præd. ſecundū uſū mercator' præd' acceptavit quodq; præd̄ Thomas Price cui vel cujus ordini ſoluc' denar' præd' in Billa excambii præd. mentionat̄ per eandem Billam appunctuat̄ fuit fiend' poſtea ſcilicet eodem decimo quarto die Novembris anno ſupradicto apud Lond' præd̄ in paroch & warda præd. p̄ valore per eundem Thomā Price de eiſdem Stephano Evans & Petro Percivall adtunc & ibidem habit̄ & recept' p̄ Indorſamen' ejuſdem Billæ excambii ſecund' conſuetud' Mercator' p̄d' ordinavit contenc̄ ejuſdem Billæ excambii ſolvi præfat' Petro Percival & Stephano Evans adtunc apud Lond' præd. reſiden' & Mercator' ibidem exiſten' quodq; præd' Willielmus Ryder poſtea ſcilicet quinto die Decembris anno ſupradicto apud Lond' præd. in paroch & ward' præd. de præmiſſ. prædict' habuit notic̄ ac per eoſdem Stephanum & Petrum adtunc & ibidem requiſit' fuit ad ſolvend' eandem denar' ſum' in eadem Billa excambii mencōnat̄ eiſdem Stephano & Petro ſecund' formam & effect' præd' Indors̄ Billæ excambii præd. quod ipſe idem Williel' adtunc & ibidem facere penitus recuſavit de omnibus quidem p̄miſſ. idem Lancelot̄ Cramlington poſtea ſcilicet primo die Januar' anno ult' ſupradict' apud London' præd. in paroch & ward' præd' notic' habuit ac ratione inde ac p̄ conſuetud' præd' à toto tempore præd' uſitat' & approbat̄ idem Lancelot̄ ad ſolvend' eaſdem quingent' libr' eiſd' Stephano Evans & Petro Percivall onerabil' & onerat' devenit Et ſupinde idem Lancelot' Cramlington in conſiderac̄ p̄miſſ. poſtea ſcilicet eodem primo die Januar' anno ult' ſupradicto apud Lond̄

The Defendant being a Merchant at Newcaſtle, drew a Bill upon one J. S.

Payable to one Price, Merchant in London.

Value received

The Bill preſented to J. S.

And by him accepted.

Price orders Payment to the Plaintiff.

J. S. had Notice, and the Money demanded of him.

But he refuſed Payment.

Of which the Defendant had Notice.

And became chargeable, and thereupon promiſed Payment.

præd. in paroch & ward' præd' ſuper ſe aſſumpſit & eiſdem Steph' & Petro adtunc & ibidem fidelit' ꝑmiſit quod ipſe idem Lancelot' prædict.' quingent' libr' eiſdem Stephano & Petro cum inde requiſit' eſſet bene & fidelit' ſolvere & contentare vellet præd. tamen Lancelot' ꝑmiſſion' & aſſumpc̃on' ſuas præd in forma præd' fact' minime curan' ſed machinan' & fraudulent' intenden' eoſdem Steph' & Petr' in hac parte callide & ſubdole decipe & defraudare p̃d' quingent' libr' Bill' excambii p̃d' menc' ſeu aliquem inde denar' eiſdem Steph' & Petro ſeu eorum alteri nond̃ ſolvit (licet ad hoc faciend' poſtea

But altho' often requeſted non ſolvit.

ſcilt eod' primo die Jañ anno ſuprad' apud Lond' p̃d' in paroch & ward' præd. idem Lanc' ꝑ p̃fat' Steph & Petr' requiſit' fuit) ſed ill' eis ſeu eorum alteri ſolvere hucuſq; omnino recuſavit & adhuc recuſat unde iidem Steph' & Petr' dic' quod ip̃ deteriorat' ſunt & dampn̄ habent ad valenc' ſexcentar' libr' Et inde ꝑduc' ſectam, &c.

Et modo ad hunc diem ſcilicet diem Mercurii ꝓx. poſt Quinden. Paſchæ iſto eodem Termino uſq; quem diem præd. Lancelot. habuit licenc̃ ad Bill' præd interloquend. & tunc ad reſpondend. &c. cor̃

Imparlance.

Domino Rege apud Weſtm. ven. tam præd. Steph. & Petr. ꝑ Attorn. ſuum prædict' quam præd' Lancelot. ꝑ Adam Baynes Attorn. ſuum Et idem Lancelot. defend. vim & injur. quando, &c. Et dic. quod præd. Steph. & Petrus action. ſuam p̃d inde verſus ipſum habere ſeu manutenere non debent Quia ꝓteſtando qd. non habetur nec exiſt. nec à toto tempore ſuprad. habebatur vel fuit quædam conſuet. int.

Proteſtando, that there is no ſuch Cuſtom.

mercator. & al. perſonas infra hoc regn. Angl. reſiden. & commerc. habentes uſitat. & approbat. quod ſi aliquis Mercator vel al. perſon. infra hoc regn. Angl' reſiden. fecerit aliquam Billã excambii ſecund. uſum Mercator. & hujuſmodi Bill. Excamb. ſua ꝑpr. manu ſubſcrip. & eandem Billam excambii ſecund̃ uſum mercator. alicui al. mercatori ſive al. ꝑſonæ infra hoc regn. Angl. reſiden. direxerit & ꝑ eandem Billam excambii requiſiverit hujuſm. mercat. ſive al. perſon. cui hujuſm. Billa excamb. fuit direct. ad ſolvend. aliquam denar. ſum. in hujuſm. Billa excamb. mentionat. ad aliqd. tempus in hujuſm. Bill. excambii limitat. alicui al. mercatori ſive ꝑſonæ in hujuſmodi Bill. excamb. nominat. vel ordini ſuo ꝑ uſu alicujus al. mercator. ſive ꝑſon. in hujuſm. Billa nominat. ꝑ conſimili valore in hujuſmodi Bill. excambii mentionat. fore recept. de aliquo al. mercat. ſive ꝑſon. in hujuſm. Billa excambii nominat. & ad locand. hujuſm. denar. ſum. ad Comput. prout ꝑ adviſament. Et ſi hujuſmodi mercator ſive al. perſon. cui hujuſmodi Billa excambii ſic direct' foret ſuꝑ viſum hujuſm. Billæ excambii acceptaret hujuſm. Bill. excambii ſecund. uſum mercat. ad ſolvend. hujuſm. denar. ſum. in hujuſm. Billa mentionat. ſecund̃ tenor̃ hujuſmodi Billæ excambii Et ſi hujuſm. mercat. ſive al. ꝑſon. cui vel cujus ordini ſoluc̃o hujuſm. denar. ſum. in hujuſ. Bill. excamb menc̃onat. appunctuat. fuerit fiend. ꝑ Indorſ. hujuſm. billæ Excambii ordinavit content. hujuſm. billæ Excamb ſolvend' aliquibus al' mercat. ſive al' ꝑſon. in hujuſm. Indorſ. nominat. vel ordini eor̃ ꝑ valore

in hujuſm. Indorſ. menc̃ fore recep̃ de hujuſm. perſon' in hujuſm' Indorſ. nominat̃ ac ſi hujuſm. mercat. ſive al̃ p̃ſon' qui hujuſm' bill' Excambii ſic accep̃ poſtea recuſaverit ſolvere hujuſm' denar̃ in hujus̃ billa Excambii menc̃ hujuſm' mercat̃ ſive al̃ p̃ſon̄ in hujuſm' Indorſ. hujuſm' billæ Excamb nominat̃ quibus vel quorū ordini ſoluc̃o indè p̃ hujuſm' Indors̃ hujuſm' billæ Excamb' appunct' fore fiend' ſecund' tenor' hujuſm' billæ Excambii tunc hujuſm' mercat' ſive al' p̃ſon' qui hujuſm' billā Excambii ſic fecerit ſup̃ notic̃ hujuſm' recuſation' onerabilis extitit & à toto tempore ſuprad' onerab' extitit & onerat' eſſe conſuevit ſolvere hujuſm' denar̃ ſum̄ in hujuſm' billa Excambii menc̃ hujuſm' mercator̃ ſive al̃ p̃ſonis in hujuſm' Indorſ. hujuſm' billæ Excambii nominat̃ quibus vel quor' ordini ſoluc̃o inde p̃ Indors̃ hujuſ. billæ Excambii ſic ut præfertur foret fiend. modo & forma p̃ut p̃d' Stephanus & Petrus per billam ſuam præd. ſuperius allegaver' Pro placito tamen idem Lancelot' dic̃ qd' diu ante diem exhibic̃on̄ billæ præd' Felix Calvert Arm̄ in billa præd̃ ſuperius nominat̃ exiſten' un' Commiſſionar' & Gubernator' omn̄ Ratar̃ Impoſic̃on̄ & Debit' Exciſæ ſup̃ Cerviſiā lupulat' (Anglice, Beer) Cerviſiam (Anglice, Ale) Pyrac̃on̄ (Angl̃, Perry) Pomac̃ (Angl̃, Cider) Mellicrat' (Angl̃, Metheglin) & omniū al' liquorū exciſabil' dic' Dn̄o Regi nunc debit' & ſolubil' infra regn' Angl' Dom' Walliæ & villam Bervici ſuper Tweed decimo die Novembr' anno regni dicti Domini Regis nunc primo ſupradicto apud præd. Villam Novi Caſtri ſup̃ Tinam ſolvit eidem Lancelot' per manus p̃d' Franciſci Clever præd. quingent' libr̃ de denar' eidem Domino Regi nunc accreſcen' & renovan' de debit' Exciſæ ſuper liquores exciſabil' præd' in præd. Villa & Com' Novi Caſtri ſuper Tinam & Com' Northumbr' ad intention' quod præd̃ quingent' libr̃ ſolut̃ forent eidem Felici Calvert p̃ uſu dicti Dn̄i Regis nunc apud Civit' London' præd. poſteaq; ſcilicet eodem decimo die Novembris anno primo ſupradicto apud præd. Villam Novi Caſtri ſuper Tinam ad requiſic̃on' præd. Felicis idem Lancelot' præd. billā Excambii fecit & ſubſcripſit & præd̃ Willielmo Ryder direxit & per eandem billam requiſivit præd' Willielm' Ryder ad ſolvend' præd. Thomæ Price præd. quingent' libr' p̃ uſu præd. Felicis modo & forma in billa præd̃ mentionat' Et idem Lancelot̃ ulterius dic' qd̃ præd' Felix ſic ut p̃fertur Commiſſionar' & Gubernator' debit' Exciſæ p̃d' exiſten' poſtea ſcilicet viceſimo quarto die Novembris anno primo ſupradicto & ante diem exhibic' billæ p̃d̃ eidem Dom' Regi nunc indeb' exiſtebat in diverſis denar' ſum' attingen' in toto ad quinq; mille libr' legalis monet' Angl' & amplius ratione p̃miſſ. prout per Record' Scac' dic' Dn̄i Regis nunc apud Weſtm' in Com. Midd' plen' liquebat & apparebat Quodque præd' Fel̃ Calvert præd. quinque mille libr' eidē Dn̄o Regi nunc non ſolvit nec ſolvi fecit ratione cujus taliter ſuperinde in Cur' Scac' p̃dict. fuit quod poſtea ſcilicet eodem viceſimo quarto die Novembris anno regni dicti Dom' Regis nunc primo ſupradicto quoddam Breve dicti Domini Regis nunc de

Pro Placito, That one Calvert an Exciſeman paid the Defendant the Money in Queſtion by the Hands of one Clever, being the King's Money.

To the Intent that it ſhould be paid to the King.

And the Defendant afterwards at Calvert's Requeſt drew the Bill. That Calvert was then indebted to the King.

Prout per Record' Scaccarii.

Extendi

An Extent iſſued ut thereupon.

Extendi fac̃ à dicta Cur' Scac̃ dicti Domini Regis nunc apud Weſtm' ſub ſigillo ejuſdem Cur̃ & Vic' Lon̄ direct' pro præd. debit' quinque mille librar' verſus præd. Felicem Calvert debito modo emanavit p̄ qd' quidem breve idem Dominus Rex nunc eiſdem tunc Vic' Lond̃ p̄cepit qd' iidem Vic' non omitterent propt' aliquam libert' quin eam ingred̃ ac tam p̄ ſacrum̄ p̄borum & legal' hom' de balliva p̄fat̃ Vic' vel alit' p̄ ſacram' & teſtimonium aliquorum p̄roborum & legal̃ hom̄ de eadem balliva p̄fat' Vic' p̄ quos rei veritas melius ſcir' potuiſſet qm̄ omnibus aliis viis mediis & modis quibus idem Vic' ſci-

Ad inquirendum.

viſſent aut potuiſſent diligent' inquirerent quæ & cujuſmodi bona & catalla & cujus pretii Ac quæ debit' ſpecial' & denar' ſum' idem Fel' Calvert tunc habuit in dicta balliva p̄fat' Vic' eaque omnia & ſingula præd. bona & catalla debit. credit. ſpecial. & denar. ſum. in quorumcunq; manus tunc exiſt. pro ſacram. p̄fat. prob. & legal̃ hom̄ diligent. apprec. & extendi ac in manus dicti Dom̄ Regis nunc capi & ſeiſire fecerint ut idem Dom̄ Rex nunc ea quouſq; ſibi de debito p̄d̃ plen̄ ſatisfac. haberet juxta form̄ Stat̃ p̄ hujuſm. debit. dicti Dominі Regis recup̄and. inde nup̄ edit. & proviſ. Et qualit̃ p̄cept. ill. fuerit execut̃ iidem Vic. contrafacerent Bar' de Scac. p̄d̃ apud Weſtm̄ præd' viceſimo ſexto die inſtant̃ menſis Novemb̃ Quod quidem breve poſt. & ante retorn̄ ejuſdem ſcilt viceſimo quarto die Novemb̃ anno regni dicti Dn'i Regis nunc primo ſupradicto apud Lond. p̄d̃ in pa-

The Writ delivered to the Sheriffs

roch̃ & ward. præd' quibuſdam Benj. Thorowgood Mil̃ & Thomæ Kinſey Mil. adtunc exiſten' Vic. Lond. præd. deliberat. fuit in deb. juris forma exequen. Et præd' Lancelot. ulterius dic. qd. poſtea & ante diem exhibic. Billæ p̄d. necnon ante retorn. brevis præd. ſcilt viceſimo quinto die Nov. anno regni dicti Dom. Regis nunc primo

An Inquiſition taken by them.

ſupradicto præd. Benj. Thorowgood & Tho. Kinſey Vic. Lond. præd' execuconi brevis p̄d̃ procedebant Et quandam Inquiſic̃ indent̃ cor̃ eis apud Guildhall Civit. Lond. præd̃ ſituat. in paroch̃ ſancti Laurencii in veteri Judaiſmo in Warda de Cheape ejuſd. Civitat. præd' viceſimo quinto die Nov. anno regni dicti Dom. Regis nunc primo ſupradicto p̄ Sacr' Danielis Mann Willielm. Church Thom. Pounſett Johan. Philips Georgii Gill Johan. Pope Phil. Perry Wil. Partridge Johan. Hutton Johan. Bell Johan. Dod & Georg. Knight proborum̄ & legal. hom. Civit. Lond. præd' Virtute brevis præd' ceper. per quam quidem Inquiſic. inter al. in eadem Inquiſic. content. & ſpecificat. compert. exiſtit quod ipſe idem Lancelot. Cramlington (modo def.) p̄ nomen Lanc̃ Cramlington de Villa & Com. Novi Caſtri ſup̄ Tinam mercat. præd̃ 24 die tunc inſtanc. Novembr. indebitat. fuit & adtunc indebitat. exiſtebat p̄fat. Felici Calvert in quingent libr. legal̃ monet. Angl̃ pro tant. denar. ſum. p̄ eundem Lancelot. Cramlington (modo def.) ad opus & uſum ipſius Felicis Calvert ante tunc habit. & recept. Et quod ipſe idem Lanc. Cramlington (modo def.) fecit & traxit quand. billā Excambii geren. dat. 10 die tunc inſtantis menſis Nov. pro p̄d̃ quingent. libr. ſolvend. p̄ quendā Will. Ryder cuidā

Thomæ Price ad uſu' p̄d' Felicis Calvert quodq; p̄d' ſum' quingent' libr' & quælibet inde parcell' dicto die capc̄on̄ inquiſic̄ præd. præd' Felici Calvert debit' exiſtebat & inſolut. Et iidem Vic̄ dicto die cap' inquiſic' præd. præd ſum' quingent' libr. p̄ ipm' præd. Lanc. Cramlington præd. Felici Calvert ſic ut p̄fertur tunc debit' & inſolut' & quælibet inde parcell' necnon bill. Excambii p̄d. Virtute brevis p̄d. ſibi direct. in manus dicti Dom. Regis nunc capi & ſeiſire fec' juxta exigent. ejuſdem brevis Et ad diem retorn. ejuſdem brevis ſcilicet p̄d' viceſimo ſexto die Nov. anno regni dicti Dom. Regis nunc primo ſupradicto pro execuc. brevis præd. Baron. præd. Scac. præd (eodem Scac. apud Weſtm. præd tunc exiſten') retornaver. & certificaver. inquiſic. præd' p̄ ipſos in forma præd. capt. Et quod iidem Vic. præd. ſum. quingent. libr. p̄ ipm' præd' Lancelot. Cramlington præd' Felici Calvert & q'libet inde parcel. necnon billa Excambii p̄d' in manus dicti Dom. Regis nunc capi & ſeiſiri fec. juxta exigen. brev. p̄d' put p̄ Record. præd. brevis de Extendi fac. & retorn. ejuſdem & inquiſic. præd' eidem annex. in Scac. præd certificat. & ibm̄ in cuſtod. Remem. dicti Dom. Regis remanen. plen. apparet Virtute cujus quidm. brevis de Extendi fac. & inquiſic. præd. ſupinde capt. & præd. capc̄on. Seiſuræ præd ſummæ quingent. libr. & præd' bill. Excambii p̄ ſolucon. inde ſic ut præfertur fact. & tract. in manus dicti Domini Regis per Vic. Lond. præd. ſic ut præfertur fact. idem Dominus Rex nunc ad præd. ſum. quingent. libr. præd. bill. Excambii in inquiſic. prædict' menc. pro eiſdem quingent. libr. ſicut p̄fertur fact. & tract. legitime intitulat. fuit & exiſtit videlt apud Lond. p̄d. in paroch & ward. præd Et idem Lancelot. ulterius dic̄ quod taliter ſuperinde in præd Cur. Scac. dicti Domini Regis nunc coram Baron. ejuſdem Scac. p̄ceſſ. fuit qd' poſtea ſcilicet nono die Dec. anno regni dicti Domini Regis nunc primo ſupradicto quoddā breve dicti Domini Regis nunc de Extendi fac. e dicta Cur. Scac̄ dicti Dom. Regis nunc ſub Sigillo ejuſdem Cur. Vic. præd. Villæ Novi Caſtri ſuper Tinam direct. pro præd. debito quingent. libr. p̄ Inquiſic. præd. ſic ut p̄fertur compert̄ verſus eund. Lancelot. (modo def.) debito modo emanavit Et idem Lancelot. poſtea & ante diem exhibic. billæ præd prædict' Stephani & Petri ſcilicet decimo quinto die Jañ anno regni dicti Dom. Regis nunc primo ſupradicto apud Lond. p̄d. in paroch & ward. p̄d. præd. ſum. quingent' libr. legalis monet. Angl' ad uſum dicti Domini Regis nunc ſolvit & ſatisfecit in plen̄ exoneracon. & ſatisfac̄ p̄d ult. menc. brevis de Extendi fac. & p̄d. billæ Excambii & ſum. quingent. libr. per Inquiſic. præd. ſic ut p̄fertur compert. & per Vic. Lond. præd' in manus dicti Dom. Regis nunc ſic ut p̄fertur capt. & ſeiſit. Et idem Lancelot. ulterius in facto dic̄ qd ipſe idem Lancelot. Cramlington (modo defend.) & p̄d Lanc. Cramlington in Inquiſic. præd & in p̄d ult. menc. brevi de Extendi fac. nominat. ſunt una & eadem p̄ſona & non alia neque diverſa Quodque præd. billa Excambii in bill. præd. præd. Petri & Stephani menc̄ & ſum. quingent. libr. in eadem billa

The Money ſeiſed.

The Money and Bill of Exchange ſeiſed, and returned into the Exchequer.

The King became entitled.

An Extent afterwards iſſued out for the Levying of the Money.

And the Money paid thereupon.

Averment of una & eadem perſona.

Ex-

Et una & eadem Billa

Excambii menc & p eandem solvi appunctuat & p'd' bill' Excambii & sum quingent libr p Inquisic p'd' sic ut p'fertur compert & p Vic' Lon præd. in manus dicti Domini Regis nunc sic ut p'fertur capt & seisit & p ipsum Lanc sic ut p'fertur solut & satisfact' fuer & sunt una & eadem billa Excambii & una & eadē summa quingent libr & non alia neq; diversa Et hoc parat est verificare Unde pet Judic si præd. Steph. & Petrus action' suam præd' inde vers. eum habere seu manutenere debeant, &c.

Et una & eadem Summa.

The Plaintiff demurs to the Plea, especially.

Et præd' Stephanus & Petrus dic' quod ipsi per aliqua per præd. Lanc. supius placitando allegat ab actione sua p'd' inde versus ipsu' Lanc' habend' p'cludi non debent quia dic' quod placit' præd. p ipsum Lanc' modo & forma præd' superius in barra placit materiaq; in eodem content minus sufficien' in lege existunt ad ipsu' Steph & Petrum ab actione præd' inde versus præd' Lanc habend' p'cludend Quodq; ipsi ad placit illud modo & forma p'd' p ipsum Lanc. super placitat' necesse non habent nec p legem terræ tenentur respondere Et hoc parat sunt verificare Unde p defectu sufficien respons præd. Lanc in hac parte iidem Stephanus & Petrus pet Judic & dampna sua occone p'missor sibi adjudicari, &c. Et p causis moracon in lege super placito illo iidem Steph. & Pet. secund' forma Statut' in hujusmodi casu inde nuper edit & provis. ostendunt & Cur hic demonstrant has causas subsequen videlicet eo quod placit p'd' tendit ad general exit & est incertum in se pregnans & forinsecum & non respondet ad narration. & caret forma, &c.

Causes of Demurrer. Et tendit ad Generalem Exitum.

Joinder in Demurrer.

Et præd' Lancelot dic quod placitu. p'd. per ipsu' Lanc' modo & forma præd' superius in barra placit materiaq; in eadem content' bon & sufficien in lege existunt ad ipsos Steph. & Petrum ab accone sua præd. inde versus ipsum Lanc habend' p'cludend' quod quidem placitum modo & forma p'd' superius in barra placitat. materiamq; in eodem content. ipse idem Lanc. paratus est verificare & probare put Cur. &c. Et quia p'd Steph & Petrus ad placit ill' non respond. nec ill. hucusq; aliqualiter dedic. idem Lanc. ut prius pet. Judic. & qd p'd Steph & Petrus ab accone sua p'd versus eund' Lanc. habend. p'cludantur, &c. Et quia Cur. dicti Dni Regis nunc hic de Judicio suo de & super p'miss. reddend. nondum advisatur dies inde dat est partibus præd. cora Domino Rege apud Westm. usq; diem Veneris prox. post Crastinu sanctæ Trin' de Judicio suo de & sup p'miss. ill. audiend' eo quod Cur dicti Domini Regis nunc hic inde nondu, &c. Ad quem diem coram Domino Rege apud Westm. ven. tam præd' Stephanus Evans & Petrus Percivall qm præd. Lancelot Cramlington per Attorn suos præd' Et quia Cur. dicti Domini Regis nunc hic de Judicio suo de & super p'miss. præd' reddend' nondu' advisatur dies inde dat' est partibus præd' coram eodem Domino Rege apud Westm usque diem Sabbati prox. post tres Septimanas Sancti Michaelis de Judicio suo de & super præmiss. audiend. eo quod Cur. dicti Dom. Regis nunc hic inde nondum, &c. Ad quem diem cora

Continuance.

Further Continuance.

Domino Rege apud Weſtm' ven' tam præd' Stephanus & Petrus qm' præd' Lancelot' per Attorn' ſuos præd. Et quia Cur. dicti Domini Regis nunc hic de Judicio ſuo de & ſuper præmiſſ. præd' reddend. nondum adviſatur dies inde dat' eſt partibus coram eodem Domino Rege apud Weſtm' uſque diem Lunæ prox' poſt Octab' Sancti Hillar. de Judicio ſuo de & ſuper p̃miſſ. præd' audiend' eo quod Cur. dicti Dom' Regis nunc hic inde nondum, &c. Ad quem diem coram Domino Rege apud Weſtm' ven' tam præfat' Stephanus & Petrus qm' prædict' Lancelot. per Attorn. ſuos prædict. Et quia Cur. dicti Domini Regis nunc hic de Judic' ſuo de & ſuper præmiſſ. præd. reddend' nondum adviſatur dies inde dat' eſt partibus præd' coram eode' Domino Rege apud Weſtm' uſque diem Mercur. prox' poſt Quinden' Paſchæ de Judicio ſuo præmiſſ. ill' audiend. eo quod Cur. dicti Domini Regis nunc hic inde nondum, &c. Ad quem diem coram Domino Rege apud Weſtm. ven. tam prædict. Stephanus & Petrus qm' prædict' Lancelot' per Attorn' ſuos prædict. & quia Cur. Dicti Domini Regis nunc hic de Judicio ſuo de & ſuper p̃miſſ. præd. reddend. nondum adviſatur dies inde dat. eſt partibus prædict. coram eodem Domino Rege apud Weſtm' p̃dict. uſque diem Veneris prox. poſt Craſt. Sanctæ Trinitatis de Judicio ſuo de & ſuper præmiſſ. audiend. eo qd. Cur. dicti Domini Regis nunc hic inde nondum, &c. Ad quem diem coram Dom' Rege apud Weſtm. ven. tam præd. Stephanus & Petrus qm. p̃d. Lancelot per Attorn. ſuos præd. & quia Cur. dicti Domini Regis nunc hic de Judicio ſuo de & ſuper premiſſ. reddend. nondum adviſatur dies inde dat. eſt partibus prædict. coram eodem Domino Rege apud Weſtm' uſque diem Lunæ prox. poſt tres Septimanas Sancti Michaelis de Judicio ſuo de & ſuper præmiſſ. audiend. eo qd' Cur. dicti Domini Regis nunc hic inde nondum, &c. Ad quem diem coram Dom' Rege apud Weſtm. ven. tam præd. Stephanus & Petrus qm. præd. Lancelot. per Attorn. ſuos p̃d. & quia Cur. dicti Dom. Regis nunc hic de Judicio ſuo de & ſup p̃miſſ. reddend. nondu' adviſatur dies inde dat. eſt partibus p̃d. coram eodm. Dño Rege apud Weſtm. p̃d' uſq; diem Lunæ prox. poſt Octab' Sancti Hillar. de Judicio ſuo de & ſuper p̃miſſ. audiend. eo qd. Cur. dicti Dom' Regis nunc hic inde nondum, &c. Ad quem diem coram Domino Rege apud Weſtm' ven. tam. p̃d. Stephanus & Petrus qm' præd. Lancelot. per attorn. ſuos præd. Et quia Cur. dicti Dom' Regis nunc hic de Judicio ſuo de & ſuper præmiſſ. reddend. nondum adviſatur dies inde dat. eſt partibus præd. coram eodem Domino Rege apud Weſtm. præd. uſque diem Mercurii prox. poſt Quinden. Paſchæ de Judicio ſuo de & ſuper præmiſſ. audiend. eo quod Cur. dicti Domini Regis nunc hic inde nondum, &c. Ad quem diem coram Domino Rege apud Weſtm. ven. tam prædict. Stephanus & Petrus qm' præd' Lancelot' per Attorn. ſuos prædict. & quia Cur. dicti Dom. Regis nunc hic de Judicio ſuo de & ſuper

Further Continuance.

Further Continuance.

Further Continuance.

Further Continuance.

Further Continuance.

Further Continuance.

premiſſ. reddend. nondum adviſatur dies inde dat. eſt partibus p̃d. coram eodem Dom. Rege apud Weſtm. uſq; diem Veneris prox' poſt Craſtin. Sanctæ Trinitatis de Judicio ſuo de & ſup̃ p̃miſſ. audiend. eo qd. Cur. dicti Dom' Regis nunc hic inde nondum, &c. Ad quem diem coram Dom' Rege apud Weſtm' ven' tam præd. Stephanus & Petrus qm' præd. Lancelot. per Attorn. ſuos præd. Et quia Cur. dicti Domini Regis nunc hic de Judicio ſuo de & ſuper præmiſſ. reddend' nondum adviſatur dies inde dat' eſt partibus præd. coram eodem Domino Rege apud Weſtm' uſq; diem Martis prox' poſt tres Septimanas Sancti Michaelis de Judicio ſuo de & ſuper præmiſſ. audiend' eo qd' Cur. dicti Domini Regis nunc hic inde nondum, &c. Ad quem diem coram Domino Rege apud Weſtm' ven' tam præd. Stephanus & Petrus qm' prædict' Lancelot. per Attorn. ſuos prædict. & quia Cur. dicti Domini Regis nunc hic de Judicio ſuo de & ſuper præmiſſ. reddend' nondum adviſatur dies inde dat' eſt partibus prædict. coram eodem Domino Rege apud Weſtm' prædict' uſque diem Mercurii prox' poſt Octab' Sancti Hillar. de Judicio ſuo de & ſuper præmiſſ. audiend. eo qd. Cur. dicti Domini Regis nunc hic inde nondum, &c. Et modo ad hunc diem ſcilicet a die Paſchæ in quindecim dies iſto eodem Termino uſque quem diem loquela prædict. (antea remanens ſine die) Virtute cujuſdam Actus Parliamenti confect. apud Weſtm' decimo tertio die Febr. anno regni Domini Willielmi & Dominæ Mariæ nunc Regis & Reginæ Angl', &c. primo revivificat' continuat' & adjornat' fuit coram Dom' Rege & Domina Regina Willielmo & Maria apud Weſtm' præd. ven' tam p̃d. Steph. & Petr. qm' p̃d' Lancelot' p̃ Attorn' ſuos p̃d' ſup̃ quo vis' & p̃ Cur' dictor' Dom' Regis & Dominæ Reginæ nunc hic plenius intellectis omnibus & ſingulis præmiſſ. maturaque deliberac'on' ſuper-inde habita videtur eidem Cur' qd' placitum præd' p̃ ipſum Lancelot' modo & forma præd' ſuperius in Barr' placitat' materiaque in eodem content' minus ſufficien' in lege exiſtunt ad ipſos Stephanum & Petrum ab acc'one ſua præd' inde verſus præd' Lancelot' habend' præcludend' Ob quod iidem Stephanus & Petrus dampna ſua verſus præfat' Lancelot' occ'one præmiſſorum recuperare debeant ſed quia Cur' dictorum Domini Regis & Dominæ Reginæ nunc hic incognit' exiſtit quæ dampna iidem Stephanus & Petrus tam occ'one præmiſſorum præd' quam pro mis' & cuſtag' ſuis per ipſos circa ſectam ſuam in hac parte appoſit' ſuſtinuer' Ideo præcept' eſt Vic' London prædict' quod per Sacram' proborum & legalium hominum de Baliva ſua diligent' inquir' quæ dampna iidem Stephanus & Petrus tam occ'one præmiſſorum præd' qm' pro mis' & cuſtag' ſuis per ipſos circa ſectam ſuam in hac parte appoſit' ſuſtinuer' & Inquiſic'on qm', &c. Domino Regi & Dominæ Reginæ apud Weſtm' prædict' die Veneris prox' poſt Craſtin' Sanctæ Trinitatis ſub ſigill', &c. & ſigill', &c. mittant una cum brevi dicti Domini Regis

Further Continuance.

Further Continuance.

Further Continuance.

The Loquela and Proceedings revived by Act of Parliament.

Judgment for the Plaintiff.

Writ of Enquiry awarded.

& Dominæ Reginæ eis inde direct' idem dies dat' eſt p'fat' Stephano & Petro ibidem, &c. Ad quem diem coram Dom' Rege & Domina Regina apud Weſtm' p'd' ven præd. Stephanus & Petrus per Artorn' ſuum præd' & Vic. London prædict' (videlicet) Johannes Fleet Mil' & Humfrid' Edwin Mil' retorn' quandam Inquiſic'on' coram eis vicefimo quarto die Maii anno regni Domini Willielmi & Dom' Mariæ nunc Regis & Reginæ Angl', &c. primo apud Guild-Hall ſituat' in paroch. Sancti Laurentii in Veteri Judaiſmo in Warda de Cheape ejuſdem Civitat. Virtute Brevis præd' capt' per Sacram' duodecim proborum & legalium hominum de Baliva præfat' Vic. per quam compert' exiſt' qd' præd' Stephanus & Petrus ſuſtinuer. dampna occaſione præmiſſorum præd' ultra mis' & cuſtag' ſua per ipſos circa ſectam ſuam in hac parte appoſit' ad ſexcent' libr. & pro mis' & cuſtag' ill' ad vigint' ſex ſolid. & octo denar. Ideo cons' eſt qd. p'd' Stephanus & Petrus recuperent verſus præfat. Lancelot' dampna p'd' per Inquiſic'on' præd' ſuperius in forma præd. compert. necnon trigint. & ſex libr. treſdecim ſolid. & quatuor denar. pro mis' & cuſtag' ſuis præd' eiſdem Stephano & Petro per Cur. dictorum Domini Regis & Dominæ Reginæ nunc hic ex aſſenſu ſuo de Incro' adjudicat. Quæ quidem dampna in toto ſe attingunt ad ſexcent' trigint' & octo libr. & præd' Lancelot' in miſericordia, &c. Judic' ſign. ſexto die Junii MDCLXXXIX. General Errors aſſigned.

The Inquiſition returned.

Damages found.

Judgment for the Plaintiff.

Cramlington *verſus* Evans and Percival.

IN a Writ of Error upon a Judgment in the King's Bench, where Evans and Percival declared againſt the Defendant in an Action upon the Caſe, that in the Realm of England (viz.) in the Pariſh of St. Mary Le Bow, London, there is and hath been Time out of Mind a Cuſtom amongſt Merchants and other Perſons, (viz.) That if a Merchant, or other Perſon, makes a Bill of Exchange according to the Uſage of the Merchants, directed to a Merchant or other Perſon reſident in England, requeſting the Perſon to whom directed, to pay the Sum of Money in the Bill mentioned, at the Time therein limited, to the Perſon in the Bill named, * or his Order, for the Uſe of any other Perſon in ſuch Bill mentioned, for the Value received of the Perſon mentioned in ſuch Bill, and to place it to Account as by Advice; and if the Perſon, to whom ſuch Bill is directed, accepts it according to the Uſage of Merchants; and if that Perſon, who in ſuch Bill is appointed to receive ſuch Money by an Indorſement upon the ſaid Bill, orders the Payment of ſuch Money to any other Perſon or Perſons, or their Order, for the Value in the Indorſement mentioned to have been received of the Perſon named in ſuch Indorſement; if he that accepted ſuch

1 Show. 4, 5. and vide ib. 125. 4 Mod. 242. 5 Mod. 314, 367. 6 Mod. 29, &c. Cumberba. 384, 385. 1 Vent. 45, 152.

* See Cumberba. 176, 401, 466. 1 Salk. 125, 133, &c.

Bill doth afterwards refuſe to pay it to him named in the ſaid Indorſement, then he which made and directed the Bill, upon Notice of ſuch Refuſal, is chargeable to pay the Money to the Perſon, or his Order, to whom by the Indorſement it was appointed to be paid.

Then they ſay, that Cramlington the 10th Day of November, Anno Domini 1685. at Newcaſtle, directed a Bill of Exchange of the ſame Date to one William Ryder, requeſting him at 25 Days after the Date of the ſaid Bill, to pay to Thomas Price, or his Order 500 l. for the Uſe of Felix Calvert Eſquire, for the Value received of Francis Clever, and to place it to Account prout per adviſamentum; and on the 14th of the ſaid November it was ſhewn to the ſaid Ryder, who then (according to the Uſage of Merchants) accepted it; and that the ſaid Price upon the ſaid 14th Day of November, for the Value received of them the ſaid Evans and Percival, by an Indorſement upon the ſaid Bill, according to the Uſage of Merchants, ordered the Contents thereof to be paid to the ſaid Evans and Percival: and that the ſaid Ryder afterwards (viz.) the 5th Day of December, in the Year aforeſaid, was requeſted by them the ſaid Evans and Percival to pay to them the ſaid Money according to the aforeſaid Indorſement, and the ſaid Ryder refuſed to pay it.

Of all which the ſaid Cramlington had Notice, (viz.) upon the 1ſt Day of January in the ſame Year, and by Reaſon thereof, and of the Cuſtom aforeſaid, he became charged with the Payment of the ſaid Money to them the ſaid Evans and Percival; and thereupon the ſaid Cramlington in conſideratione præmiſſorum did promiſe to pay the ſaid 500 l. to the ſaid Evans and Percival, &c. but not minding his Promiſe, had not paid the ſaid Money licet ſæpius requiſitus, &c.

To this the Defendant Cramlington puts in a Plea in Bar to the Effect as followeth; (viz.) Proteſtando that there was no ſuch Cuſtom as ſet forth in the Declaration, pro placito dicit, that long before the Action brought, Felix Calvert in the Declaration mentioned, was one of the Commiſſioners of Excile; and upon the 10th of November, anno primo Domini Regis nunc by the Hands of Clever in the Declaration mentioned, did pay 500 l. of the Money ariſing to his Majeſty upon the Duty of Excile; and at the Requeſt of the ſaid Calvert, the Defendant upon the ſame 10th of November, made and directed the aforeſaid Bill of Exchange to the ſaid William Ryder, to pay to the ſaid Price 500 l. for the Uſe of the ſaid Calvert, as in the Declaration ſet forth.

And he further ſaith, that the ſaid Calvert, upon the 24th Day of the ſaid November, was indebted to the King upon the Account aforeſaid in 5000 l. and upwards, prout per Recordu' Scaccar', &c. & ſuperinde taliter proceſſum fuit in Cur. Scacar. prædict', that

upon the 24th of November aforeſaid, a Writ of Extendi facias was awarded to the Sheriffs of London againſt the ſaid Calvert for the ſaid Debt of 5000 l. commanding them to enquire per Sacramentum proborum & legalium hominum, &c. what Goods, Chattels, Debts, Specialties, Sums of Money, &c. the ſaid Calvert then had, and to extend and ſeize them into the King's Hands, in whoſe Hands ſoever they then were, that the King might be thereout ſatisfied of the ſaid Debt juxta formam Statuti pro hujuſmodi deb' dicti Dom' Regis recuperand'; Which Writ was returnable the 26th of the ſaid November, and upon the 24th was delivered to the then Sheriffs of London, and upon the 25th Day of the ſaid November, by Virtue of the ſaid Writ, took an Inquiſition per Sacramentum, &c. by which it was found that the ſaid Defendant Cramlington, upon the 24th of the ſaid November, was indebted to the ſaid Calvert in 500 l. for Money received by him to the Uſe of the ſaid Calvert; and that the Defendant made a Bill of Exchange, dated the 10th of the ſaid November, directed to the ſaid Ryder, to pay to the ſaid Price, to the Uſe of the ſaid Calvert the Sum of 500 l. and that the ſame was due to the ſaid Calvert at the Time of the Inquiſition taken; and that the ſaid Sheriffs did thereupon ſeize the Debt and Bill of Exchange into the King's Hands ſecundum exigentiam brevis prædict', and returned the ſaid Writ and Inquiſition, &c. into the Exchequer, prout per Recordum, &c. plenius apparet; by Virtue of which the King became lawfully entitled to the ſaid 500 l. and Bill of Exchange aforeſaid.

And the Defendant further ſaith, that afterwards (ſcilicet) the 9th of December, Anno primo, &c. a Writ of Extendi facias was awarded out of the ſaid Court of Exchequer againſt the ſaid Defendant Cramlington for the ſaid 500 l. and thereupon he paid the ſaid 500 l. upon the 15th Day of January anno primo ſupradicto, to the Uſe of the King in plena exoneratione & ſatisfactione præd' ult' mentionat' brevis de extendi fac' & præd' Billæ excambii & ſummæ quingent' librarum per Inquiſitionem præd' ſic ut præfertur compert', &c. and concludes with Averments, (viz.) That he the Defendant Cramlington is the ſame ſo named with him in the Extent, and that the 500 l. the Bill of Exchange, &c. in the Inquiſition found, are the ſame mentioned with them in the Declaration, &c. and ſo demands Judgment of the Action.

To this Plea the Plaintiffs demurred.

And after divers Arguments Judgment was given in the King's Bench for the Plaintiffs in Eaſter Term, in the firſt Year of King William and Queen Mary.

And now it came to be argued upon a Writ of Error in the Exchequer-Chamber.

First,

Firſt it was alledged for Error, that the Cuſtom is laid ſo general, (viz.) not only to extend to Merchants, but all others; ſo that it muſt be at the Common Law if to be allowed at all.

Antea 292, 295. 1 Show. 125. 1 Salk. 125.

Sed non allocatur: For in the Caſe of Sarsfield and Witherly, (lately adjudged) it was reſolved, that a Perſon, not being a Merchant, drawing a Bill of Exchange, was bound according to the Uſage of it amongſt Merchants, and in Declarations upon Bills of Exchange, the whole Matter is to be ſet forth ſpecially.

Secondly, There were (as appears by the Bill of Exchange) 25 Days given for the Payment of it after the Date of the Bill; whereas here the Requeſt and Refuſal is upon the 25th Day after the Date.

Sed non allocatur: For as the Bill is ſet forth, it is to pay the Money ad viginti & quinque dies poſt datum; and this can't be, if not paid at the five and twentieth Day.

Thirdly, The Matter chiefly inſiſted upon for Error was, that the 500 l. was appointed to be paid to Price for the Uſe of Calvert, ſo the Right and Intereſt of the Money was in Calvert, by whomſoever it ſhould be received, and then it might well be ſeized for the Debt which Calvert did owe to the King.

But the Court held, that the Seizure for the King ought not to have been in this Caſe.

1. For that tho' it were to be paid for Calvert's Uſe, yet this was but a Truſt, and the Right of the Money was in Price. As if Goods be given to A. to the Uſe of B. the Property of the Goods is in A. otherwiſe, if Money be delivered to A. to pay to B. there the Right of the Money is in B. and he may bring an Action of Debt.

1 Rol. Abr. 597.

2. Here the Bill is endorſed over to be paid to the Plaintiffs before any Seizure, or the Writ of Extent was iſſued forth, and the Cuſtom is expreſly laid, that an Endorſement might be as in the Caſe here; which Cuſtom is confeſſed, and that determines the Right and Intereſt in the Money of him that makes the Endorſement, and puts it in the Plaintiffs.

Wherefore the Judgment was affirmed.

Termino

Termino Sanctæ Trinitatis, Anno 2 W. & M.

In Scaccario.

Burchett *verſus* Durdant.

IN a Writ of Erroꝛ upon a Judgment in an Ejectment in the King's Bench, where the Plaintiff Mary Durdant declared upon the Demiſe of William Durdant of two Meſſuages, 100 Acres of Land, &c. in Chobham, in the County of Surrey. 1 Vent. 334. Raym. 330. 2 Jones, 99, 100. Pollexfen. 457. 2 Lev. 232. 233. Ray. 330.

Upon Not guilty the Jury gave a Special Verdict, that Henry Wicks was ſeiſed in Fee of the Premiſſes, and by his Will in writing, dated the 6th of June 1657. he deviſed in the Words following: (Viz.) I give to my Couſin John Higden and his Heirs, during the Life only of Robert Durdant my Kinſman, all thoſe my Meſſuages, &c. in Chobham in the County of Surrey; upon this Truſt and Confidence, that he the ſaid John Higden and his Heirs, ſhall permit and ſuffer the ſaid Robert Durdant, during his Life, to have and receive the Rents and Profits thereof, which ſhall yearly grow due and payable, he the ſaid Robert committing no Waſte. And from and after the Deceaſe of Robert Durdant, then do I give the ſaid Lands and Præmiſſes in Chobham unto the Heirs Males of the Body of him the ſaid Robert Durdant now living, and to ſuch other Heirs Male and Female as he ſhall hereafter happen to have of his Body; and for Want of ſuch Heirs, then to the Uſe and Behoof of my Couſin Gideon Durdant and the Heirs of his Body; and for want of ſuch Heirs, the ſame to be and remain to the Right Heirs of me the ſaid Henry Wicks.

They find that Wicks died the 2d of December 14 Car. 2. ſeiſed, as aforeſaid, and that John Higden entred and was ſeiſed prout lex poſtulat, and by Deed bearing Date the 1ſt of Jan. 14 Car. 2. reciting the ſaid Will, and that the ſaid Robert Durdant and Gideon Durdant had contracted with the ſaid John Higden for the Sale of the ſaid Meſſuages, Lands and Premiſſes: And to the Intent, that the Contingent Remainder by the ſaid Will limited to the Heirs Male and Female of the Body of the ſaid Robert Durdant, might be extinguiſhed and deſtroyed, he the ſaid John Higden, by the Appointment of the ſaid Robert Durdant, did ſurrender his Eſtate in the Premiſſes to the ſaid Gideon Durdant; and by the ſaid Deed it was covenanted, that the ſaid Robert Durdant, John Higden and Gideon Durdant ſhould levy a Fine of the Premiſſes, which ſhould be to the Uſe of the ſaid John Higden and his Heirs.

They

They find that a Fine was levied accordingly in Easter Term, 15 Car. 2.

They find, that Robert Durdant died on the 19th of August, 20 Car. 2. and that John Higden after in 20 Car. 2. upon a Valuable Consideration in Money, enfeoffed John Butcher of the Premisses; and that the said Butcher died the 1st Day of October in the same Year, and that the Premisses from him came to the Defendant Butcher, who entred into the Premisses and became seized prout lex postulat.

And they find, that Robert Durdant, as well at the Time of the said Will making, as at the Death of the said Henry Wicks, had an only Son called George Durdant, who was also Godson to the Testator; and that the said George Durdant died, and that William Durdant (Lessor of the Plaintiff) was his Son and Heir, and entred, and made the Demise prout, &c. & si super totam materiam, &c.

Upon this Special Verdict Judgment was given in the King's Bench for the Plaintiff.

And the Court here afterwards having heard the Case thrice argued, did affirm the Judgment.

And the first Point spoken to was, Whether the Estate did not execute in Robert Durdant by the Statute of 27 H. 8. of Uses: For if so, he would be seized of an Estate-Tail, and then Butcher would have a good Title.

It is clear, Lands may be devised to the Use of another, as in Popham 4.

'Tis true, a Devise implies a Consideration, and will lodge the Estate in the Devisee, if no Use be limited upon it.

Here it is devised to John Higden and his Heirs, upon Trust and Confidence that he should permit and suffer, &c. The Word Trust is proper for the Limitation of an Use, and the Estate shall execute, unless it be first limited to the Use of a Man and his Heirs in Trust for another; there the Intention is, that it should be only a Trust; and here Robert Durdant is restrained only from doing Waste, which shews, that he intended he should take an Estate, or else he could not commit Waste.

2 Salk. 679.

This was denied to be Law. 2 Salk. 679.

The Court over-ruled this Point, and resolved it to be only a Trust in Robert Durdant; for the Words are, that Higden should permit him to take the Profits, which shews that the Estate was to remain in Higden; and for the Restraint of Waste it was proper; for Higden was to permit Robert Durdant to have the Possession, but the Testator would not have him to commit Waste or Spoil.

But Lands may be devised to an Use, tho' the Statute of Wills is since the Statute of Uses, Mo 107. 1 Cro. 343.

Devise to Trustees and their Heirs, on Trust to permit A. to take the Profits for his Life, and after the Trustees to stand seis'd to the Use of the Heirs of the Body of A. the Quære was, whether A. had an Estate-tail executed; and Judgment was given, that he had; and held that would have been a plain Trust at Common Law; and what at Common Law was a plain Trust of a Freehold or Inheritance is executed, by the Statute which mentions the Word Trust, as well as Use. 2 Salk. 679. Broughton and Langley, and 1 Lutw. 823. S. C.

The ſecond and principal Point was, Whether the Remainder to the Heirs of Robert Durdant, now living, did veſt in George Durdant, or was a contingent Remainder?

It was much urged, That one could not take in the Life of his Anceſtor by the Name of Heir; for nemo eſt hæres viventis, in 1 Co. Archer's Caſe. A Deviſe to Robert, Remainder to the next Heir Male of Robert, and to the Heirs Male of the Body of that Heir Male, this is reſolved to be a contingent Remainder during the Life of Robert; and it was ſaid in that Caſe, that the next Heir Male is as much a Deſignation of a Perſon, as an Heir now living. He that will take by Purchaſe by the Name of Heir, muſt be a compleat Heir to all Intents. Co. Littl. 24. b. 2 Leon. 70. Chaloner and Bowyer's Caſe upon a Deviſe.

But it was reſolved, That this was a Remainder veſted in George Durdant: For the Remainder being limited to the Heirs of the Body of Robert Durdant, now living, and George being found to be then the only Son, it was a ſufficient Deſignation of the Perſon, and as much as if it had been ſaid, to his Heir apparent; and ſuch an one is called Heir ſometimes in Proceedings in Law, where the greateſt Strictneſs of Phraſe is uſed; as in Writs of Raviſhment of Ward, Quare filium & hæredem rapuit, 2 Inſt. 439. Weſtm. 2. cap. 35. 25 Ed. 3. the Statute of Treaſons, Treaſon to kill the Heir of the King.

The third Point was, Whether George Durdant took an Eſtate-tail, or only an Eſtate for Life? For it was objected, that if the Words (Heirs of the Body) were taken for the Deſcription only of the Perſon who ſhould take, then he muſt take only for Life.

But the Court held, That they would take an Eſtate-tail; for Heirs is nomen collectivum, and is ſometimes ſo taken when 'tis only Heir in the ſingular Number. A Deviſe to one for Life, Remainder to the Heirs Male of his Body for ever; this is an Eſtate-tail in the Deviſee, Pawſey and Lowther, in Roll. Abr. 2 Part 253. But in Caſe the firſt Words, (viz.) Heirs of the Body now living, would carry but an Eſtate for Life to George Durdant, yet the ſubſequent Words would make an Entail in him, (viz.) And to ſuch other Heirs, Male and Female, as he ſhould hereafter happen to have of his Body, this would clearly veſt an Entail in George, he being Heir of the Body of Robert, and ſurviving Robert. So the Judgment was affirmed, and Writ of Error brought in the Houſe of Lords, and there affirm'd. 2 *Lev.* 232.

N. Chan. Caſes 156, 214. 1 R. Ab. 623.

Sed nota as to the ſecond Point, the Lord Chief Baron Atkyns and Juſtice Powell ſeemed to be of Opinion, that the Remainder was Contingent: But in regard the Point had been upon a Writ of Error brought in the Houſe of Lords upon a Judgment given in the King's Bench in another Caſe, upon the ſame Will, adjudged to be a Remainder veſted, they conceived themſelves bound by that Judgment in the Houſe of Lords.

This Caſe denied to be Law by Holt Ch. J. 2 Salk. 679.

Paſchæ,

Paſchæ, Anno 2 Willielmi & Mariæ.

Memorandum.

By an Order of the King and Council, 1 Willielmi & Mariæ, the Judges were ordered to meet; and all of them (except Gregory, Eyre and Turton) were aſſembled at the Lord Chief Juſtice's Chamber, to give their Opinion concerning Colonel Lundy, who was appointed Governor of London-derry in Ireland by the King and Queen, and had endeavoured to betray it; and afterwards he eſcaped into Scotland, where he was taken and brought Priſoner into England, and committed to the Tower.

Vaugh. 191, 192. Whether, admitting he were guilty of a capital Crime by Martial Law, committed in Ireland, he might be ſent thither from hence to be tried there, in regard of the Act of Habeas Corpus made Anno 31 Car. 2. which enacts, That no Subject of this Realm ſhall be ſent over Priſoner to any foreign Parts: But then it has a Proviſo, That if any Subject of this Realm has committed any capital Crime in Scotland, or other foreign Parts of the King's Dominions, he may be ſent from hence to be tried in ſuch foreign Place.

See 1 Vent. 349. Upon Conſideration of which Proviſo the Judges unanimouſly gave their Opinion, That there was nothing in the Habeas Corpus Act (ſuppoſing he had committed a capital Crime by Law Martial in Ireland) to hinder his being ſent thither to be tried thereupon; and ſubſcribed their Names to the ſaid Opinion, and certified the ſame to the Privy Council.

Note, That it was ſaid, (while my Lord Hale was Chief Juſtice of the King's Bench) that one———who had committed Murder in Barbadoes, and taken here, was ſent over to be tried there: But it was before the Habeas Corpus Act.

Patrick Harding's *Caſe.*

HE was indicted at the Seſſions in the Old Baily (Anno primo Willielmi & Mariæ) for High Treaſon.

The Indictment ſets forth, That the ſaid Patrick Harding machinans & ꝑditorie intendens pacem & communem tranquilitatem hujus regni Angl' deſtruere & Gubernationem dictorum Domini Regis & Dominæ Reginæ infra hoc regnum Angl' ſubvertere ac cædes deſtructiones & deſolationes infra hoc regnum procurare 22 Novembr. anno regni Dom. noſtr. Willielmi & Mariæ, &c. primo apud paroch Sancti Martini in Campis in Com. Middleſex prædict. malitioſe & ꝑditorie compaſſavit imaginat' fuit & intendebat dict. Dom̃ Regem & Dom̃ Regin̄ adtunc ſupremos veros & indub' Dom. ſuos non ſolum à ſtatu titulo poteſtate imperio & regimine regni ſui Angl' penitus deponere & deprivare verum etiam eoſdem Dom. Regem & Dom' Reginam interficere & ad mortem & finalem deſtructionem ponere & adducere & ſtragem miſerabilem inter ſubditos ꝑ totum hoc regnum & alia Dominia ſua cauſare quodq; ipſe præd Patricius Harding ad nequiſſimas proditiones & proditioſas intentiones ſuas præd. ꝑimplend' eodem viceſimo tertio die Novembr. apud paroch præd. proditorie vi & armis, &c. bellum & rebellionem contra dictos Dom' Regem & Dom' Reginam nunc ordinavit levavit & gerebat ac diverſos milites & viros armatos & armaturos ad mil' ac bellum contra dictos Regem & Reginam nunc gerend' congregavit levavit & procuravit ac viros & milites ſic ut ꝑfertur levat' extra hoc regnum Angl' miſit & iter ſuum ſuſcipe procuravit ad ſeſe jungen̄ aliis hoſtibus inimicis & rebellionibus dictorum Regis & Reginæ & bellum contra eoſdem gerend' & ulterius qd. ipſe Patricius Harding ad nequiſſimas ſuas proditiones ꝑimplend' & ꝑficiend' eodem 23 Novembr. apud paroch præd. ut falſiſſimus proditor. dictor. Regis & Regin' cum quodam Johanne Taaff adtunc ſubdito dictor. Regis & Reginæ exiſten' proditorie ſe aſſembl' & conſultavit ac eaſdem proditiones ſuas præd. adtunc & ibid' eidem Johanni Taaff malitioſe proditorie & adviſat' loquend in auditu diverſ. ſubditor. dictor. Regis & Reginæ publicavit & declaravit ad ſuadend' eundem Johannem Taaff adjutan' & aſſiſten' eſſe in iiſdem proditionibus magnum præmium & ſtipend' eidem Johanni Taaff adtunc & ibidem obtulit ſi ipſe præd. Johannes Taaff adjutans & aſſiſtens in iiſdem eſſe vellet contra ligeantiæ ſuæ debitum & contra pacem dictor' Dom' Regis & Dom' Regin' nunc coron' & dignitat' ſuas necnon contra formam Statut' in hujuſmodi caſu edit' & proviſ. &c.

Upon Not guilty pleaded, the Jury found a Special Verdict, (Viz.)

See 1 Hawk. 37, 38. and the Cases there cited.

That Patrick Harding, to the Intent to depose the King and Queen, and deprive them of their Royal Dignity, and restore the late King James to the Government of this Kingdom, did (for Money by the said Patrick paid) list, hire, raise and procure sixteen Men, Subjects of this Kingdom, at the Time and Place in the Indictment mentioned, to fight and wage War against the King and Queen; and those sixteen Men so listed, hired, raised and procured, did send out of this Kingdom into the Kingdom of France to assist and aid the French King, then and yet an Enemy to the King and Queen, and in open War with Their Majesties, and to join themselves with the Enemies and Rebels of and against the King and Queen, in waging War against the King and Queen: And if upon this Matter the said Patrick Harding be guilty of Treason prout the Indictment, then we find him Guilty prout, &c. and if Not guilty, &c. then Not guilty, &c.

Upon this Special Verdict found, the Lord Chief Justice, Justice Gregory and Justice Ventris, who were then present at the Sessions, conceived some Doubt; for they were of Opinion, that it did not come within the Clause of the Statute of 25 Ed. 3. of levying War: For that Clause is, That if a Man levy War against our Sovereign Lord the King in his Realm; and by the Matter found in the Special Verdict it appears, that these Men were listed and sent beyond Sea to aid the French King.

It was also doubted, Whether it were a good Indictment within the Clause of the Statute of adhering to the King's Enemies, the Fact found in the Verdict comes fully within that Clause, (viz.) the sending Men to aid the French King, then an Enemy to the King and Queen in open War against them. But the Indictment is short as to this Matter; for 'tis quod milites sic ut præfertur levatos extra hoc regnum Angl' misit ad sese jungend' aliis hostibus inimicis & rebellat' dict' Regis & Regin'; whereas it should have set forth who the Enemies were, that the Court might take Notice whether they were Enemies as the Law intends. If the Indictment had been, That he sent them to the French King, then in open War, &c. it had been well.

33 H. 6. 1. b.

And upon these Doubts the Case was adjourned for further Consideration.

In Michaelmas Vacation the greater Part of the Judges were assembled at the Lord Chief Justice's Chamber, and having debated the Matter amongst themselves, they all (except Justice Dolben) agreed, that the said Patrick Harding was guilty of High Treason within the Clause of the Statute, for Compassing the Death of the King, it being found by the Verdict, That the said Patrick Harding, to the Intent to depose the King and Queen, and deprive them of their Dignity, &c. did for Money, hire, list, &c. and an Intent to depose the King, (proved by an Overt Act) hath been always taken

Writing Letters to a foreign Prince, inciting to Invasion, an overt Act. H. P. C. 13.

to be within the Clauſe of Compaſſing the Death of the King. So is Hale's Pleas of the Crown, fo. 11. and ſo it was held in the Caſe of the Earl of Eſſex in Queen Elizabeth's Time, and in the Lord Cobham's Caſe in the Reign of King James the Firſt.

And the Chief Juſtice cited the Stat. made 29 H. 6. c. 1. upon the Rebellion of Jack Cade; which Act ſets forth, That John Cade, naming himſelf John Mortimer, falſly and traiterouſly imagined the Death of the King, and the Deſtruction and Subverſion of this Realm, in gathering together and levying of a great Number of the King's People, and exciting them to riſe againſt the King, &c. againſt the Royal Crown and Dignity of the King, was an Overt Act of Imagining the Death of the King, and made and levied War falſly and traiterouſly againſt the King and his Highneſs, &c. So that it appears by that Act, that it was the Judgment of the Parliament, That gathering Men together, and exciting them to riſe againſt the King, was an Overt Act of Imagining the Death of the King. Vide Staundford's Pleas of the Crown, fol. 180.

And according to this Opinion Judgment was given againſt Harding in the following Seſſions, and he was executed thereupon.

NOta, At an adjourned Seſſions held the 19th of May, 2 Willielmi & Mariæ, it appeared that one of the King's Witneſſes, which was to be produced in an Indictment for Treaſon, had been the Day before challenged to fight by a Gentleman, (that, it was ſaid, was a Member of the Houſe of Commons,) he was by the Court bound in a Recognizance of 500 l. to keep the Peace. And becauſe it appeared the Witneſs had accepted the Challenge, he was bound in the like Sum.

Vide 1 Sid. 186. Poph. 153, 158. 3 Inſt. 158. Mo. 563. Hob. 120, 215. 1 Keb. 694. 2 Roll.Ab. 78.

NOta, Upon an Appeal to the Houſe of Lords (Anno 2 Willielmi & Mariæ) the ſole Queſtion was, Whether upon the Statute of Diſtributions, 22 & 23 Car. 2. the Half-Blood ſhould have an equal Share with the Whole Blood, of the Perſonal Eſtate? And by the Advice of the two Chief Juſtices, and ſome other of the Judges, the Decree of the Lords was, That the Half-Blood ſhould have an equal Share. Vide Parl. Caſes 108. adjudg'd accordingly.

1 Vent. 307, 316, 323. 1 Show. 1. 2 Mod. 204. Ch. J. Jones, 93. 1 Mod. 209. Alleyn 36.

Samon

Samon *versus* Jones.

1 Mod. Rep. 175. 1 Vent. 137. Carter 137. Vide 2 Lev. 213. Walker and Hall. 2 Lev. 225. 2 Jones 105. Pollexf. 523. Coltman and Stenhorse.

IN an Ejectment brought in the Court of Exchequer, in the —— Year of the Reign of the late King James the Second.

The Case upon a Special Verdict was to this Effect; William Lewis, seised of a Reversion in Fee expectant upon an Estate for Life, did by Deed-Poll, in Consideration of natural Love and Affection which he had to his Wife, and Robert Lewis his Son and Heir apparent, begotten on the Body of his said Wife, and to Ellen his Daughter, give, grant and confirm unto the said Robert Lewis the Son, all those Lands, &c. the Reversion and Reversions, Remainder and Remainders thereof, To have and to hold to his Son and his Heirs to the Uses following, (viz) to the Use of himself for Life, (and then mentioned several other Uses not necessary to be here mentioned, as not material to the Point in Question) and then to the Use of the Wife for Life, and after to the Use of Robert and the Heirs of his Body; and for Want of such Issue to the Use of Ellen the Daughter, and the Heirs of her Body, &c. William Lewis and his Wife died; Robert the Son devised the Estate to the Lessor of the Plaintiff, and died without Issue; Ellen was in Possession, and claimed the Lands by this Deed; in which there was a Warranty, but no Execution of the said Deed (further than the Sealing and Delivery) was had, either by Enrolment, Attornment, or otherwise.

Antea 149, 260, 266. 1 Vent. 138. 1 Mod. 278.

So that the sole Question was, Whether this Deed should operate as a Covenant to stand seised, or be void? And it was adjudged to amount to a Covenant to stand seised in the Court of the Exchequer.

And upon a Writ of Error brought upon the Statute of Ed. 3. before the Commissioners of the Great Seal, and others empowered by that Act to sit upon Writs of Error, of Judgments given in the Court of Exchequer, the said Judgment was reversed by the Opinion of Holt, Chief Justice of the King's Bench, and Pollexfen, Chief Justice of the Common Pleas.

And upon a Writ of Error before the Lords in Parliament, brought upon the said last Judgment, it was argued for the Plaintiff in the Writ of Error, That this should enure as a Covenant to stand seised to the Use of the Wife, Son, &c.

It appears by Bedell's Case in 7 Co. and Fox's Case in 8 Co. that the Words proper to a Conveyance are not necessary; but, ut res magis valeat, a Conveyance may work as a Bargain and Sale, tho' the Words be not used so, as a Covenant to stand seised, tho' the Word Covenant is not in the Deed, and—and Poplewell's Case

were cited in 2 Roll. Abr. 786, 787. A Feme in Consideration of a Marriage intended to be had between her and J. S. did give, grant and confirm Lands to J. S. and his Heirs, with a Clause of Warranty in the Deed, which was also enrolled, but no Livery was made: It was resolved to operate as a Covenant to stand seised, (Vide Osborn and Churchman's Case in 2 Cro. 127. which seems contrary to that Case) but the chiefest Case relied upon was that of Crossing and Scudamore, Mod. Rep. 175. where a Man by Indenture bargained, sold, enfeoffed and confirmed certain Lands to his Daughter and her Heirs, and no Consideration of Natural Love or Money express'd: This was resolved 22 Car. 2. in B. R. to operate as a Covenant to stand seised; and upon a Writ of Error in the Exchequer Chamber, the Judgment was affirmed. 1 Vent. 137, 142.

It was said on the other Side for the Defendant, That the Case at Bar differed from the Cases cited; for here the Intention of the Deed is to transfer the Estate to the Son, and that the Uses should arise out of such Estate so transferred. In the Cases cited no Uses are limited upon the Estate purported or intended to be conveyed; but only an Intention appearing to convey an Estate to the Daughter in Crossing's Case, and to the intended Husband in Poplewell's Case; and seeing, for Want of due Execution in those Cases, the Estate could not pass at Law, it shall pass by raising of an Use. But the Case at Bar is much the same with the Case of Hore and Dix in Siderfin, the 1st Part 25. where one by Indenture between him and his Son of the one Part, and two Strangers of the other Part, in Consideration of Natural Love, did give, grant and enfeoff the two Strangers to the Use of himself for Life, Remainder to the Son in Tail, &c. and no other Execution was there than the Sealing and Delivery of the Deed; this was resolved not to raise an Use, for the Use was limited to rise out of the Seisin of the Strangers, who took no Estate. Vide Pitfield and Pierce's Case, 15 Car. 1. Marche's Rep. 50. One gave, granted and confirmed Lands to his Son after his Death; this Deed had been void, if Livery had been made: It was resolved not to enure as a Covenant to stand seised, because the Deed was void in the Frame of it.

The Lords affirmed the last Judgment given by the Lords Commissioners, &c. and held that no Use would arise,

With the concurrent Opinion of Baron Nevil, Justice Eyre, and Justice Ventris.

THE

THE ARGUMENT OF Mr. Juſtice Ventris IN THE EXCHEQUER-CHAMBER, UPON A Writ of ERROR out of the *King's Bench.*

Chriſtopher Dighton Gent. . Plaintiff,
verſus
Bernard Greenvil Eſq; Defendant

THE Plaintiff brought a Writ of Error upon a Judgment, in an Action of Treſpaſs and Ejectment in the King's Bench given for the Defendant, where the Plaintiff declared upon the Demiſe of Theophilus Earl of Huntingdon, of a Moiety of the Manor of Marre, and of divers Meſſuages, Lands and Tenements lying in Marre Bently in Baln in the County of York, and alſo of the Demiſe of Robert Earl of Scarſdale, of the other Moiety of the ſaid Manor, and of the Demiſe of Elizabeth Lewis, of the entire Manor of Marre, and that by Virtue of theſe ſeveral Demiſes he entered, and was poſſeſſed until ejected by the Defendant. 1 Show. 36, 37, &c. 4 Mod. 247.

Upon Not guilty pleaded, the Jury found the Defendant not guilty of the Treſpaſs and Ejectment upon the Demiſe of Elizabeth Lewis, and as to the Demiſes of the ſeveral Moieties by the ſaid Earls, they found a Special Verdict to this Effect, viz.

That Thomas Lewis the 9th of April, 20 Jac. 1. before the Mayor of Lincoln, acknowledged a Statute Merchant to William Knight for 1200 l. to be paid at the Feaſt of St. Philip and Jacob then next following, and that the ſaid Money was not paid at the Day, and that William Knight the 16th of November 1629. made his laſt Will, and one Iſaac Knight his Executor, and died; that Iſaac proved the ſaid Will, and in Trinity Term 20 Car. 1. ſued a Cap. ſi laicus out of the Common Pleas againſt the ſaid Thomas Lewis, directed to the Sheriff of Lincoln, returnable in Tres Trin. who returned quod laicus fuit, ſed non fuit inventus in balliva ſua, upon which iſſued a Writ bearing Teſte the 7th of July 23 Car. 1. Vic' Eborum, to extend the Goods and Chattels, and all the Lands and Tenements of the ſaid Thomas Lewis, tempore Recognitionis debiti præd' returnable Menſe Michael. upon which the ſaid Sheriff returns an Inquiſition taken the 11th of October then next following; whereby Thomas Lewis was found ſeized of divers Lands and Tenements, Parcel of the Lands in the Declaration mentioned to be demiſed by the ſaid Earls, which he the ſame Day cauſed to be delivered to the ſaid Iſaac, to hold by Extent as his Freehold, until he ſhould be ſatisfied of his ſaid Debt, with his Damages and Coſts.

They further find, that the ſaid Thomas Lewis, and one John Levet, and Thomas Levet the 20th of November, 13 Car. 1. acknowledged a Recognizance in Nature of a Statute-Staple, before the Lord Chief Juſtice Bramſton, to Richard Gerard for 1000 l. payable at Chriſtmas then next following, which Money was not paid at the Day, and that upon a Certificate of the ſaid Recognizance in the Chancery by John Gerard, ſurviving Executor of Richard Gerard the 22d of June, 22 Car. 1. there iſſued a Cap. ſi laicus, and an Extent againſt the ſaid Thomas Lewis, to the Sheriff of the County of York, returnable in Craſt. animar' prox' at which Day the Sheriff returned an Inquiſition by him taken; whereby it appeared, that the ſaid William Lewis tempore Recogn' debiti p'd. was ſeized in Fee of the Manor of Marre, and of divers Meſſuages, Lands and Tenements, being the ſame Lands in the Declaration mentioned to be demiſed by the ſaid Earls; and the 29th of Novem. 24 Car. 1. a Liberate was ſued out returnable in quinden. Hillar. to the ſaid Sheriff who returned, that the 29th of November 24 Car. 1. he had cauſed to be delivered the ſaid Manor, Meſſuages, Lands and Tenements to the ſaid John Gerard, to hold as his Freehold, until he ſhould be ſatisfied his ſaid Debt, with his Damages and Coſts.

They further find, that Thomas Lewis and Thomas Levet the 27th of May, 15 Car. 1. acknowledged a Recognizance in Nature of a Statute-Staple, before the Lord Chief Juſtice Bramſton, to Sir Gervaſe Elways, and William Burroughs for 5000 l. payable at the

the Feaſt of St. John the Baptiſt next following, which Money was not paid at the Day, and that upon a Certificate of the ſaid Recognizance in Chancery, by the ſaid Sir Gervaſe Elways and William Burroughs, the 10th of Decemb. 15 Car. 1. there iſſued out a Cap. ſi laicus, and an Extent againſt the ſaid Thomas Lewis, directed to the Sheriff of the County of York, returnable in Quinden' Hill. prox' at which Day the Sheriff returned an Inquiſition by him taken; whereby it appeared, that the ſaid William Lewis tempore Recogn' debiti præd' was ſeized in Fee of a Capital Meſſuage in Marre, and of divers Meſſuages, Lands and Tenements, being the ſame Lands mentioned in the Declaration, to be demiſed by the ſaid Earls; and that the 10th of Febr. 15 Car. 1. a Liberate was ſued out returnable in Quinden' Paſch. to the ſaid Sheriff, who returned that he had cauſed to be delivered the ſaid Lands and Tenements to the ſaid Sir Gervaſe Elways, and William Burroughs, to hold as their Freehold, until they ſhould be ſatisfied the ſaid Debt with their Damages and Coſts.

They find that Thomas Lewis was ſeized of all the Lands mentioned in the ſaid ſeveral Inquiſitions, at the reſpective Times of his Acknowledgment of the ſaid Statute and Recognizance.

They find that the 15th of July 1651. Iſaac Knight, and John Gerard, by their reſpective Deeds granted their ſaid ſeveral extended Intereſts to one Edward Lewis; by Virtue whereof the ſaid Edward Lewis became poſſeſſed of the Manor and Tenements, & præd. Edvardo ſic poſſeſſionat. exiſtente prædictoque Thoma Lewis de Manerio & omnib. præmiſis ſeiſit. exiſten. & in actual. & reali poſſeſſione inde; the ſaid Thomas Lewis by his Indenture of Leaſe and Releaſe, dated the 25th and 26th of May 1657. for 4000 l. conveyed the ſaid Manor and Premiſſes to John Lewis and his Heirs, in which there is a Covenant to levy a Fine, before the End of Trinity-Term then next enſuing, and that accordingly in Trinity-Term 1657. the ſaid Thomas Lewis did levy a Fine come ceo, with Proclamations, of the ſaid Manor and Premiſſes to the ſaid John Lewis, to the Uſes in the ſaid Indenture mentioned, by Virtue whereof the ſaid John Lewis was ſeized in Fee of the ſaid Manor and Premiſſes: And that John Lewis being thereof ſo ſeized the 21ſt Day of July 1670. made his laſt Will and Teſtament in Writing, and thereby deviſed the ſaid Manor and Tenements to Edward Lewis, and the Heirs Male of his Body, and for want of ſuch Iſſue to his Daughters, Elizabeth and Mary, and the Heirs of their Bodies lawfully iſſuing, and for want of ſuch Iſſue to his own right Heirs; and that John Lewis the 1ſt of Auguſt 1671. died ſo ſeized, and that the ſaid Manor and Premiſſes, at the Time of making of the ſaid Will, were in the Poſſeſſion of the ſaid Edward Lewis; and that by Vir-

tue thereof, the ſaid Edward Lewis became ſeized of the ſaid Manor and Premiſſes, prout lex poſtulat, and that in Michaelmas Term 23 Car. 2. the ſaid Edward Lewis being ſo ſeized, levied a Fine come ceo, with Proclamations, of the ſaid Manor and Premiſſes to Francis and his Heirs, to the Uſe of Edward Lewis and his Heirs.

They find that John Lewis had Iſſue two Daughters, Elizabeth and Mary, who were the Heirs both of John and Edward Lewis; and that Edward Lewis 30 Sep. 26 Car. 2. died without Iſſue, and that the ſaid Elizabeth and Mary, as Heirs to both John and Edward Lewis thereupon entered into the ſaid Manor and Premiſſes and were ſeized prout lex poſtulat; and that Elizabeth afterwards married Theophilus Earl of Huntingdon, and that Mary married Robert Earl of Scarſdale, by Virtue whereof the ſaid Earls, in Right of their ſaid Wives, entred into the ſaid Manors and Premiſſes, and were ſeized prout lex poſtulat.

They find, that the Executors of Edward Lewis aſſigned to Elizabeth Lewis Widow, all their Intereſt in the ſaid Statute and Extent, by Virtue whereof the ſaid Elizabeth entered and was poſſeſſed, but in Truſt for the ſaid two Earls, and demiſed the ſame unto the ſaid Earls at Will.

They find, that the 6th of November 1672. Sir Gervaſe Elways died, and that William Burroughs ſurvived; and that he afterwards on the 3d of May 30 Car. 2. died, and that on the 30th of July 1680. Adminiſtration as to the ſaid Recognizance and Sum of 5000l. and Proceſs thereupon, was committed to Anne Greenvil (Wife of the ſaid Bernard), and that the ſaid Earls being ſo ſeized on the 31ſt of July 32 Car. 2. the ſaid Bernard Greenvil and Anne his Wife adminiſtred of all the Goods and Chattels of Richard Gerard, unadminiſtred by John Gerard, and Francis Gerard; which Adminiſtrators of the Goods and Chattels of Richard Gerard, cum Teſtamento annexo, did confeſs themſelves to be fully ſatisfied the ſaid 1000l. in the ſaid Recognizance acknowledged by Thomas Lewis unto the ſaid Richard Gerard, and of their Damages and Coſts thereby ſuſtained, and prayed that the ſaid Recognizance might be vacated, which was accordingly done; and afterwards on the 28th of September 24 Car. 2. the ſaid Bernard in Right of the ſaid Anne, entered into the ſaid Manor and Premiſſes; and afterwards, (viz.) on the 1ſt of June 34 Car. 3. the ſaid Earls entered upon the ſaid Bernard, and made the Leaſes in the Declaration to the Plaintiff, by Virtue whereof the Plaintiff was poſſeſſed, until ejected by the Defendant; and concludes generally, that if Bernard be guilty, they aſſeſs Damages to 12d. and Coſts to 40s. and if not guilty, they find ſo.

There have been divers Points made in the Caſe by the Counſel that have argued; ſome have made more than others: But the Method I ſhall take will be, to obſerve the ſeveral Tranſactions that have been in the Caſe, as they are found in this Special Verdict; and to conſider of what Effect and Conſequence they will be in Law for the Barring of the Extent upon in the Statute acknowledged to Elways and Borroughs, either in reſpect of any preſent Right that he had at the Time of the Fines levied, or any future Right that ſhould firſt come to him upon the Satisfaction acknowledged upon Gerard's Statute, ſo as to give him the Benefit of the ſecond Saving in the Statute of the 4th of Henry the 7th, of Fines.

It is found, that there were the Statutes ſucceſſively acknowledged, and that the laſt Statute was extended firſt, which I think makes neither one way nor other; and that on the 5th of July in the Year 1655. the two Extents which were upon Knight's Statute and Gerard's Statute (which were the 1ſt and 2d in Time acknowledged) were aſſigned to Edward Lewis; and two Years after in the Year 1657. Thomas Lewis, who is found to be in the Actual and real Poſſeſſion, of the Lands in Queſtion; and Edward Lewis in Poſſeſſion prout lex poſtulat, bargained and ſold the Premiſſes to Sir John Lewis in Fee, and levied a Fine in Trinity-Term 1657. to him with Proclamations, and five Years paſſed without any Claim by Edward Lewis.

Before I go any further, I will ſee what became of the Extents upon the ſeveral Statutes to Knight and Gerard, after this Aſſignment, Fine and Non-claim.

I obſerve, that the Counſel for the Defendant hath argued, that the Extents upon Gerard and Elways's Statutes were Reverſions or reverſional Intereſts; and thereupon have concluded, that Knight's Extent was drowned in Gerard's Extent, after they came both to be aſſigned to Edward Lewis.

Which Point they made uſe of firſt, to remove Knight's Statute out of the Way; for if that be not made an End of ſome way or other, there having been no Satisfaction acknowledged upon that, it ſhould ſtand in way of the Defendant's Title: And this is alſo of Uſe to them in another Matter; for if the two Extents upon the Statutes of a later Date be reverſional Intereſts, the Conſequence will be, that when Sir John Lewis deviſed the Inheritance to Edward Lewis, Gerard's Extent will not thereupon be drowned in the Fee, becauſe of the reverſional Intereſt, which was then in Burroughs and Elways, that comes between; as is reſolved in the Caſe of Chamberlain and Ewer in 2 Bulſtr. 12. For if Gerard's Statute were drowned by that Deviſe, it would make an End of it too ſoon for the Defendant's Purpoſe; for that the Eſtate and Intereſt by Extent, they would ſuppoſe to continue, at leaſt as to

Burroughs

Burroughs and Elways, till ſuch Time as Satisfaction ſhould be acknowledged, which was not done till twelve Years after.

For my Part, I do not think it neceſſary to the Reſolution of the main Point of this Caſe, to inſiſt upon the Drowning; or to determine, whether the Extents upon Gerard's Statute and Burroughs's Statute were Reverſions, or in the Nature of reverſional Intereſts; yet becauſe it has not been a Point much ſpoken to on both Sides, I will ſay ſomething to it by and by, and I do incline to think that they are in the Nature of Reverſions, and that Knight's Extent after the Aſſignment to Edward Lewis became drowned in Gerard's Extent: But whether there were any Drowning or no, there is enough in the Caſe beſides to take Knight's Extent out of the Way, or to determine it: For I am not ſatisfied that Knight's Statute, as the Verdict is found, was ever extended at all; for it is found to have been acknowledged before the Mayor of Lincoln, and that the Money was not paid at the Day, and that Knight the Conuſee died; and that Iſaac Knight his Executor, took a Capias thereupon out of the Common Pleas.

2 R. Ab. 467. Now it being a Statute-Merchant, it ought firſt to have been certified into the Chancery, and from thence a Capias ſhould be iſſued out, returnable in the Court of Common Pleas. And ſo the Statute of Acton Burnel. (30 Ed. 3.) enacts, and ſo is Fitz. N. B. 130. whereas here the Capias goes out of the Common Pleas, and for ought appears, was the firſt Step towards the Execution of this Statute; for it doth not appear that it was ever certified, or that the Court had any Record before them to award this Capias upon, and ſo the Execution is quite in another Manner than the Statute provides, and is a new Caſe introduced by the Statute, and therefore it ſeems to be void; and if ſo, then the Statute of Knight could not be aſſigned ſo as to paſs the Intereſt of it to Edward Lewis, and the Fines will have no Effect upon it; and indeed it puts it clean out of the Caſe before us, as if it had never been acknowledged, and the Intereſt of that Statute muſt be ſtill in the Executor of Knight.

But then admitting it to have been extended, and conſequently well aſſigned, together with Gerard's Statute, to Edward Lewis; if ſo, I take it to be drowned in Gerard's Extent. As to that the Caſe is no more than this; that after the Statute is extended, there comes another Extent upon a puiſne Statute (for 'tis found that Gerard's Statute was extended after Knight's Statute) whether the Eſtate by Extent upon the puiſne Statute be in the Nature of a reverſional Intereſt? for if ſo, then when the Intereſt of the firſt Extent and the later comes into one Perſon, the firſt muſt be drowned; for an Eſtate for Years, or other Chattel-Intereſt, will

merge in a Chattel in Reverſion that is immediately expectant. And that is Hugh's and Robotham's Caſe in the 1 Cro. 302. pl. 32. If a Leaſe for Years be made, and then the Reverſion is granted for Years with Attornment, the Leſſee may ſurrender to the Grantee and the Term will drown in the Reverſion for Years.

To which it is objected, that an Extent is rather in the Nature of a Charge upon the Land, than an Intereſt or Eſtate in the Land it ſelf. In the Caſe of Haydon and Vavaſor *verſus* Smith in Mo. 662. an Extent is thus deſcribed, that it is onus reale inhærens gremio liberi tenementi & tout temps Executory, as the Words of that Book are: If the Tenant by an Extent purchaſe the Inheritance of Part of the Lands extended, the whole falls. So a Releaſe of the Debt will immediately determine the Extent; and it has been compared to one that enters into Lands by Virtue of a Power to hold until Arrear of Rent is ſatisfied.

It is true, an Extent is an Execution given by the Statute-Law, for the Satisfaction of a Debt, and therefore the Releaſe of the Debt muſt determine the Eſtate by Extent, becauſe the Foundation of it is removed; and ſo if the Inheritance of Part of the Land extended comes to the Conuſee, it deſtroys the whole Extent, whereas if a Leſſee for Years purchaſeth the Reverſion of Part, the Leaſe holds for the Reſt: But in Caſe of an Extent, if it ſhould be ſo, the Conuſee would hold the Reſidue of the Land longer, becauſe the Profits that ſhould go in Satisfaction of the Debt muſt be leſs, and this would be to the Wrong of him in the Reverſion. But in other Reſpects an Extent makes an Eſtate in the Land, and hath all the Properties and Incidents of and to an Eſtate, and doth in no ſort reſemble ſuch an Intereſt as is only a Charge upon the Land.

2 Rol. Abr. 470, 1.

An Intereſt by Extent is a new Species of an Eſtate introduced by Statute-Law; our Books ſay, that 'tis an Eſtate created in Imitation of a Freehold, and quaſi a Freehold; but no Book can be produced that ſays, that 'tis quaſi an Eſtate. The Statute of 27 Ed. 3 cap. 9. enacts, that he to whom the Debt is due, ſhall have an Eſtate of Freehold in the Lands; and the Statute of 13 Ed. 1. de Mercatoribus ſays, that he ſhall have Seiſin of all the Lands and Tenements. When a Statute is extended, it turns the Eſtate of the Conuſor into a Reverſion; and ſo are the expreſs Words in Co. 1. Inſt. 250. b. and ſo the Objection, that he does not hold by Fealty, is anſwered; and there are no Tenures that are to no Purpoſe; but he that enters by Virtue of a Power to hold till ſatisfied an Arrear of Rent, leaves the whole Eſtate in the Owner of the Land, and not a Reverſion only.

Tenant by Statute Merchant, Staple, Elegit, are ſaid to hold Land, ut liberu' tenement, until their Debts are paid; and yet in Truſt they have no Freehold but a Chattel, which ſhall go to the Executors; but they may have an Aſſize as Tenant of the Freehold. Co. Lit. 43. b.

If

If a Leaſe for Years be made reſerving Rent, and then the Leſſor acknowledge a Statute, which is extended, the Conuſee after the Extent ſhall have an Action of Debt for the Rent, and diſtrain and avow for the Rent, (as in Bro. tit. Stat. Merch. 44. and Noy. fo. 74.) but he that enters by a Power to hold for an Arrear of Rent ſhall not.

He in Reverſion may releaſe to the Tenant by Extent, which will drown the Intereſt and merge his Eſtate, according as it is limited in the Releaſe, Co. 1 Inſt 270. b. 273. Tenant by Statute may forfeit by making a Feoffment, Mo. 603. he is to attorn to the Grant of the Reverſion, 1 Roll 293. and is liable to a Quid juris clamat, 7 H. 4. 19. b. Tenant by Extent may ſurrender to him in Reverſion, 4 Co. 82. Corbet's Caſe; therefore theſe Caſes are to ſhew, that an extended Intereſt makes an Eſtate in the Lands, as much as any Demiſe or Leaſe.

And I take it, the Conſequence of that is, that when an Eſtate by Extent is evicted by an Extent upon a prior Statute, as Elways and Burroughs's Extent was by the Extent of Knight's Statute; or where the prior Statute is firſt extended, and then a Statute of later Date is extended, as Gerard's Statute is found to be extended after the Extent upon Knight's Statute: In both theſe Caſes, the Extent upon the puiſne Statute will be in the Nature of a reverſional Intereſt.

A Reverſion is every where thus deſcribed, (viz.) An Eſtate to take Effect in Poſſeſſion after another Eſtate determined. 'Tis not in Nature of a future Intereſt, as a Term for Years, limited to commence after the End of a former Term; for ſuch an one ſhall not have the Rent upon a former Leaſe, as I have ſhewn before, but he that extends upon a Leſſee for Years ſhall; for the Liberate gives a preſent Intereſt to hold ut liberum tenementum, but indeed cannot take Effect in Poſſeſſion by Reaſon of a prior Extent, or by prior Title.

And this is the very Caſe of a Reverſion which is an actual preſent Intereſt, though it be to take Effect in Poſſeſſion after another Eſtate.

Now I conceive it will plainly follow from this, that Knight's Statute is drowned in Gerard's Statute upon the Aſſignment of both to Edward Lewis. 'Tis true in Fullwood's Caſe in the 4 Co. whereas in the Caſe before us, two Eſtates by Extent were aſſigned to one Perſon, there is no Notice taken of the Drowning, which makes nothing againſt it; for there was no Occaſion there to ſtir or inſiſt upon that Point.

But the next Thing to be conſidered is, (ſuppoſing Knight's Statute to have been well extended, and not to be drowned in Gerrard's Statute, after the Aſſignment of both to Edward Lewis) how the Fine levied by Thomas Lewis and Nonclaim will work to the Barring of theſe extended Intereſts, that were thus in Edward Lewis at the Time of the Fine levied.

That a Right to an Eſtate by Extent will be barred by a Fine and Nonclaim, as well as the Intereſt or Right to a Term of Years, or any other ſuch like Eſtate, cannot be queſtioned, and I think has been agreed of all Hands. Saffin's Caſe in 5 Co. and the Authority of a great many other Books makes that to be without Controverſy.

But the Counſel for the Defendant have inſiſted upon two Things in this Caſe, by which they have endeavoured to ſhew, that neither of theſe Extents ſhould be barred by this Fine; which I ſhall mention and give ſome Anſwer to.

Firſt, It has been ſaid, that it is reaſonable to intend, That the Aſſignment of Knight's and Gerrard's Extent to Edward Lewis was in Truſt, and to wait upon the Inheritance; and if ſo, the Fine by Thomas Lewis ſhall only work upon the Inheritance. For it would be a great Inconvenience when Eſtates for Years, or by Extent, are taken in and aſſigned to protect Purchaſers from later Incumbrances, if the Fine of him that has the Inheritance, and alſo the Truſts of thoſe Eſtates aſſigned, ſhould bar his own Truſtee. And tho' in Iſeham and Morris's Caſe, in 3 Cro. 109. there ſeems to be an Opinion, That a Truſtee in ſuch a Caſe is barred: Where the Caſe is,

That a Man had purchaſed a Leaſe for Years in Truſt for himſelf, and afterwards he bought the Inheritance, and afterwards ſold it, and levied a Fine to the Purchaſer; it is ſaid there, that five Years Nonclaim ſhall bar the Aſſignee of the Term: For (ſaith the Book) the Truſt paſſed incluſively in the Fine. So that it muſt be underſtood in that Caſe, that the Conuſee, who was as Purchaſer, did not know of this Term, nor any Agreement to have it aſſigned in Truſt for him; and then if the Fine had not barred he had been cheated. Vide 1 Sid. 460. 1 Vent. 56, 80, 82. 1 Salk. 245. 3 Lev. 387. Hard. 400, 401.

But I conceive the Law would have been otherwiſe, if by Agreement this Term had been to be aſſigned in Truſt for the Conuſee; and this I think goes upon a very good Reaſon: For he that has the Inheritance in Truſt, for whom ſuch a Term or Eſtate by Extent is aſſigned, muſt be taken as Tenant at Will to his Truſtee, and then that his Poſſeſſion is the Poſſeſſion of the Truſtee; the Conſequence of which is, That the Fine levied by him that has the Inheritance will work only upon that, when it appears that it was ſo intended, and that the Term ſhould be kept on Foot; whereas in Iſeham and Morris's Caſe, for ought appears,

pears, there was no ſuch Intention, nor doth it appear that the Conuſee knew of the Term. So that I do agree, That if it were found that theſe Aſſignments to Edward Lewis of the Statutes were in Truſt, and to wait upon the Inheritance, which was after ſold and conveyed by the Fine of Thomas Lewis to Sir John Lewis, that then the Fine and Nonclaim will not work to the Barring of either of thoſe Statutes.

But the Special Verdict finds nothing of any Truſt, and we cannot intend it without finding; neither is there any Thing found to induce or ground any Suppoſition of a Truſt: For it is not found that either of the Aſſignments were made to Edward Lewis for Money, or other Conſideration moving, from Thomas Lewis or Sir John Lewis, nor to have been made by any Direction or a Requeſt of theirs, and there was two Years Diſtance between the Aſſignments and the Fine levied and Sale of the Premiſſes to Sir John Lewis, ſo that they cannot be taken to have been made with any Relation to his Purchaſe; and then it will be plain that Knight's Extent (ſuppoſing it not to be drowned in Gerrard's Extent) muſt be barred after five Years, without claim upon the Fine in 1657. of Thomas Lewis. For as this Verdict is found, it muſt be taken that the Eſtate by Extent was deveſted and put to a Right; for the Liberate puts the Conuſee in actual Poſſeſſion. If an Extent be made upon a Leſſee for Years, the Leſſee after a Liberate to the Conuſee may plead an Eviction, and not before the Liberate, Hob. 82. The Conuſee after the Liberate is capable of Releaſe to enlarge his Eſtate, 1 Co. Inſt. 270. b.

1 Vent. 41.
3 Lev. 312.
4 Mod. 48.
2 Salk. 563.

Now the Verdict finds, That at the Time of the Fine levied in 1657. Thomas Lewis, the Conuſor of that Fine, was in actual and real Poſſeſſion, and that Edward Lewis was in Poſſeſſion prout lex poſtulat; this actual and real Poſſeſſion in Thomas Lewis could not be, unleſs he had regained the Poſſeſſion after the Liberate upon the Extent of Knight's Statute.

It hath been objected, That he ſhould be taken to have entered by the Conſent of Edward Lewis.

There is no ſuch Thing found, and ſo cannot be intended, and then that Eſtate by Extent muſt be deveſted; and ſo the Caſe is ſtronger than that of a Leſſee for Years before Entry, who gains no actual Poſſeſſion till Entry, and therefore his Intereſt cannot be properly ſaid to be deveſted; and yet a Fine will bar him, if he enters not within five Years. A fortiori a Tenant by Statute ſhall be barred, who has had the actual Poſſeſſion by a Liberate, and then afterwards the Conuſor gains the actual and real Poſſeſſion, as the Verdict expreſly finds, and levies a Fine upon the Finding in this Verdict; which I take to be as ſtrong a Caſe as can be put as to Edward Lewis, being barred by the Fine as to Knight's Statute.

Why then after that he became barred he ſhall have five Years more to claim, in reſpect of Gerrard's Statute, this is ſtill upon a Suppoſal that Knight's Statute was well extended, and that it did not drown in Gerrard's Statute: For if the Extent upon Knight's Statute were void upon the Reaſons mentioned before, or if drowned, then muſt Edward Lewis claim within the firſt five Years after the Fine, to ſave Gerrard's Extent. For I ſhall grant that he may have five Years upon Gerrard's Statute, after the five Years Nonclaim upon Knight's Extent, and that by the ſecond Saving of the Statute of 4 H. 7. for 'tis a new Right then firſt come to him upon Knight's Extent, being barred.

Therefore I cannot agree with Mr. Finch and ſome that have argued for the Plaintiffs in the Writ, That if there be ſeveral Extents upon Statutes acknowledged at different Times, that they are all preſent Rights, becauſe the Liberate delivers the Land to the Conuſee to hold immediately ut liberum tenementum; and therefore if a Fine be levied, he that hath the Extent upon the puiſne Statute muſt claim immediately, as well as he that hath the firſt Extent; whereas the Extent upon a later Statute, until there comes an Extent upon an elder Statute, is either turned to a Reverſion, as I argued before, or in the Nature of a future Intereſt: And therefore till the firſt Extent be barred, or ſome Way determined, he that hath the Extent upon the puiſne Statute, can have no preſent Right, and conſequently is not bound to claim, but his Right is preſerved by Virtue of the ſecond Saving of the Statute of 4 H. 7. But it appears by the Verdict, that above ten Years paſſed after the Fine of Thomas Lewis, without any Claim by Edward Lewis; ſo that I conceive he was barred as to both Extents.

So that which I have taken Notice of to have already paſſed in the Caſe, is enough to bar the two Extents of Knight and Gerrard, and to let in the Right of the Extent of Elways and Burroughs; ſo that I think they might have entered or made their Claim without any Thing more. But it is found further in the Caſe, that in the Year 1670. Sir John Lewis deviſed the Premiſſes by his Will in Writing to Edward Lewis and the Heirs of his Body, and for Want of ſuch Iſſue to his two Daughters, who are married to the Earls the Leſſors of the Plaintiff, and died in Auguſt 1671. and 'tis found that at the Time of the Will, and alſo of the Death of the ſaid Sir John Lewis, the Lands were in the Poſſeſſion of Edward Lewis; and in Michaelmas-Term 1671. Edward Lewis levied a Fine of the Lands in Queſtion to Francis Lewis, to the Uſe of Edward (the Conuſor) and his Heirs.

Now if we ſhould admit that the Extents of Knight's and Gerrard's Statute were not barred by the Fine of Thomas Lewis, let us ſee what will become of them upon theſe Things done ſince. And here I will agree with thoſe that have argued for the Defendant, that the Deviſe of the Inheritance to Edward will not drown the Extent upon Gerrard's Statute. For, as I have argued before, I take the Extent of Elways and Burrough's Statute, after the Eviction by the elder Statute, to be turned to a reverſional Intereſt, and then the Interpoſing of the Reverſion will hinder the Drowning of Gerrard's Extent in the Fee deviſed to Edward Lewis as aforeſaid.

Now therefore let us ſee what is found to have been done further in the Caſe; and I conceive, if we ſhould grant, as the Counſel for the Defendant have urged, That the Fine by Thomas Lewis had no Effect as to the Barring of Gerrard's Extent, nor that the Deviſe of the Inheritance of the Premiſſes to Edward Lewis will not drown the Extent; as I agree it did not, by Reaſon of the Extent interpoſing that was in Elways and Burrough's Caſe, being (as I have argued) a reverſional Intereſt; I ſay, admitting all this, yet when Edward Lewis, who had the extended Intereſts upon Knight's and Gerrard's Statute in him, and the Eſtate of Inheritance, alſo in Michaelmas-Term 1671. levied the Fine to Francis Lewis, to the Uſe of himſelf and his Heirs, that Fine muſt deſtroy and determine the extended Intereſts that were in him. For where a Fine is levied by him that hath the Fee and Freehold in him, whatever Right, Eſtate or Intereſt there is in him beſides, paſſeth inclusively in the Fine; not by Way of Transfering the very Intereſt it ſelf, but (as it were) conſolidating with the Fee: So as to determine and extinguiſh ſuch Intereſt, none can pretend that after this Fine of Edward Lewis the extended Intereſt did continue in him.

They could not paſs to Francis Lewis, as aſſigned or transferred by the Fine; why then they muſt be deſtroyed: And I think it cannot be denied, but that Elways and Burroughs might have entred immediately, the two former Extents being taken out of the Way. And 'tis found that at the Time of the Fine Edward Lewis was in Poſſeſſion, ſo that five Years paſſing without Claim after the Fine (for 'tis found that Satisfaction was not acknowledged till nine Years after,) 'tis plain that the Extent upon Burroughs and Elways's Statute was barred as to the preſent Right. For I think it's clear, that when a former Statute is determined, whether it be by Releaſe of the Debt, by Purchaſe of Part of the Lands, by being barred by Nonclaim upon the Fine, Satisfaction acknowledged, or any other Means, this lets in the puiſne Statute.

And now we are come to the great Queſtion in the Caſe.

Admitting the Extent upon Elways's Statute was barred in reſpect of the preſent Right; Whether a new Right came upon the Satisfaction acknowledged upon Gerrard's Statute, ſo that there ſhould be five Years more given by the ſecond Saving of the Statute of 4 H. 7. to claim upon that new Right?

It has been much urged by thoſe that argued for the Defendant, That wherever there is a Reverſion or an Eſtate to commence after the End of another Eſtate, that if a Fine be levied, tho' the Caſe be ſo that he in Reverſion may enter or bring his Action, ſo that five Years Nonclaim will bar him as to the preſent Right or Remedy, yet he ſhall have five Years more to claim when the Time is incurred, or the Limitation come, that the firſt or particular Eſtate ſhould end.

Now, though the Extents upon the two firſt Statutes were ſo avoided, that there might have been an Entry upon Elways's Extent, yet the proper and natural Determination of Gerrard's Extent, was not till Satisfaction acknowledged upon Record, or by Perception of Profits appearing upon Record, and then there ſhall be five Years given to claim, and that by Virtue of the ſecond Saving of the Statute of 4 H. 7. which is to this Purpoſe, (Viz.) Saving to all Perſons ſuch Right as firſt ſhall grow, remain, deſcend or come to them after the Fine levied, by Reaſon of any Matter before the Fine levied, ſo that they take their Action or purſue their Right within five Years next after ſuch Right ſhall come.

Now I do not ſee that the Condition of this Saving was performed by thoſe that had the Right of Elways and Burrough's Extent; the Right indeed came after the Fine levied, and upon a Matter before; for it came after that the Extents upon Knight's and Gerrard's Statutes were barred, or otherwiſe avoided. Whether upon the Nonclaim by the firſt Fine, or their being deſtroyed by the ſecond Fine, which was levied by Edward Lewis; but there was no Claim within five Years after either of thoſe Fines, ſo the Right clearly was not purſued within five Years after the Right firſt came.

And this has been held neceſſary to be done where there has been only a Right of Action, as in Sawle and Clerk's Caſe in Jones 211. and Cro. Car. where the Caſe as to this Point is to this Effect:

A Remainder upon an Eſtate-tail was deveſted by the Fine of Tenant in Tail, who had made an Eſtate for Life, warranted by the Statute, and died without Iſſue: He in the Remainder was barred from bringing a Formedon in the Life of the Tenant for Life within five Years after the Fine, and had not a new five Years after the Death of Tenant for Life, tho' he could not enter in the Life of the Tenant for Life.

And

And the Reaſon given in Crook's Reports is, becauſe he had no other Right after the Death of the Tenant for Life than he had before; and this plainly diſtinguiſheth that and the Caſe at the Bar from the Caſes that have been cited of June and Syme's Caſe in 1 Cro. 219. and Laund and Tucker 254. for there the Fine was levied by the particular Tenant, which was a Forfeiture which he in Reverſion might chuſe whether he would take Advantage of, and as the Caſe might be, it would be to his Prejudice to take Advantage of it, where the particular Tenant has charged the Land; and therefore if he would, he ſhould have five Years after the Eſtate determined, to claim as of his Reverſion, which is another diſtinct Right from that of the Forfeiture.

And this was the ſtanding Difference that made the Diſtinction, where there ſhould be a new five Years given to him in Reverſion after the particular Eſtate determined, and where not; as we ſee in Margaret Podger's Caſe in 9 Co. 106. If the Tenant for Years were ouſted, and a Fine levied by the Diſſeiſor, he in the Reverſion was bound by the firſt five Years Nonclaim; becauſe, tho' he could not enter, as if the Eſtate for Years had been determined, or as in the Caſes before of the Forfeiture; yet he might have immediately brought an Aſſize, with which Sawl and Clarke's Caſe exactly agrees, and goes upon the ſame Reaſon. As for Freeman's Caſe, the Reſolution goes wholly upon the Circumſtances of Fraud appearing in the Caſe; the Principal of which was, That the Leſſee continued in Poſſeſſion, and paid the Rent.

I confeſs they have gone a little farther of late; and now it is taken, That he in Reverſion ſhall have five Years after the Term is ended by Effluxion of Time, tho' there were no Forfeiture incurred at the Levying of the Fine: Nor no ſuch plain Circumſtances of Fraud, as appears in Fermer's Caſe, and the Caſe put before and cited out of Margaret Podger's Caſe, is not held to be Law.

Raym. 219. 1 Vent. 241. 1 Sid. 349, 350. 2 Lev. 52, 55. The contrary whereof is taken to have been reſolved in Folley and Tancred's Caſe in 24 Car. 2. and I do not intend to ſhake the Authority of that Caſe, but admit it to be good in the Law; yet I crave Leave to obſerve, That it is a Reſolution carried beyond the Words of the Statute; for the Right is not purſued within five Years next after it firſt came. For it is agreed in Fermer's Caſe fo. 79. that there the Conſtruction was againſt the Letter of the Statute; and I muſt ſay, it is a Conſtruction by Equity, which is a little extraordinary, to weaken the Force of a Statute which was made for the Quieting of Mens Poſſeſſions, and to add Force to Fines, which were of ſo great regard in Law; and eſpecially to make a Conſtruction by Equity, contrary to the Reaſon of the Common Law, which took no Care of a future Right at all; for he in the Reverſion, in caſe of a Fine levied at the Common Law, depended wholly upon the Entry or Claim of the particular Te-

nant, and in Default of that loſt his Eſtate, as in 1 Inſt. 262. b. and in Plowden's Commentaries in Stowell's Caſe. I ſay again, I do not deſign by this to oppoſe any Caſe that hath been ſettled: But I confeſs I ſhould not have gone ſo far, if I had not been led by Authority; and am not willing to go a Step farther.

And now I ſhall endeavour to ſhew, That this Caſe goes a great deal farther, and would be a greater Strain upon the Statute than yet has been. And,

Firſt, I obſerve, That upon all or moſt of the Caſes of a Fine, where there has been an Eſtate for Life or Years in Being at the Time of the Fine, that the Poſſeſſion was held ſtill in the particular Tenant, ſo that he in Reverſion had no Reaſon to ſuſpect any Fine or other Thing done upon the Eſtate, there being no Alteration of the Poſſeſſion. And this agrees ſomewhat with the Reaſon of the Common Law, in Caſe of a Fine executory; he that had Right was not bound to claim till there were an Execution of the Fine, and Tranſmutation of the Poſſeſſion thereupon, as in Plowden's Commentaries 257. b. in Stowell's Caſe: But here it is found, that the Conuſor, and not the Conuſees, or the Tenants by Extent, or either of them, were in Poſſeſſion; ſo that the Land being in the Poſſeſſion of a Wrong-doer, they which had Right ought to have watched, and might well ſuſpect that Fines ſhould be levied to the Prejudice of their reſpective Rights. It is ſaid in Fermer's Caſe, If a meer Wrong-doer having got the Poſſeſſion, levieth a Fine on purpoſe to bind the Right, this ſhall bind notwithſtanding his unjuſt Deſign.

But the Differences that I chiefly rely upon, to diſtinguiſh the Caſe before us, from the Caſes of Reverſions upon Eſtates for Life and Years, or the like particular Eſtates, are theſe:

1. That in thoſe Eſtates there is either, by an expreſs Limitation of the Parties, or an Operation of Law, a certain and particular Term or End of the Eſtate, which until it happens, it has not its proper Determination, which an Eſtate by Extent has not. I know it has been much inſiſted on, that the natural and proper Determination of an Extent is Satisfaction by a Perception of Profits, according to the extended Value; whereas I cannot ſee but a Releaſe of the Debt, or Satisfaction by a ſudden Accident, is as properly a Determination of the Extent, as if it were run out by Perception of Profits, according to the extended Value: For when the firſt Extent is out of the Way, the ſecond is immediately to take Place; or why this acknowledging Satisfaction on Record ſhould be the natural and proper Determination of the Extent more than a Releaſe of the Debt by the Conuſee, or deſtroying of it by a Fine, which is an higher Record than the Statute, or the Entry of Satisfaction acknowledged thereupon.

2. To

2. To let him that has the Reverſion upon an Eſtate by Extent have five Years to claim after the firſt Extent run out by Perception of Profits or Satisfaction acknowledged is to let in a Claim after an Eſtate, that no Man can ſee to the End of: For when it ſhall be ſatisfied by the Profits no Man can tell, and can much leſs tell that Satisfaction will ever be acknowledged; whereas other particular Eſtates have a known and determinate Limitation; In the other Caſe it could not be computed within what Compaſs of Time a Poſſeſſion would be quieted, and ſo the Statute of Fines, in a great Meaſure would be defeated of its End. But,

3dly, and principally, It ſhould be in the Power of the Party that has the Extent in Reverſion, to protract the Time as long as he pleaſed; for till he thinks fit to bring the Scire facias ad computandum, he nor no one elſe can ſay the Statute is ſatisfied. For that muſt appear by an Account taken in the Scire facias, nor none can compel the Acknowledging of Satisfaction and ſo it ſhould be at the Pleaſure of Strangers to him that is in Poſſeſſion by a Fine to make his Eſtate liable to a future Claim as long as they pleaſed; and ſure this would render the Statute of Fines of little or no Effect. And this makes an Eſtate by Extent, to differ wholly from an Eſtate for Life or Years, or ſuch other like particular Eſtate, which will end of it ſelf, and cannot be protracted longer than the proper Limitation of the Act of any whatſoever.

I will conclude with an Anſwer to an Objection, that has been much inſiſted upon by thoſe that argued for the Defendant, That an Extent begins by Record, and cannot end but by Record, viz. either by an Account taken upon a Scire facias or Satisfaction acknowledged upon the Record of the Statute; or at leaſt, he that is in Reverſion, is bound to take Notice of any other Determination of the Extent.

To which I anſwer, It begins by Record, but it may end without Matter of Record; for a Releaſe by the Conuſee after the Extent, determines it to all Intents and Purpoſes; and undoubtedly in ſuch Caſe he which hath a puiſne Statute may enter; an Extent upon an Elegit begins by Record, yet when ſatisfied by Perception of Profits, he in Reverſion may enter: So that the Scire facias, as appears by our Books, is to be brought upon another Reaſon, and not becauſe the Extent cannot end but by Record, but 'tis becauſe of the Incertainty of the Expences that muſt be ſatisfied. And why ſhould not they, which have had the Right of Burrough's Extent, be bound to take Notice of the Fines that have been levied, as much as the Acknowledging of Satisfaction? And a Fine is much more a publick Record than the other, eſpecially ſince the Statute of 4 H. 7. has provided for the making of Proclamations upon it.

Note, The Judgment in this Caſe which was given in Banco Regis for Mr. Greenvil the Defendant in the Action, was here reverſed.

Some Remarkable and Curious

CASES

IN THE

Court of Chancery.

Termino Sancti Trinitatis Anno 22 Car. II.

In Cancellaria.

Marſh *verſus* Lee.

A Bill in Chancery was brought by Marſh, and an Anſwer put in thereto. S. C. Hard. 173. 1 Chan. Caſes, 162, 163, &c. 1 Chan. Ca. 36, 201, 202. 2 Chan. Ca. 20, 35, 208, 213.

The Caſe was thus

One Engliſh being ſeized of the Manor of Wickſall, and of the Manor of Monfield, in 1649. mortgages Part of the Manor of Wickſall to Burrell for 1000 l. Afterwards in 1655. he acknowledges a Statute to Burrell of 800 l. for the Payment of 400 l. Afterwards in 1662. Engliſh mortgages both theſe Manors to Mrs. Duppa for 7000 l. Afterwards in 1665. Engliſh mortgages the Manor of Wickſall to Lee for 2000 l. Lee having no Notice of the former Mortgages. But afterwards Lee coming to have Notice of the Mortgage to Duppa, purchaſes in the two Incumbrances to Burrell, (viz.) the Mortgage of Part of the Manor of Wickſall, and the Statute. And now Marſh, Executor of Duppa, ſues Lee, who pleads this whole Matter.

My Lord Keeper, assisted with Hale, Chief Baron, and Justice Rainsford, held, that Lee might make Use of these Incumbrances to protect his own Mortgage. For they said, that he had both Law and Equity for him.

First, he had Law; for that he had a precedent Mortgage in 1649. (which indeed was but upon Part) and also the Statute in 1655. so that while these remained in Force, Marsh could not come in.

Next, he had Equity; for he having a subsequent Mortgage, yet, it being without Notice, he ought to be relieved in this Court. And therefore my Lord Chief Baron put the Case, as if the first Mortgage had been of the Manor of W. to Burrell, and afterwards it had been mortgaged to Duppa, and afterwards to Lee, not having Notice; if afterwards Lee bought in Burrell's Mortgage, he shall hold the Estate against Duppa, until he be satisfied for both the Money which he paid Burrell and also his own Money lent upon the last Mortgage: And for that he said, that it had been so adjudged in Camera Scaccarii, in the Court of Equity, since the King came in, in one Shelley's Case: Next he put the Case of the Statute which English entered in to Burrell in 1655. and was afterwards bought by Lee from Burrell. He held that Duppa shall not bring Lee to any Account upon this Statute here in Equity, any otherwise than he may do at Common Law.

Nota, It was agreed that the Lands were extended upon the Statute at the third Part of the true Value. Now at Common Law the Conusor, or he that claims under him, must bring a Scire facias ad computand', as in the 4 Co. 69. b. But then the Conusee shall not account according to the true Value, but according to the extended Value, and also for the whole Statute: And if the Conusee is satisfied by the extended Value, the Conusor shall recover; or if the Conusor will pay down the rest of the Money which is behind with Damages, he shall also recover. But if the Conusor will sue the Conusee in a Court of Equity, then he shall bring him to Account for what he hath received of the Profits above the extended Value.

Now then our Case here is somewhat more; for Lee has also Equity on his Side, and therefore Duppa shall not bring him to Account for what he has received above the extended Value, unless he has also received enough to satisfie his own Mortgage of 2000 l. as well as the Statute; and therefore if Marsh will take off this Statute by a Suit in this Court, he must be content that Lee doth account upon the extended Value for the whole 800 l. and Damages.

Secondly, they held, that whereas Part of the Manor of W. was mortgaged to Burrel; but that now the whole Manor was mortgaged to Lee, that yet the first Mortgage should not extend to protect more than that Part of the Manor which was first mortgaged to Burrel.

And my Lord Chief Baron Hale put the Case thus: If a Man is seised of 60 Acres, and mortgages 20 to A. and then mortgages the whole to B. and then mortgages the whole to C. and afterwards C. purchases in the first Mortgage, that shall not protect more than the 20 Acres; but it shall protect those 20 Acres so as B. shall never recover that until he pay C. all the Money upon the first and last Mortgage. 1 Chan. Ca. 168. 2 Chan. Ca. 213.

But Hale said, that he thought that in this Case, inasmuch as the Mortgage to Lee was only of Part of W. that therefore Marsh might bring Lee to an Account upon the extended Value, whereupon these two Manors were extended upon the Statute; and if Lee had received the Money due upon the Statute by receiving of the Profits according to the extended Value, or if she will pay down the Residue of the Money due upon the Statute, or if she will pay down so much as the Proportion will come to for Monfield, that then she may discharge the Manor of Monfield.

But then my Lord Keeper asked him, how he would have it appointed, and how much should be laid upon Monfield, and how much upon Wicksal; for that Part of W. is under that Extent.

To which Hale answered, that if Marsh did sue Lee for the Discharge of this Statute from Monfield, that Monfield should be discharged by her paying down as much as the Proportion comes to; or when Lee shall have received so much according to the extended Value; and that he thought there might be a Proportion found out by the Court.

Nota, Sir H. Fynch, Counsel for Lee, cited Primate and Jackson's Case, Grove and Grove's Case, and Mrs. Calamy's Case: All which were resolved in this Court, that a Purchaser or Mortgagee coming in upon a valuable Consideration without Notice, and purchasing in a precedent Incumbrance, it shall protect his Estate against any Person that hath a Mortgage subsequent to the first, tho' before the last Mortgage; tho he purchased in the Incumbrance after he had Notice of the second Mortgage. 1 Chan. Ca. 36.

White *verſus* Ewer.

AT a Re-hearing before my Lord Keeper, aſſiſted with Juſtice Vaughan and Turner, concerning the Redemption of a Mortgage which had been made above 40 Years ſince,

See 1 Chan. Rep. 60, 105, 128, 172, 184, 124. 2 Chan. Rep. 44, 106. 3 Chan. Rep. 56, 57, 83, 85.

My Lord Keeper declared, that he would not relieve Mortgages after 20 Years; for that the Statute of 21 Jac. cap. 16. did adjudge it reaſonable to limit the Time of one's Entry to that Number of Years: Unleſs there are ſuch particular Circumſtances as may vary the ordinary Caſe, as Infants, Femes-Covert, &c. are provided for by the very Statute; tho thoſe Matters in Equity are to be governed by the Courſe of the Court, and that 'tis beſt to ſquare the Rules of Equity, as near the Rules of Reaſon and Law as may be.

Termino Sancti Michaelis, Anno 22 Car. II.

In Cancellaria.

Peter Pheſant *verſus* Anne Pheaſant, the Lord Mayor of London, and Sir Thomas Player, Chamberlain of London, &c.

1 Chan. Ca. 181. S. C. 2 Chan. Ca. 117, 129. See 1 Lev. 162, 227. 2 Lev, 32, 130. 1 Chan. Rep. 26, 27, 84. 2 Chan. Rep. 179.

THE Caſe was this,

Anne Hadly (now Pheaſant) one of the Defendants, being an Orphan of London, and having an Eſtate of 3 or 4000 l. in Money in the Court of Orphans there, was married to W. Pheaſant, elder Brother to the Plaintiff. W. Pheaſant, before ſhe was at Age of 21 Years, and not having taken out this Money, dies, having bequeathed this Money inter alia to his ſaid Wife, provided that ſhe ſhould not claim Dower, &c. Notwithſtanding ſhe brings Dower againſt the now Plaintiff, Brother and Heir to her late Husband. Whereupon he brings this Bill in Chancery to make Diſcovery of this Eſtate, and to compel her to releaſe her Dower, or renounce this Deviſe; and thereupon obtains an Injunction, to ſtay Proceedings in the Writ of Dower.

The Point was, whether this Money in the Court of Orphans were deviſable, or no?

Serjeant Goodfellow argued, that it was deviſable as a Chattel Perſonal in the Teſtator's Poſſeſſion, and veſted in the Baron; the Court of Orphans have but the Cuſtodiam, Co. Entries 346. 1 Roll. 550. the Chamberlain of London is the Officer intruſted, and

and a ſole Corporation to this Purpoſe, as to take Recognizance, which ſhall go to his Executors, and is the only Corporation of that Nature in England. His Poſſeſſion is the Teſtator's actual Poſſeſſion, Latch 127. If the Servant be robbed, the Maſter ſhall have the Action, as in 1 Cro. 37. This is not a Debitum, but a Depoſitum, as in Cuſtodia, in gremio legis by the Cuſtom of London, as if Money had been brought into Court here by a compulſory Order, in which Caſe it would have veſted in the Husband. Now in the Court of Orphans they compel People to bring in the Money, or to give Security, and they pay no Intereſt, only allow Finding-Money, that is, for the Orphan's Maintenance, and no more. Seeing the Feme is intituled to Dower immediately, it were hard that the Baron ſhould not have the Portion; Debts he ſhall not have becauſe of his Laches, in not bringing an Action whereby to reduce them to Property; but this cannot be had until the Wife's full Age. Upon the Marriage of Orphans the Cuſtom is to appoint the Common Serjeant to treat and take Security for the Orphan.

Serjeant Maynard Contra. This was a Choſe in Action, Debt lies for it, and it cannot be recovered without an Action. Intereſt is allowed for it according to the Cuſtom (tho' not Statute-Intereſt) and proportionable to the Sum. And the Caſe of Dr. Ent. *verſus* Adrian was, by the Cuſtom of London, if a Man die leaving three Sons, his Eſtate ſhall be equally divided amongſt them; and if either of them die within Age, his Part ſhall ſurvive to the other. The Father taking Notice of this Cuſtom, deviſed, that if any of his Sons die within Age, his Part ſhould not ſurvive, but that it ſhould go to J. S. It was reſolved, that the Father could not thus give the Child's Portion, becauſe but a Poſſibility, and a Thing not veſted in himſelf.

Wylde ſaid, that when he was Recorder he certified the Cuſtom in that Caſe to be, that the Father might deviſe.

Curia, viz. Bridgman, Lord Keeper, (Twiſden and Wylde aſſiſting) We are clear of Opinion, that this was a Choſe en Action and not deviſable. A Trover and Converſion lies not for it, if it be refuſed to be paid: It was the Laches of the Husband, that he did not recover it; for by the Cuſtom it is to be paid at the full Age or Marriage of the Female Orphan. The Chamberlain is not a Servant to the Orphan, but to the Mayor. If it were purely a Depoſitum, it muſt be paid in Specie without Intereſt; but they pay Cuſtomary Intereſt: And tho' whilſt the Orphans are under Age (and unmarried, if Women) they give them Finding-Money only; yet at the End of all, when the Orphan cometh at full Age, (or if a Female marries) all is caſt up, and the Intereſt is paid. The Word Cuſtodia in Pleading imports an Intereſt, as in the Caſe of Guardian in Soccage, &c. the Lord Mayor, &c. have a Special Intereſt

Intereſt in it, and if it be loſt or miſcarry, they are to anſwer it. Let the Injunction be diſſolved.

See Plowd. 310,311, &c. The Caſe of Mines, &c. 2 Jon, 71. 2 Lev. 185.

Nota, This Caſe was referred by my Lord Keeper to Juſtice Wylde. A Man opens a Mine in his Land, and digs until he comes under the Soil of another; whether he can follow his Mine there? And he certified his Opinion, that he might: But if the Owner dig there alſo, he conceived that he might then ſtop his farther Progreſs. And in Cornwal it is their Uſe, that if a Man begins a Mine in his own Land, he may proceed in the Vein thro' another Man's Ground.

See 2. Chan. Ca. 163, 224.

Note, If a Bill in Chancery be exhibited againſt a Peer, the Courſe is firſt, for my Lord Keeper to write a Letter to him, and if he doth not anſwer, then a Subpœna, and then an Order, to ſhew Cauſe why a Sequeſtration ſhould not go; and if he ſtill ſtands out, then a Sequeſtration: For there can be no Proceſs of Contempt againſt his Perſon.

Termino Sanctæ Trinitatis, Anno 29 Car. II.

Clobberie's Caſe.

2 Chan. Ca. 155. Poſtea 346, 366.

IN one Clobberie's Caſe it was held, that where one bequeathed a Sum of Money to a Woman, at her Age of 21 Years, or Day of Marriage, to be paid unto her with Intereſt, and ſhe died before either, that the Money ſhould go to her Executor; and was ſo decreed by my Lord Chancellor Finch.

But he ſaid, If Money were bequeathed to one at his Age of 21 Years; if he dies before that Age, the Money is loſt.

On the other Side, If Money be given to one, to be paid at the Age of 21 Years; there, if the Party dies before, it ſhall go to the Executors.

Termino Sancti Michaelis, Anno 30 Car. II.

In Cancellaria.

Haymer Vid. *versus* Haymer.

THE Case was thus,

The late Husband of the Plaintiff, before their Marriage, had entered into Articles with the Plaintiff whereby it was agreed, that certain of the said Haymer's Lands should be settled before the Marriage, (which was then intended between them) should be solemnized, upon him and the Plaintiff, and the Heirs of his Body by the Plaintiff, but died before the Settlement was made. Nelf. Chan. Rep. 146, 170, 405.

In Pursuance of the said Articles the Plaintiff married him, and after his Decease the Plaintiff exhibits her Bill, to have those Articles executed: Which was decreed accordingly against the Heir at Law of the Husband.

Altho it was objected, that the Articles being to make the Settlement before Marriage, it was a Waver of the Benefit of them, the Plaintiff marrying before it was done; and the Plaintiff being the sole Party with whom they were made, her Marriage with the other Party before they were performed, was a Release in Law. See 1 Chan. Cases, 21, 117. Hob. 216.

Note, The Lands were mortgaged to one that had no Notice of the Articles.

It was decreed, that the Plaintiff should redeem, and hold for her Life, and that her Executors should detain the Land till the Money was raised that she had been out upon the Redemption. 1 Chan. Cases, 271.

Termino

Termino Sancti Hillarii, Anno 31 & 32 Car. II.

In Cancellaria.

Sir Oliver Butler's Caſe.

3 Lev. 220. S. C. See 2 Sand. 174. 2 Keb. 465.

UPon a Scire facias to repeal a Patent granted by this King to Sir Oliver Butler, for a Market to be kept at Chatham; reciting, that there was an Ancient Market long before kept at Rocheſter, within half a Mile of Chatham, and that there was an ad quod damnum taken out before the new Patent, and the Inqueſt thereupon taken, found it not to be to the Damage of any, and that it was executed by Surprize and without Notice; and that notwithſtanding it was to the great Damage of the former Market, &c.

To this Scire facias Sir Oliver Butler demurred.

And it was argued by his Counſel, that this Patent could not be repealed, becauſe it was preceded by a Writ of ad quod damnum; whereupon it was found to be to no Body's Damage, and that ſhould conclude all; or at leaſt, the King could not bring a Scire facias to repeal his own Patent.

But the Lord Chancellor Finch (aſſiſted by North, Chief Juſtice of the Common Pleas, and Juſtice Jones) gave Judgment for repealing of the Patent: For the Return of the Writ of ad quod damnum, was not concluſive, and here by the Demurrer it is confeſſed to be to the Damage of the former Market. And where a Patent is granted to the Prejudice of the Subject, the King of Right is to permit him, upon his Petition, to Uſe his Name for the Repeal of it in a Scire facias at the King's Suit, and to hinder Multiplicity of Actions upon the Caſe; for ſuch Action will lie notwithſtanding ſuch void Patent.

Termino

Termino Sanctæ Trinitatis, Anno 32 Car. II.

In Cancellaria.

Sir Jerom Smithſon's *Caſe.*

A Motion was made for a Ne exeat Regnum againſt Sir Jerom Smithſon; for that his Wife had ſued him in the Eccleſiaſtical Court for Alimony, and it was ſuſpected that he would go beyond Sea to avoid the Sentence: And the Writ was granted. Ne exeat Regnum. See 1 Chan. Caſes 115. 2 Chan. Rep. 19, 20.

And the Lord Chancellor ſaid, That it had been ſo done before; for this Court was to aid the Eccleſiaſtical Court in ſuch Caſes.

And likewiſe the Court being informed of his ill Uſage of his Wife, a Supplicavit de bono geſtu was granted.

My Lord Hollis's *Caſe.*

Paſch. Anno 26 Car. II.

My Lord Hollis's Caſe was thus:

An hundred Pounds was lent by his Lady, and in the Note which was firſt given for it, it was written that the Money was to be diſpoſed as the Lady Hollis ſhould direct. An Action at Law for this Money being barred by the Statute of Limitations, a Bill was exhibited for Relief, and the Statute of Limitations inſiſted upon. But in regard the Money was looked upon as a Depoſitum, and a Truſt thereupon to the Lady, a Decree was obtained for the Money. Q. The Caſe of Gorge and Chancey. 1 Chan. Rep. 125, 126, 127.

Sir William Beverſham's *Caſe.*

He had purchaſed a Manor, and a Copyhold being a little before eſcheated, which was not intended to paſs in Demeſne, was left out of the Particular; yet the Conveyance was ſufficient to paſs it in Law.

And the Vendor exhibited a Bill to be relieved, and obtained a Decree, to hold by Copy of Sir William Beverſham. Vide 1 Roll. 379. Averments not to be admitted in Chancery contrary to the Purport of a Deed.

Anonymus. *Bourn v. Tyrrel.*

Trin. Anno 31 Car. II.

THE Case was thus:

J. S. made his Will, (his Wife being at that Time with 1 Wms. 788. Child) where he ordered that all his personal Estate, after his Debts and Legacies paid, should be laid out in Land (in Case he had a Son) and be settled upon his Brother, for Preservation of his Name, and devised, That if his Wife were delivered of a Daughter, that she should have 3000 l. paid her at her Day of Marriage, provided that she married with her Mother's Consent, and otherwise but 1000 l. and also devised, That the Mother should have 80 l. Part of the Interest of the 3000 l. for the Education of the Daughter.

The Testator dies, and the Wife has a Daughter. The Question was, Whether the Daughter should have the remaining Part of the Interest of the 3000 l. or the Executors should have it in Trust for the Brother, and so to be laid out, &c.

It was said for the Brother, That the Father intended the Daughter but 3000 l. at the most, and that appointing 80 l. Part of the Interest for her Education, excluded her from the rest; and it's a Devise, That all his Personal Estate shall be laid out, &c.

2 Chan. Ca. 155. Antea 342. Postea 366. Curia. There is nothing to be laid out until the Debts and Legacies paid; the 80 l. is not to the Daughter, but for the Mother. 'Tis taken for granted, that where a Sum of Money is devised to a Child at such an Age, it shall have the Interest in the mean Time, rather than the Executor shall swallow it; but clear, when no Maintenance is otherwise provided for it.

The Lord Chancellor decreed it for the Daughter, and that the Executor should account for what Interest he paid the Brother.

Note, Tho' it be said, That the Money to be laid out after all Legacies paid; yet all, besides what serves to pay the Legacies, should be laid out presently.

Anonymus.

Trin. Anno 31 Car. II.

A Devise of 100l. to J. S. at the Age of twenty-one Years; and if J. S. died under Age, then J. N. and A. B. to have 100l. or else the Survivor of them.

A. B. and J. N. die both in the Life of J. S. and before the Age of twenty-one Years, and then J. S. died under the Age of twenty-one Years.

The Administrator of J. N. who survived A. B. sued, and obtained a Decree for the 100l. for tho' he died before the Contingency hapned, yet his Administrator should have it. Antea 342, 346. Post. 367.

Charles Blois & al' Plaintiffs, *versus* Dame Jane Blois and Jane Blois Infant, Defendants.

See the same Case 2 Chan. Rep. 162, 163, &c.

Mich. Anno 31 Car. II.

THE Case was thus:

Sir William Blois, who had Issue the Plaintiff and two Daughters by a former Venter, and Jane the Defendant by a second Venter, upon his second Marriage settled Lands for the Jointure of his Wife, and after her Decease (in Case he had Issue only a Daughter) to raise 3000l. for that Daughter, to be paid her at the Day of Marriage, so that she married after sixteen, or otherwise at the Age of eighteen Years; and if she died before either, then his Heir to have the Benefit.

Afterwards Sir William Blois by his Will devises the Reversion of his settled Lands, and all his other Estate, to Jane his Relict, one of the Defendants, and three others; and says, That after the Son, by a convenient Match, shall have raised 9000l. for his three Daughters, that then they should let the Son, the now Plaintiff, have his Estate.

The Question was now, That if the Daughter by the second Venter had 3000l. paid her, whether she should have any farther Benefit by the Settlement, and so take a double Portion, one upon the Will, and another upon the Settlement?

The Decree made by my Lord Finch was, That if the Heir paid 9000l. the Security by the Settlement should be discharged, the Will being but cumulative Security, and so the Defendant Jane was to have but one 3000l. and be subject to the same Contingencies with the Settlement, and gave the Heir two Years Time to pay the Money; and in the mean Time Jane to have a third Part of the Profits of the Land devised.

My Lord Chancellor cited one Pyne's Caſe; where a Man had ſecured Portions for his Children, and afterwards by his Will deviſed to each of them a like Sum; it was held, that this would not double their Portions, unleſs plainly proved that he intended to do ſo.

Nota, If one ſue in Chancery an Executor of one Obligor, to diſcover Aſſets, you muſt make all the Obligors Parties, that the Charge may lie equal.

Quære, Whether you may not ſue the Principal, and leave out them that are bound only as Sureties? But 'tis clear, That if a Judgment be had at Law againſt one Obligor, you may ſue the Executor of him alone, to diſcover Aſſets, &c. becauſe the Bond is drowned in the Judgment.

Turner's *Caſe*.

Poſt. 351. A Mortgage was made in Fee, which deſcended to the Heir at Law, and the Money ten Years ſince paid to him. The Executor of the Mortgagee preferred his Bill, and had a Decree for the Money; but without Intereſt.

Vide 1 Chan. Caſes 285. My Lord Chancellor went upon the Reaſon of the Caſe in Littleton, That if a Feoffment be made upon Condition to re-enter upon the Payment of a Sum of Money, and not expreſſed to whom to be paid, there (after the Death of the Feoffee) it muſt be paid to the Executor, and not to the Heir. So here, tho' the Proviſo was to pay to the Feoffee, his Heirs or Executors; yet when the Day is paſt, 'tis as much as if no Perſon had been expreſſed, and then Equity ſhall follow the Law and appoint it to the Executor.

Termino Paſchæ, Anno 32 Car. II.

In Cancellaria.

Anonymus.

AN Impropriator deviſed to one that ſerved the Cure, and to all that ſhould ſerve the Cure after him, all the Tithes and other Profits, &c. Tho' the Curate was incapable to take by this Deviſe in ſuch Manner, for Want of being Incorporate and having Succeſſion; yet my Lord Chancellor Finch decreed, That the Heir of the Deviſee ſhould be ſeiſed in Truſt for the Curate for the Time being.

Broadhurſt *verſus* Richardſon & al'.

A Man had Iſſue three Daughters, and deviſed to his three Daughters 540 l. equally to be divided between them; that is to ſay, 180 l. a-piece; but if any of them died without a Child, her Part to go to the Survivors. S. C. 2 Chan. Rep. 153.

One of the Daughters married Broadhurſt, and before the Portion paid ſhe died without Iſſue.

Broadhurſt exhibits his Bill againſt the Executor, and the two ſurviving Siſters, and had a Decree for the 180 l. For a Sum of Money cannot be entailed.

Anonymus.

IF Lands be deviſed for the Payment of Debts and Legacies, and the Reſidue of the perſonal Eſtate be given to the Executors after the Debts and Legacies paid; the perſonal Eſtate ſhall notwithſtanding, as far as it will go, be applied to the Payment of the Debts, &c. and the Land charged no further than is neceſſary to make up the Reſidue. Q. Poſt. 359.

Termino

Termino Sancti Hillarii, Anno 32 & 33 Car. II.

In Cancellaria.

Sayle & Freeland & al' Infants.

THE Bill was to redeem a Mortgage made by the Father of the Defendants, or to be foreclosed.

The Defendants by Guardian answered, setting forth, That their Grandfather was seised in Fee, and made a Settlement, whereby he entailed the Estate; but with a Power of Revocation by any Writing published under his Hand and Seal in the Presence of three Witnesses.

Vide 10 Co. 144. Scroop's Case. Hob. 312. Kibbett and Lee. 3 Chan. Ca. 55. Bath and Mountague.

And the Case was; That he made his Will under his Hand and Seal, wherein he recited his Power, and declared that he revoked the Settlement; but the Will had but two Witnesses, which subscribed their Names, tho' a third present, and died. The Lands descended to the Father, who made the Mortgage; and the Defendants claimed by Virtue of the Entail.

The Decree was, That the Mortgage-Money should be paid.

First, My Lord Chancellor said, That here was an Execution of the Power in Strictness, tho' the third Witness did not subscribe.

Secondly, If there had not, that Equity should help it in such a little Circumstance where the Owner of the Estate had fully declared his Intention. There is a Difference where a Man has Power to make Leases, &c. which shall charge and incumber a third Person's Estate, such Powers are to have a rigid Construction; but where the Power is to dispose of a Man's own Estate, it is to have all the Favour imaginable.

2 Roll. Rep. 434. 1 Lev. 239. 1 Chan. Ca. 171. Hob. 203. 2 Roll. A. 379.

It was offered by the Counsel, That where Tenant in Tail did bargain and sell his Estate, that seeing he had Power over it, notwithstanding there were no Fine and Recovery, a Court of Equity should decree against the Heir. 1 Chan. Ca. 294.

But my Lord Chancellor said, That he would not supersede Fines and Recoveries; but where a Man was only Tenant in Tail in Equity, there this Court should decree such Disposition good; for a Trust and equitable Interest is a Creature of their own, and therefore disposable by their Rule. Otherwise where the Entail was of an Estate in the Land.

Nota. In the Caſe ſupra, That the Court would not decree the Infants to be foreclosed till they came of Age, (tho' ſometimes 'tis ſo done;) becauſe this Mortgage depended upon a diſputable Title, and ſo no Money could be expected upon Aſſignment of it over.

Termino Paſchæ, Anno 33 Car. II.

In Cancellaria.

Sir Thomas Littleton's *Caſe*.

IN this Caſe my Lord Chancellor declared,

1. That it was a conſtant Rule, That the Money to be paid upon Mortgages in Fee, whether forfeit or not before the Death of the Mortgagee, that it ſhould go to the Executor. Antea 348. 1 Chan. Ca. 245.

2. If a Man had Lands in Fee, and other Lands mortgaged to him in Fee; by a Deviſe of all his Lands the Mortgage would paſs.

3. If a Man had but the Truſt of a Mortgage of Lands in D. and had other Lands in D. by a Deviſe of all his Lands in D. the Truſt would paſs: But here a Will deviſed Lands to J. S. in D. S. and T. and all his Lands elſewhere, when he had a Mortgage of Lands that did not lie in D. S. or T. which were of more Value than the Lands in D. S. and T. The Decree was, that the Mortgage ſhould not paſs; for he could not be thought to mean, to comprehend Lands of ſo much Value under the Word (elſewhere) which is like an (&c.) that comes in currente calamo; and beſides, that there were ſome other Circumſtances in the Will that did ſeem as if he intended not to paſs the Mortgage-Lands.

Anonymus.

A Bill was exhibited, ſetting forth, That the Defendant in a Replevin had avowed for a Rent-charge; and Iſſue was taken thereupon, upon the Seiſin of the Grantor, and it was found for the Defendant.

Which Verdict the Plaintiff complained of, alledging that the Rent pretended to be granted, had not been paid in fifty Years, and other Circumſtances, to render the Grant ſuſpicious, &c.

The

The Lord Chancellor decreed, That there ſhould be a new Trial, the Complainant paying the Coſts of the former.

Note, This could not have been tried again at Law; becauſe the Verdict in Replevin is concluſive.

Cage *verſus* Ruſſel.

1 Chan. Ca. 265. Smith v. Aſhton. 1 Chanc. Rep. 127.

A Feme Covert having Power by her Will to deviſe certain Lands, deviſed them to her Executors to pay 500 l. out of them to her Son, when he ſhould attain the Age of one and twenty Years; provided, that if the Father of the Son did not give a ſufficient Releaſe to the Executors, of the Goods and Chattels remaining in ſuch an Houſe, then the Deviſe of the 500 l. ſhould be void and to go to the Executors.

After her Deceaſe, a Releaſe was tendered to the Father, who refuſed it; and then the Son exhibits a Bill againſt the Father, and the Executors for the 500 l. and to compel the Father to releaſe.

The Executors in their Anſwer inſiſted upon the Refuſal as a Forfeiture of the 500 l.

And the Father ſaid, That tho' he had for ſome Reaſons before refuſed, he was now ready to releaſe.

The Lord Chancellor decreed the Payment of the 500 l. and ſaid, that it was the ſtanding Rule of the Court, That a Forfeiture ſhould not bind where a Thing may be done afterwards, or any Compenſation made for it. As where the Condition was to pay Money, or the like. But in the Caſe of Fry and Potter in the 22d of Car. 2. (which ſee at large in the Modern Reports) where a Deviſe was of an Houſe, upon Condition that the Deviſee ſhould marry with the Conſent of three Perſons, and ſhe married without Conſent, it was an immediate Forfeiture; for Marriage without Conſent was a Thing of that Nature, that no after Satisfaction could be made for it: But if where there is a Deviſe over to a third Perſon, after a Forfeiture by the firſt, a Forfeiture in ſuch a Caſe would be generally binding; but here 'tis ſaid, that it ſhall go to the Executors, &c. which was not to be conſidered, becauſe it is no more than what the Law implied.

1 Mod. 86, 300. Raym. 236. 1 Vent. 199. 2 Lev. 21. 1 Chan. Ca. 138. 2 Chan. Rep. 26.

Termino Sancti Michaelis, Anno 33 Car. II.

In Cancellaria.

Anonymus.

ONE deviseth 250l. to his Son, and makes his Wife Executrix, who marries another Husband. See Nelson's Chan. Ca. 250.

In a Bill brought against them for the Legacy by the Son, the Defendants would have discounted Maintenance and Education,

Which was not permitted by the Court, so as to diminish the principal Sum; for it was said, that the Mother ought to maintain the Child. But a Sum of Money paid for the Binding of him out an Apprentice was allowed to be discounted.

Note, It is the Course here, that where a Man dies in Debt, and under several Incumbrances, (viz.) Judgments, Statutes, Mortgages, &c. and the Heir at Law buys in any of them that are of the first Date; if those which have the later Securities prefer their Bill, the Incumbrances bought in shall not stand in their Way for more than the Heir really paid for them.

Goylmer *versus* Paddiston.

THE Case was thus:

Thomas Goylmer in 1653. being seised of certain Lands in Fee of the Value of 14 l. per Annum, and there being a Marriage in Treaty between the Plaintiff (the Brother of Thomas) and Anne Wells, the said Thomas did make a Writing, sealed and delivered by him; which was to this Purpose, (viz.) That if the Marriage takes Effect between my Brother and Anne Wells, she being worth eightscore Pounds, I do promise, That if I die without Issue, to give my Lands in, &c. to my Brother and his Heirs, or to leave him 80l. in Money; and for the true Performance of this, I bind my Self, my Heirs, Executors and Administrators. See 3 Chan. Rep. 29, 30, 50, &c. Postea 364, 365.

Marriage Articles, &c. decreed to be performed. Vide N. Chan. Ca. 150, 170, 183. 234, 244, 261, 405.

After which the Brother, (the now Plaintiff) and the ſaid Anne Wells did intermarry, and ſhe was worth eightſcore Pounds: But Thomas Goylmer did afterwards marry, and having no Iſſue, he did ſettle the Lands upon his Wife for Life, the Remainder to his own right Heirs; (this was a Jointure ſettled before Marriage) and did afterwards deviſe the Land to her in Fee, and died without Iſſue.

His Wife afterwards deviſed it to the Defendant's Wife in Fee; and now the Plaintiff exhibited his Bill to have the Land conveyed according to the Agreement above.

But for the Defendants it was much inſiſted upon, that this being to ſettle the Lands, in Caſe Thomas ſhould die without Iſſue, it ſhould not be regarded in this Court; for the Execution of a Truſt of a Remainder or Reverſion in Fee; upon an Eſtate-tail, ſhall not be compelled, becauſe it is ſubject to be deſtroyed by the Tenant in Tail, as here Thomas might have done, in Caſe he had made a Settlement according to the Import of that Writing, who therefore could not have been compelled himſelf to have executed this Agreement.

But the Lord Chancellor Finch decreed the Land for the Plaintiff; becauſe it was proved that the Marriage with the Plaintiff's Wife was in Expectation of the Performance of this Agreement, and he was obliged to have left the Land to the Plaintiff, if he had had no Iſſue.

Termino Sanctæ Trinitatis, Anno 34 Car. II.

In Cancellaria.

Collet *verſus* Collet.

WIlliam Fox having three Daughters, Mary, Elizabeth and Martha, (the Two latter being married, and the firſt a Widow) by his Will deviſed in theſe Words, (viz.) 2 Chan. Ca. 110.

I give Martha my Daughter the Sum of 400 l. to be paid unto her by my Executors within one Year next after my Deceaſe; But I Will, and my Deſire is, that Cornelius Collet (the Husband of Martha) upon the Payment of the ſaid 400 l. ſhall give ſuch Security as my Executors ſhall approve of, that the ſaid 400 l. ſhall be laid out within eighteen Months next after my Deceaſe, and purchaſe an Eſtate of that Value to be ſettled and aſſured upon her the ſaid Martha, and the Heirs of her Body lawfully begotten.

And in the Cloſe of his Will were theſe Words following: viz.

I Will, That after my Debts which I ſhall owe at the Time of my Deceaſe, and my Funeral Expences, and the Probate of this my Will be diſcharged; then I do give all the reſt of my Perſonal Eſtate unbequeathed, to purchaſe an Eſtate near of as good Value as the ſame Perſonal Eſtate ſhall amount unto, within one Year next after my Deceaſe. Which ſaid Eſtate ſo to be purchaſed, I Will ſhall be ſettled and aſſured unto and upon my ſaid three Daughters, Mary, Elizabeth and Martha, and the Heirs of their reſpective Bodies lawfully begotten for ever; or otherwiſe my ſaid Daughter Mary, and the Husbands of my ſaid two other Daughters Elizabeth and Martha ſhall, for ſuch Moneys as they ſhall receive of my ſaid Executors, for the Overplus of my Perſonal Eſtate, enter into one or more Bonds in the double Sum of Money as each Part ſhall amount to (the ſame being to be divided into three Parts) unto my ſaid Executors, within eighteen Months next after my Deceaſe to ſettle and aſſure ſuch Part or Sum of Money as each of them ſhall receive and have by this my Will for the Overplus of my Perſonal Eſtate, unto and upon the Child and Children of my ſaid Daughters, Mary, Elizabeth and Martha, Part and Part alike.

Martha, the Wife of Cornelius Collet died within ſix Months after the Teſtator, leaving Iſſue only a Daughter, who died within four Months after the Mother; the other two Siſters ſurviving.

Cornelius Collet took out Letters of Adminiſtration both to Martha his Wife, and likewiſe to his Daughter; the four hundred Pounds, and likewiſe the Overplus of the Perſonal Eſtate, being unpaid or diſpoſed of.

Cornelius Collet preferred his Bill againſt the Executors and the ſurviving Siſters, and thereby demanded the 400 l. and likewiſe a third Part of the Overplus, which amounted unto 700 l.

And the Cauſe came to be heard before my Lord Chancellor upon Bill and Anſwer, who decreed the 400 l. to the Plaintiff; but as to the Surplus of the Eſtate the Bill was diſmiſſed, altho' it was much inſiſted on for the Plaintiff, that he might have given Bond to ſecure the Surplus for his Child, and ſo from the Child it would have come to him as Adminiſtrator: But ſeeing that no Intereſt could veſt in the Child till the Election were determined (it not being material as to this Point, whether the Executors or the Husband had the Election) the Father could not claim it as Adminiſtrator to the Child. And then if the Money had been laid out in Land, and the Settlement, according to the Direction of the Will, the Husband would have had no Benefit; for there would have been a Joint Eſtate for Life in the Daughters with ſeveral Inheritances, and no Severance of the Jointure by the Marriage and having Iſſue, Co. Inſt.—and ſo no Tenant by the Courteſy. Therefore as to the Surpluſage the Bill was decreed to be diſmiſſed.

Note, As to the 400 l. the Order of my Lord Chancellor was, That Intereſt ſhould be paid for it from the Time of bringing the Bill.

Termino Sancti Michaelis, Anno 34 Car. II.

In Cancellaria.

West *verſus* The Lord Delaware.

WEST, Heir apparent to the Lord Delaware, exhibited his Bill againſt the ſaid Lord, ſetting forth, See N. Chan. Caſes 397, 444.

That upon a Marriage agreed to be had between him and the Daughter of one Mr. Huddleſton, with whom he was to have 20000 l. Portion, the Lord his Father articled to ſettle Lands of ſuch yearly Value for the Wife's Jointure, for their Maintenance, and the Heirs of their Bodies, &c. That the Wife being now dead (and without Iſſue) and no Settlement made, the Bill prayed an Execution of the Articles, and a Diſcovery of what Incumbrances there were upon the Lands ſettled.

To this my Lord Delaware anſwered, That he never intended to ſettle Lands, but for the Wife's Jointure only, and that the Plaintiff her Husband was not named in the Articles, and ſo was adviſed, He needs no Settlement; and upon that Reaſon the Plaintiff could not require him to diſcover Incumbrances.

An Exception being taken to the Anſwer, for that it did not diſcover any Thing touching Incumbrances, it was argued before my Lord; and for the Defendant it was alledged, That by the Courſe of the Court the Time of the Diſcovery ſhould be when the other Point was determined; for if that be for the Defendant, then no Diſcovery can be required; but if otherwiſe, then the Defendant ſhall be put to anſwer Interrogatories, as is uſual in Caſes of like Nature: And it cannot be objected, That the Eſtate may be charged with Incumbrances ſince the Bill, becauſe they will be of no Avail.

On the other Side it was ſaid, That this would create great Delay; for upon the Diſcovery of Incumbrances other Parties muſt be made to the Bill, and therefore this Caſe differed from the Caſe of Account, which concerns the Defendant himſelf only; but the Queſtion now is only for the Making proper Parties.

The Court ordered, That a further Anſwer ſhould be made.

Nota, If a Man deviſeth, That ſuch a Sum of Money ſhall be paid out of the Profits of his Lands, and the Profits will not amount to the Sum, in ſuch Caſe the Land may be ſold. Noell Deviſe of Rents and Profits is a Deviſe of the Lands. 1 Salk. 228.

Noell *versus* Robinson.

2 Chan. Ca. 145. S. C.

THE Plaintiff's Father being seised in Fee of a foreign Plantation, devised it to the Plaintiff, and made the Defendant Executor.

The Executor lets it for Years, reserving Rent in Trust for the Plaintiff, who now exhibited his Bill to have his Rent.

The Defendant confessed the Devise of the Testator, and the Lease made by himself, but said, That great Losses had fallen upon the Testator's Estate, and that he paid and secured (which is Payment in Law) for the Debts of the Testator to a great Value, and that he hoped he should be permitted to reimburse himself by the Receipt of this Rent, notwithstanding the Mentioning of the Trust, as aforesaid.

The Cause came to Hearing, and the Court decreed for the Plaintiff.

For altho' a Legatee shall refund against Creditors (if there be not Assets) and against Legatees, all which are to have their Proportion where the Assets fall short; yet the Executor himself, after his Assent, shall never bring the Legacy back: But if he had been sued and paid it by the Decree of this Court, the Legatee must have refunded; as a Debtor to a Bankrupt pays him voluntarily, he must pay him over again. Otherwise of Payment by Compulsion of Law.

Vide 1 Chan. Ca. 257. Chamberlain's Case.

Note, My Lord Chancellor said, That if they give Sentence for a Legacy in the Ecclesiastical Court, a Prohibition lies, unless they take Security to refund.

4 Mod. 226. 1 Lutw. 622.

Note also in this Case, That tho' it be an Inheritance, yet being in a foreign Country 'tis looked upon as a Chattel to pay Debts, and a testamentary Thing.

It was objected, That this could not be taken for an Assent; for if so, how could the Testator let it?

But the Court said, That it did tantamount to an Assent, and being a lawful Act a little Matter will be taken for an Assent.

Anonymus.

Vide N. Chan. Ca. 60. 264, &c.

A Bill was exhibited by the Assignees of Commissioners of Bankrupts, to have an Account against the Defendant of the Bankrupt's Estate.

The Defendant pleaded, That he was but Servant to the Bankrupt, and had given an Account of all to his Master, and likewise had been examined before the Commissioners upon the whole Matter.

Upon hearing this Plea, my Lord Chancellor over-ruled it, and ordered that he should answer.

Anonymus.

If a Man makes a Lease, or devise an Estate for Years (he being seised of an Estate of an Inheritance) for Payment of Debts; if the Profits of the Land surmount the Debt, all that remains shall go to the Heir, tho' not so express'd; and albeit it be in the Case of an Executor. See N. Chan. Ca. 53, 61. See 2 Chan. Rep. 295, 296; but 1 Chanc. Rep. 263. contra.

Barney *versus* Tyson.

The Case was thus:

The Plaintiff in the Life of his Father, being about twenty-six Years of Age, and having Occasion for Money, prevails with the Defendant to let him have in Wares to the Value of 400l. and gives him Bond for 800l. to be paid if he survived his Father; (at which Time an Estate would befall him of 5000l. per Annum) and he having survived his Father, he preferred his Bill against the Defendant, to compel him to take his principal Money and Interest. 2 Chan. Ca. 120. Nott v. Hill. 2 Chan. Ca. 136. See 1 Nelf. Abr. 430.

And it was proved in the Case, That the Defendant was informed at the Time of this Bargain, that the Father was ill, and not like to live, (and he did live but a Year and half after) and that one Stifled, a Man very infamous, was employed in the Transaction of this Bargain.

And the Plaintiff obtained a Decree in the Time of the Lord Chancellor Finch.

And now upon a Petition to the Lord Keeper North, the Defendant obtained a Re-hearing.

And in Maintenance of the Decree it was alledged, That the Hazard which was run was very little, and such Bargains with Heirs were much to be discountenanced.

The Lord Keeper affirmed the Decree; but said that he would not have it used as a Precedent for this Court to set aside Mens Bargains.

But this Case having received a Determination, and the Defendant having accepted his principal Money and Interest thereupon, and there being only a slight Omission in the Enrollment of the Decree, (which if it had been done had prevented a Re-hearing) and the Defendant having delayed his Application to him by Petition, he would not now set the Decree aside.

Termino

Termino Paſchæ, Anno 35 Car. II.

In Cancellaria.

Hodges *verſus* Waddington.

1 Chan. Ca. 136, 149. 1 Chan. Rep. 133. 2 Chan. Rep. 155. 3 Chan. Rep. 54. N. Chan. Rep. 303. contra.

THE Caſe was thus:

An Executor waſted the Teſtator's Eſtate, and made his Will, wherein he deviſed divers of his own Goods, and made his Son Executor.

Afterwards a Suit was commenced againſt the Son, to bring him to an Account for the Eſtate of the firſt Teſtator, which was waſted; and depending that Suit the Son after the Bill brought againſt him by the Legatee of his own Goods, delivered them to the Legatee, and aſſented to the Legacy.

After which, upon the Account againſt the Son, it appeared that the firſt Executor had waſted the Goods of the firſt Teſtator to ſuch a Value.

And then the Party, at whoſe Suit the ſaid Account was, and who was to have the Benefit thereof, together with the Son and Executor of the firſt Executor, preferred a Bill againſt a Legatee of the Goods to make him refund, and obtained no Relief; eſpecially for that he had made the Executor Plaintiff, who ſhould not be admitted to undo his own Aſſent.

But Liberty being given to bring a new Bill againſt the Legatee and the ſaid Executor, the Cauſe came to Hearing, and it was decreed, That the Legatee ſhould refund: So that one Legatee that is paid, ſhall not only refund againſt another; but a Legatee ſhall refund againſt a Creditor of the Teſtator, that can charge an Executor only in Equity, (viz.) Upon a Waſting by the firſt Executor: But if an Executor pays a Debt upon a ſimple Contract, there ſhall be no Refunding to a Creditor of an higher Nature.

Note alſo, The Principal Caſe went upon the Inſolvency of the Executor.

Anonymus.

A Bill was brought, ſetting forth a Deed of Settlement of Lands in Truſt, and to compel the Defendant, who was a Truſtee therein nominated, to execute an Eſtate.

The Defendant by Anſwer ſays, that he believed that there was ſuch a Deed as in the ſaid Bill is ſet forth, &c.

And upon the Hearing they would have read a Deed for the Plaintiff, tho' not proved, (but upon a Commiſſion taken out only againſt another Defendant to the Bill) ſuppoſing it to be confeſſed by the Anſwer.

But the Court would not permit the Reading of it; for the Confeſſing goes no further than what is ſet forth in the Bill, and will not warrant the Reading of a Deed produced, altho' it hath ſuch Clauſes in it.

Anonymus.

A Bill was preferred againſt one, to diſcover his Title, that A. B. might be let in to have Execution of a Judgment.

The Defendant pleaded, that he was a Purchaſer for a valuable Conſideration; but did not ſet forth, that he had no Notice of the Judgment.

And it was over-ruled; for 'tis a fatal Fault in the Plea.

Note, 2 Chan. Ca. 73. Lord Chancellor ſaid, 'tis an infallible Rule, that a Purchaſer for valuable Conſideration ſhall never without Notice diſcover any Thing to hurt himſelf.

Bird *verſus* Bloſſe.

THE Caſe was thus:

One wrote a Letter, ſignifying his Aſſent to the Marriage of his Daughter with J. S. and that he would give her 1500 l. And afterwards by another Letter, upon a further Treaty concerning the Marriage, he went back from the Propoſals of his Letter. And at ſome Time after declared, that he would agree to what was propoſed in his firſt Letter. See 2 Chan. Rep. 284, 285.

This Letter was held a ſufficient Promiſe in Writing, within the Statute of 29 Car. 2. called the Statute againſt Frauds and Perjuries, and that the laſt Declaration had ſet the Terms in the firſt Letter up again.

Anonymus.

WHere a Man buys Land in another's Name, and pays Money, it will be in Truſt for him that pays the Money, tho' no Deed declaring the Truſt, for the Statute of 29 Car. 2. called the Statute of Frauds, doth not extend to Truſts, raiſed by Operation of the Law. 2 Salk. 676, 7.

Anonymus.

AN Administrator de bonis non of the Cousee of a Statute had agreed with the Cousor, to assign it in Consideration of a Sum of Money which upon the said Agreement the Cousors had covenanted to pay to him, his Executors or Administrators; and then the Administrator died.

The Court decreed the Money to be paid to the Executor of the Administrator, and not to the new Administrator de bonis non: altho' before the Extent it could not be assigned at Law.

Sed Nota, That there were not Debts of the first Intestate appearing.

Termino Sancti Hillarii, Anno 35 & 36 Car II.

In Cancellaria.

2 Chan. Rep. 371, 372, &c.

NOTE, Suits in Chancery admitted for Distribution of Intestates Estates, upon the Act of 22 Car. 2.

Sir Thomas Draper Mil' *versus* Dr. Crowther.

THE Bill sets forth a Contract under Seal with the Defendant, for making of a Lease of certain Lands in Middlesex, and to have an Execution of the Agreement.

See N. Chan. Rep. 45. Antea 33, 106.

The Defendant pleaded, that he was Head of a College in Oxford; and sets forth the Charters of 14 R. 2. and 14 H. 8. Impowering the University to enquire and proceed in all Pleas and Quarrels in Law and Equity, except concerning Freehold, where a Scholar, their Servants and Ministers sunt una partium, &c. ita qd' Justiciarii de Banco Regis, sive de Communi Banco, vel Justiciarii ad Assisas non se intromittant, &c. and the Confirmation by an Act of Parliament of the 13th of Elizabeth; and concluded his Plea to the Jurisdiction of the Court.

And it came to be argued before the Lord Keeper Guildford, 22 Febr. 1683. and the Plea was over-ruled, because the Charter ought properly to be extended to Matters at Common Law only, or to Proceedings in Equity that might arise in such Cases, and not to meer Matters of Equity, which are originally such, as to execute Agreements in specie.

Again, Conuſance of Pleas is never to be allowed, unleſs the Inferior Jurisdiction can give Remedy. Here they can only excommunicate or impriſon; but cannot proceed to Sequeſtration of Lands in Middleſex.

If the Matter lay only in Damages; it might be allowed to them, becauſe the Jurisdiction is given over all England; but this is not to be intended where the Suit is for the Thing it ſelf, and when 'tis out of their Reach.

A Precedent was cited in the Year 1663. * before my Lord Clarendon, Chancellor, aſſiſted with Hale (then Chief Baron) and Juſtice Wyndham, where the Plea was over-ruled. Vide in the 3 Cro. 73. Wilcocks and Bradell's Caſe, and Hallie's Caſe 87.

* Q. if not 1673. For the Caſe cited, ſeems to be that in Nelſ. Chan. Ca. 45.

Sir Robert Reeve's Caſe.

SIR Robert Reeve, upon his Marriage with his ſecond Wife, ſettled a Jointure of divers of his Lands in Suffolk, which he had before charged with his Daughter's Portion, (viz.) 3000 l. (which Daughter he had by a former Wife;) and by his laſt Will he mentioned that the ſaid Jointure-Lands were ſo incumbred; and therefore he deviſed certain Lands he had in Bickerton in Yorkſhire to his Wife, in lieu of ſuch Part of the Suffolk Lands as were charged with the Portion, in Caſe ſhe would accept thereof.

Vid. 1 Chan. Ca. 99. Douglas v. Ward. 1 Nelſ. Abr. 430.

But after his Deceaſe it appeared, that the Lands in Bickerton were not equivalent in Value to the Suffolk Lands; and therefore ſhe held to the later, and was not prejudiced by the Charge of the Portion, becauſe it appeared to be a voluntary Settlement.

Nota, In this Caſe the Lord Keeper decreed, that the Portion ſhould be charged upon the Bickerton Lands, for ſo much as it was defeated by the Settlement in Jointure of the Suffolk Lands.

1 Chan. Ca. 295.

Anonymus.

ONe deviſed his Lands to J. S. in Fee, in Truſt for Katharine —— and the Heirs of her Body; and if Katharine died without Iſſue to Jane —— for Life: And in another Clauſe in the Will he deviſed, that if Katharine died without Iſſue, and Jane be then deceaſed; then, and not otherwiſe, he gave the Land to J. N. and his Heirs.

1 Chan. Ca. 190.

Katharine died without Iſſue, and Jane ſurvived her and died.

A Bill was brought by J. N. againſt J. S. and the Heir at Law of the Teſtator, to have this Truſt executed.

My Lord Keeper decreed it for J. N. altho' Jane ſurvived Katharine; becauſe the Words (if Jane be then deceaſed) ſeemed to be put in to expreſs his Meaning, that Jane ſhould be ſure to have it for her Life, and that J. N. ſhould not have it till ſhe were dead; and alſo to ſhew when J. N. ſhould have it in Poſſeſſion.

Termino Paſchæ, Anno 36 Car. II.

In Cancellaria.

William Ragget and his Wife *verſus* William Clarke.

Plea of Occupancy allowed.

S. C. 1 Vern. 384.

THE Caſe was thus: Nicholas Wheeler was ſeized of a Parcel of Land for his own Life, and the Lives of two others, and prevailed with the Defendant to be bound with him for a Sum of Money. And that the Defendant might raiſe Money for the Diſcharge of the ſaid Debt, he permitted the Defendant to enter into the ſaid Lands, and to take the Profits for two Years, (the ſaid Lands being about 12 l. Yearly value;) and the ſaid Land being ſo in the Poſſeſſion of the Defendant, the ſaid Wheeler died, and made Iſabel (Wife of the now Plaintiff) his Executrix.

And this Bill was brought by the ſaid Husband and Wife, to have an Account of the Profits, and that the Poſſeſſion of the Land ſhould be delivered up to them.

The Defendant by Plea ſets forth his Title as Occupant, and it was allowed. And the Bill was diſmiſſed.

Bonham *verſus* Newcomb.

Q. antea. 353, 354.

ONE being ſeized in Fee, in Conſideration of 1000 l. paid to him by a Perſon that married his Kinſwoman, conveys to him and his Heirs, and takes a Re-demiſe for 99 Years, if he ſhould live ſo long: And a Covenant therein, that if he ſhould pay 1000 l. (with the Intereſt that ſhould be due for the ſame) at any Time during his Life, that the Grantee ſhould re-convey to him and his Heirs; and that if he did not pay the Money, then that his Heirs, &c. ſhould have no Power to redeem.

He died, the Money not being paid, and his Heir preferred a Bill to redeem it.

And it was urged for him, that in a Conveyance, which was a Security for Money, whatever Covenant there was therein to exclude from Redemption, ſuch Covenant would not be regarded in this Court, and that the Perſon to whom the Conveyance was made might have had a Bill in the Life-time of him that conveyed, to have a Time ſet for the Payment of the Money, or otherwiſe to be foreclоſed.

But my Lord Keeper diſmiſſed the Bill; For, he ſaid, in a common Mortgage ſuch Covenant to reſtrain Redemption, ſhould not be regarded; but this was made with an Intention of a Settlement of his Eſtate, beſides the Conſideration of the Money paid. And he denied that he could have been, by the Degree of this Court, limited to any Time for Payment of the Money; for this Court cannot ſhorten the Time that is given by expreſs Covenant and Agreement of the Parties; but when that Time is paſt, then the Practice is to foreclоſe.

Nota, This Diſmiſſion was afterwards in the Parliament, held 1 & 2 W. & M. affirmed.

Nota, If a Man makes a voluntary Conveyance, and there be a Defect in it, ſo as it cannot operate at Law, this Court will not decree an Execution thereof: But ſometimes it has been Decreed, where it is intended a Proviſion for Younger Children. Vide N. Chan. Rep. 201, 343. See the D. of Norfolk's Caſe, in 3 Chan. Ca.

The Lord Salisbury's Caſe.

My Lord Salisbury married the Daughter of one Bennet, who had two Daughters, and bequeathed by his Will to each of them 20000 l. provided, that if they, or either of them married before the Age of Sixteen, or if that the Marriage were without the Conſent of ſuch Perſons, that they ſhould loſe 10000 l. of the Portion, and that the 10000 l. ſhould go to his other Children. 3 Chan. Ca. 135. See N. Chan. Ca. 62, 145, 234.

The Caſe was thus:

The Lord Salisbury married with one of the Daughters under the Age of 16. but with the Conſent of all the Parties.

It was urged, That it being with Conſent, it might be at any Age.

But my Lord Keeper was of Opinion, that both Parts muſt be obſerved.

Anonymus.

In a Covenant to ſtand ſeized to the Uſe of A. for Life, and after to two equally to be divided, and to their Heirs and Aſſigns for ever. 3 Lev. 373. 3 Mod. 209. 1 Salk. 226, 390, &c.

My Lord Keeper declared his Opinion, that the Inheritance was in Common, as well as the Eſtate for Life. He ſaid, That it had been

3 Mod. 209. 2 Rol. Abr. 89, 90. 1 Salk. 226, 390, 391. 3 Lev. 373.

been held that where the Words were (to two equally divided) that should be in Common; otherwise if the Words were (equally to be divided;) but since taken to be all one. Nay, a Devise to two equally will be in Common. Here there shall not be such a Construction as to make one Kind of Estate for Life, and another of the Inheritance; and Survivorship is not favoured in Prejudice of an Heir.

Vide N. Chan. Rep. 67 & 393.

Note, That if a Bill be exhibited for the Examining of Witnesses in perpetuam rei memoriam, if the Plaintiff therein prays Relief, the Bill shall be dismissed.

Termino Paschæ, Anno 1 Jac. II.

In Cancellaria.

The Lord Pawlet's Case.

Q. 1 N. Abr. 430.

THE Lord Pawlet had made a Settlement of his Estate, and had by the Deed charged his Lands with the Payment of 4000 l. apiece, to be paid to his two Daughters, at their respective Ages of 21 Years, or Days of Marriage; and reserved to himself a Power of otherwise ordering it by his Will.

And by his Will in Writing made at the same Time, or within a Day after, devised by these Words, (viz.) I give and bequeath to my two Daughters by Name 4000 l. apiece, to be respectively paid unto them for their Portions, in such Manner as I have provided by the said Settlement; and mentioned, that he would be understood to mean only one 4000 l. to each of his said Daughters, and appointed to each of the Daughters 100 l. per annum for Maintenance.

It happened one of the Daughters died before Marriage or the Age of 21 Years, and my Lady Pawlet (the Mother of the Daughters) took out Letters of Administration to the Daughter that died, and preferred a Bill against the Trustees for the 4000 l. and the Heir, to whom the Benefit of the Lands after the Money raised was appointed.

The Question solely was, whether this Money should go to the Administratrix, or the Land be discharged thereof, and accrue to the Benefit of the Heir?

It was agreed on all Hands, that if this had been a Legacy, or a Sum of Money bequeathed by the Will, altho' the Party had died before the Age of 21 or Marriage, the Administrator should have had it; and that is the Practice in the Ecclesiastical Court in Case of Legacies. The Legatee in such Case is taken to have a present Interest, tho' the Time of Payment be future.

Antea 342, 346, 7.

My Lord Keeper mentioned the Reaſon to be, becauſe it charges the Perſonal Eſtate which is in Being at the Time of the Teſtator's Death, and if the Legacy ſhould by ſuch an Accident be diſcharged, it would turn to the Benefit of the Executors, whereas the Teſtator did not probably ſo intend it: And further it has been ruled, that altho' a Sum of Money be deviſed out of Lands to be ſo paid at a future Day, the Death of the Legatee doth not loſe it. Tho' my Lord Keeper did not ſeem ſatisfied with the Reaſon of that Caſe; but it having been ſo decreed it was not good to vary, to avoid Arbitrarineſs and Incertainties.

But here this Sum of Money is appointed to be paid by the Deed, and is a Truſt charged upon Lands, and Truſts are governed by the Intention of the Party, and that the Perſonal Eſtate is not charged, and this Sum of Money doth not lie in Demand by a Suit, as where a Legacy is deviſed; but only a Bill may be preferred, to have the Truſts performed.

And tho' it was much inſiſted on for the Plaintiff, that here the Will bequeaths this Money; yet that refers to the Deed, and orders it to be paid in ſuch Manner as was thereby appointed.

And it was ſaid to be the ſame with the Caſe of Bond and Richardſon, which was lately by my Lord Keeper thus decreed, being a Sum of Money charged to be paid out of Land at ſuch an Age. If a Settlement were made, and Lands charged with ſuch Sums of Money as a Will ſhould declare, there the Will would be but declarative, and not operative.

Termino Sancti Hillarii, Anno 1 & 2 Jac. II.

In Cancellaria.

Frances Whitmore Vid. Plaintiff, *verſus* Weld & al', Defendants.

THE Caſe, as it was drawn up upon Reference thereof by my Lord Keeper to the Judges of the Common Pleas for their Opinion, was thus: (Viz.) 2 Chan. Ca. 167. S. C.

On the 18th of January 1675. William Whitmore the Elder, taking Notice that he had ſettled the major Part of his Lands by Deed, and being poſſeſſed of a very great Perſonal Eſtate in Mortgages, Jewels, Plate, Bonds and other Goods and Chattels, amounting in the whole to a very great Sum, by Will in Writing deviſed ſeveral Legacies; and after Wills in this Manner: (Viz.)

—— The Surpluſage of my Perſonal Eſtate (my Debts, Legacies and Funeral Charges being paid and ſatisfied) I give unto the Right Honourable William Earl of Craven, for the Uſe of my only Son William

William Whitmore and his Heirs lawfully deſcended from his Body, and for the Uſe of the Iſſue Male and Iſſue Female deſcended from the Body of my Siſter Elizabeth Weld deceaſed, Margaret Kemes and Anne Robinſon, in Caſe that my only Son William Whitmore ſhould deceaſe in his Minority, without Iſſue lawfully deſcended from his Body. I nominate and appoint my only Son William Whitmore Executor of my laſt Will and Teſtament. I nominate and appoint the Right Honourable William Earl of Craven, during the Minority of my only Son William Whitmore, Executor of my laſt Will and Teſtament. I commit the Education and Tuition of my only Son William Whitmore unto the Care of the Right Honourable the Earl of Craven.

On the 5th of Auguſt 1678. the Teſtator died, his Son being then about the Age of 13 Years. The Earl of Craven proved the Will.

William Whitmore the Son made his Will in Writing, and thereby deviſed to Frances his Wife all his Eſtate Real and Perſonal, and makes her ſole Executrix, and about the 2d of Auguſt died without Iſſue, being above the Age of 18 Years, and under the Age of 21 Years, not having proved his Father's Will.

The Will of William Whitmore the Elder, is duly proved by Frances.

The Queſtion was, whether Frances Whitmore the Executrix of William Whitmore the Son, be well entitled to the Surpluſage of the Perſonal Eſtate of William Whitmore the Father, or the Deſcendants of the Siſters?

Upon hearing of this Cauſe a Caſe was made ut antea, and referred by the late Lord Keeper North to the Judges of the Common Pleas, who were divided in Opinion, but made no Certificate thereof, (the Reference being determined by his Death.)

And afterwards by Order it came to be heard before the Lord Chancellor Jefferies, who upon hearing of the Counſel of both ſides decreed it for Frances Whitmore the Complainant; for that the Executorſhip of my Lord Craven determined at the Age of 17 Years of William Whitmore the Son, and then the Surpluſage became an Intereſt veſted in him, and could not be deviſed over: And his Lordſhip ſeemed to be of Opinion, the Minority in the Clauſe wherein the Deviſe over was, ſhould be underſtood to determine at the ſame Time, as in the Clauſe of Executorſhip.

A TABLE OF THE Principal Points Argued and Reſolved in the SECOND PART OF THESE REPORTS.

A.

Acceptance.

See **Surrender.**

Action.

TORTS in their Nature are ſeveral, ſo one Defendant (of many) may be found Guilty, and the other Not guilty; but 'tis not ſo in Actions grounded upon Contracts, Page 151

Action upon the Caſe.

See **Aſſumpſit, Outlawry.**

Action lies againſt the Mayor of *London*, for not granting a Poll upon a double Election, 25

The Law gives an Action for but a Poſſibility of Damage, as for calling an Heir apparent, Baſtard, *&c.* 26, 27

Where an Officer does any Thing againſt (or refuſes to do) the Duty of his Place, whereby Damage accrues to the Party, Action lies, 26

But it lies not againſt a Lord of a Manor, for refuſing to admit a Copyholder, 27

Againſt a Common Carrier, for loſing Goods delivered, and Carriage paid for, 78

Againſt Bailiffs, for levying Money by Pretence of a *Fieri facias*, 93

For not folding his Sheep upon the Plaintiff's Land, whereby the Plaintiff loſt the Benefit of Foldage, 138

For the Profit of an Office; not neceſſary to ſhew every particular Sum received by the Defendant: But it is good Evidence for Damage, to ſhew the Profit of the Office *Communibus Annis*, 171

In an Action, for not Grinding at his

Mill, what ſhall be a ſufficient ſetting forth of the Cuſtom, Page 292

Action upon the Caſe for Slander.

Writ in a Letter, of a Lawyer, *He will give vexatious and ill Counſel, and ſtir up a Suit, and milk your Purſe, and fill his own large Pockets*, Actionable, 28

Anciently, no Action for Words, unleſs the Slander concerned Life, *ibid.*

Of one who had been a Member of Parliament, *Your Maſter is a Papiſt, when he is at Home he goes to Church; but when he is at* London *he goes to Maſs: Sir* J. C. *and he were both Penſioners at the Time of the Long Parliament*, Actionable, 265

To ſay of Man that had been in an Office, that *he had behaved himſelf corruptly in it*, Actionable, 266

Adminiſtration.

In an Action againſt an Adminiſtrator, it is neceſſary to ſet forth, that Adminiſtration was committed to him, tho' not to ſay by whom, 84

Adminiſtrator ſhall be charged for Rent, after the Aſſignment of the Teſtator's Term, 209

Admiralty.

Mariners, as well Officers as Common Seamen, may ſue for Wages in the Court of Admiralty, and ſome only may ſue there, as well as when all join, 181

If the Suit be there againſt ſome of the Part-Owners, the Courſe is not to charge them with the whole, but according to their proportionable Parts, *ibid.*

Advowſon.

Preſentation by Turns among Parceners, whether an Uſurpation in a Turn, puts all out of Poſſeſſion, or only one, 39

Age.

See **Deviſe, Executor.**

Amendment.

See **Diſtreſs, Scire facias, Writs.**

Habere facias, inſtead of *Liberari facias*; and *inquirat* inſtead of *inquirant*, amendable upon Motion, becauſe in a Judicial Writ, Page 171

Arbitrament, Award.

See **Umpire.**

No Place mention'd where the Award was made nought, 72

Whether Arbitrators having Power to name an Umpire, may name a ſecond, if the firſt refuſes, 114

Submiſſions to Awards favourably conſtrued, becauſe they tend to the End of Controverſies, 115

Where an Award that ſeems all on one ſide, may be good, 222

Award may be by Word of Mouth, and he which ſets forth ſuch Parol Award is not tied to Strictneſs of Words; but 'tis ſufficient to ſhew the Effect and Subſtance of what was awarded, 242

Award to pay the Charges of a Suit good, tho' the Sum is uncertain; for it may be eaſily reduced to Certainty, 243

Where Money is awarded to be paid to *J. S.* and no Mention made of his Executors; yet in Caſe that he dies before, the Money ſhall be paid to his Executors; for an Award creates a Duty; and the Executor ſhall releaſe where the Teſtator was awarded ſo to do, 249

Aſſent.

See **Executor.**

Aſſent of a Purchaſe veſts the Eſtate in him, tho' he cannot have an Action of Treſpaſs before Entry. 205

Aſſigns.

Where a Man covenants for himſelf and his Aſſigns to permit; if a Breach be laid in the Aſſigns, this Covenant ſhall relate only to the Aſſigns after the Deed was made, and not before, Page 278

Aſſumpſit.

J. S. being indebted to the Plaintiff, and the Defendant to *J. S.* the Defendant promiſes, that if he would procure an Order from *J. S.* he would pay him; Action good after the Order procured, 71, 74

If four be ſued in an *Aſſumpſit*, and they plead *Non aſſumpſit infra ſex annos*, and the Jury find that one did aſſume *infra ſex annos*, but not the Reſt; the Plaintiff cannot have Judgment, 151

Indebitatus Aſſumpſit brought for Money won at a Play called Hazard, a general Declaration good, without ſetting forth Croſs Conſiderations 175

A Promiſe to one Part being void, cannot ſtand good as to the other, 224

Attorney.

An Attorney has Privilege to lay his Action in *Middleſex*, becauſe of his Attendance, 47

Averment.

Whether an Agreement may be plead ed and averr'd, to ſhew the Meaning of the Parties, and that the Condition of a Bond may be taken accordingly, 108

Quarter Days may be averr'd upon theſe General Words, [*The uſual Feaſts*] 141

Authority.

See **Ampire.**

Where an Authority is once fully Executed, the Power is determined. Not ſo where there is a compleat Execution, Page 115

Where a Man is veſted with a bare Authority, his Denial or Refuſal to execute it does not conclude him, but that he may execute it afterwards, 116. *Secus* where he is veſted with an Intereſt, 117

Award.

See **Arbitrament.**

B.

Bail.

See **Pleading.**

THE Plaintiff may releaſe his Action after the Sheriff hath taken a Bail-Bond, 131

Attachments out of Chancery, within the Statute, that enables the Sheriff to take Bail-Bonds, 238

How far a Bail-Bond may vary from the Writ, *ibid.*

Bankrupt.

Trover and Converſion brought by an Aſſignee of Commiſſioners of Bankrupts, againſt one poſſeſt of Bankrupt's Goods, 63

The Commiſſioners cannot aſſign Money levied at the Bankrupt's Suit in Execution, remaining in the Sheriff's Hands, or in Court, 95

A Bankrupt's Servant ſhall ſet forth an Account of the Bankrupt's Eſtate in his Anſwer to a Bill in Chancery, tho' he hath been already Examined before the Commiſſioners, 358

Baron and Feme.

If a Woman be Warden of the Fleet, and one in Priſon there marry her, he is thereby out of Priſon, and (in the Eye of the Law) at large; being a Husband cannot be in Cuſtody to his Wife, 19

Bar-

Battery brought for both, and found only as to the Wife, tho' they cannot join for beating both; yet good after Verdict, 29
The Baron and Feme (Executrix) *devaſtaverunt & converterunt ad uſum ipſorum*, good, 45
In an action brought againſt the Husband for Lodging, and goods had by the Wife after Elopement, what Plea ſhall be good, what not, 155
Whether the Wife may join with her Husband in bringing Treſpaſs *Quare Clauſum fregit*, where the Land is the Wife's, 195
A *Supplicavit de bono geſtu* granted in Chancery againſt the Husband, for ill Uſage to his Wife, 345

Bond or Bill Penal.

See Obligation.

By-Law.

A Corporation cannot make a By-Law to bind thoſe which are not of its Body, without Act of Parliament, or expreſs Preſcription, 33
Whether a By-Law of the Univerſity of *Oxford* ſhall oblige the Townſ-Men, 33, 34
A Corporation cannot make a By-Law, to have a Forfeiture levied by ſale of Goods, nor for Forfeiture of Goods, 183

C.

Canons.

THoſe of 3 *Jac.* 1. of force, tho' never confirmed by Act of Parliament, 44
What Canons of Force, what not, *ibid.*

Challenge.

To the Array; becauſe the Sheriff (in 1687.) had not taken the Teſt, the Challenge diſallow'd, 58

Chancery.

See Covenant, Mortgage, Trial, Limitations, Executor.

An Infant's Anſwer in Chancery by Guardian, no Evidence at Law to affect the Infant, 72
There can be no Proceſs of Contempt in Chancery againſt a Peer, 342
Purchaſer without Notice of Incumbrance favour'd in Chancery, 339, 343
Words of Conveyance paſſing more than was intended, how relievable in Chancery, 345
A Truſt and Equitable Intereſt is a Creature of the Chancery, and therefore diſpoſable by the Rules of that Court, 350
Where a Man leaves his Eſtate under ſeveral Incumbrances, if the Heir buys in any of the firſt, they ſhall not by the Courſe of this Court ſtand in the Way of Creditors for more than the Heir really paid for them, 353
Relieves an Heir againſt Extortion, 359
What ſhall be admitted to be read in Chancery, what not, 361
Diſtribution of Inteſtates Eſtates upon the Statute of 22 & 23 *Car.* 2. *c.* 10. may be ſued for in Chancery, 362
Where a Bill is exhibited, to examine *in perpetuam rei memoriam*, the Plaintiff muſt not pray Relief, 366

Commitment.

What Commitment of Juſtices of the Peace, for refuſing to find Sureties of Good Behaviour, good; what not, 22, 23, 24

Condition.

Condition of a Bond, not to give Evidence at the Aſſizes, againſt Law; and the Obligee ought to be proſecuted for taking ſuch a Bond, 109

Conſideration.

See Uſe, Notice, Grant, Enrolment, Marriage, Mortgage.

Conveyance.

Conveyances at the Common Law (not ſuch as work by the Statute of Uſes, or Surrenders of Copyholds) deveſt the Eſtate out of him that makes them immediately, and put it in the Party to whom ſuch Conveyance is made, tho' in his Abſence, or without his Notice, till he ſhews his Diſagreement, Page 201

What Acts are requiſite in Conveyances at Common Law, 201, 202

Articles to ſettle, decreed to be executed by the Heir at Law, 343

A voluntary Conveyance defective at Common Law, rarely relieved in Chancery, 365

Copyhold.

See Action on the Caſe.

In what Caſes, and when, the Lord ſhall ſeize the Copyhold Eſtate of his Tenant, for Felony or Treaſon, 38

Lands do not appear to be Copyhold by ſaying they were held *according to Cuſtom*, unleſs it be ſaid *at the Will of the Lord*, 144

A Copyholder in Pleading, need not ſhew Admittance, where the Title does not come in Queſtion, as in Avowry for Rent reſerved from his Under-Tenant, 182

Corporation.

See By-Law.

A Corporation cannot preſcribe in a *Que Eſtate*; *ſed Quære*, 186

Coſts.

See Nonſuit.

The Court cannot allow double Coſts, unleſs the Judge of Aſſizes cauſed the *Poſtea* to be mark'd, Page 45

Divers Treſpaſſes aſſigned; the Defendant pleads Not guilty for ſome, and juſtifies for others, and the Jury find for the Plaintiff in one Iſſue, and for the Defendant on the other, no more Coſts than Damages, 180, 195

What Coſts diſcharged by the General Pardon, and what not, 210

No Coſts to either Party upon a Repleader, 196

Full Coſts in Treſpaſs given, where the Damage was under 40*s*. 215

Covenant. 278

See Grant, Treſpaſs.

An Attorney covenants on Behalf of another Perſon, that the Plaintiff ſhall quietly enjoy, an Action of Treſpaſs is brought againſt the Plaintiff, whether this is a Breach of the Covenant? 46, 61, 62

In an Action of Covenant the Defendant cannot plead, that the Plaintiff *tempore quo, nihil habuit in tenementis*, tho' ſuch Plea in an Action of Debt for Rent, is good, 99

Where Leſſee covenants to build three Houſes upon the Premiſſes, and keep them in Repair; he builds four and lets one fall to Decay, whether the Covenant extends to the Fourth, 128

A Covenant which does not conſiſt with the Recital that leads and occaſions it, ſhall not oblige, 140

A Suit in Chancery to ſtay Waſte, no Breach of Covenant for quiet Enjoyment, tho' the Bill be diſmiſſed with Coſts, 213, 214

A later Covenant by a ſecond Indenture cannot be pleaded in Bar to the former; but the Defendant muſt bring his Action on the laſt

last Indenture, if he will help himself, Page 218

Cuſtom.

See Fine.

D.

Damages.

See Coſts.

Debt.

See Rent.

IF Part of a Debt upon Bond be received, and an Acquittance given before the Action, it is a Bar only of ſo much as was received; but if after the Action brought, it ſeems it may be pleaded in Bar to the Whole, 135

Whether an Action of Debt may be brought upon a Judgment pending a Writ of Error, and whether the Defendant in ſuch Action ought to demur or plead Specially, 261

A Conſideration creates a Debt, tho' that Debt be not reduced to a certain Sum; as in the Caſe of a *Quantum meruit*, 282

Debt ſecured is Payment in Law, 358

Deviſe.

See Tail, Uſe.

Of implicit Deviſes, and where Lands ſhall paſs by Implication in a Will, and where not, 56, 57

A Reverſion ſhall paſs in a Will by the Words, *All my Hereditaments*, 286

Whether Money in the Court of Orphans be deviſable, 340

If Money be deviſed to one, to be paid at his Age of 21 Years, if the Party dies before, it ſhall go to his Executors; but if Money be bequeathed to one at his Age of 21 Years, and he dies before, the Money is loſt, 242, 366

Where a Sum of Money is deviſed to a Child at ſuch an Age, it ſhall have the Intereſt in the mean Time, rather than the Executor ſhall ſwallow it, eſpecially when no Maintenance is otherwiſe provided, Page 346

Deviſe to *J. S.* at the Age of 21, and if *J. S.* dies before 21, then to *A. A.* dies, after *J. S.* dies under 21, the Adminiſtrator of *A.* ſhall have it, 347, 349

If Lands be deviſed for Payment of Debts and Legacies, the perſonal Eſtate ſhall notwithſtanding as far as it will go, be apply'd to the Payment of Debts, *&c.* and the Land only make up the Reſidue, 349

Where an Adminiſtrator ſhall have an Eſtate deviſed to an Infant, and where not, 355, 356

A Sum of Money deviſed to be raiſed out of the Profits of his Lands, the Profits will not amount to the Sum, the Land may be ſold, 357

Diverſity, where a Child's Portion is deviſed out of perſonal Eſtate, and where to be raiſed out of Land, 366, 367

Diſtreſs.

Whether a Drover's Cattle put into a Ground belonging to a common Inn upon the Road to *London*, may be diſtrained for Rent due from the Inn-keeper, 50

Leave given to mend the Conuſance upon a Diſtreſs, after a Demurrer, paying Coſts, 142

A Diſtreſs may not be ſever'd (as Horſes out of a Cart) and therefore in ſome Caſes a Diſtreſs of great Value may be taken for a ſmall Matter, becauſe not ſeverable, 183

Where one holds a third Part of certain Land, and another two Third

Parts of the ſame Land, undivided; he who hath the one Part cannot diſtrain the Cattle which were put in by Licence of him who hath the two Parts, Page 228, 283

E.

Eccleſiaſtical Court.

See Marriage.

Whether the Eccleſiaſtical Court may proceed againſt Conventicles, or whether they be puniſhable only at Common Law, 41. They may, 44

The legal Method of Proceedings in the Eccleſiaſtical Courts, 42, 43

The Proceeding *ex Officio*, *ibid.*

A Suit may be tried in the Eccleſiaſtical Court, upon a Preſcription to repair the Chancel; ſo alſo for a *Modus decimandi*, 239

Eccleſiaſtical Perſon.

A Curate incapable of taking an Eſtate deviſed in Succeſſion, for Want of being incorporate; but the Heir of the Deviſee ſhall hold the Eſtate in Truſt for the Curate for the Time being, 349

Ejectment.

In Ejectment, the Declaration of *Michaelmas*-Term, and the Demiſe laid 30 of *October*, after the Term began, 174

Elegit.

See Execution.

Enrolment.

A Deed, where the Grant is expreſſed to be in Conſideration of natural Affection as well as Money, need not be enrolled; but the Land will paſs by Way of Covenant to ſtand ſeis'd, 150

Error.

See Debt.

Eſſoin.

Where ſeveral Tenants in a real Action may be eſſoined ſeverally, Page 57

Regularly Proceedings in an Eſſoin in Dower, 117

Eſtate.

What Word ſhall create a Tenancy in Common, 265, 266

Evidence.

See Action on the Caſe, Chancery.

Exchange.

Bills of Exchange have the ſame Effect between others as between Merchants, and a Gentleman ſhall not avoid the Effect by Pleading, *He is no Merchant*, 295, 310

The Cuſtom of Bills of Exchange, 307, 310

Execution.

How the Sheriff ought to behave himſelf in executing a *Fieri facias*, 94, 95

Whether Money paid for Goods taken upon a *Fieri facias* is properly paid to the Uſe of the Sheriff, or Plaintiff, *ibid.*

A *Fieri facias* was executed after the Party was dead, upon the Goods in the Hands of the Executor; but *Teſte* before, tho' not delivered to the Sheriff till after. This was a good Execution at the Common Law; but *quære* ſince the Statute of 29 *Car.* 2. *cap.* 3. 218

An Extent upon an *Elegit* being ſatisfied by Perception of Profits, he in Reverſion may enter, 336

Executor.

Executor.

See Award, Rent, Waver.

An Executor may detain for a Debt due upon a ſimple Contract, againſt a Debt grounded upon a *Devaſtavit*, Page 40

Whether the Executor of a Biſhop may bring an Action of Covenant for Breach of a real Covenant relating to Lands of the Biſhoprick, 56

Where a Woman diſpoſes of Goods, as Executrix in her own Wrong; if ſhe takes Adminiſtration afterwards, though before the Writ brought, this will not hinder the Plaintiff from charging her as Executrix in her own Wrong, 180

An Executor in his own Wrong cannot retain, *ibid.*

The Mother Executrix ſhall not diſcount for Maintenance and Education, out of the Money left by the Father; for the Mother ought to maintain the Child: But Money paid for binding him Apprentice may be diſcounted, 353

After an Executor aſſents to a Legacy, he ſhall never bring it back again to pay Debts: *Secus*, where he is ſued and pays by Decree in Chancery, there the Legatee ſhall refund, 358

Where an Executor pays a Debt upon a ſimple Contract, there ſhall be no refunding to a Creditor of a higher Nature, 360

Vide Legacy.

Money decreed in Chancery to the Executor of an Adminiſtrator *de bonis non*, and not to the ſecond Adminiſtrator *de bonis non*, where no Debts appeared of the firſt Inteſtate, 362

Minority as to Executorſhip determines at the Age of 17, and then a perſonal Eſtate deviſed to ſuch Executor, veſts in him, Page 368

Expoſition of Words.

Faldagium. 139

The Force of theſe Words [*in forma prædicta*] 215

F.

Fieri facias.

See Execution.

Fine.

WHere and how a Fine levied by a Feme Covert ſhall be ſet aſide, and where the Commiſſioner who took it may be fined by the Court. 30

A Fine acknowledged before the Revolution, and Writ of Covenant ſued out after, allowed good, 47,48

A Right to an Eſtate by Extent, barr'd by a Fine and Nonclaim, 329. So alſo the Right to a Term for Years, *ibid.* *Secus*, where a Statute is aſſigned in Truſt to wait upon the Inheritance. 330

Fine Cuſtomary.

What cuſtomary Fine between Lord and Tenant ſhall be allow'd good upon Alienation, 134, 135

Forfeiture.

See Office.

Generally where a Statute gives a Forfeiture, and not ſaid to whom, the King ſhall have it, unleſs there be a particular Perſon grieved, 188, 189, 267, 268

A Forfeiture ſhall not bind, in Equity, where a Thing may be done afterwards, or Compoſition made for it, 352

G.

Gaming.

See Aſſumpſit.

DIce-Play not unlawful in it ſelf, though prohibited by ſeveral Statutes to certain Perſons, and in certain Places, Page 175

Grant. 175

A Deed having no Execution to make it work as a Grant, ſhall operate as a Covenant to ſtand ſeiſed, 261. and by the Statute of Uſes, 266

Where Land is granted by Deed-Poll in conſideration of natural Affection, without Inrolment or Attornment, whether it ſhall operate as a Covenant to ſtand ſeized, or be void, 318

H.

Habeas Corpus.

NO *Habeas Corpus* to be moved for in the Common Pleas, unleſs it concerns a Civil Cauſe; yet the contrary permitted in the Caſe of an Attorney of that Court, 24

Half-Blood.

The Half-Blood ſhall have equal Share with the Whole-Blood, in Diſtribution, upon the Statute of 22 & 23 *Car.* 2. *c.* 10, 317

Heir.

See Mortgage.

Heirs, is *Nomen collectivum*, and is ſometimes ſo taken when 'tis only Heir, in the Singular Number, Page 313

Heir (and not Executor) ſhall have the Surpluſage of Lands leaſed for Payment of Debts, 359

I.

Infant.

INfants not forecloſed in Chancery till they come of Age, 351

Intent.

No Exception to *Unum Vaſum Vini Hiſpanici*, that is not ſaid what the Veſſel was made of; for it is intended to be made of Wood, 67

The Name of a Grantor omitted in an Indenture, ſupplied by Intendment, 142

Racks in a Stable ſhall be intended to be fix'd, and need not be ſhewn to be ſo in Pleading, 214

Every Agreement muſt have ſome reaſonable Conſtruction, that may be conſiſtent with the Intent of the Parties; and therefore if a Man agrees with another, that he ſhall make a Drain through his Ground, he ſhall not make it through the Party's Stables or Building, in Caſe there are other Places proper, 278

In a Special Verdict, nothing ſhall be intended that is not found, 330

Impriſonment.

See Pleading.

Impropriation.

Whether a Rectory impropriate, being made a Lay-Fee, can be ſeque-

ſtred by the Court Chriſtian, for not repairing the Chancel, Page 35

Ireland.

See Naturalization.

Of its Conqueſt, and the Introducing the Laws of *England* there, 4
The Power of an Act of Parliament in *Ireland*, 5

K.

King.

See Forfeiture.

Allegiance due to the Natural, and not the Politick, Perſon of the King, 3
In Caſe of Things which are *Nullius in Bonis*, where no viſible Right appears, the Law gives them to the King, as Derelict Lands, Treaſure Trove, Extra-parochial Tithes, *&c.* So where the Right is equal between the King and the Subject, the King's Title hath the Preference, 208
The King is the Fountain of Juſtice, and that as well Eccleſiaſtical as Civil, and may by the ancient Law of the Realm viſit, reform and correct Abuſes in the Juriſdiction Spiritual, 268
In what Caſes Forfeitures are veſted in the King before Office found, and where not, 270

L.

Law.

A Thing for which there is neither practical Cuſtom, judicial Precedent, or Act of Parliament, to warrant, may well be judged to be againſt Law, 7
The cleareſt way how to underſtand any Law, is to conſider what was the Judgment of thoſe People among whom, and the Times in which, it was practical, Page 17
To excite the People to the Diſobedience of a Law of publick Nature, is the Higheſt Offence under High Treaſon, 23

Leaſe.

What Leaſe capable of a Releaſe, to work a Bargain and Sale, 35
For 99 Years, if two Perſons ſhall ſo long live, determines upon the Death of either, 74
Articles amounting to a Leaſe, 62

Legacy.

See Executors.

Legatees are to have their Proportion, where the Aſſets fall ſhort, 358
Legatees ſhall refund againſt Creditors, and if the Eccleſiaſtical Court give Sentence for a Legacy, a Prohibition lies, unleſs they take Security to refund, 358, 360

Licence.

See Diſtreſs.

Limitation. 152

See Original, Mortgage.

Suit to recover a *Depoſitum*, in Truſt for a *Feme-Covert*, not barr'd by the Statute of Limitations, 345

London.

Of the Cuſtom of *London*, relating to Orphans Money, 340, 341

Market

M.

Market.

WHere a Market is granted to the Damage of another, the Patent may be repealed in a *Scire facias* notwithſtanding a Writ of *ad quod damnum* had been executed; for the Return of that Writ was not concluſive, Page 344

Marriage.

Whether a Man may marry his Great Uncle's Widow, 9. He may, 18, 20
The four Statutes relating to Marriage expounded, 11, *& infr.*
Tho' the Stat. 32 *H.* 8. *c.* 38. allows all Perſons to marry that are without the Levitical Degrees; yet Perſons Pre-contracted, or under a perpetual Impotence, are prohibited to marry, 15
To marry his Brother's Wife prohibited by the Statute, tho' not by the Levitical Law, 17. So of his Wife's Siſter, *Ibid.*
Marriages in the aſcending and deſcending Line, prohibited without Limit; not ſo between Collaterals, and the Reaſons, 18
The Eccleſiaſtical Courts have Cognizance to puniſh Perſons marrying within the Levitical Degrees; but not to determine what is within the Levitical Degrees, and what not, 22
Agreements to ſettle in Conſideration of Marriage, favoured in Chancery, 353, 354, 357
Marriage Reſtrictions, how to be obſerved, 365

Mine.

If a Man opens a Mine in his own Land, he may dig and follow the Vein under another Man's Ground, Page 342
But if the Owner dig there alſo, he may ſtop his further Progreſs, *Ibid.*

Mortgage.

Where Lands are mortgaged thrice over, the third Mortgagee may buy in the firſt Incumbrance, to protect his own Mortgage, and he hath both Law and Equity for him, 338
He ſhall hold the Land againſt the ſecond Mortgagee, until he be ſatisfied both the Money he paid the firſt Mortgagee, and alſo his own which he lent upon the laſt Mortgage, *Ibid.*
But where only Part of the Lands are mortgaged to the firſt, and the whole to the ſecond, and after to the third; here, if the third buys in the firſt Title, it ſhall protect only that Part that is in the firſt Mortgage, 339
A Purchaſer or Mortgagee coming in upon a valuable Conſideration without Notice, and purchaſing in a precedent Incumbrance; it ſhall protect his Eſtate, tho' he purchaſed in the Incumbrance after Notice of a ſecond Mortgage, *Ibid.*
Mortgages not relievable in Chancery after 20 Years; for the Stat. 21 *Jac.* 1. *c.* 16. limits the Time of Entry to that Number of Years, and 'tis beſt to ſquare the Rules of Equity, as near the Rules of Reaſon and Law as may be, 340

Upon

Upon a Mortgage in Fee, the Redemption Money ſhall be paid to the Executor, and not to the Heir, Page 348, 351
Where by a Deviſe of all his Lands, Lands in Mortgage paſs, 351
Where a Man's own Covenant ſhall reſtrain him from his Equity of Redemption, and where it ſhall not, 365

Murder.

Husband kills a Man in the Act of Adultery with his Wife, Manſlaughter and not Murder; the Provocation being exceeding great. *Vide* the firſt Part of theſe Reports, 158

N.

Naturalization.

WHether a Scotiſhman *Antenate*, being naturalized by Act of Parliament in *Ireland*, can inherit Lands in *Ireland*, 2

Ne exeat Regnum.

Granted in Chancery, to ſtop one from going beyond Sea to avoid a Sentence in the Eccleſiaſtical Court, 345

Nonſuit.

The Plaintiff nonſuited in Ejectment after Evidence, where two Defendants, and one appears to confeſs Leaſe, Entry, &c. and the other not, the Plaintiff ſhall pay Coſts; but *quære* how to be divided, 195

Notice.

See Chancery, Conveyance. Mortgage.

If a Man pleads a valuable Conſideration in Chancery, to ſave his Eſtate from Judgment, he muſt alſo ſet forth, that he had no Notice of the Judgment, Page 361

O.

Obligation.

A Penalty may be recovered in an Action of Debt upon a Bill Obligatory, though it be not drawn properly as a Penal Bill, 106
A Bond againſt Law is void, 109

Occupant.

Occupancy favoured in Chancery, 364

Office.

Where the Archdeacon forfeits his Right to grant the Office of his Regiſter, by the Stat. 5 *E.* 6. *c.* 16. againſt the Sale of Offices, whether the King or Biſhop ſhall take Advantage of the Forfeiture, 188, 213, 367
A Diſſenter that hath not received the Sacrament of 12 Months before, may plead the Stat. 13 *Car.* 2. Stat. 2. *c.* 1. to excuſe him from ſerving Offices in Corporations, 247, 248

Original.

See Writs.

What Original Filing within Time, ſhall be ſufficient to prevent the pleading the Statute of Limitations, 193, 259

Whe-

Whether, in the Common Pleas, an Original in a *Clauſum fregit*, be ſufficient to warrant a Declaration in an *Aſſumpſit*, Page 259

Outlawry.

A Man in Priſon ought not to be outlawed by him who impriſoned him, 46

Action on the Caſe will not lie for the Party who hath an Outlawry, againſt a Sheriff who neglects to extend the Goods of the Outlaw, upon the Delivery of a Writ of *Capias Utlagatum*, for that it is the King's Loſs, 90

Whether Outlawry may be pleaded in Bar to an *Aſſumpſit* upon a *Quantum meruit*, 282

Oxford.

See **By-Law.**

The Privilege of the Univerſity not allowed to a Townſman, ſo as to excuſe him from Office, who keeps a Shop and follows a Trade, tho' he be matriculated, and Servant to a Doctor, 106

Privilege not allowed to a Member of this Univerſity, in a Suit in Chancery, 362

P.

Pardon.

SUits by Succeſſor againſt Executor for Dilapidations, not pardoned by the General Pardon; otherwiſe of Suits *ex Officio* againſt the Dilapidator, 216

Parliament.

No Action lies againſt the Chief Officer of a Corporation for a double Return of a Burgeſs, the Common Pleas having no Juriſdiction of this Matter, Page 37

Peace.

The King cannot diſcharge a Recognizance taken for Surety of the Peace; but after it is broken he may, 131

A Gentleman (ſaid to be a Member of the Houſe of Commons) bound to the Peace for challenging one of the King's Witneſſes to fight, 317

Plantation.

Though a Plantation be an Inheritance; yet being in a foreign Country, 'tis look'd upon as a Chattel to pay Debts, and a Teſtamentary Thing, 358

Pleading.

See **Baron and Feme, Covenant, Intent, Scire facias, Copyhold.**

What ſhall be held a double Plea, and what ſhall not, 98, 198

Treſpaſs for carrying away *diverſa onera equina* of Gravel, naught for Incertainty, 73

Want of the Word *alio*, or *aliis*, in a Declaration, where ſeveral Mention is made of Things of the ſame Nature, yet good enough, 78

For the Defendant to traverſe Matter not alledged, good Cauſe for the Plaintiff to demur, Page 79

If a Judgment and Execution be pleaded in an inferior Court, not of Record, the Proceedings ought to be ſet forth at large, and not ſufficient to ſay, *taliter proceſſum fuit*; alſo it ought to be ſet forth, That the Cauſe of Action did ariſe within the Juriſdiction, 100

In a Preſcription for Privilege, *tempore quo non exſtat memoria*, good enough; though the Courſe be to ſay, *à tempore cujus contrarium memoria hominum non exiſtit*, 130

Though by Courſe of the Court, if a Defendant lie in Priſon two whole Terms, without any Declaration put in, he may get a Rule to be diſcharged; yet if a Declaration be afterwards delivered and Judgment thereupon, 'tis a good Judgment, and the Bail formerly given will be liable, 143

Where Freehold Lands were pleaded to paſs by Surrender, according to Cuſtom, the Special Cuſtom muſt be ſet forth, 144

Where the Writ contains more than is declared for; this is a Variance not aided by the Verdict, and Judgment arreſted, 153

Debt upon Bond conditioned, That the Husband ſhall permit the Wife to diſpoſe of her perſonal Eſtate, *&c.* it is not ſufficient for the Defendant to plead, *quod Conditio nunquam infracta fuit*, and put the Plaintiff to aſſign a Breach; but the Defendant muſt ſhew forth, That he hath perform'd the Condition, 156

Where an Action of Treſpaſs (brought for the ſame Matter in another Court) may be pleaded in Bar to an Action of Trover, Page 169, 170

In Treſpaſs, *quod duas acras terræ fod. ſubvert. & aſportavit*, Judgment ſtayed, becauſe the Declaration doth not expreſs the Quantity of Earth carried away; for the two Acres relate only to the Ground digged, 174

The Plaintiff declares for Aſſault, Battery, Wounding, and Impriſonment; the Defendant in his Plea takes no Notice of the Battery; naught, 193

Plea in Abatement, That the Plaintiff was dead before the Action brought; where good, 196

Where [*prædict.*] is neceſſary, and where not, 197

Where a Traverſe that might have been omitted, is Cauſe of Demurrer, 212

Doubleneſs in a Declaration cured by Anſwering, 222

Day of the Week, where material, ought to be ſet forth in Pleading; for the Court are not obliged to conſult the Almanack, 248

Tempore dimiſſionum, where it ſhould be *temporibus dimiſſionum*; naught, 253, 254, 271

Super Acclivitatem de Hampſtead, which is a Deſcription of a Situation, whether it be a Vill, or *Lieu conus*, ſufficient for a Jury? 254, 272

Diverſas pecias Maheremii cepit, &c. naught for the Incertainty, 262

Where the Defendant pleads an inſufficient Plea, the Plaintiff ſhall make no Advantage of that (upon Demurrer) if his own Declaration be naught; but Judgment will

will be againſt the Plaintiff, P. 262
As where an Executor ſues for Rent, and does not ſufficiently intitle his Teſtator to the Eſtate demiſed, *ibid.*
Plenam poteſtatem, Jus, & Titulum ad Præmiſſa dimittend', and does not ſet forth what Eſtate he had, whether in Fee, or other Eſtate; not good upon a Demurrer, 271
Houſes are ſet forth in Pleading to lie *in Parochia prædicta*, and two Pariſhes are named before; naught for the Incertainty, 278
Traverſe impertinent, where the Matter is confeſſed and avoided, 283
No General Rule, That a Matter cannot be pleaded ſpecially, which may be given in Evidence upon a General Iſſue, and in what Caſes it may, 295

Vide infra, Statute 1 *Will. & Mar. cap.* 4.

Preſumption.

Preſumptions of Law ſtand as ſtrong, till the contrary appears, as an expreſs Declaration of the Party, 208

Privilege.

Whether the Warden of the *Fleet* ſhall have a Writ of Privilege, ſitting the Parliament, 154

Prohibition.

A ſecond Prohibition not grantable after a Conſultation, 47

Q.

Quantum meruit.

See Outlawry.

Que Eſtate.

See Corporation.

R.

Recovery.

A Deed, Fine and Recovery, do all make but one Aſſurance, but each hath its ſeveral Effect, Page 31
Common Recoveries are Common Aſſurances, and are not to be overthrown by nice Conſtructions, 32
A Common Recovery ſtopp'd; what ſhall be good Cauſe to ſtop it, 90

Relation.

Of Relation, its Force, and where it ſhall operate, 200

Remainder.

What ſhall be accounted a contingent Remainder, and what a Remainder veſted, 313

Rent.

Rent due, if the Thing let hath been really enjoyed, 68
Reſervation void, 272

A Rent cannot be reſerved out of a Thing incorporeal, Page 69
Every Quarter's Rent is a ſeveral Debt, and diſtinct Actions may be brought for each Quarter's Rent: Not ſo for Part of the Money due upon Bond, or Contract, unleſs the Plaintiff ſhews, that the reſt is ſatisfied, 129
A Debt for Rent payable by an Executor before Bonds, becauſe it favours of the Realty, and is maintain'd in regard of the Profits of the Land received, 184

Requeſt.

Requeſt, where neceſſary to be ſet forth, and where not, 75

Reſcous.

See Return.

Return.

If a Sheriff return a Reſcous, it is not now traverſable, though formerly it was, 175

Reverſion.

A Reverſion is a preſent Intereſt, though to take Effect in Poſſeſſion after another Eſtate determined, 328

Revocation.

What ſhall be a good Revocation in Equity, 350

S.

Scire facias.

WHere one Tertenant is returned ſummoned, he may plead, That there are other Tertenants, though in another County, 104. But he muſt not plead this by Way of Abatement, but demand Judgment, *ſi ipſe ad breve præd. in forma præd. retorn' reſpondere compelli debeat*, Page 105
The Record of a *Scire facias* naught in the Titling, not permitted to be amended, *ibid.*
Scire facias in Chancery to repeal a Patent, 344

Settlement.

See Conveyance, Marriage, Mortgage.

A voluntary Settlement avoided by a following Settlement in Jointure, 363

Sheriff.

If a Sheriff of a City be in Contempt, the Attachment ſhall go to the Coroners, and not to the Mayor; but if he be out of Office, then it ſhall go to the ſucceeding Sheriff, 216

Simony.

To ſell an Advowſon *ea intentione* that *J. S.* ſhall be preſented, Simony, 39

In Caſe of Simony the Preſentation veſts in the King without Office, *Quære* in other Caſes, Page 213

Statutes.

13 *E.* 1 *Stat.* of *Winton.* In an Action upon this Statute, not neceſſary to ſet forth more in the Declaration than is pertinent to the Action, 215

4 *H.* 7. *cap.* 24. *Of Fines.* Of Claims after the coming in of future Intereſts in the ſecond Saving in this Act, 333

21 *Jac.* 1. *cap.* 16. See *Limitations.*

22, 23 *Car.* 2. *cap.* 9. *No more Coſts than Damages*, explained. 36

What Treſpaſs within this Statute, what not, 48

29 *Car.* 2. *cap.* 3. A Promiſe by Letter, a ſufficient Promiſe in Writing within this Statute, 361, This Statute does not extend to Truſts raiſed by Operation of Law, 361

31 *Car.* 2. *cap.* 2. Where a Man commits a capital Crime in *Ireland*, he may be ſent thither to be tried thereupon; notwithſtanding that by this Act, *No Subject of this Realm ſhall be ſent Priſoner to any foreign Parts*, 314

1 *W. & M. cap.* 4. That Statute (which ſaves Time of Limitation) does not alter the Form of Pleading, but that ſhall be as it was before, 185, 197

13 *Car.* 2. 247, 248

Statute, Recognizance.

See Fine.

What ſhall be eſteemed a regular Extending of a Statute-Merchant, 326

Where the Intereſt of a former Statute ſhall be drown'd in that of a later, being both extended, and aſſigned to the ſame Perſon, Page 326, 327, 328

The Extent of a Statute, what it is, and the Effect thereof, 326, 338

An Extent upon a *Puiſne* Statute, where extended after a *Prior* Statute, is in the Nature of a Reverſional Intereſt, 328

When a former Statute is determined, whether it be by Releaſe of the Debt, by Purchaſe of Part of the Lands, by being barr'd by Non-Claim upon a Fine, Satisfaction acknowledged, or any other Means, this lets in the *Puiſne* Statute, 332

An Extent begins by Record, but it may end without Record; for a Releaſe by the Conuſee after Extent, determines it, and he that hath a *Puiſne* Statute may enter, 336

Cannot be aſſigned before Extent, in Law, 362

Surrender.

No Surrender of an Eſtate without Acceptance by the Surrenderee, 199 Yet *Quære*; for the Judgment was reverſed in Parliament, 208

That a Surrender deveſteth the Eſtate immediately, before expreſs Aſſent of the Surrenderee, 203 *& inf.*

T.

Tail.

A Deviſe to one for Life, Remainder to the Heirs Male of his Body for ever; this is an Eſtate-Tail in the Deviſee, 213

A Sum of Money cannot be entailed, Page 349

Tender.

Plea of a Tender without ſetting forth a Refuſal, not good; otherwiſe if a Place of Payment was appointed, and the Party to receive was not there, 109

Tithes.

Whether Notice be neceſſary to be given to the Parſon, upon ſetting forth of Tithes, 48

Traverſe.

See Pleading.

Treaſon.

Whether liſting of Men, to ſend beyond Seas to join the King's Enemies, be Treaſon within the Clauſe of *levying War*, in the Statute of 25 *Ed.* 3. 316

Whether the Indictment ſhould not expreſs in particular, who thoſe Enemies are; or whether the General Words be not ſufficient, *Ibid.*

To liſt, *&c.* and an Intent to depoſe the King is Treaſon, within the Clauſe of *Compaſſing the Death of the King*, 317

Treſpaſs.

See Aſſent.

Whether a Suit in an Action of *Treſpaſs*, be a Breach of Covenant to hold and enjoy quietly, 46, 61, 62

Where an Action of Trover will lie for Goods, though an Action of Treſpaſs would not, for taking them, Page 169, 170

Truſt.

See Chancery, Limitation.

The Force of the Word Truſt, in the Limitation of a Uſe, 312

Where a Man buys Land in another's Name and pays Money, it will be a Truſt for him who pays the Money, though there be no Deed declaring the Truſt, 361

Truſt executed in Chancery, according to the Parties Meaning, 363, 364

Trial.

A new Trial directed by the Lord Chancellor, where the former Verdict has been complain'd of in a Bill before him, the Complainant paying the Coſts of the firſt Trial, 351, 352

V.

Variance.

See Pleading 141

Verdict.

See Baron and Feme.

A Miſtake in an *Indebitatus Aſſumpſit*, where good after Verdict, 36

A Declaration, though inartificial, is notwithſtanding good after Verdict, 174

Vill.

Vill and Pariſh, the Diverſity, and where Lands in one ſhall paſs in the other of the ſame Name, Page 31

Umpire.

Arbitrators and Umpire cannot lawfully have concurrent Authorities at the ſame Time, 115

Uſe.

Where Money is paid to *A.* for the Uſe of *B.* in whom the Right and Intereſt veſts, 310

Lands may be deviſed, to the Uſe of another; but if no Uſe be limited, they will lodge in the Deviſee; for a Deviſe implies a Conſideration, 312

Uſury.

No unlawful Uſury, if the Agreement be not corrupt, though the Wording of the Condition may be otherwiſe by Miſtake, 83

W.

Wager of Law.

WHere a Man ſhall be admitted to wage his Law in an Action of Debt, and the Manner of doing it, 171

Waver.

An Executor cannot wave a Term, unleſs he renounce the whole Executorſhip, Page 209

Way.

How a Man may intitle himſelf to a Foot-way, 186

Wills.

See Deviſe.

Where there is a Cuſtom to paſs Lands by a Parol or Nuncupative Will; yet they ſhall not paſs without expreſs and plain Words to ſhew the Intention, 216

A Cumulative Proviſion in a Will ſhall not double a Portion, unleſs plainly proved, that the Teſtator intended to do ſo, 347, 348

Writs.

Where a Writ ſhall be amended, according to the Inſtructions given to the Curſitor, 46, 49, 152

Where an Original Writ ſhall be new made, according to the Inſtructions firſt given to the Curſitor, 130

Uſual for a Plaintiff to take out his Original after Judgment entered, 154

FINIS.

BOOKS printed for *D. Browne*, *J. Walthoe*, *T. Osborn*, *W. Mears*, *T. Ward*, *T. Woodward*, and *J. Hooke*.

1. THE Reports of Sir *Creſwell Levinz*, Knight, late one of the Judges in the Court of Common Pleas, in *French* and *Engliſh*; containing Caſes Hear'd and Determined in the Court of King's Bench; during the Time that Sir *Robert Foſter*, Sir *Robert Hyde*, and Sir *John Keyling*, were Chief Juſtices there; as alſo of certain Caſes in other Courts at *Weſtminſter*, during that Time. Tranſlated into *Engliſh*, by Mr. Serjeant *Salkeld* and others, with proper Tables in three Parts. The ſecond Edition, with many Thouſand new References.

2. The Reports of the moſt Learned Sir *Edmund Saunders*, Knight, late Lord Chief Juſtice of the King's Bench: Of ſeveral Pleadings and Caſes in the Court of King's Bench, in the Reign of King *Charles* the II. in 2 Vol. with proper Tables

3. An Abridgment of the Common Law: Being a Collection of the Principal Caſes argued and adjudged in the ſeveral Courts of *Weſtminſter-Hall*. The whole being digeſted in a clear and Alphabetical Method, under Proper Heads, with ſeveral Diviſions and Numbers under each Title, for the more ready finding any Judgment or Reſolution of the Law Caſes. Whereby the Opinion and Judgment of the Courts may be ſeen in an exact Series of Time, and what Alterations have been made in the Law by ſubſequent Statutes and Judgments, brought down to the Year 1725. In 3 Vol. By *William Nelſon*, of the *Middle Temple*, Eſq;

4. Modern Entries, being a Collection of ſelect Pleadings in the Courts of King's Bench, Common Pleas, and Exchequer, *viz.* Declarations, Pleas in Abatement and in Bar, Replications, Rejoinders, *&c.* Demurrers, Iſſues, Verdicts, Judgments, Forms of making up Records of *Niſi Prius*, and entring of Judgments, *&c.* in moſt Actions, *&c.* with proper Tables, by *J. Lilly* Gent. Author of the Practical Conveyancer. In two Parts.

5. Sir *Orlando Bridgman*'s Conveyances, being ſelect Precedents of Deeds and Inſtruments concerning the moſt Conſiderable Eſtates in *England*. The fifth Edition, with large Additions.

6. *Lex Manerierum:* or the Law and Cuſtoms of *England*, relating to Manors and Lords of Manors, their Stewards, Deputies, Tenants, and others, *viz.* of the Lords Right to Deodands, Felons Goods, Waifs, Eſtrays, Wrecks, and Goods of *Felo de ſe*. Of the Privileges of their Tenants in Ancient Demeſne, and of Widow's *Free Bench*, *&c.* of Copyhold Eſtates, Courts Leet, Courts-Baron, and By-Laws there made, and of Amerciaments, Fines and Heriots, and how to be recovered. Of Surrenders and Admittances to Copyholds, and of Entailing them, and of Barring and Diſcontinuing ſuch Entails by Fines and Recoveries in the Lord's Court, and by other Methods. Of Leaſes made by Copyholders with Licence, and without; Alſo of Forfeitures and other Determinations of their Eſtates. The whole being a methodical Collection of the Caſes diſperſed in the ſeveral Volumes of the Law relating to Copyhold Eſtates, and to every Thing depending on that Tenure. To which is added an Appendix of all the Modern Entries of Declarations, Pleas, Replications, Rejoinders, Demurrers, Iſſues, Special Verdicts, Writs of *Recordari*, *Certiorari*, *&c.* relating to the ſaid Caſes. With proper Tables to the Whole. By *William Nelſon*, Eſq;