# REPORTS
## OF
# CASES

Adjudg'd in the

## Court of King's Bench;

WITH

Some Special CASES in the Courts of *Chancery*, *Common Pleas* and *Exchequer*, from the First Year of K. *WILLIAM* and Q. *MARY*, to the Tenth Year of Queen *ANNE*.

By *WILLIAM SALKELD*,
Late Serjeant at LAW.

With Two Tables; the one of the Names of the Cases, the other of the Principal Matters therein contained.

In Two VOLUMES.

Allow'd and approv'd of by all the Judges.

In the *SAVOY*:
Printed by Eliz. Nutt and R. Gosling, (Assignees of *Edward Sayer* Esq;) for J. Walthoe in the *Middle-Temple-Cloysters*; and J. Walthoe, *jun.* against the *Royal-Exchange* in *Cornhill*. 1717.

A
# TABLE
OF THE
# Names of the CASES
IN THE
# FIRST VOLUME.

A.


ADAMS *versus Tertennants of* Savage. *Pag.* 40
Allen *v.* Dockara 127
*Lord* Anderson's *Case* 389
Andrews *v.* Lynton 268
Armit *v.* Breame 76
Armstrong *v.* Lisle 60
Arran *v. (Countess) v.* Crispe 221
Ashby *v.* White *&* *al.* 19
Aston *v.* Sherman 298
Atkinson *v.* Crouch 407
*Attorney-General contra* Shelby 163
Atwood *v.* Burr 402
Aulin *v.* Bennet 356
Aumble *v.* Jones 238
Aylesbury *(Lord's) Case* 103


B.


Bacon *v.* Dubarry 70
Badger *v.* Lloyd 232
Ball *v.* Cross *p.* 164
Ballard *v.* Gerrard 332
Banbury *(Earl) v.* Wood 5
*Bankrupts Act*, 4 An. *the Judges Resolution thereupon* 111
Barber *v.* Dennis 68
—— *v.* Damer 80
—— *v.* Palmer 178
Barker *v.* Wich 56
Bates's *Case* 254
Bayly *v.* Grant 33
—— *v.* Cheesely 72
Bellasis *v.* Burbrick 209
Benbridge *v.* Day 212
Bennet *v.* Talbot 212
—— *v.* Preston 328
Benson *v.* Scott 185
Berkenhead *v.* Fanshaw 86
Bertie *v.* Falkland 231
Berwick *v.* Andrews 314
Best *contra* Stamford 154
Bethell's *Case* 348
Betts *v.* Hancock 33
Billinghurst *v.* Speerman 297
Bird *v.* Bird 74
—— *v.* Sedgwich 110
Bisse *v.* Harcourt 177


* Black-

Blackborough *v.* Davies *p.* 38, 251
Blackby *v.* Fry 193
Blackham's *Case* 290
*The Case of the Hundred of* Blackheath 362
Blainfeild *v.* March 285
Bliffett *v.* Cranwell *& al.* 226
Bold's *Case* 53
Booth *v.* Booth 322
Bourkermine *v.* Darnell 27
Bracy's *Case* 348
Brewster *v.* Kitchet 198
Bridgwater (*Countess*) *v. the Duke of* Bolton 236
Brittle *v.* Dade 185
Britton *v.* Cole 395, 408
—— *v.* Standish 166
Brockwell *v.* Lock 331
Brooke *v.* Hustler 56
—— *v.* Ellis 363
—— *v.* Smith 280
Brookes *v.* Stroud 73
Broome's *Case* 32
Browne *v.* Mug 161
—— *v.* Gibbons 206
—— *v.* Hedges 290
Buckley *v.* Pirk 79, 316
—— *v.* Collier 114
—— *v.* Cumbell 131
Bucksom *v.* Hoskins 52
Bunter *v.* Cole 237
Burdeaux *v. Dr.* Lancaster *& al.* 332
Burdett's *Case* 327
Burdon *v.* Burdon 252
Burnaby *v.* Saunderson 266
Burr *v.* Atwood 89
Burroughs *v.* Perkins 131
Burston *v.* Ridley 39
Butcher *v.* Porter 94
—— *v.* Andrews 23
Butler *v.* Crisps 130
—— *v.* Palmer 190
Butterfeild *v.* Burroughs 211

C.

Caddon *v.* Eastwick 192
Callonel *v.* Briggs 112
Campbell *v. St.* John *p.* 219
Cane *v.* Coleman 109
Canterbury (*Archbishop*) *v.* Willis 17, 251, 314
Cardiff Bridge *Case* 146
Carlton *v.* Morlagh 268
Carpenter *v.* Faustin 114
Carter *v.* Davies 218
Carter (*the Leases of*) *v.* Tash 241
Cary *v.* Crisp 108
Catsworth *v.* Bettison 247
Chamberlayne *v.* Hewson 115
Charnock's *Case* 288
Child (*Sir* Josiah, *& al.*) *v.* Sands 31
—— *v.* Harvey 48
Chorley *Village's Case* 175
Churchill *v.* Hopton 318
Clark *v.* Pigot 126
—— *v.* Mundall 124
Clay *v.* Sudgrave 33
Clements *v.* Scudamore 243
Clerk *v.* Moor 92
—— *v.* Martin 129, 364
—— *v.* Rowland 399
—— *v.* Smith 241
—— *v.* Withers 322
Coggs *v.* Bernard 26
Cole *v.* Rawlinson 234
Cole's *Case* 196
Coleman *v.* Sherwin 137
Combe *v.* Talbot 21
Cone *v.* Bowles 205
Cooke *v.* Cooke 399
Coote *v.* Lynch 321
Corbet *contra* Maidwell 159
Cotton *v.* Johnson 183
Courtney *v.* Strong 364
Cowne *v.* Bowles *& al.* 93
Cox *v.* Wilbraham 50
Crackall *v.* Thomson 353
Cross *v.* Bilson 3
—— *v.* Smith 148
Crouther *v.* Oldfeild 364
Crowder *v.* Oldfeild 170
Cuddon *v.* Eastwick 143
Curtis *v.* Hadley 175
Cuthbert *contra* Peacock 155


D.

D.

Dalſton *v.* Church p. 1
Darby *v.* Boacher 279
Davila *v.* Almanza 73
Dean *v.* Crane 28
Deering *v.* Torrington 79
Deerly *v.* *Dutcheſs* Mazaime 116
Denham *v.* Stephenſon 40
—— *v.* Stephenſon 355
Dillar's *Caſe* 61
Dillon *v.* Harper 328
Dockminique *v.* Davenant 220
Donne *v.* Caſhford 363
Dudfeild *v.* Andrews 184
Duke's *Caſe* 400
Duncombe *v.* Church 1

E.

Earle *v.* Peale 386
Eaſt *v.* Eſtington 130
Eaſtcourt *v.* Weeks 186
Eaſt-India-Company's *Caſe* 191
Eaves *v.* Macato 314
Elſtebb *v.* Thoroughgood 393
Emerton *v.* Solby 169
Erby *v.* Erby 80
Etherick *v.* Cowper 99
Etherington *v.* Parrot 118
Eyres *v.* Lynch 54
—— *v.* Faulkland 231
Exeter (*Dean and Chapter*) *Caſe* 334

F.

Fanſhaw *v.* Morriſon 208
Farrow *v.* Chevalier 139
Fawtry *v.* Fawtry 36
Fazacharly *v.* Baldo 352
Fenwick's *Caſe* 257
—— *v.* Groſvenor 258
Ferrer *v.* Miller 217
Fetter *v.* Beal 11
Fiſher *v.* Wigg 391
Fitch *v.* Wells p. 215
Fitz-Patrick's *Caſe* 103
Fletcher *v.* Ingram 175
Fooler *v.* Cooke 297
Ford *v.* Hopkins 283
—— *v.* Grey 285
Foot's *Caſe* 93
Foreland *v.* Marygold 72
Forſter *v.* Brunem 83
Foſter *v.* Mitton 183
Frek's *Caſe* 353
Freke *v.* Thomas 39
Freeman *v.* Bernard 69
—— *v.* Blewitt 409

G.

Gage *or* Gray *v.* Aſton 325
Gallaway *v.* Suſach 284
Gargrave *v.* Smith 221
Garland *v.* Extend 194
Genbaldo *v.* Cognani 102
Genner *contra* Harper 163
—— *v.* Sparkes 79
Germain *&* *ux.* *v.* Orchard 346
Gerrard (*Lord*) *v.* *Lady* Gerrard 253
Gibbons *v.* Roberts 269
Gidley *v.* Williams 37
Gifford's *Caſe* 333
Giggeer's *Caſe* 264
Gilman *v.* Hore 275
Giſbourne *v.* Hurſt 249
Glover *v.* Cope 185
—— *v.* Barrie 71
Goddard *v.* Smith 21
Goodright *v.* Corniſh 226
Goring *v.* Biſhop 87
Goſlin *v.* Elliſon 330
Gould *v.* Johnſon 25
Green *v.* Horne 197
Gregg's *Caſe* 89
Greſcot *v.* Green 199
Griffith *v.* Harriſſon 196
Grimſton *cont.* *Lord* Bruce *&* *ux.* 156
Groenvelt *v.* Burwell 200, 263
—— *v.* Burwell 144


Groenvelt

Groenvelt *v.* Burwell p. 396
Gwam *and* Ward *v.* Roe 90

H.

Hale *v.* Clare 266
Hall *v.* Mifter 84
Hamilton (*Duke*) *v. Lord* Mohun 158
Hampftead, *the Lord of the Mannor there, his Cafe* 220
Hard's *Cafe* 23
Harding *v.* Salkill 296
Harman *v.* Owden 140
——— *v.* Renew 165
Harriffon *v.* Cope 24
Harrop *v.* Holt 263
Harry *v.* Perrit 133
Haffer *v.* Wallis 28
Haftrop *v.* Haftings 212
Hatton *v.* Morfe 394
Hawkins *v.* Cardee 65
Haydon *v.* Gould 119
Haywood *v.* Davies *& al.* 4
Herbert *v.* Borftow 25
——— *v.* Waters 205
Hern *v.* Nicholls 289
Hefcot's *Cafe* 330
Hetherington *v.* Reynolds 8
Heydon *v.* Heydon 392
Heyling *v.* Huskins 29
Hicks *v.* Downing 13
Hicks's *Cafe* 373
Higgins *contra* Derby 156
Hill *& al. v.* Lewis 132
—— *v.* Aland 215
Hills *v.* Mills 36
Hillyard *v.* Cox 37
Hodges *v.* Steward 125
Holland *v.* Serjeant 98
Holler *v.* Bufh 394
Hollinghead's *Cafe* 351
Hollingworth *v.* Brewfter 256
Hopewell *v.* Ackland 239
Hopkins *v.* Ellis 110
Houfe *and* Downing *v. Lord* Petre 311
Howard *v.* Jennifon 223
——— *v.* Pitt 261
——— *v.* Fremaine p. 278
Hudfon *v.* Jones 90
Hunt *v.* Bourn 57, 244, 339
Huffey *v.* Jacob 344

I.

Jackfon *v.* Piggot 127
——— *v.* Humphreys 273
Jacob *v.* All[illegible] 27
Jayfon *v.* Rafh 207
Jenkins *v.* Plume 207
Inter *Inhabitants of the Parifh of* Weftbury *and* Cofham 121
Inter *Inhabitants of the Parifh of* Caftor *and* Aicles 68
Inter *the Parifhes of St.* George's *and St.* Margaret's Weftminfter 123
Inter *the Parifhes of* Budworth *and Townfhip of* Dumply *in* Lancafhire 123
Johnfon *v.* Long 10
——— *v.* Shippin 35
Jones *v.* Bodminer 1
——— *v.* Bodingham 173
Ivefon *v.* Moore 15
Juftin *v.* Ballin 34

K.

Keach's *Cafe* 351
Kemp *v.* Goodall 277
Kettle *v.* Townefend 187
Kigget *v.* Player 111
King *v.* Fowler 293
—— *v.* Ayliff 295
—— *v.* Clerk 349
—— *v.* Speed 379
Kingfdale *v.* Mann 321
Kirkham *v.* Wheeley 30
Kneller (*Sir* Godfrey) *Cafe* 151
Knight *v.* Burton 75
—— *v.* Syms 254
Knight's *Cafe* 329

L.

Lamb *v.* Archer 225
—— *v.* Williams 89

Lambert

Lambert *v.* Pack p. 127
Lamplough *v.* Shortridge 219
Lampton *v.* Collingwood 262
Lane *v.* Cotton 17, 141
Lane's *Case* 28
Langfort *v. Administratrix of* Tiler 113
Langston *v.* Grant 92
Latuch *v.* Pasherante 86
Lawrence *v.* Martin 7
Lawson *v.* Storie 205
Leperd *v.* German 50
Lepiot *v.* Browne 7
Lett *v.* Mills 6
Linsey *v.* Clerk 54
Lisle's *Case* 103
Little *v.* Heaton 259
Loddington *v.* Kime 224
Loder's *Case* 64
London *(the City) v.* Vanacre 142
Lovelace's *Case* 203
Lovell (*Sir* Lathiel's) *Case* 85
Lucas *v.* Haynes 130
Lumley *v.* Quarry 101
Lyell *v. Manucapt.* Galletly 101
Lynch *v.* Hooke 7

M.

Manning *v.* Napp 37
Marlet *v.* Johnson 187
Marriott's *Case* 104
Martyn *v.* Hendrickson 287
Matthews *v.* Carew 107
Medina *v.* Stoughton 210
Meredith *v.* Davies 270
——— *v.* Short 25
——— *v.* Alleyn 138
Middleton *v.* Fowles, *& al.* 282
Milford *v.* Wallicot 129
——— *v.* Smith 225
Mitchell *v.* Harris 71
Mohun (*Lord's*) *Case* 104
Mood *v. Mayor and Commonalty of* London 397
Moor *v.* Green 178
Mordant *v.* Thorold 252
Morgan *v. Archdeacon of* Cardigan 166
Morris *v.* Reynolds 73
Mosely *v.* Warburton 320

N.

Nehuff's *Case* p. 151
Nevil *v.* Soper 213
Newton *v.* Rowland 2
——— *v.* Richards 296
——— *v.* Trigg 199
Norfolk *(Duke's) Case* 401
Northcote *v.* Underhill 199
Nottingham *v.* Jennings 233
Nurse *v.* Frampton 214

O.

Oades *v.* Woodward 87
Oates *v.* Bromil 75
Ode *v.* Norcliff 4
Opy *v.* Addison, *& al.* 31
Orbet *v.* Ward 59
Ormond (*Duke*) *v.* Brierly 99
Ovyat *v.* Vyner 309

P.

Page *v.* Price 98
Paine *v.* Partridge 12
——— *& al. v.* Teap *& al.* 108
Palmer *v.* Stovely 24
Pantam *v.* Isham 19
Parker *v.* Atfeild 311
——— *v.* Harris 262
——— *v.* Kett 94
Parkhurst *v.* Foster 389
Parsloe *v.* Baily 76
Parsons *v.* Gill 50
Peachy *v.* Harrisson 77
Peacock *v.* Harris 331
Pease *v.* Parsons 1
Pembrooke (*Lord*) *v. Lord* Jeffereys 52
Penmour *v.* Bruce 319
Perkins *v.* Woolaston 321
Pett *v.* Pett 250
Phillips *v.* Berry 403
Pierce *v.* Prowse 165
Pinkney *v.* Hall 126
Pitcher *v.* Tovey 81
Pitts *v.* Gaince *and* Foresight 10
Plymouth *(Countess) v.* Throgmorton 65
Poole's *Case* 368

Pope *v.* *St.* Leger p. 344
Popham *cont.* Bamfeild 236
Potter *v.* Pearson 129
Poulter *v.* Cornwall 9
Powers *v.* Clerk 298
Pratt *v.* Rutlidge 95
Presgrave *v.* Saunders 5
——— *v.* *Churchwardens of* Shrewsbury 167
Price *v.* Longford 337
—— *v.* Parker 178
—— *v.* *Earl of* Torrington 285
Pride *v.* *the E. of* Bath & Mountague 120
Primer *v.* Phillips 222
Puleston *v.* Warburton 48
Pullerton *v.* Agnew 172

R.

Reading *v.* Royston 242
Reading's *Case* 392
Redham *v.* Waters 269
Redwood *v.* Coward 328
Reeve *v.* Long 227
*Regula Generalia* 147
Reynolds *v.* Gray 70

*Rex*
*v.* Atkinson, *& al.* 382
*v.* Ball 370
*v.* Barebaker 121
*v.* Barnaby 181
*v.* Barnes 151
*v.* Barret 383
*v.* *the Inhabitants of* Belton 370
*v.* Best, *& al.* 174
*v.* Bothell 149
*v.* Browne 146, 376
*v.* *the Dutchess of* Buckleigh, *& al.* 358
*v.* Bunney 190
*v.* Clerk 376, 377
*v.* —— 370
*v.* *the Inhabitants of* Cluworth 358
*v.* Culliford 382
*v.* Daniel 380
*v.* Danvers 194
*v.* Darby 78
*v.* *St.* David's *Bishop* 294
*v.* Davison p. 105
*v.* Dilliston 386
*v.* Dixon 150
*v.* Doring 260
*v.* Dummer 374
*v.* Dyer 181
*v.* Edwards 193
*v.* Everard 195
*v.* Fell 272
*v.* Fitz-gerald 401
*v.* Fowler 350
*v.* Fox 67, 169
*v.* Foxby 266
*v.* Gaul 372
*v.* Gilbert 200
*v.* Gould 381
*v.* Gregory 372
*v.* Harris 47
*v.* —— 260
*v.* Harwood 370
*v.* Hertford *Mayor* 55, 373, 375
*v.* Hill 371
*v.* —— *& al.* 201, 294
*v.* Jennings 383
*v.* Ingram *& ux.* 384
*v.* *Inhabitants of* Newington 356
*v.* Johnson 68
*v.* Jones 379
*v.* Kendall & Roe 347
*v.* Kent 47
*v.* —— 103
*v.* Kime 357
*v.* King 183, 340
*v.* Knatchbull 150
*v.* Knight 375
*v.* Larwood 167
*v.* Layton 106, 353
*v.* Levermore 146
*v.* Mackarty, *& al.* 286
*v.* Mathews 357
*v.* Morphes 85
*v.* Murrey 122
*v.* Nash 147
*v.* North 144
*v.* Odam 124
*v.* Oranage 385
*v.* Paine 281

Rex *v. the Parish of St.* Mary's *in the* Devises p. 147
Rex *v.* Peck 66
Rex *v.* Peirson 382
Rex *v.* Porter 149
Rex *v. Lady* Portington 162
Rex *v. Lord* Preston 278
Rex *v.* Pullen *& al.* 369
Rex *v.* Rawlins 367
Rex *v. Sir* Richard Raynes 299
Rex *v.* Sainthill 359
Rex *v.* Sangwayes 294
Rex *v.* Smith 342
Rex *v.* —— 377
Rex *v.* Stoker 342, 371
Rex *v.* Sumers 55
Rex *v.* Taylor 341
Rex *v.* Trobridge 371
Rex *v.* Tutchin 51
Rex *v.* Walliot 371
Rex *v.* Wallis 334
Rex *v.* Warrington 152
Rex *v.* Watts 357
Rex *v.* Whitehead 371
Rex *v.* Whiting 283
Rex *v.* Williams 384
Rex *v. the Inhabitants of the County of* Wilts 359
Rex *v.* Wyatt 380
Rex *v.* Yarrington 406
Risney *v.* Selby 211
Roberts *v.* Wetheral 223
Robinson *v.* Greinold 119
—— *v.* Walker 393
Rock *v.* Leighton *Vicar of* Salop 310
Rouse *v.* Etherington 312
Rush *v. the Chancellor and Schollars of* Oxford 343
Russell *& ux. v.* Come 119

S.

St. Davids *(Bishop) v.* Lucy. 134
Salisbury *(Bishop) v.* Phillips 43
Sands (*Dr.*) *Case* 145
Savage's *Case* 291
Saveris *v.* Briggs 83
Savier *v.* Lenthall 82
Savil *v.* Roberts p. 13
Scatterwood *v.* Edge 229
Scott *v.* Peacock 271
Sea *v.* Taylor 394
Sexton *v.* Miles 22
Shardelve *v.* Naylor 313
Shelley's *Case* 296
Shirley *v.* Wright 273
Shoor *v.* Rookesby 315
Shore *v.* Browne 26
—— *v.* Madisten 206
Simon *v.* Gavil 74
Sifted *v.* Lee 402
Slaughter *v.* May 42
Smallcombe *v.* Buckingham 320
Smartle *v.* Penhallow 188
—— *v.* Williams 245
—— *ex dimiss.* Newport *v.* Williams 280
Smartly *v.* Henden 255
Smith *& Ux' v.* Angell 354
—— *v.* Harman 314
—— *v.* Sharp 139
—— *v.* Stoneard 267
—— *v.* Stracy 110
—— *v.* Villar 3
—— *v.* Wallis 58
South *v.* Alleine 228
Springate *v.* Springate 332
Stagg *v.* Hind 139
Stainer *v. Burgesses of* Draitwitch 281
Stannian *v.* Davis 404
Staple *v.* Haydon 173, 216
Starkey *v.* Cheesman 128
Stedman *v.* Bates 390
Stephens *v.* Watson 45
Stockhold *v.* Cottington 330
Stroud *v. Lady* Gerrard 8
*The Case of the Surgeons Company* 373
Swinstead *v.* Lyddall 408
Symonds *v.* Cudmore 338

T.

Taylor *v.* Jones 389
Tennant *v.* Golding 21, 360
*The Mayor of* Thetford's *Case* 192

Thomas

Thomas *v.* Howell p. 170
—— *v.* Lloyd 194
Thomlinson *v.* Dighton 239
Thompson *v.* Crocker 49
Thorpe *v.* Thorpe 171
Thurston *v.* Slatford 284
Tilley's *Case* 286
Tilly *v.* Richardson 97
—— *v.* Norris. 309
Tilsden *v.* Palfriman 213, 345
Todd *v.* Stoakes 116
Toler's *Case* 176
Tomkins *v.* Burnet 22
Tompkins *v.* Pincent 141
Transer *v.* Watson 35
Trevilian *v* Pyne 107
Trevivan *v.* Lawrence 276
Turbervil *v.* Stamp 13
Turnor *v.* Turnor 179
—— *v.* Barnaby 259
Tyson *v.* Hilliard 269
—— *v.* Paske 333

V.

Vane *contra Lord* Bernard 161
Vasper *v.* Eddows 248
Vavasor *v.* Hill 52
Venn *v.* Phillips 208
Vinkestone *v.* Ebden 248
Vivian *v.* Campion 141
Underhill *v.* Durham 256

W.

Walden v. Holman 6
Walter v. Rumball 247
Walwin v. Smith 177
Wankford v. Wankford 299
Ward v. Everard 390
Warr v. Huntley 118
Warren v. Mathews 357
Watson *(Dr.) Case* 106
Watson v. Sutton 272
Watson v. Sparks p. 287
Watts v. Rosewell 274
Webley v. Palmer 222
Weeks v. Peach 179
—— v. Speed 94
Wells v. Williams 46
West v. Sutton 2
—— v. Troles 213
Weston v. James 42
Whitcomb *contra* Jacob 161
Whitehall v. Squire 295
Whitlock *contra* Waltham 157
Whittingham v. Andrews 255
Wicker *& al.* v. Creamer 264
Wilkin v. Wilkin 9
Williams v. Crey 12
—— v. Williams 98
Wilmot v. Tyler 63
Wilson v. Laws 59
—— v. Tucker 78
Winchurch v. Belwood 337
Winter v. Carlick 75
Winton *(Mayor)* v. Wilks 203
Withers v. Harris 258
Wolfe v. Davison 319
Wood v. Sheppherd 78
——'s *Case* 121
Worcester *(Bishop's) Case* 48
Woodward v. Marshall 82
—— v. Makepeace 164
Woodyer v. Gresham 116
Wright v. Sharp 288
Wyatt v. Aland 324

Y.

Yard v. Ellard 117
York *contra* Stone 158
—— v. Grindstone 388
Yoxley's *Case* 351

Z.

Zouch *v.* Thompson 210

# *A* CATALOGUE *of the Names of as many of the* SUBSCRIBERS *to Serjeant* Salkeld's REPORTS *as came to our Hands.*

A.

FRancis Annesley *of the* Inner-Temple, *Esq*;
Nathaniel Axtell *of the* Inner-Temple, *Esq*;
Heyrick Athorpe *of* Nottingham, *Esq*;
Thomas Abnett *of the* Inner-Temple, *Esq*;
Edmund Allen *of the* Inner-Temple, *Gent.*
Dingley Askham *of* Bernard's Inn, *Gent.*
Richard Abell, *Gent.*
Richard A-Court *of* Axbridge *in the County of* Somerset, *Gent.*
James Altham *of* London, *Gent.*
John Atwood *of* Clement's Inn, *Gent.*
Henry Aylwood, *Town-Clerk of* Chichester.
Frederick Alpe *of* Bernard's Inn, *Gent.*

B.

William Branthwayt, *Serjeant at Law.*
Arthur Branthwayt *of the City of* Norwich, *Esq*;
Arthur Branthwayt *Jun. of* Gray's Inn, *Esq*;
Thomas Birch *of the* Middle-Temple, *Esq*;
John Bains *of the* Inner-Temple, *Esq*;
Shradrock Blundell *of the* Inner-Temple, *Esq*;
William Bateman *of the* Middle-Temple, *Esq*;
Thomas Boteel *of the* Inner-Temple, *Esq*;
Thomas Brooke *of the* Inner-Temple, *Esq*;
Thomas Brooke *of the City of* Norwich, *Esq*;
John Brockett *of the* Middle-Temple, *Esq*;
William Bohun *of the* Middle-Temple, *Esq*;
Thomas Barton *of* Malton *in* Yorkshire, *Esq*;
Charles Bernard, *Clerk of Barbers and Surgeons-Hall*, London, *Gent.*
Thomas Bradshaw *of the* Middle-Temple, *Gent.*
Thomas Burton *of the* Inner-Temple, *Gent.*
Samuel Barroughs *of the* Inner-Temple, *Gent.*
Allan Broderick, *Esq*; *Attorney-General of* Jamaica.
Jasper Blythman *of the* Inner-Temple, *Gent.*
Francis Bennet, *Gent.*
Walter Baynes *of the* Middle-Temple, *Gent.*
Champion Branfill *of* London, *Gent.*
Fotherley Baker *of St.* Lawrence-Lane, London, *Gent.*
John Billingsley *of* London, *Bookseller.*
Daniel Browne *of* London, *Bookseller.*
Benjamin Barker *of* London, *Bookseller.*
Jonas Browne *of* London, *Bookseller.*
Thomas Bever *of* London, *Bookseller.*

C.

*Sir* John Cheshyre, *Knt. one of His Majesty's Serjeants at Law.*
*Sir* Thomas Clarges, *Bart.*
John Comyns, *Serjeant at Law.*
*The Honourable* Edward Carteret *of the* Middle-Temple, *Esq*;
Edward Chapman *of the* Middle-Temple, *Esq*;
Thomas Coates *of the* Middle-Temple, *Esq*;
William Chapple *of the* Middle-Temple.
John Chomley *of* Lincoln's Inn, *Esq*;
James Cross *of the* Middle-Temple, *Esq*;
William Cann *of the* Middle-Temple, *Esq*;
Walter Churchey *of the* Middle-Temple, *Esq*;
Francis Cannon *of the* Middle-Temple, *Gent.*
Cornelius Coupley *of* Gray's Inn, *Gent.*
John Clark *of* Lincoln's Inn, *Gent.*
John Clarkson *of* Boston *in* Lincolnshire, *Gent.*
Walter Cradock *of* New-Inn, *Gent.*
Samuel Collier *of* Broadwell *in* Glocestershire, *Gent.*
James Collins, *an Attorney in* Ross *in* Herefordshire.
William Churchill *of* London, *Bookseller.*

D.

# *The Names of the* SUBSCRIBERS.

D.

John Darnell, *Serjeant at Law.*
Alexander Denton *of the* Middle-Temple, *Esq*;
Knightley D'Anvers *of the* Inner-Temple, *Esq*;
William Dawson *of the* Middle-Temple, *Esq*;
Peter Davis *of* Lincoln's Inn, *Esq*;
Thomas Duncomb *of the* Middle-Temple, *Esq*;
Robert Davye *of the City of* York, *Esq*;
Christopher Driffeild, *Recorder of* Rippen *in* Yorkshire, *Esq*;
Thomas Douce *of* London, *Attorney at Law.*

E.

William Earl, *Serjeant at Law.*
Thomas Edwards *of the* Inner-Temple, *Esq*;
John Edwards *of* Lyme *in* Dorsetshire, *Esq*;
Robert Earl, *one of the Clerks of the Papers in the* King's Bench.
Thomas Elleray *of* Portsmouth, *Gent.*
Isaac Ewer *of* Lincoln's Inn, *Esq*;

F.

Richard Foley *of* Lincoln's Inn, *Esq*; *one of the Prothonotaries of the Court of* Common-Pleas *at* Westminster.
Nicholas Fazakerley *of the* Middle-Temple, *Esq*;
John Fenton *of* Newcastle *in* Staffordshire, *Gent.*
Francis Foot *of* Gray's Inn, *Esq*;

G.

Jeffery Gilbert, *Esq*; *Lord Chief Baron of his Majesty's Court of* Exchequer *in* Ireland.
William Guidott *of* Lincoln's Inn, *Esq*;
Abraham Grammage *of* Gray's Inn, *Gent.*
James Glyde, *Serjeant at Law.*
William Gardiner *of the* Inner-Temple, *Esq*;
Nathaniel Gyles *of* Gray's Inn, *Gent.*
Timothy Goodwin *of* London, *Bookseller.*
Robert Gosling *of* London, *Bookseller.*

H.

William Hall, *Serjeant at Law.*
Edward Horsman *of* Lincoln's Inn, *Esq*;
Hugh Hamersley *of the* Inner-Temple, *Esq*;
Richard Hull *of the* Inner-Temple, *Esq*;
William Hawkins *of the* Inner-Temple, *Esq*;
Robert Hart *of the* Middle-Temple, *Esq*;
William Howard, *Esq*;
William Hayt *of the* Middle-Temple, *Esq*;
Francis Hayes *of the* Inner-Temple, *Esq*;
Thomas Hussey *of the* Middle-Temple, *Esq*;
Robert Harvey *of the* Inner-Temple, *Esq*;
Edward Halstead *of* Clement's Inn, *Gent.*
Alexander Henderson *of the* Middle-Temple, *Gent.*
Edward Haistwell *of the* Middle-Temple, *Gent.*
James Hawson *of* Canterbury, *Gent.*
Anthony Hungerford *of* New Inn, *Gent.*
Henry Hammond, *Clerk of* Wine-Coopers Hall, London, *Gent.*
Henry Horton *of the* Middle-Temple, *Gent.*
John Harris *of* Lincoln's Inn, *Gent.*
Francis Hildyard *of the City of* York, *Bookseller.*
Israel Harrison *of* London, *Bookseller.*

I.

Herbert Jacob *of the* Inner-Temple, *Esq*;
Thomas Jett *of the* Middle-Temple, *Esq*;
John Jermy *of the* Inner-Temple, *Esq*;
Winnington Jefferies *of the* Middle-Temple, *Esq*;
John Josselyn *of the* Middle-Temple, *Esq*;
Edward Jones *of* Lincoln's Inn, *Esq*;
Nicholas Jefferies *of the* Inner-Temple, *Esq*;
John Isted *of the* Middle-Temple, *Esq*;
Matthew Imber *of* Winchester, *Gent.*
Theodore Johnson, *Gent.*
Robert Incledon *of* New-Inn, *Gent.*

K.

Abel Kettleby *of the* Middle-Temple, *Esq*;
Edmund Kelly *of the* Inner-Temple, *Esq*;
Thomas Kilpin *of the* Middle-Temple, *Esq*;
William Kynaston *of the* Inner-Temple, *Esq*;
Joseph Kirk *of* Lincoln's Inn, *Esq*;

John

John Knowler *of the* Inner-Temple, *Gent.*
George Knapp *of the* Inner-Temple, *Gent*

L.

Nicholas Lechmere *of the* Middle-Temple, *Esq*;
Thomas Lutwych *of the* Inner-Temple, *Esq*;
Robert Lucas *of the* Inner-Temple, *Esq*;
Thomas Luck *of* Gray's Inn, *Esq*;
Richard Lardner *of the* Middle-Temple, *Esq*;
John Lewis *of the* Middle-Temple, *Gent.*
John Launder *of the* Middle-Temple, *Gent.*
Martin Lantrow *of* Lyon's Inn, *Gent.*
Samuel Lyne *of* Launſton *in* Cornwal, *Gent.*
Bernard Lintot *of* London, *Bookſeller.*

M.

*Sir* Nathaniel Mead, *Knt. Serjeant at Law.*
Edmund Miller, *Serjeant at Law.*
Samuel Mead *of* Lincoln's Inn, *Eſq*;
John Mallet *of the* Middle-Temple, *Eſq*;
William Mallet *of the* Middle-Temple, *Eſq*;
Robert Myddleton *of the* Middle-Temple, *Eſq*;
Thomas Morley *of the* Inner-Temple, *Eſq*;
Giles Merefield *of* New-Inn, *Eſq*;
Robert Martin *of the* Inner-Temple, *Eſq*;
John Metcalf *of the* Middle-Temple, *Gent.*
William Moreland *of the* Inner-Temple, *Gent.*
Gelaſius Mac-Mahon *of the* Middle-Temple, *Gent.*
Henry Mountague *of* Lincoln's Inn, *Gent.*
James Mead *of* London, *Gent.*
William Mills *of* Leek *in* Staffordſhire, *Gent.*
Henry Maſterman *of the* Middle-Temple, *Gent.*
William Marriot, *an Attorney in* Northampton.
Robert Marten, *an Attorney at* Thetford *in* Norfolk.
William Mears *of* London, *Bookſeller.*
Daniel Midwinter *of* London, *Bookſeller.*

N.

*Sir* Edward Northey, *Knt. his Majeſty's Attorney General.*
Richard Newdigate *of the* Middle-Temple, *Eſq*;
William Norcliff *of the* Inner-Temple, *Eſq*;
Richard Newton *of the* Middle-Temple, *Eſq*;
Thomas Norman *of* Lewis *in* Suſſex, *Bookſeller.*

O.

*The Right Honourable the Earl of* Orrery.
John Ord *of the* Middle-Temple, *Gent.*
Oliver Ormsby *of the* Inner-Temple, *Gent.*
Thomas Osborne *of* London, *Bookſeller.*

P.

*Sir* Conſtantine Phipps, *Knt. of the* Middle-Temple.
John Pocklington, *Eſq*; *one of the Barons of his Majeſty's Court of* Exchequer *in* Ireland.
John Prat *of the* Middle-Temple, *Eſq*;
Edmund Probyn *of the* Inner-Temple, *Eſq*;
Fitz-William Plumptree *of the* Middle-Temple, *Eſq*;
John Pym *of the* Middle-Temple, *Eſq*;
David Papillion *of the* Inner-Temple, *Eſq*;
Arthur Player *of* Gray's Inn, *Eſq*;
Thomas Player *of* Gray's Inn, *Eſq*;
William Phillips *of* Gray's Inn, *Eſq*;
Charles Pilſworth *of the* Inner-Temple, *Eſq*;
Richard Potinger *of the* Inner-Temple, *Eſq*;
Henry Facey *of* Boſton *in* Lincolnſhire, *Gent.*
Robert Fowle *of* Clement's Inn, *Gent.*
Bradſhaw Peirſon *of* Gray's Inn, *Gent.*
Samuel Prigg *of the* Middle-Temple, *Gent.*
Ralph Peters *of* Leverpoole *in* Lancaſhire, *Gent.*
Nathan Partridge *of* Northampton, *Gent.*
John Pemberton *of* London, *Bookſeller.*

R.

R.

James Reynolds, *Serjeant at Law.*
Thomas Reeves *of the* Middle-Temple, *Esq*;
John Randolph *of* Gray's Inn, *Esq*;
John Rudd *of* Durham, *Esq*;
Meux Rant *of* Gray's Inn, *Gent.*
Richard Sare *of* London, *Bookseller.*

S.

William Smith *of the* Middle-Temple, *Esq*;
Thomas Sewell *of the* Middle-Temple, *Esq*;
Edward Shorte *of the* Middle-Temple, *Esq*;
Benjamin Smart *of the* Middle-Temple, *Esq*;
James Sheppherd *of the* Middle-Temple, *Esq*;
Lewis Stuckley *of the* Middle-Temple, *Esq*;
George St. Amand *of the* Inner-Temple, *Esq*;
Edmund Sawyer *of the* Inner-Temple, *Esq*;
Leonard Streate *of* Gray's Inn, *Esq*;
William Shiers *of the* Inner-Temple, *Gent.*
Charles Salkeld, *one of the Clerks of the Papers of the Court of* King's-Bench.
John Strange *of the* Middle-Temple, *Gent.*
John Spelman *of the* Middle-Temple, *Gent.*
Samuel Stillingfleet *of* Sherborn *in* Dorsetshire, *Gent.*
Samuel Smith *of the* Middle-Temple, *Gent.*
Ralph Smith *of* London, *Bookseller.*

T.

*Sir* William Thompson, *Knt. His Majesty's Sollicitor-General and Recorder of the City of* London.
John Tyrrell *of the* Inner-Temple, *Esq*;
Robert Thornhill *of the* Inner-Temple, *Esq*;
John Toller *of* Lincoln's Inn, *Esq*;
William Tusker *of* Wrington *in the County of* Somerset, *Gent.*
John Theedam *of the* Inner-Temple, *Esq*;
John Taylor *of* Winchester-Street, London, *Gent.*
*Mr.* Turvin *of the* Inner-Temple.
*Mr.* John Thorold, *Attorney in* Cambridge.
Benjamin Tooke *of* London, *Bookseller.*
William Taylor *of* London, *Bookseller.*

U.

Simon Urlin *of the* Middle-Temple, *Esq*;
Edward Veron *of* Bernard's Inn, *Gent.*

W.

*Sir* Nicholas Williams *of the* Inner-Temple, *Bart.*
Edward Whitaker, *Serjeant at Law.*
William Peer-Williams *of* Gray's Inn, *Esq*;
John Wale *of* Gray's Inn, *Esq*;
Phillip Ward *of the* Inner-Temple, *Esq*;
John Washer *of* Lincoln's Inn, *Esq*;
Thomas Windham, *Jun. of* Lincoln's Inn, *Esq*;
John Watts *of* Lincoln's Inn, *Esq*;
Clement Wearg *of the* Middle-Temple, *Esq*;
Thomas Williams *of the* Middle-Temple, *Esq*;
John White *of the* Middle-Temple, *Esq*;
Thomas Warkhouse *of* Lincoln's Inn, *Esq*;
Edward Webbe *of* Gray's Inn, *Esq*;
William Wright *of the* Inner-Temple, *Esq*;
Richard Wilson *of* Leeds *in* Yorkshire, *Esq*;
Samuel Walkey *of* Ilmister *in* Somersetshire, *Esq*;
Richard West *of the* Inner-Temple, *Esq*;
Lewis West *of the City of* York, *Esq*;
Richard Witton *of* Wakefield *in* Yorkshire, *Esq*;
George Walker, *Esq*;
John Wiseman *of the* Middle-Temple, *Esq*;
John Walmesley, *jun. of* Wigan *in* Lancashire, *Gent.*
George Woodcroft *of* London, *Gent.*
Daniel Whitaker *of* Lyon's Inn, *Gent.*
John Way *of* Lyon's Inn, *Gent.*
Richard Walthoe *of the* Inner-Temple, *Gent.*
John Wright *of the* Inner-Temple, *Gent.*
Martin Wright *of the* Inner-Temple, *Gent.*
Philip Wright *of* Bell-yard, *Gent.*
Thomas Ward *of* London, *Bookseller.*
Matthew Wotton *of* London, *Bookseller.*
Richard Wilkin *of* London, *Bookseller.*
Thomas Woodward *of* London, *Bookseller.*

Y.

Philip Yorke *of the* Middle-Temple, *Esq*;

Z.

*Mr.* Arthur Zouch *at* Barbadoes.

# ABATEMENT.

## Duncombe *versus* Church. Mich. 8 Will. III. B. R.

(1) Guardian del. Fleet pleads Privilege pl. repl. quod fuit in Custod. Mar. ads. A.

ACtion versus Warden of the Fleet. The Defendant Salvis sibi omnibus adv. ad bill. præd. pleaded he was an Officer of the Court of Common Pleas, and that no Officer of that Court can be sued præterquam cor. Justic. de C. B. Plaintiff replies quod tempore exhibitionis billæ, the Defendant was in Custod. Mar. Maresc. in quodam placito debiti ad sect. A. B. To this it was demurred and the Court held,

Want of prout patet per Record.

1. That want of a prout patet per record. is only matter of form, and helped by general demurrer, because without such conclusion, if a Record be pleaded, the other side may reply nul tiel record. Vide 2 Ro. 275. 1 Saund. 98. This is no Plea after Imparlance.

Un. in Custod. Marr. avera son priv.

2. Tho' a Bill be filed against the Warden as in Custody, he may plead his Privilege; for per Holt C. J. the Difference is, where a Person is here in actual Custody, he is liable to all Actions; but if he be here only upon Bail, he may plead his Privilege, for the Sheriff cannot take notice of his Privilege; so that he must give Bail. Also this is no Plea to the Bill, but to the Jurisdiction and the Clause of salvis omnibus, &c. ought to be to the Jurisdiction as well as the Bill.

## Pease *versus* Parsons. Mich. 8 Will. III. B. R.

(2) Quod ipse est Attorn. not. fuit. temp. impetr. brevis, ill.

IN an Action versus Parsons, he pleaded quod ipse est unus Attorn. Cur. Domini Regis de B. without saying fuit tempore Impetrationis brevis, and a respondeas ouster awarded.

## Jones *versus* Bodinner. Hill. 8 Will. III. B. R.

(3) Privilege of Attorney of C. B. pleaded by Defendant in cust. Mar. after giving Bail.

BOdinner being an Attorney of the Common Pleas was sued by J. S. in B. R. and gave Bail, and was declared against as in custodia: The same Term one Jones deliver'd a Declaration by the by against him; to which he pleaded his Privilege: Plaintiff replied that the Defendant was in Custod. Mar. at the Suit

 of

of J. S. and was delivered out to Bail, and that during the continuance of that Suit he exhibited his Bill secundum Curs. Cur. &c. Defendant demurr'd, and it was urged pro Quer. that the Defendant had allowed the Jurisdiction of the Court by giving Bail, and had waived his Privilege 2 Ro. 275. Et per Cur. 1. Defendant might plead his Privilege to the first Action, for he comes here by coercion, and had no opportunity to claim Privilege till now, and therefore tho' a Man be in Custod. Mar. one may claim conusans. 22 Ass. 83. 27 H. 6. 7. and it is absurd that the Defendant should be in a worse Condition as to J. S. then he was to the first Plaintiff, when this second Suit is topp'd on the Action of the first Plaintiff; and 'tis clear the Defendant might plead his Privilege to the first Action notwithstanding his being in Custod. Mar. Yet the Court held, that if it had been waived as to the first Action, it would have been waived as to the second also.

## Newton *versus* Rowland. Mich. 11 Will. III. B. R.

(4) Privilege of Attorney of C. B. pleaded by H. sued as Executor, and over-ruled.

INdeb. Assumpsit for 100 l. against the Defendant as Executor, he pleaded in Abatement he was an Attorney of the Common Pleas, and prayed his Privilege, but was ruled to answer over; for his Privilege extends only to Actions brought against him in his own Right. Vide Hob. 177. An Attorney was sued as Administrator, he pleaded in Abatement that he was an Attorney de C. B. and a respondeas ouster awarded.

## West *versus* Sutton. Paschæ 1 Ann. B. R.

(5) Plea, Alien Enemy.

Where the Replication must conclude al pais, and where with Averment.

Matter of disability which might have been pleaded to the Action, nor pleadable to Sci fa. on Judgment.

A Scire facias was brought on a Judgment in Assize, for the Office of Marshal; Defendant pleaded in Abatement that the Plaintiff was an Alien Enemy & hoc, &c. Plaintiff replied he was a Subject born, sc. at such a Place in England. Et hoc paratus est verificare: Defendant demurred, & per Holt C. J. The Plaintiff should have concluded to the Country; for where Alienee is pleaded in Abatement, 'tis triable where the Writ is brought; for which reason the Replication must conclude to the Country. Aliter where Alienee is pleaded in Bar, therefore in that Case the Replication must conclude, Et hoc paratus est verificare.

2. This cannot be pleaded in Abatement to the Scire facias, because it was pleadable in Abatement to the Assize: He shall not disable the Plaintiff from having Execution, since he admitted him able to have Judgment: Ideo considerat. est quod respondeat.

## Brookes *versus* Stroud. Paschæ 1 Ann. B. R

TWO Executors sued and set forth themselves to be Executors, and that they proved the Will; but upon the probate set forth, it appeared that one only proved the Will: Defendant pleaded this in Abatement, sed respondeas ouster awarded, for both have the Right in them, and he that did not prove may come in when he pleases, but cannot refuse during the Life of him that has proved.

(6) Action by Two Executors and probate by one held well.

## Smith *versus* Villar. Trin. 1 Ann. B. R.

VIllars was arrested as J. Villars Armiger, and pretended himself to be Earl of Buckingham; and upon a Motion the Question was how he should put in Bail so as not to estop him. Et per Cur. He need not join in the Recognizance, and then there is nothing to estop him: In Civil Actions the Defendant is not of necessity to be joined in Recognizance as in Criminal, and even there upon Motion we allowed the Earl of Banbury upon an Indictment, not to join in a Recognizance, but to find others who gave Bail for him, by the Name of G. Knowles, Esq; for their Act could not conclude him.

(7) In civil Actions not necessary for Defendant to join in Recognizance of Bail, and in Criminal may be dispens'd with by the Court.

## Cross *versus* Bilson. Mich. 1 Ann. B. R.

IN Replevin the Plaintiff declared for taking his Mare apud H. in quodam loco ibidem vocat. the King's Highway, Defendant venit & defendit vim & Injur. &c. Et ut ballivus, &c. bene cognoscit captionem equæ præd. in quodam loco voc. the King's Highway & juste, &c. quia, it was the Freehold of my Lord Lemster, &c. absque hoc that he took the Mare in the Place called the King's Highway & hoc, &c. unde pet. Judicium & retorn. equæ præd. Plaintiff replies Just. cognoscere non debet quia dic. quod cepit equam præd. in loco vocat. the King's Highway & hoc pet. quod inquiratur per patriam, Defendant demurrs and therein concludes, Et ut prius pet. Judic. & quod narr. præd. cassetur. Plaintiff joins in Demurrer.

(8) Replevin; Plea, Prisal, in auter lieu, concluded pet. Jud. & retorn. held ill because concluded in Bar.

Per Cur. 1. This Plea or Cognizance concludes in Barr for pet. Judicium & retorn. was in Bar at Common Law, Damages are only by the Stat. 7 H. 8. c. 4. 21 H. 8. c. 14. Before the Judgment was only to have a retorn. And Prisal in auter lieu is but Matter in Abatement, which cannot be pleaded in Bar; and the Conclusion is upon the whole Matter.

If Defendant makes a discontinuance by his Demurrer, Plaintiff may take Judgment or join in Demurrer.

2. If the Demurrer was in Abatement, then it was a discontinuance, and the Plaintiff might take Judgment; but nevertheless he was not bound to do it, and therefore had his Election and might join in Demurrer, and the Court upon this Joinder shall give him Judgment in Bar, for the Court is not hindered by the Conclusion of the Demurrer in Abatement to give Judgment, as of right they ought, upon the whole Record.

3. This Demurrer might be taken for a Demurrer in Bar, because it concludes ut prius pet. Judicium & quod, &c. and the Court will reject the & quod, &c. as being idle and repugnant; Judgment pro Quer. after several Motions and Debates. Pengelly pro Quer. Salkeld pro Def.

## Ode *versus* Norcliffe. Mich. 1 Ann. B. R.

(9) Replication to Plea in Abatement ill for want of venue.

PLEA that he was Attorney de C. B. and ought not to be sued Alibi absque consensu, Plaintiff replied he did consent and laid not a venue where, and therefore bad. Per Cur.

## Haywood *versus* Davies & al. Mich. 1 Ann. B.R.

(10) Defendant cannot plead in Abatement Tenancy in Common in himself, but in a Stranger, may.

Vide Admiralty 1 Sir Josiah Child's Case.

Were Traverse to be concluded with Averment and were to the Country.

TRespass versus A. & B. for taking a Pail of Water out of the Plaintiff's Well; A. pleaded in Abatement that B. was Tenant in Common with the Plaintiff of the said Well; Plaintiff replied he was sole seized, absque hoc that he was Tenant in Common with the Defendant B. Et de hoc pon. se super patriam. To this it was demurred and a respondeas ouster awarded; it was agreed that in Trespass, the Defendant cannot Plead in Abatement that himself is Tenant in Common with the Plaintiff, because he may give it in Evidence; but on the other Side, he may Plead that another is Tenant in Common with the Plaintiff, for that will not prove him not Guilty: But the Point insisted on was, whether the Plaintiff should not have concluded his absque hoc with an Averment; and the Court seemed to think that where an absque hoc comprizes the whole Matter generally as absque tali Causa, it may conclude & de hoc pon. se super patriam; but where it only traverses a particular Matter as absque tali warranto, &c. it ought to be averred, but the Chief Justice thought not this such a particular Matter as need be averred, for 'tis to maintain his Writ. Vide Dy. 333. 353. 1 Brownl. 1 Lev. 26. 2 Keb. 380.

## Michaelmas 1 Ann. B. R.

(11)

UPON a respondeas ouster, the Defendant pleads the general Issue; the Plaintiff shall sign Judgment if the Defendant

fendant's Attorney on re-delivering back a Copy of the Issue will not pay for it; and it seems the old Course was, to deliver in a Copy of the whole Record; viz. the Declaration Plea in Abatement, &c. and Issue; but the Court made a Rule for the future that a Copy of the Narr. and Issue should only be paid for. Per Cur.

## Presgrave *versus* Saunders. Mich. 2 Ann. B. R.

(12) Replevin; Property in a Stranger is pleadable either in Bar or Abatement, at Election.

Replevin for several Goods taken in a Chamber in Devereux Court, Defendant pleaded Actio non quia dic. quoad such and such proprietas eorum fuit ipsi Def. absque hoc, That the Property of them was in the Plaintiff, & hoc paratus est verificare, & quoad others dicit quod proprietas eorum fuit in quodam Richardo Frith, absque hoc quod fuit querenti & hoc paratus est verificare Unde pet. Judic. si præd. Quer. Actionem suam habere debeat, &c. pet. etiam retorn. Bonorum, &c. cum dampnis, &c. upon demurrer Mr. Ward objected that Property in a Stranger ought to be pleaded in Abatement and not in Bar. Cur. contra. It has been adjudged otherwise, and the Law is otherwise, for it utterly destroys the Plaintiff's Action: And whether the Defendant or a Stranger have the Property, 'tis all one to the Plaintiff since he has it not. Vide 31 H. 6. 12. 39 H. 6. 35. 2 Lev. 92. 1 Ven. 249.

## Earl of Banbury *versus* Wood. Mich. 2 Ann. B. R.

(13) Want of Addition pleaded in homine replegiando.

In a homine replegiando Defendant appeared and pleaded in Abatement, that there is no Addition of Place, Vill, or Hamlet; Plaintiff demurred, for replevin is not vi & Armis, and in Actions vi & Armis Process of Outlawry lay only, and no Addition is necessary where such Process lay not: And the 25 E. 3. c. 17. does not extend to replevin. Et per Cur. Process of Outlawry lies in replevin, and the King may have a Fine. V. 35 H. 6. 6. 2 Ro. 805. n. f. 1 Inst. 128. b. Plo. 228. N. Br. 220. H. But this is not by Common Law nor upon the Original, but the Statute of Edw. 3. gives the Exigent, and that is upon the Pluries returned; for the Original is vicountiel and is determined: The Words of the Statute of H. 5. are, in every Original in Actions Personal whereon Process of Exigent lies, &c. That Statute is construed strictly. And an Assize of Novel disseisin is not within it tho' the King shall have a Fine; and Exigent lies, because 'tis a mixt Action. So here it must be such an Original as the Court does proceed upon, not such an Original as is determined; for the Court does not proceed upon that: In this Case the Original replevin is vicountiel, and the Court proceeds upon the Pluries; therefore the first replevin needs no Addition within the Statute, and where the first Writ is with-

Exigent given in repl. by Statute of E. III.

Original in Statute of Additions intends such Original as the Court proceeds upon.

out

Where one Process is grounded on another, the latter must pursue the former exactly.

out Addition, it cannot be necessary in the second; nay, 'tis so far from that, that the inserting such an Addition would vitiate the second Writ, for where any Writ or Process is founded upon a former, it must pursue the former, and cannot vary: Et per Powel, an Addition was never seen in a Writ de homine replegiando.

## Lett *versus* Mills. Hill. 2 Ann. B. R.

(14) Plea, quod suscepit ordinem militarem, &c. Matter that concerns the Person need not be pleaded with venue.

DEfendant pleaded in Abatement quod suscepit ordinem militarem & jam Miles existit, and upon demurrer it was held; First, that quod suscepit ordinem militarem, &c. was a very proper way of expressing, he was made a Knight. V. Statute de Militibus; and that Miles without Addition is a Knight Bachelor. 2. That there needs no venue where he was dubb'd, for any thing that concerns his Person shall be tried where the Action is laid: Yet at last a respondeas Ouster was awarded, quia not said he was a Knight before, or at the time of the Bill exhibited.

## Walden *versus* Holman. Hill. 2 Ann. B. R.

(15) Misnosmer pleaded. Traverse of the Name in the Writ is the Point of the Plea. But both that and the Inducement are Material.

ACtion of the Case was brought for Words against Benjamin Walden, Defendant pleaded in Abatement that he was baptized by the Name of John, & per nomen & cognomen de John Walden semper, &c. cognitus & vocatus fuisset, absque hoc, that he was called or known by the Name and Surname of Benjamin Walden, Plaintiff replied, He was called and known by the Name and Surname of Benjamin Walden, & hoc petit quod inquiratur per patriam: Defendant demurred, and it was urg'd that the material Part of the Plea was the Name of Baptism, and that he could not have another Name; and that the Traverse was needless and frivolous, and the Matter precedent was the Substance of the Plea: To this Opinion Powel Justice at first inclined; but at last a respondeas ouster was awarded per tot. curiam; for per Holt C. J. one may have a nomen & cognomen that never was baptized, and Thousands in fact have: Also one may be baptized by the Name of A. and be confirm'd by the Name of B. as Sir Francis Gawdy was; not that he thought the first Name ceased. Also he thought it would not be a sufficient Answer for the Defendant to say he was baptized by the Name of A. without averring also, that he was ever called and known by that Name: But supposing it had been a sufficient Answer without more, yet saying he was baptized &c. was no more than Inducement, which is waived by the Traverse; so that the effect of the Plea is, that the Defendant was never called by the Name of A. B. And the Chief Justice said that the Traverse was material, and likewise the Inducement Jud. quod respond.

 Lepiot

## Lepiot *versus* Browne. Hill. 2 Ann. B. R.

ONE brought up by Habeas Corpus and in Custod. Mar. was declared against by the Name of A. B. de D, in Custod. Mar. Defendant pleaded in Abatement, that his Father lived in D. likewise, and that his Name was A. B. and so because there was no Addition pet. Jud. de billa; and it was urg'd that tho' this be by Bill, and not within the Statute of Additions, yet by Common Law there ought to be an Addition to distinguish Father and Son, viz. Junior and Senior; and if the Son be sued there ought to be an Addition; aliter if the Father. Vide Rast. 310. 3 H. 6. 54. 55. 37 H. 6. 29. b. a. 4 E. 3. 31. 8 E. 3. 50. 21 H. 6. 26. b. 5 E. 4. 25. Per Holt C. J. If Father and Son are both called A. B. by naming A. B. the Father prima facie shall be intended; but if a Devise were to A. B. and the Devisor did not know the Father, it would go to the Son: Suppose one deals with the Son and knows nothing of the Father, must he bring his Action v. A. B. Junior? If this had been an Original, and the Father and Son had lived in different Counties, there had been no need of this Addition; but this is an Action v. A. B. in Custod. Mar. you must shew there is A. B. the Father in. Custod. Mar. too. Judgment quod respond. ouster nisi.

(16) Want of Addition pleaded to a Bill.

Additions at Common Law by Senior and Junior.

Where no Addition the Father intended prima facie.

Any matter that distinguishes the Person makes addition of Senior and Junior not necessary.

## Linch *versus* Hooke. Mich. Hill. 3 Ann. B R.

A Woman was arrested by Name of Minors, and gave a Bail-Bond to the Sheriff by that Name. Et per Cur. If one be arrested by a wrong Name and brought into Court, he may plead Misnosmer, and whatever a Bail-Bond may do in other Cases, in Case of a feme Covert, she may plead, it cannot estop her; for she may plead non est factum. per Cur. Et per Cur. eodem termino, in another Case it was said, If A. give Bond by Name of B. and he is accordingly sued by that Name of B. he may plead Misnosmer, and the other may reply that he made the Bond by the Name of B. and estop him by demanding Judgment, if against his own Deed he shall be admitted to say his Name is A. and then he may rejoin and say that he made no such Deed; and this he must do without Oyer, for if he pray Oyer he admits his Name to be B.

(17) Feme covert after Arrest and Bail-Bond given by a wrong Name, may plead the Misnosmer.

Binds himself in a Bond by a wrong Name is estopped to say it is not his Name.

## Lawrence *versus* Martin. Hill. 4 Ann. B R.

AN Attorney was sued as Administrator, he pleaded in Abatement that he was an Attorney de C. B. and a respondeas ouster awarded. Nota upon a respondeas ouster, no notice need be

(18) Respondeas Ouster

be given of it; for the Defendant is supposed to be attending upon his Cause in the Paper to maintain his Plea. M. 3 An. B. R. per Holt C. J.

## Stroud *versus* Lady Gerrard. Mich. 6 Ann. B. R.

(19) Misnosmer apres Com. Bail filed. V. post Pl. 15.

Assumpsit for Work done versus Eliz. Gerrard, Defendant pleads in Abatement her Name was Hannah and not Eliz. Plaintiff replies quod imposuit Commune Ballium per nomen Eliz. and prays Judgment if she shall say her Name is not Eliz. Et per Cur.

Quod per nomen illud Comperuit, imposuit bail.

The putting in Bail is the Act of the Court and not of the Party, and therefore cannot estop her, but the Defendant appearing by that Name may estop himself, and Bail is an Appearance as well as Bail. But then it ought to be pleaded as an Appearance, if the Plaintiff will make use of that as an Estoppel. In Debt on a Bail-Bond, if the Defendant has put in Common Bail, he cannot plead he has put in Common Bail, but Comperuit ad diem, for he must plead according to the operation things have in Law.

## Hetherington *versus* Reynolds. Mich. 6 Ann. B. R.

(20) Habeas Corpus. Marriage after Suit in inferior Court commenc'd, pleadable in Abatement in the superior Court after removal. But on moving that Matter sur retorn Hab. Corpus Court will grant Procedendo.

An Action of Debt was brought against the Defendant, as a feme sole, in the Palace-Court, after Appearance and Plea pleaded she married, and then removes the Cause in B. R. per Habeas Corpus, and here the Plaintiff declares against her in Custod. Mar. Defendant pleaded in Abatement, she was married at the time of the Habeas Corpus sued out, and ruled a good Plea; for here the Proceedings are de novo, and the Court takes no notice of the Proceedings below, or of what preceded the Habeas Corpus; but the Course in such Case is to move the Matter to the Court upon the retorn of the Habeas Corpus, and the Court will grant a Procedendo; for tho' a Habeas Corpus be a Writ of Right, yet where 'tis to abate a rightful Suit, the Court may refuse it.

## Michaelmas 6 Ann. B. R.

(21) Death of Defendant before the Commission Day not aided by the Statute, but if after Commission-Day it is aided.

Ejectment laid in Devonshire to be tried at Exeter, the Defendant died the Day before the Assizes began at Exeter, and upon a Trial on full Evidence, Verdict pro Quer. and motion in Arrest of Judgment. Et per Cur. First the Death of either Party before the Assizes is not remedied by the Statute: But if the Party dies after the Assizes begins tho' the Trial be after his Death, that is within the remedy of the Statute, for the Assizes is but one Day in Law, and this is a remedial Law and shall be construed

favourably. 2. The Court held that in this Case it was in their Discretion whether they would upon Motion arrest Judgment or put the Party to a Writ of Error: Accordingly they refused to arrest the Judgment and the Party was put to his Writ of Error, that the Point might be put in Issue and tried by a Jury.

# ACCOUNT.

## Wilkin *versus* Wilkin. Hill. 2 W. & M. B. R.

Assumpsit, and declares that the Defendant intending to go beyond Sea, he delivered him a Box and Goods, which the Defendant promised to dispose of for him, and to give him an Account thereof at his return; Defendant pleaded in Abatement, he was the Plaintiff's Bailiff and merchandized the said Goods, and that he ought to bring Account and not an Action on the Case: Non allocatur; for the Action being grounded on an express Promise, Assumpsit lies as well as Account, and the Plaintiff has his Election. Note, The Objection was, that in Account against the Defendant as Bailiff, he would have Allowances, &c. Et per Holt: There is some inconvenience in giving a long rambling Account in Evidence to a Jury: But where-ever one acts as Bailiff, he promises to render Account.

(1) Assumpsit. Defendant pleads in Abatement that he was Bailiff, and Plaintiff ought to bring Account. Where express Promise is, Assumpsit lies as well as Account.

## Poulter *versus* Cornwall. Trin. 5 Ann B. R.

INdebit. Assumpsit for Money received ad computandum. Verdict pro Quer. and moved in arrest of Judgment, that this Action did not lie, but Account: For if a Man receives Money to a special Purpose, as to account or to merchandise, 'tis not to be demanded of the Party as a Duty, till he has neglected or refused to apply it according to the Trust under which he received it: And the Declaration must shew a Misapplication, or Breach of Trust. Et per Cur. The Verdict has aided this Declaration, for it must be intended there was Proof to the Jury that the Defendant refused to account, or had done somewhat else that rendered him an absolute Debtor.

(2) Cro. El. 644. 1 Rol. Rep. 259. Owen 86. Hob. 209. Indebit. Assumpsit for Money receiv'd ad Computandum. Aided by Verdict.

C ACTION

# ACTION in General.

## Rogers *versus* Cook. Trin. 4 W. & M. B. R.

(1) Action by Administrator. Indebitatus Assumpsit to Inteſtate, and insimul Computasset for Money due to Administrator, not joinable.

H. Brought an Action as Administrator to A. and declar'd on an Indebitatus Assumpsit to A. and an insimul Computasset between Plaintiff and Defendant for Money due to the Plaintiff himself. Upon Demurrer the Declaration was held ill; for the Plaintiff in one Action cannot prosecute his own Right and another's: And the reason is, because the Costs to be recovered are intire, and then the Plaintiff can never distinguish how much he is to have as Administrator, and how much he is to hold as his own.

## *Sir* John Dalston *versus* Jauson. M. 7 W. III. B. R.

(2) Assumpsit on Custom of Realm and Trover not joinable in Action against Carrier.

IN Assumpsit on the Custom of the Realm and Trover against Carrier joined in the same Declaration; after Verdict for the Plaintiff and intire Damages, Judgment was arrested; for the Assumpsit is ex quasi contractu, and a contract and a Tort cannot be joined; and in the Case of Matthews and Hopkins, 1 Sid. 244. the Judgment was arrested, the Record of which Case Holt C. J. said he had seen.

## Johnson *versus* Long. M. 10 Will. III. B. R.

(3) New Action for the Erection of Nusance abated by prior recovery for the same, tho' laid at different day.

ACtion sur le Case, for erecting a Nusance 2. die Febr. Defendant pleaded a prior Action brought for erecting a Nusance 20. die Martii and a recovery thereupon, and avers these to be the same Nusance and Erection: Plaintiff demurred and Judgment against him; for he may have an Action for the continuing of the same Nusance, but can never have a new Action for the same Erection.

## Pitts *versus* Gaince and Foresight. Pas. 12 W. B. R.

(4) Case or Trover quod fuit Magister navis, and Defendant detain'd her, per quod fuit impeditus in Viagio.

ACtion sur le Case, for that he was Master of a Ship, and that it was laden with Corn in such a Harbor ready to Sail for Dantzick, and that the Defendant entred and seized the Ship, and detained

detained her, per quod impeditus & obstructus fuit in Viagio. Defendant justified for Toll and Port Duties; but his Plea being naught took this Exception to the Action, viz. That it should have been Trespass. Vide 4 E. 3. 24. Palm. 47. 13 H. 7. 26. Holt C. J. In the Cases cited the Plaintiff had a Property in the thing taken; but here the Plaintiff has not a Property; the Ship was not the Masters but the Owners: The Master only declares as a particular Officer, and can only recover for his particular Loss. Yet he might have brought Trespass as a Bailiff of Goods may; and then as a Bailiff he could only have declared upon his Possession, &c. that he was possessed; which is sufficient to maintain Trespass. Judgment pro Quer.

Held well for the special Damages, but that he might have had Trespass on his Possession.

## Fetter *versus* Beale. Trin. 13 Will. III. B. R. Intr. Pas. 10 Will. III.

IN an Action for Assault, Battery and Mayhem, declares that the Defendant beat his Head against the Ground, and that he brought an Action of Assault and Battery for that, and recovered; and that since that Recovery, by reason of the same Battery, a piece of his Skull was come out. The Defendant pleaded the Recovery mentioned in the Declaration in Bar, and avers it to be for the same Assault and Battery: The Plaintiff demurrs. And Shower pro Quer. urged this subsequent Damage was a new Matter which could not be given in Evidence on the first Recovery, when it was not known; and compared it to the Case of a Nusance where every new Dropping is a new Act. If a Man beat my Servant and he die, I lose my Action and must proceed by Indictment, and by the same reason that a Matter ex post may defeat an Action, it may also give an Action: Sed Holt C. J. contra. Every new Dropping is a new Nusance, but here is not a new Battery, and in Trespass the grievousness or consequence of the Battery is not the ground of the Action, but the Measure of the Damages, which the Jury must be supposed to have considered at the Trial. Judgment pro Def.

(5) Assault, Battery and Maihem, the Plaintiff's Declaration recites Judgment in a former Action for the same Battery, and shews new consequential Damages happen'd since.

# ACTION sur le Case.

## Payne *versus* Partridge. Trin. 3 Will. III. B. R.

(1) Common Ferry for all Passengers paying Toll, (but the People of A. who are Toll-free.) One of A. may bring an Action for taking Toll, but not for not keeping up the Ferry, because the former is a private right, but the latter a publick. Owner of Ferry can't suppress that and put up a Bridge in its place without Licence and ad quod damnum.

Declares that the Vill of Littleport is an Antient Vill, and that there has been time out of mind a Ferry over the River there, and that it was a common Passage for all the King's People paying Toll, and that the Inhabitants of Littleport had Passage Toll-free, and that the Defendant was Owner of the Ferry and let it decay, and that the Plaintiff requested him to let him go over the Ferry, but he refused. Defendant pleaded he had built a Bridge in the place of it, &c. And upon Demurrer the Court held the Owner could not let down the Ferry and put up a Bridge without Licence, and an ad quod damnum; and that the Custom was good in the nature of an Easement, but that the Custom consisted not in the Right to pass, for that was common to all the King's Subjects, but in the Right to pass Toll-free. That therefore the Plaintiff could not maintain an Action for not passing, for so any other Subject might bring an Action, which would be endless, and infinite. Aliter, if Toll had been exacted and paid by him; that had been a special Damage, but without special Damage, he can only indict or bring Information.

## Williams *versus* Crey. Paf. 7 W. 3. B. R. Intr. Paf. 6 W. 3.

(2) Action by Executor for a false retorn of Fieri facias in the Lifetime of Testator, held well within Statute 4 E. 3. c. 7. Difference between mesne Process and Execution as to this Action.

Williams the Executor of J. S. brought Case against Crey the Sheriff, for that his Testator having recovered Judgment in Debt, A. sued out a Fieri facias, whereon the Defendant return'd he had levied 19 l. 5 s. 4 d. and that he had taken other Goods the value of 40 s. which remain'd in his Hands pro defectu emptorum and that A. had no other Goods, ubi revera the Sheriff had levied the whole Debt, and averr'd that afterwards A. became poor, and unable to satisfy the residue of the Debt. Verdict pro Quer. 'Twas objected in arrest of Judgment that this was a personal Tort and not within 4 E. 3. c. 7. Sed Cur. contra. There is a great difference between mesne Process, as the Case in Jones 173. Noy 87. Latch 167. Poph. 187. and this Case, which is a Process in Execution, for by levying of the Goods a Right was vested in the Testator. Judgment pro Quer.

Hicks

## Hicks *versus* Downing. Mich. 8 Will. III. B. R:

(3) Lessee makes Assignment, Assignee burns the House by negligence, Lessee can't have Action; Otherwise in the case of an Under-lease. V. 1 Cro. 187. Plaintiff in such Action must have a residuary Interest.

PLaintiff declares he was possessed of a Messuage for a term of Years adtunc & adhuc venturo, and being so possessed, demised it to the Defendant for three Years, Virtute cujus the Defendant entered, and being so possessed, reversione inde eidem Quer. spectan. so negligently kept his Fire that the House was burnt down, and Verdict pro Quer. Mov'd in arrest of Judgment, that tho' the Plaintiff had a term adtunc & adhuc venturum, yet that might not be so long a term as the term of the Under-Lessee for three Years, and this Action lies not without a residuary Interest, by which means he is liable over to him that has the Inheritance: The Court allowed that, but thought it appeared here was a residuary Interest, it being laid to be an Under-Lease, and not an Assignment with these Words, Reversione inde eidem Quer. spectan.

## Turbervil *versus* Stamp. Mich. 9 Will. III. B. R.

(4) Case for negligent keeping his Fire in Clauso suo, pro quod it burnt the Plaintiff's Corn in another Close, gist.

CASE on the Custom of the Realm quare negligenter custodivit ignem suum in Clauso suo, ita quod per flammas blada Quer. in quodam Clauso ipsius Quer. combusta fuerunt. After Verdict pro Quer. it was objected the Custom extends only to Fire in his House, or Curtilage (like Goods of Guests) which are in his Power. Non alloc. For the Fire in his Field is his Fire as well as that in his House, he made it and must see it does no harm, and answer the Damage if it does. Every Man must use his own so as not to hurt another: but if a sudden Storm had risen which he could not stop, it was matter of Evidence and he should have shewed it.

## Savil *versus* Roberts. Mich. 10 W. 3. B. R. Intr. Trin. 9. W. 3. Rot. 724.

(5) Action for maliciously causing him to be indicted of a Riot after acquittal by Verdict

DEclares quod Defendens falso & malitiose absque aliqua probabili Causa ipsum indictari causavit de rioto: cui indictamento ipse placitabat non culp. & fuit inde per veredict. Juratorum acquietatus; per quod magnas denariorum summas & multos labores expendere & subire coactus fuit: Upon non culp. the Plaintiff had a Verdict and Judgment in C. B. which was now affirmed in B. R. It was objected that this would discourage Prosecutions; and at this rate the Prosecutor, whenever he is in the wrong, or miscarries, will be subject to an Action. Et per Cur.

Americiaments pro falso Clamore were affeer'd by Jury upon Warrants to the Coroners.

1. A Civil Action differs very far from an Indictment. For in that the Defendant has his Costs, and at Common Law the Plaintiff was amerced pro falso Clamore, for the Estreats of which Amerciaments Warrants were constantly delivered to the Coroners, who by a Jury affeered them according to the Malice or Vexation of the Plaintiff. Also in Civil Actions the Plaintiff asserts a Right or complains of an Injury, and therefore the Court held, That to say, A is a Bastard and I am the Heir, is not actionable, because he is a Party concerned and asserts a Right. Aliter, if he had not added, and I am the Heir. Vide 4. Co. So to bring an Action, tho' there be no good Ground, is not actionable, because 'tis a Claim of Right, and he has found Pledges and is amerciable pro falso Clamore, and is liable to Costs; but yet if one has a Cause of Action to a small Sum, and take out a Latitat to a very great Sum, or has no Cause of Action at all, and yet maliciously sues the Plaintiff to the intent to imprison him for want of Bail, or do him some special prejudice, an Action of the Case lies; but then 'tis not enough to declare generally, that he brought an Action against him ex malilitia & sine Causa, per quod he put him to great Charge, &c. but he must shew the grievance specially, as in 1 Sid. 424, sc. whereas he owed him the Defendant 100 l. he sued him for 500 l. and to hinder him from Bail affirmed to the Sheriff 500 l. was due, per quod he was imprisoned for want of Bail; or 1 Saund. 228. for that the Defendant intending to procure his Imprisonment, where there was no Cause of Action, or without any Cause of Action, sued him in an Action for 300 l. whereupon he was arrested and imprisoned. &c. And yet if one that is not concerned, as a stranger, procure another to sue me causelesly, I may maintain an Action against him generally. Vide N. B. 98. m. 2. Inst. 544. 3 Cro. 378.

Bringing an Action not actionable, tho' nothing due, without some special Collateral Act of Wrong, which must be expresly shewn.

If one not concern'd procure A. to sue B. without Cause, B. may have an Action against him.

2. If a Man be falsly and maliciously indicted of any Crime that may prejudice his Fame and Reputation, he may bring his Action, for he is falsly scandalized by the Malice of the Prosecutor, and this is a Damage for which the Law gives an Action. 1 Sid. 46. Yel. 15. Lut. 122. So if a Man be falsly and maliciously indicted of a Crime that subjects him to Peril of Life or Liberty, and for which he may be punished, he may bring his Action, for he is indangered in this Respect and receives a Damage, for which the Law gives an Action. So if a Man be falsly and maliciously indicted, tho' it neither touch his Fame nor Liberty; for it is injurious to his Property in putting him to a needless Expence, and a Damage to one's Property will maintain an Action as well as a Damage to his Fame or Person. Vide 3. E. 3. 19. 3 Ass. 1. 7 H. 4. 31. 11 H. 7. 25. 26. N. Br. 106. Sty. 379.

Action will lie for maliciously causing H to be indicted, whereby he is damnified, either 1. in Person, as by Imprisonment. 2. in Reputation, as by Scandal. 3. in Property, as by Expence. In the two first Cases tho' Indictment be insufficient or Ignoramus returned, but not in the last.

3. Where a Man is falsly and maliciously indicted of a Crime, which hurts his Fame, and which is a scandal to him, tho' the Indictment be insufficient, or an Ignoramus found, yet an Action lies for the Slander; because the Mischief of that is effected. So it is if it indangered his Liberty and he was actually imprisoned.

 Other-

Otherwise where it only concerns his Property, for he cannot suffer in that in either of those Cases.

But tho' the Action lie, yet it is not to be favoured, and therefore 1st. If the Indictment be found by the Grand Jury, the Defendant shall not be obliged to shew a probable Cause; but it shall lie on the Plaintiff's Side to prove an express Rancour and Malice. 2ly, If Ignoramus be returned, where Indictment contains no Scandal, or the Party has not been imprisoned, no Action lies; otherwise if it contains Scandal, or the Party has been imprisoned, but then there must be Evidence of express Rancor and Malice, for Innocence is not sufficient. Judgment affirmed.

N. B. In an Action on the Case for maliciously procuring H. to be indicted for exercising the Trade of a Badger without Licence, *per quod* he was put to great Expence. (in which it was agreed that the Indictment was insufficient) It was resolv'd by Parker C. J. and the whole Court upon great Consideration, that there was no reason for this diversity between a malicious Prosecution upon a good Indictment, and upon a bad one; and that this Action will lie as well for Damage by Expence, as by Scandal or Imprisonment, tho' the Indictment be insufficient. Hill. 12 Annæ B. R. Jones versus Gwynn. Intr. Trin. 11 Annæ. Rot. 326.

## Robins *versus* Robins. 11 Will. III. B. R.

(6) Case for malicious holding to Bail; Declaration ought to set forth the Sum due and the Process specially, and that the first Action is determin'd.

CASE, for that the Defendant colore cujusdam medii Process. in lege caused him to be arrested, and tho' he offered a common Appearance held him to Bail, where by Law no Bail was required, and Verdict pro Quer. on Non Culp. Et per Holt C. J. This is a tender Action. You must show that the Plaintiff being indebted to the Defendant in so much, the Defendant took out such a Writ for so much more, on purpose to hold him to Bail; how else can it appear to us whether and how far he might be held to Bail in that Action? And as to what Carthew said, That the Writ was seldom returned, and they could not have it to give in Evidence, and therefore it would be inconvenient to set it out specially in the Declaration, the Chief Justice answered, He might have a Rule on the Officer to return his Writ. Vide 1 Saund. 228. And this Action lies not till the Original Action is determined.

## Iveson *versus* Moore. Trin. 11 Will. III. B. R. Intr. Hill 9. Will. III. Rot. 436.

(7) Case for stopping up a Highway leading to the Plaintiff's Colliery, with intent to deprive him of the Profit thereof, *per quod* he lost the Profit, &c. and his Coals were spoiled for want of Buyers. Court divided whether Action lies or not.

CASE, and declared that he was possessed of a Colliery, and that there was a Highway near, by which he used to carry his Coals, and that he had a certain quantity of Coals dug ready for sale, and that the Defendant dug a Colliery near his, and intending to draw away his Customers, and deprive him of the Profit of his Colliery, stop'd up the said Way, so as Carts and Carriages could not come to his Colliery, per quod per totum tempus prædict. proficuum Carbonariæ suæ, prædict. totalit. perdidit & Carbones

bones sui prædict. pro defectu emptorum ex Causa prædict. magnopere deteriorat. & depreciat. devenerunt. Non Cul. and Verdict pro Quer.

No Action lies for a publick Nusance without special damage.

All the Court agreed, That where an Action arises from a publick Nusance, there must be a special Damage, for he that did the Nusance is punishable at the Suit of the Publick, and to allow all private Persons their Actions, without special Damage, would create an infinite and endless multiplicity of Suits.

Et per Turton and Gould: Here is a special Damage and well enough set forth; for all have not Cole-pits, and the Matter subsequent to the per quod is not traversable. Vide 1 Rol. 89. Goldsb. 146. 1 Leo. 236. 1 Rol. 63. pl. 31. 1 Co. 51. Ventr. 114. 126. 2 Jo. 146. 156. a strong Case. To shew a special Damage 'tis sufficient to say, per quod Servitium, for such a time, amisit. Hob. 284. erexit ad nocument. liberi tenementi sui. 9 Co. 53. per quod Commun. habere non potest in tam amplo modo & forma. And the Damage does not consist in a single Instance, as per quod Maritagium amisit, which may be shewn; but in casu principali it would be infinite.

Rokeby and Holt C. J. contra. The Plaintiff's near Situation yields him a convenience but no Right, for it is the King's Highway, for the equal use and benefit of all his Subjects; and the Plaintiff has no more, nor no better right than any Body else: And they held, a Man could not have a particular Action without a particular Injury or a particular Right, which are the Grounds upon which all Actions are founded, and to which they must conform. Vide 2 Saund. 115. 3 Cro. 664. This Plaintiff had neither a particular Right in this Way, nor a particular Injury; For the Stoppage is common to every one as well as to him; and an Indictment would lay it ad nocumentum omnium subditorum per viam illam transeun. And the Cases cited on the other Side were founded on a particular Right—as Case for a Stoppage where one has a way, a Water-Course or Common to his House, Mill or Tenement, there the Action is founded on a particular Right, and lies without the per quod.

No Man can have Action without a particular Injury or a particular Right.

3ly, They held, that supposing here was a particular Injury by special Damage, that special Damage is not sufficiently set forth; for it is not sufficient to say, he lost Customers, or Buyers could not come; without shewing Buyers were coming and were hindered. Vide 2 Lev. 214. 233. and the Case in 1 Rol. 53. has been often denied, and is not Law, for the Damage must be specially shewn, where the Words themselves are not Actionable: 1 Rol. 58. n. 1. 1 Cro. 140. 1 Rol. 34. 35, 36. must shew who refused. And the Chief Justice cited the Case of Paine and Partridge, 2 W. & M. in this Court. Case for not keeping of a Ferry-Boat, which was for all the King's People paying a Toll, but gratis for the Inhabitants of such a Village, of which the Plaintiff was one. In this Case the Court held the Custom to be good, but that the

Not sufficient to shew in general that Customers could not come, but must shew specially that Customers were coming and were hindred.

Action did not lie; for tho' the Plaintiff has a particular Right, yet that consists in being exempt from Toll, and not in Passing, which is common to all. So that the not keeping the Ferry is a publick Nusance, for which the Plaintiff cannot maintain an Action more than any other Person. But the Defendant must be indicted.

On motion in Arrest of Judgment, Rule made to stay Judgment quousque, &c. and afterwards the Court was equally divided whether the Action lay, the Plaintiff could not have Judgment because no Rule could be made to discharge the first Rule.

The Court being thus divided, and there being a former Rule to stay Judgment, no Judgment could be entered. Et per Cur. If the Court had been divided on the first Motion, the Plaintiff might have entered Judgment; but now this Rule must stand or be discharged, and discharg'd it cannot be, because the Court is equally divided.

## Lane *versus* Cotton. & al. Pas. 12 W. 3. B.R. Intr. Pas. 10. W. 3 Rot. 401.

(8) Case against the Post-Master General for Exchequer-Bills lost out of a Letter delivered at the Office at London. Vide the Entry in this Case. 2 Mod. Intr. 108.

SIR Robert Cotton and Sir Thomas Frankland were constituted Post-Masters General by Letters Patents, according to the Stat. 12 C. 2. c. 35. for erecting the Post-Office; and in the Patent there was a Power to make Deputies, and appoint Servants at their Will and Pleasure, and to take Security of them in the Name and to the Use of the King; and also that the Defendants should obey such Orders as from time to time should come from the King, and as to the Revenue, should obey the Orders of the Treasury. Farther, the King grants to them that they should not be chargeable for their Officers, but only for their own voluntary Default or Misbehaviour; and this is granted with a Fee of 1500 l. per Annum. The Plaintiff Lane, having Exchequer-Bills, inclosed them in a Letter directed to one Jones at Worcester, and delivered it at the Post-Office at London into the Hands of one Breeze, who was appointed by the Defendants to receive the Letters, and had a Salary; The Letter was opened in the Office by a Person unknown, and the Exchequer-Bills taken away; and for this an Action of the Case was brought against the Defendants, and on the general Issue, the special Matter found as is above-mentioned.

Adjudg'd that the Action lies not, per 3 Judges contra Holt C. J.

Turton, Gould and Powis held the Action lay not. 1. Because the Office is for Intelligence and not for Insurance. 2. Because Breeze is an Officer, and he is liable. 3. It is impossible the Post-Master General, who is to execute this Office in such distant Places, at home and abroad, and at all times, by so many several Hands, should be able to secure every thing. 4. Because Exchequer-Bills are new things, and this Office is not a Conveyance for Treasure.

Holt C. J. contra. He considered this as a Letter lost in the Office, and not upon the Road; and held the Post-Master General was liable, because the Care of the whole is committed to him, and the rest are but his Deputies: For the Law makes the Officer, whoever he be, responsible of Consequence both for himself and his

his Deputy, as the Marshal or Warden for a Prisoner, or the Sheriff for Goods taken in Execution, for which he is liable upon an extendi facias on the Statute, as well as a Levari facias, which is at Common Law; or for a Prisoner in Execution in Debt, which is by the Stat. of the 25 E. 3. c. 17. as well as in Trespass vi & Armis, which is an Execution at Common Law: And this shews that the Officer is in Consequence liable, whether he become intrusted by Common Law or by Statute: And there is no need of a Contract, for the Law makes him answerable. 2ly, He has a Reward, which is the reason in the Case of Inn-keepers, Hoymen, &c. who are bound to keep safely, and answer all Neglects of those that act under them, and so they would be, tho' they should expresly caution against it. And this Case is within the same Reason with those Cases that make Men responsible for negligent keeping, viz. that if they could not be charged without assigning a particular neglect, they might cheat any Man living, and it would not be in his Power to prove it. It is a hard thing to charge a Carrier; but if he should not be charged, he might keep a Correspondence with Thieves, and cheat the Owner of his Goods, and he should never be able to prove it: It would be hard in this Case to put the Plaintiff to prove a particular Neglect among such a Multitude of Under-Officers; Ergo the Post-Master is charged with it.

Officer responsible both for himself and Deputy, whether his Trust arise by Common Law or by Statute. Inn-keepers, Carriers, &c. taking reward answerable for Neglects of those that act under them.

2dly, Exchequer-Bills are proper to be sent this way; for the Words are general, Any Packets whatsoever; and their being new Things is no Argument against it; for new Things may be governed by old Laws, when they fall within the Reason of those Things which were the Subject-Matter of those Laws at first. Also when a Man takes upon himself a publick Employment, he is bound to serve the Publick as far as his Imployment goes, or an Action lies against him for refusing. Thus, If a Farrier refuse to shoe a Horse, an Inn-keeper to receive a Guest, a Carrier to carry, when they may do it, an Action lies; their Understanding is in proportion to their Power and Convenience. Dy. 158.

4 Co. 4. a. b. New Things may be within old Laws, when they fall within the Reason of those Things which were originally the Subject-Matter of those Laws. Whoever takes a publick Employment, is bound to serve the Publick as far as that extends.

3dly, If without this Act or before it, any Person had voluntarily set up such a Post-Office, that Person had been liable to an Action; and consequently so is the Post-Master; for all other People are excluded: The nature of the Office is the same, and he is in on the same Terms.

4thly, Tho' the Master be liable, yet Breeze is chargeable also; But he is not chargeable as an Officer, but as a Wrong-doer. It is upon this Reason that an Action lies against the Gaoler as well as against the Sheriff, for a voluntary Escape; for it is in nature of a Rescue: But for a negligent Escape, the Action lies only against the Sheriff. Vide 1 Leo. 146. 3 Cro. 175. 743. 1 Ro. Rep. 78. Ill reported, Noy. 90.

Deputy is chargeable as a Wrong-doer.

5thly, What is done by the Deputy is done by the Principal, and it is the Act of the Principal, who may displace him at pleasure, even

even tho' he were constituted for Life. Vide Hob. 13. Mo. 856. And the act of the Deputy may forfeit the Office of his Principal. 39 H. 6. 34.

Act of Deputy may forfeit Office of Principal, because quasi his Act.

6thly, The King's Discharge may be good against the King as to his Revenues, but not as to the Subject; for it cannot hinder him of a Remedy the Law gives him. Judgment pro Def.

## Pantam *versus* Isham. Pas. 13 Will. III. B. R.

(9) Case for negligently keeping his Fire per quod, &c. It lies not against Lessee at Will by Lessor seiz'd in Fee; Otherwise by Lessor, Term or for Years, or a Stranger. Ante, Turbervil versus Stamp.

CASE; the Jury found that the Plaintiff being seized in Fee of Six Stables let one to the Defendant at Will, and the rest to other Persons for a term of Years yet induring; and that the Defendant kept his Fire so negligently, that it burn'd the Plaintiff's Stable, and also the Defendant's, and the other Five Stables.

It was agreed, That if one seized of a House in Fee, make a Lease at Will, and Lessee negligently burns the House, no Action lies; for he had it in his Power to secure himself by Covenant: Secus, if Lessee for Years make a Lease at Will, not but that he might secure himself by Covenant, but because he is answerable over to his Lessor, in that respect he shall have an Action on the Case.

Also the Court held, No Action lay against the Defendant for the Stable he took, if the Fire had ceased there; but if it goes on, and burns his next Neighbour's, he shall have an Action for his Loss, because he is a Stranger, and had it not in his Power to make him covenant to be careful; and by Consequence so may the Tenants of the other Houses.

Lastly, That the Lessor might bring Actions against the other Lessees, and so might they against Lessee at Will; and as the Lessor might sue the other Tenants, and they sue Tenant at Will, the Lessor should have his Election. Vide 3 Lev. 358.

## Ashby *versus* White. & al. Mich. 2 Ann. B. R.

(10) Case by a Burgess against Constables of a Borough for refusing to receive his Vote in Election of Members to Parliament. Held that it lies not by three Judges against Holt C. J.

ACtion upon the Case against the Constables of Aylesbury, and declares that the King's Writ issued and was delivered to the Sheriff of Bucks for Election of Knights of the Shire and Burgesses of Boroughs to serve in Parliament; whereupon the Sheriff made out his Precept to the Defendants, being Constables of Aylesbury, for the Election of two Burgesses for that Borough, which was delivered, and the Burgesses duly assembled to choose, &c. and that the Plaintiff being duly qualified, &c. offered to give his Voice for Sir T. Lee, and S. Mayne, Esq; but the Defendants obstructed him from voting, and refused and would not receive his Vote, nor allow it. Upon not Guilty, a Verdict was found for the Plaintiff, and after Motion in Arrest of Judgment, the Court gave their Opinions Seriatim.

Gould J. was of Opinion for the Defendants, that the Action was not maintainable, because the Constable acted as a Judge, and not as an Officer, and that in a Parliamentary Matter. Also because the hindering of a Vote is damnum absque Injuria. 9 H. 6. 60. 2 Lev. 114. 19 H. 6. 44 Hob. 267. Farther, he held it would beget multiplicity of Actions, (Vide 5 Co. Williams's Case) and that this was out of time. It ought at least to follow and not to precede the Adjudication of the House of Commons. 2 Cro. 368. The Reason of Stirling's Case was because the refusal of a Poll occasioned the loss of the Place of Bridge-Master, which was a real Profit: And the Case of an Action by a Freeman for refusing to admit his Voice in the Election of a Lord-Mayor was, because he had no other Remedy but this Action; but this differs. Vide 2 Lev. 50. 2 Ventr. 50. 2 Lev. 250.

Powis J. ad idem, That the Defendant, tho' not properly a Judge, is quasi a Judge; that when the Matter comes before the House of Commons, the Plaintiff's Vote will be allowed; and therefore he does not lose his Privilege; de minimis non curat Lex, and this Injury, if it be one, comes within that Rule; and he mention'd the 7 and 8 W. 3. which gives an Action for a double Return, to the Candidate, and that before the Statute 23 H. 6. the Candidate had no Action for a false Return; and that in 1641. there were Seventy double Returns, and yet no Action brought, or Act made; and from those Statutes giving new Actions in those Cases, he inferred no Action lay for the Voter at Common Law: Farther, the Judgment here will not bind the Commons, nor be Evidence there; for the Commons are not bound by our Determinations; and lastly, omnis Innovatio plus novitate perturbat, quàm utilitate prodest: 1 Bul. 138.

Powell J. differed from Gould and Powis, the one holding him Judge, the other quasi a Judge, for he must be a Judge or not a Judge, and there is not any medium: That here he is an Officer; as such he is to execute the King's Writ, and has nothing but a ministerial Power: In other Matters Powell agreed with the other Two, urging that the Right of Election of Members must depend upon the Right of the Electors, and the former the Parliament are to decide, and the Plaintiff may petition the Parliament to determine it; and after that, may have his Action, but not before; and therefore was not without Remedy.

Right of Election of Members of Parliament, is either 1. Real, viz. ratione liberi tenementi, in Counties, and ratione Burgagii, in Ancient Boroughs: Or 2. Personal, viz. ratione Franchesiæ in Corporations.

Holt C. J. contra. He held that the Plaintiff had a Right to vote, that a Free-holder has a Right to vote by reason of his Free-hold, and it is a real Right; and the value of his Free-hold was not material, till 8 H. 6. c. 7. which requires it should be 40 s. per Annum; That in Boroughs they have a Right to vote ratione Burgagii; And that in Cities and Corporations, it is a Personal Inheritance, and vested in the whole Corporation, but to be used and exercised by the particular Members, and that such a Franchise cannot be granted but to a Corporation. Hob. 14. 12 Co. 120. Mo. 812. And this is not a minimum in lege, but a noble

Privilege, which intitles the Subject to a Share in the Government and Legislature: No Laws can be made to affect him or his Property but by his own Consent, given in Person if he be chosen, or by his Representative if he is a Voter: That if the Plaintiff has a Right, he must in Consequence have a Remedy to vindicate that Right; for want of Right and want of Remedy is the same thing. If a Statute gives a Right, the Common Law will give a Remedy to maintain that Right; à Fortiori where the Common Law gives a Right, it gives a Remedy to assert it. This is an Injury, and every Injury imports a Damage. Violating the Right of another by a scandalous Word is sufficient Damage to give an Action, tho' the Party suffers not a Farthing, and the pecuniary Loss be nothing. Where Parliamentary Matters come before us, as incident to a Cause of Action on the Property of the Subject, which we in duty must determine, tho' the Incident Matter be Parliamentary, we must not be deterr'd, but are bound by our Oaths to determine it: There can be no such Method by Petition as my Brother Powell speaks of; nor can the Parliament judge of this Injury, nor give Damages to the Plaintiff for it. But Judgment was given for the Defendant. Note, On Friday the 14th of January, 1703, this Judgment was reversed in the House of Lords: Trevor C. J. and Price and Sixteen Lords concurred with the Judges of B. R. The rest of the Judges and Fifty Lords concurred with Holt C. J. Altho' this Matter relates to the Parliament, yet it is an Injury precedaneous to the Parliament, as my Lord Hale said in the Cause of Barnardiston versus Soane.

Where there is a Right there is a Remedy.

If Statute gives a Right, Common Law will give a Remedy.

Where a Parliamentary Matter comes in by way of incident to an Action, the King's Court must determine it.

## Goddard *versus* Smith. Mich. 3 Ann. B. R.

(11)

CASE, for a false and malicious Indictment of Barretry, whereof he was legitimo modo acquietatus, and upon the Trial it appeared, he was acquitted no otherwise than by Entry of a nolle prosequi, and whether this was sufficient to maintain the Action was made a Point for the Opinion of the Court; and the Court held, this Evidence did not support the Declaration; for the nolle prosequi is a Discharge as to the Indictment, but is no Acquittal of the Crime. And the Chief Justice doubted as to the latter matter, and was of Opinion, that the Crown, notwithstanding the nolle prosequi, might award new Process upon the same Indictment.

Case for a malicious Indictment, unde legitimo modo fuit acquietatus. Evidence of a nolle prosequi not sufficient to maintain this Declaration.

Nolle prosequi is no discharge of the Crime, but of the Indictment.

## Tenant *versus* Golding. Mich. 3 Ann. B. R

(12)

THE Plaintiff declared, that he was possessed of a Cellar contiguous to the Defendant's Privy, and parted by a Wall, part of the Defendant's House, which the Defendant debuit & solebat

lebat reparare; and that for want of repair the Filth of the Privy ran into his Cellar, &c. Judgment by Default, and after a Writ of Inquiry 'twas mov'd in Arrest of Judgment, that this being a Charge laid upon the Owner himself, the Plaintiff should have shew'd a Title by Prescription; sed non allocatur, for 'tis a Charge laid on the Defendant of common Right, which by Law he is subject to. As one is bound to keep his Cattle from trespassing on his Neighbours Ground, so he must a heap of Dung if he erects it. Sic utere tuo ut alienum non lædas.

Case for not repairing the Partition-wall of Defendant's Privy, pro defectu of which the Filth ran into the Plaintiff's Cellar. Gist. Where the Charge is upon the Defendant of common Right, the Plaintiff need not prescribe in his Declaration.

# Action sur le Case, sur Assumpsit.

## Sexton *versus* Miles. 1 W. & M. C. B.

(1) Consideration executory is traversable: Ergò a Venue must be laid.

In Assumpsit, the Plaintiff declared, that in Consideration, &c. the Plaintiff would deliver unto the Defendant, &c. the Defendant promised to pay, &c. and in facto dicit, that he did deliver, but does not alledge a Place where; the Defendant demurred for want of a Venue, and the Declaration was held ill, for a Consideration executory is traversable.

## Tomkins *versus* Barnet. Hill. 5. W. 3. 1693. *At* Nisi prius *in* London, coram Treby *Chief Justice*.

(2) Indebitatus Assumpsit for Money receiv'd to Plaintiff's use. Evidence, Payment by an Obligor upon a usurious Bond, and held not maintainable. Indebitatus Assumpsit lies for Money paid by mistake or deceit, but not for Money paid knowingly on illegal Consideration.

Three were bound in an usurious Obligation; one of them paid some part of the Money, and afterwards the Obligee brought Debt against another of the Obligors, who pleaded the Statute of Usury, and avoided the Bond: And now the Obligor, that had paid some part of the Money without Cause to the Obligee, brought an Indebitatus Assumpsit against him to recover back that Money; Treby C. J. allowed, That where a Man pays Money on a Mistake in an Account, or where one pays Money under, or by, a mere Deceit, 'tis reasonable he should have his Money again; but where one knowingly pays Money upon an illegal Consideration, the Party, that receives it, ought to be punished for his Offence; and the Party that pays it is particeps criminis, and there is no reason that he should have his Money again; for he parted with it freely, and volenti non fit injuria: This Case was cited; One, bound in a Policy of Assurance, believing the Ship to be lost, when it was not, paid his Money, and it was held he might bring an Assumpsit for the Money: One was imployed as a Sollicitor and had Money given him to bribe the Custom-House Officers, and he laid out the Money accordingly; Assumpsit was brought against the Sollicitor for this Money, and held it lay not. Hard's

## Hard's Case. Hill. 8. Will. III. B. R.

INdebitatus Assumpsit will lie in no Case but where Debt lies; therefore it lies not upon a Wager, nor upon a mutual Assumpsit, nor against the Drawer of a Bill of Exchange; for his Acceptance is but a collateral Engagement. But it lies against the Drawer himself, for he was really a Debtor by the Receit of the Money, and Debt would lie against him.

(3) Indebitatus Assumpsit will lie in no Case but where Debt lies.

## Hill. 9 W. 3. *At* Nisi prius *at* Guild-Hall, coram Holt, *Chief Justice.*

INdebitatus Assumpsit versus A. and B. and Judgment versus A. by Default: B. pleaded Payment and Issue thereupon. Et per Holt, No Finding upon this Issue can discharge A. for he has confessed the whole.

(4) No Finding can discharge a Man against a Confession by nient dedire.

## Butcher *versus* Andrews. Will. III. B. R.

ASsumpsit, for that the Defendant, in Consideration that the Plaintiff at his Request would lend the Defendant's Son any Sum of Money, and let him have any Goods, so as the Money lent and Goods sold exceeded not 5 l. promised to pay him; and averrs that he lent him 5 l. in Money, and sold him Goods upon Credit to the Value of 5 l. and declares also that the Defendant was indebted to him for so much Money mutuo dat. & accommodat. to the Son at the Defendant's Request, &c. Upon non Assumpsit, Verdict pro Quer. and 3 l. given in Damages. Upon Motion in Arrest of Judgment it was allowed, That the Defendant could not be indebted for more than 5 l. for he engag'd for no more, so that if the Jury had given more, it had been naught. Here the Jury having given less then 5 l. this was urged to have helped the Declaration. Sed non allocatur; for first, non constat to the Court, but the Defendant has paid 5 l. already, and that this is now claimed over and above. 2ly, That the Declaration was naught; for the Money being lent to J. S. the Defendant cannot be obliged as for a Debt and liable to an Indebitatus, but to a special Assumpsit, as being but collaterally bound by his Promise; for the same Money cannot be lent to Two: Otherwise had the Money been only delivered to the Son at the Father's Request, or only had and receiv'd by the Son at the Father's Request, for then the Loan had been to the Father, quod nota.

(5) Assumpsit in consideration that at his Request, he would lend the Defendant's Son any Sum, &c. not exceeding 5 l. Plaintiff avers that he lent a greater Sum.

Indebitatus will not lie against B. for Money lent to A. at B's. Request, because the Promise is collateral only.

Harrison

## Harrison *versus* Cage. & ux. M. 10. Will. III. B. R.

(6) Assumpsit in Considera-tion Plaintiff promised to marry the Defendant, she promised to marry him, lies for the Man as well as for the Woman, because mutual.

ASsumpsit, for that in Consideration he had promised to marry the Defendant, she promised to marry him; and Verdict pro Quer. Objected that the Woman may in such Cases have an Action, but the Man cannot; because Marriage is no Advantage to the Man but to the Woman it is. And the Writ Causa Matrimonii praelocuti lay for the Woman but not for the Man. Vide Ro. 22. pl. 2. 1. Inst. 204. F. N. B. 3. 205. Hob. 10. Sed non allocatur; For Marriage is a Consideration on the Man's Side sufficient to raise an Use; and a Man shall have an Action for scandalous Words per quod he lost his Marriage. Et per Holt C. J. The Action is grounded upon the mutual Promises: If the Woman's Promise does not bind, the Man's Promise is but nudum pactum, and therefore it is actionable either on both Sides or on neither Side.

## Palmer *versus* Stavely. Pas. 13. Will. III. B. R.

(7) Indebitatus Assumpsit for Money receiv'd by the Defendant for the Plaintiff ad usum Defendant. held well after Verdict.

INdebitatus Assumpsit for Money had and receiv'd by the Defendant for the Plaintiff ad usum of the Defendant, and Verdict upon non Assumpsit for the Plaintiff. And upon Motion in Arrest of Judgment the Court held, That these Words, ad usum of the Defendant, should be rejected; because they are insensible and repugnant, and then the Promise was for Money had and received by the Defendant for the Plaintiff, which is well. Vide 1 Sid. 306. 1 Mod. 42. 2 Keb. 615.

## Cutting *versus* Williams. Hill. 1 Ann. B. R.

(8) Assumpsit on promissory Note upon the Custom of Merchants and held ill before the Statute. Judgment cannot be revers'd in part and affirm'd in part, unless where part is by Common Law, and part by Statute.

ASsumpsit and Two several Counts laid; one was on a promissory Note, and the Plaintiff counted thereon as on a Bill of Exchange upon the Custom of Merchants. On non Assumpsit, entire Damages were given, and Judgment accordingly. Upon a Writ of Error brought in this Court it was held, 1st. That the Plaintiff could not declare upon the Promissory Note as upon a Bill of Exchange: And as there could be no such Count or Action, so there could be no such Damages. 2ly, That they could not reverse the Judgment in part, viz. as to the one Count, and affirm it as to the other, and deny'd Jacob and Mills's Case Hob. 6. And took this Difference, viz. Where the Judgment is partly by the Common Law and partly by Statute, it may be reversed in part; for that which was a Judgment at Common Law, will remain a Judgment, and be compleat without the other. Vide Cro. C. 349. Cro. Ja. 424. Mo. 708. Aleyn 74. 1 Ro. 775. 1 Keb. 232. 2 Keb. 506. 535. Sty. 121. 125. 1 Ventr. 27. 39. 2 Saund. 179.

Meredith.

## Meredith *versus* Short. Pas. 1 Ann. B. R.

(9) Assumpsit in Considera-tion of the delivery of a Note under J. S's. Hand for 50 l. held a good Consideration, because the Note was Evidence of a Debt.

ASsumpsit; Declares whereas at the Request of the Defendant, he had delivered to the Defendant a Note given him by J. S. a third Person, for 50 l. the Defendant in Consideration thereof promised to pay him 50 l. After Verdict, moved in Arrest of Judgment, that it is not a gift but a Delivery, and that the Note was useless and of no value, because it does not appear to be for a Consideration. Holt C. J. The delivery shall be intended absolute and indefinite, and it is Evidence of a Debt, and therefore the parting with it is a good Consideration, and tho' the Consideration of this Note was proved at the Trial, yet that was not necessary as I conceive. Vide 3 Cro. 155. 170. contra.

## Gould *versus* Johnson. Pas. 1 Ann. B. R.

(10) Assumpsit in Considera-tion that Plaintiff would receive A. &c. into his House ut Hospites, and find them Meat, &c. Averr'd that he did receive them and find them Meat, &c. held sufficient Averment without ut Hospites; on demurrer.

ASsumpsit; and declares on a Promise in Consideration he would receive A. B. and C. into his House ut Hospites, and find them Meat, Drink and all Necessaries, to pay what was deserved; and says that he did receive them into his House, and did find them Meat, Drink and all Necessaries: And the Defendant has not paid, &c. Defendant demurred because it was not said he receiv'd them ut Hospites, which is a special receiving as Inn-keepers do; and that a precise Performance was necessary. Et per Holt & Cur. This is a sufficient Performance, for the receiving here mentioned, is receiving them ut Hospites, and Evidence of such Reception would well prove them to be receiv'd ut Hospites. And if they were receiv'd as Servants and not as Guests, it should have been pleaded on the other Side with a Traverse of their being receiv'd ut Hospites: A finding Meat, Drink, &c. is a guesting them, and must be so intended till the contrary be shewed. These Cases were cited on the other Side and answered. 2 Cro. 45. Jones 441. 2 Co. 245. Yelv. 175.

## Herbert *versus* Borstow. Trin. 2 Ann. B R. (11)

CASE; Plaintiff declar'd in Consideration that he had paid and delivered to the Defendant twenty Pieces of hammered Money, being twenty old Shillings, at his Request, he the Defendant promised to pay him 20 s. new Money. Objected the Property is not altered, sed non allocatur; for a Delivery in Consideration of being paid the Value, is a Sale.

## Coggs versus Bernard. Trin. 2 Ann. B. R.

(12) Assumpsit to take up a Hogshead of Brandy in one Cellar and lay it down in another. Breach that tam negligenter he put it down in the latter that it was stav'd, gist. If H. undertake to do a thing without hire, no Action lies for the non-feasance. But if he enters upon the doing it, Action lies for a misfeasance if thro' his own Neglect or Mismanagement, because it is a Deceit, but not if by mere Accident.

CASE, Whereas the Defendant Assumpsit to take up a Hogshead of Brandy in a Cellar in D. and safely to lay it down in another Cellar; That he tam negligenter laid and put it down in the other Cellar, that for want of Care the Cask was staved, and so much Brandy was lost. Objected in Arrest of Judgment that there is no Consideration, for the Defendant is not to have a Reward, and it does not appear that he is a common Carrier or Porter so as to be entitled to a Reward; he is only to have his Labour for his Pains, so that this is nudum pactum without Consideration: But by Holt C. J. If the Agreement had been only Executory, as that he assumed to carry it, and did not, no Action would have lain. Like the Case of 11 H. 4. 33. Action for that he promised to build him an House by such a Day, and did not, adjudged it lay not in that Case; but here he was actually entered upon the thing according to his Promise, and therefore having miscarried, he is liable to an Action; for it is a Deceit upon the Plaintiff who trusted him, and that is the Cause of Action; for tho' he was not bound to enter upon the Trust, yet if he does enter upon it, he must take care not to miscarry, at least by Mismanagement of his own. Aliter perhaps, if a drunken Man had run upon him in the Street, and thrown down the Cask, or one had privately pierced it, because he had no Reward. It is indeed held in Yelv. 128. That if H. deliver Goods to A. and in Consideration thereof he promise to re-deliver them, that yet no Action will lie for not re-delivering them; but that Resolution is not Law and was always grumbled at, and 2 Cro. 667. where Money was delivered to pay over sine mora, is contrary; for tho' the Party has no Benefit, yet if he takes the Trust upon him, he is bound to perform it. Vide 3 H. 6. 26. Dr. & Stud. 129. Owen. 141. Keb. 160. Judgment pro Quer. per totam Cur.

## Shore versus Brown. Trin. 2 Ann. B. R.

(13) Indebitatus Assumpsit, declares & in Consideratione inde se Assumpsit without saying def. Assumpsit; held well after Judgment by Default.

INdebitatus Assumpsit, and declares that the Defendant being indebted to him in 20 l. for Goods sold, in Consideratione inde super se Assumpsit: After Judgment by Default, a Writ of Error was brought, and now this Exception was taken, That it is not said the Defendant promised, so it might be a Stranger. Et per Cur. It cannot be supposed a Stranger promised, or that the Plaintiff promised himself, there is No-body to promise upon this Record but the Defendant, aliter perhaps if three Persons had been mentioned in the Record, for it might be then uncertain to which the Promise was applicable. Et per Gould J. There is also

a difference between a Collateral Promise and a Promise by Operation of Law; in the latter Case, the Law which raises the Promise applies it. 3 Cro. 913. Noy. 50. 1 Lev. 164.

## Jacob *versus* Allen. Mich. 2 Ann. *At* Guild-Hall coram Trevor *Chief Justice*.

Indebitatus Assumpsit for Money had and received to his Use; upon Evidence, the Case fell out thus. H. having Letters of Administration, appointed the Defendant by Letter of Attorney to receive Money owing to the Intestate, who accordingly received the same and paid it to the Administrator; afterwards a Will appearing the Letters of Administration were called in and repealed by Citation, and now the Executor brought an Indebitatus Assumpsit against the Defendant for Money had and received to the use of the Plaintiff. Objected, 1st. That the Defendant acting only as Attorney for him that was in fact Administrator, it was the Receipt of the Administrator and not of the Defendant. 2dly, That it ought to be a special Assumpsit and not a general Indebitatus; for the Money being received by special Authority and that expresly to the use of another, this express Intent suspends and hinders the Operation of Law, and the raising of an implied Contract to a third Person: Sed non allocatur, for the Administration was merely void, and consequently the Administrator could give no Authority, and so the Attorney acted without Authority; and then there is nothing to hinder the raising an implied Contract and charging the Defendant by Indebitatus Assumpsit to the Executor.

(14) Indebitatus Assumpsit. Administrator makes Attorney to receive the Intestate's Debts; a Will appearing the Letters of Administration are repeal'd. Executor may bring Indebitatus Assumpsit against the Attorney for Money receiv'd to his Use, quia Administration void.

## Bourkermire *versus* Darnell. Mich. 3 Ann B. R.

Declaration. That in Consideration the Plaintiff would deliver his Gelding to A. the Defendant promised that A. should re-deliver him safe, and Evidence was, that the Defendant undertook that A. should re-deliver him safe, and this was held a Collateral undertaking for another, for where the Undertaker comes in aid only to procure a Credit to the Party, in that Case there is a Remedy against both, and both are answerable according to their distinct Engagements; but where the whole Credit is given to the Undertaker so that the other Party is but as his Servant, and there is no Remedy against him, this is not a Collateral Undertaking; But it is otherwise in the principal Case, for the Plaintiff may maintain Detinue upon the Bailment against the original Hirer, as well as an Assumpsit upon the Promise against this Defendant.

(15) Where the Defendant comes only in aid of another, so that there is a Remedy against both, it is a Collateral Promise and void by the Statute of Frauds: Otherwise where the whole Credit is given to the Defendant.

 Et

Et per Cur. If two come to a Shop and one buys, and the other, to gain him Credit, promises the Seller, If he does not pay you I will, this is a Collateral undertaking and void without Writing by the Statute of Frauds: But if he says, Let him have the Goods, I will be your Pay-master, or I will see you paid, this is an undertaking as for himself, and he shall be intended to be the very Buyer, and the other to act but as his Servant.

## Dean *versus* Crane. Mich. 3 Ann. B. R.

(16) Assumpsit by Executor on Promise to Testator, Statute of Limitations pleaded, and held that a Promise to the Executor within Six Years could not be given in Evidence.

PLaintiff declared as Executor on a Promise to the Testator. Defendant pleads non Assumpsit infra sex Annos; and upon the Trial of the Issue it appeared, that there was a new Promise made within Six Years; but it was a Promise made to the Plaintiff himself and not to the Testator. Et per Cur. He should have declared accordingly.

## Love's Case. Pas. 5 Ann. B. R.

(17) Assumpsit, in Consideration the Officer would restore Goods taken on Fieri facias, to pay the Debt. A good Consideration.

THE Sheriff takes Goods in Execution upon a Fieri facias; a Stranger promises to the Officer to pay him the Debt in Consideration he would restore them. Upon Demurrer this was argued, and compared to a Consideration of suffering a Prisoner to escape, sed Cur. contra, By the Capias he is to take and keep in Salva Custodia, and to give Liberty is contrary to the Writ, But that is now to raise the Money, and the Sheriff upon a fieri facias may sell the Goods, and this is no more in effect.

## Hasser *versus* Wallis. Hill. 6 Ann. B R.

(18) A. marries B. living a former Wife, and receives the Rent of her Land from Tenants. Adjudged that B. might bring Indebitatus Assumpsit as for Money receiv'd to her use.

THE Plaintiff being a feme sole married the Defendant Wallis, who was in Truth married to another Woman: Wallis made a Lease of the Wife's Land reserving Rent, and receiv'd the Rents from the Tenants. Upon this the Plaintiff discovering the former Marriage, brought an Indebitatus Assumpsit against Wallis for so much Money receiv'd to her use. And after Verdict on non Assumpsit, it was objected, that Wallis having no Right to receive, the Tenant was not discharged, and therefore an Action lay against the Tenant, who had his Remedy over against Wallis. But the Court held Wallis was visibly a Husband and the Tenant discharged; at least that the Recovery against Wallis in this Action would discharge the Tenant, for this would be a satisfaction to the Lessor.

Heyling

## Heyling *versus* Huskins. Hill. 10 Ann. B. R.

INdebitatus Assumpsit, Defendant pleads non Assumpsit infra sex Annos; Evidence was that the Goods were sold above Six Years ago, and that the Defendant being requested to pay, denied that he bought the Goods; but farther said, Prove it and I will pay you. This Promise, tho' Conditional, shall bring it back within the Statute; for the Defendant waives the Benefit of the Act as much as by an express Promise.

(19) Conditional Promise prevents the operation of the Statute of Limitations, as much as Express.

## Roe *versus* Haugh. Pas. 9. W. 3. in Cam. Scacc.

A. Was indebted to B. And C. in Consideratione quod B. accipere vellet ipsum C. fore debitorem ipsius B. pro viginti libris debit. eidem B. per A. in vice & loco ejusdem A. super se Assumpsit, & eidem B. promisit quod ipse easdem 20 l. eidem B. solvere vellet. Whereupon B's. Executor brought an Assumpsit versus C. averring that B. accepted him, fore debitorem ipsius B. without saying that A. was discharged; and on non Assumpsit, Verdict, and Judgment pro Quer. and Judgment affirmed in Cam. Scaccar. where they held it being after Verdict they ought to do what they could to help it, and therefore they would not take it as a Promise only on the Part of C. because as such it could not bind except A. was discharged; But they construed it as a mutual Promise, viz. That C. promised B. to pay the Debt, and B. promised in Consideratione inde to discharge A. By which means if B. sues A. he subjects himself to an Action of Debt for the Breach of his Promise.

(20) Assumpsit in Consideration that the Plaintiff would accept C. to be his Debtor for 20 l. due to him from A. in loco A. Averr'd that he did accept C. fore debitorem, &c. Adjudg'd good after a Verdict without express Averment that A. was discharg'd.

ACTIONS

# ACTIONS Popular.

## Kirkham *versus* Wheeley. Trin. 7 Will. III. B. R:

Action qui tam will not lie against Attorney of C. B. in any other Court.

ACtion qui tam, &c. Defendant pleaded he was an Attorney of the Common Pleas, and that Attorneys de C. B. have time out of mind not been suable elsewhere; To which it was demurred. 1st, Because the Plea is Negative, and no Jurisdiction given to any other Court. 2dly, Because here is no full Defence, but venit & dicit. 3dly, Because the King is Party, and has Privilege to Sue where he pleases. Curia. As to the Negative, it is well enough in this Case, for the Privilege is not triable per pais, nor traversable; but 'tis a Matter in Law, and we take notice they have a Jurisdiction. 2dly, Venit & dicit is sufficient without Defence. Vide 14 H. 6. 13. 19. 3dly, The Informer is not intitled to Sue where he pleases, tho' the King is, and this is the Informer's Suit, for if he die, there is an end of the Suit, and the King is not intitled till Recovery. Prosecutors qui tam, are looked upon as common Informers.

Nota, Where a Statute gives a Penalty to a Stranger and he sues, he is a common Informer, and shall pay Costs upon the 18 Eliz. but where the Statute gives it to the Party grieved, he is not a common Informer, nor liable to pay Costs within the 18 Eliz. 1 Anderson, 116. 3 Cro. 177.

ADMI-

# ADMIRALTY.

## Opy *versus* Addison. & al. Pas. 5 W. & M. B. R.

(1) Wages due to Mariners by Parol after the usual manner suable in the Admiralty. Aliter if by Deed or special Agreement.

WARD, Attorney General, moved for a Prohibition to the Court of Admiralty in a Suit there for Mariners Wages, upon a Suggestion of a Contract made for them at Land: And the Court held, That for convenience of Seamen, the Admiralty had been allowed to hold Plea for Mariners Wages; but yet with this Limitation, that if there be any special Agreement by which the Mariners are to receive their Wages in any other manner than is usual, or if the Agreement be under Seal, so as to be more than a Parol Agreement, in such Case a Prohibition shall be granted, and so it was granted in this Case.

## *Sir* Josiah Child & al. *versus* Sands. *In Error.* Pas. 5 W. & M. B. R.

(2) Case, for that he was Owner of a Ship lying infra Corpus Com. ready to sail, and the Defendant stopp'd his Voyage by procuring an Order of Council for arresting her by Admiralty Process, perquod the Voyage was lost.

PLaintiff Sands declared, setting forth the 13 R. 2. 15 R. 2. and 2 H. 4. c. 11. which gives the Party grieved double Damages and 10 l. to the King; and that he was Owner of a Ship lying in the Thames infra Corpus Com. laden with divers Goods, wherein he had a Fifth Part to his own Share; that the Ship was ready to sail, and that the Defendant caused a Proceeding to be made in the Admiralty against the Ship, and the Ship to be arrested and staid quousque he gave Security not to go to the Maderas or East-Indies, whereby he was staid Three Months and lost his Voyage ad dampnum 3000 l. On non Culp. Jury found that the East-India Company by Charter had the sole Trade to the East-Indies and Maderas, and that the Plaintiff was going thither; and Sir Josiah Child, one of the Defendants, was Governor of the Company, and procured an Order of Council to the King's Advocate-General to proceed in this manner, &c. and that the Defendants sued this Process out of the Court of Admiralty, and if pro Quer. Jury find 1500 l. Damage and 51 l. Costs, which were doubled in the Judgment according to the Statute. Judgment for the Plaintiff in C. B. and now on Error brought,

1st, In

King can lay Imbargoes pro bono publico only.

1st, In this Case it was agreed that the King might lay Imbargoes, but then it must be pro bono publico, and not for the private Advantage of a particular Trader or Company.

A single Act may be a ground for many Actions.

2dly, Tho' here was but one Act and but one Offence, yet every several Person injur'd might have an Action and recover Damages, and upon every Conviction the Defendant would forfeit 10 l. to the King. Thus if H. drives a Distress above Three Miles from the Place it was taken, by the 1 & 2 P. M. c. 12. he is to forfeit 5 l. to the Party grieved. In that Case, suppose the Distress be of Three Cattle, and every Beast hath a distinct Owner, H. shall forfeit Three Times 5 l. Vide Noy. 62. 105. Dy. 351. b. 2 Lev. 8.

Proceeding against a Ship is within the Statute. 4 H. 4. tho' there is properly no Plaintiff nor Defendant.

3dly, Tho' there be a Process only and no Suit, nor no Plaintiff and Defendant, yet this is a Prosecution within the meaning of the Statute, for it is an usual proceeding there and of the same Mischief.

4thly, That Child was a Prosecutor within the Statute, tho' no Suit was in his Name, because he promoted and maintained it; And if he did it of his own Head, then 'tis properly his own Action; if as Agent to the Company and by their Command, then that Command being to do an unlawful Act, was void; but they held a mere Attorney would not be a Prosecutor within the Statute.

5thly, That all Five Proprietors being joint Owners, should have joined in this Action; but this being not pleaded in Abatement as it should have been, all is now well; for tho' it appears by the Declaration that there were Four others Joint-tenants of these Goods with the Plaintiff, yet it does not appear but they are dead, and then Sands alone is intitled to the Action; and where-ever Jointenancy is pleaded in Abatement, the Life of the other Joint-tenant not named, is averred in the Plea, otherwise the Plea is ill. 1 Saun. 29. And Note, whether these were Joint-tenants or Tenants in Common, either way the Action survives. Judgment affirm'd. Vide 3 Lev. 351. S. C.

Where Jointenancy is pleaded in Abatement, the Life of Joint-tenant not named must be averred.

## Broom's *Case*. Trin. 9 Will III. B. R.

(3) Where the Admiralty has Jurisdiction, their Sentence binds the Party, and at Common Law, Court must take it according to their determination.

He by Letters of Mart, &c. from the African Company took a French Ship in the River of Besaw near Gambore. Broom carries the Ship to Africa, and the Admiralty there condemn'd it as the King's Prize: After this Broom sold the Ship at Land and applied the Money to his own Use; and came into England and was sued in the Admiralty here for an Account. After Sentence against him he appeal'd, and then moved for a Prohibition, but it was not obtained; for the Suit here is but an execution of the first Sentence, by which the

Ship is adjudged the King's Prize; now the Admiralty having a Jurisdiction, that Sentence has bound the Property, and we cannot examine the Property, but must take it according to their Determination, which cannot be gainsay'd till it be repealed upon an Appeal. Adjurnat.

## Clay *versus* Sudgrace. Trin. 12 Will. III. B. R.

(4) Executor of Master sues for Wages in the Admiralty, and Prohibitions granted. Prohibition not of Right, but Discretionary. Suit in Admiralty for Wages allowed to Mariners by mere Indulgence, but never to the Master.

THE Executor of the Master of a Ship libelled in the Admiralty for Wages: And it was held by Holt C. J. 1st, That Prohibitions were not of Right but Discretionary. He said Hale and Wyndham were of that Opinion, but Kelynge differed.

2dly, He held, It was by mere Indulgence that Mariners were permitted to sue in the Admiralty for their Wages: And this Indulgence was, because the Remedy in the Admiralty was the easier and better. Easier, because they must sever here, whereas they may join there; and better, because the Ship it self is answerable. But it is against the Statute expresly, tho now Communis error facit Jus. The first Instance of it is in Winch 8. yet it was never allowed the Master should sue there; nor is it reasonable where he commences the Voyage as Master; for tho' the Mariners contract upon the Credit of the Ship, the Master does contract on the Credit of the Owners.

## Bayly *versus* Grant. Trin. 12 Will. III. B. R.

(5) Mate of a Ship may sue for Wages in the Admiralty.

THE Mate sued the Master for his Wages in the Admiralty, and Mr. Raymond moved for a Prohibition, because the Master himself could not sue there, and the Mate was not in nature of a Mariner, but was to succeed the Master if he died in the Voyage. Denied per Holt C. J. For the Master contracts with the Owners, but the Mate contracts with the Master for his Wages as the rest of the Mariners do.

## Betts *versus* Hancock. Paf. 13 Will. III. B. R.

(6) In the Admiralty principal Defendant died before Sentence, and they proceeded upon the Sipulation against the Sureties, and Prohibition pray'd. Quære.

IN the Admiralty the Principal died before Sentence: Notwithstanding this, that Court proceeded against the Bail upon the Stipulation in the nature of a Recognizance, by which he bound himself and his Heirs. Salkeld pray'd a Prohibition, and insisted, the Court could not take notice of the Course or Law of the Admiralty being not pleaded, because it was foreign to the Common Law; and there was a particular reason why they took notice of the Spiritual Law, viz. That both the Spiritual and

Temporal Laws were originally administred in the same Court, a Reason which failed in this Case: Also that Lands were intirely under the Protection of the Common Law, and they could not take Stipulations in the Realty. Lastly, That if the Defendant had been in Gaol, and had died within the Walls of the Prison, the Suit must have abated; and there was no reason why the Suit should be in a better Condition by the Defendant's being in Custody of his Bail, than in case he had been in actual Custody. And that whereas the Security given, was only that the Defendant should abide their Judgment, the Admiralty now have extended it to the Defendant's Executor. On the other Side it was said, The Bail in the Admiralty are sued as Principals, and this is the Course of their Court, because the Plaintiff and Defendant being Sea-faring Men are, more than others, subject to Casualties. Adjourned and compounded.

## Justin *versus* Ballin. Mich. 1 Ann. B. R.

(7) By the Maritime Law every Contract of the Master implies an Hypothecation; By the Common Law not, without express Agreement.

Libel for that the Ship being in great Distress upon the Sea, and wanting a Cable, the Master contracted with the Defendant for a Cable which he delivered, &c. And for that he libelled in the Admiralty; The Plaintiff suggested the Contract was made at Land, viz. at Ratcliffe upon the Thames, where the Ship then lay. Broderick urged the Case of Coster and Lewsley where an Hypothecation at Rotterdam was allowed to be within the Jurisdiction of the Admiralty; and said, that tho' the Cable was sold at Land, yet the want of the Cable was occasioned by stress of Weather at Sea: That that was the Cause of Suit, and that all Matters, incident to Navigation, belong to the Admiralty's Jurisdiction by the Laws of Oleron. Per Cur. By the Maritime Law, every Contract of the Master implies an Hypothecation; but by the Common Law it is not so, unless it be so expressly agreed: In the Case of Coster there was an express Hypothecation, and that was in a Place where Hypothecations were allowed good; for that reason we allowed the Jurisdiction of the Admiralty in that Case, for there was no Remedy at Common Law: But in this Case there is nothing but a mere common Contract at Land, & ideo fiat prohibitio. Note also, the Master may hypothecate either Ship or Goods, for the Master is intrusted with both, and represents the Traders as well as Owners of the Ship.

Master may hypothecate the Goods as well as Ship.

Transfer

## Transfer *versus* Watson. Mich. 2 Ann. B. R.

(8) Prohibition cannot be granted upon Process before Libel and Appearance.

PRocess was awarded by the Admiralty at the Suit of the Master against the Owners, to arrest the Goods landed at Bristol, in Causa Salvagii, and now before Appearance, Broderick moved for a Prohibition, on Affidavits of the Matter on the Process before Libel, whereby it appeared the Goods landed were arrested in Causa Salvagii: He cited Sands's Case, where, on Process to stay a Ship in the River, a Prohibition was granted before Appearance. Et per Cur. Tho' the Goods be now arrested at Land, yet the Salvage, which was the cause of that Arrest, might be at Sea, which will appear by the Libel; therefore we will not grant a Prohibition before Appearance or Libel to try the Validity of their Process; the rather because the Party may have another Remedy by Action of Trespass or Replevin; And this is not like Sands's Case, for that Process was not for an Appearance as this is; but in the nature of an Execution.

## Johnson *versus* Shippin. Trin. 2 Ann. B. R.

(9) On the Hypothecation of the Master the Ship is suable in the Admiralty; but not the Owners.

A Ship put into Boston in New England and there the Master took up Necessaries, and gave a Bill of Sale by way of Hypothecation; and now there being a Suit against the Ship and Owners to compel Re-payment, a Prohibition was moved for. And the Court held, That the Master could not by his Contract make the Owners personally liable to a Suit, and therefore as to them granted a Prohibition; but as to the Suit against the Ship denied a Prohibition, for the Master can have no Credit abroad but upon giving Security by Hypothecation, and it is not reasonable we should hinder the Court of Admiralty to give a Remedy, where we can give none our selves. Vide Hob. 12. 1 Ven. 32. 1 Lev. 267. Hob. 115.

# ADMINISTRATOR.

## Hills *versus* Mills. Mich. 3 W. & M. B. R.

(1) If Executor becomes Bankrupt, Spiritual Court cannot commit Administration; Otherwise if he becomes non Compos.

A Prohibition was prayed and granted to the Ecclesiastical Court of Canterbury to stay a Suit there to repeal or revoke the Probate of a Will, because the Executor was become Bankrupt, and to grant Administration to another. And tho' one Coats's Case was cited, where an Administration was revoked for that Cause, yet the Court said that differed; For the Executor is constituted by the Testator himself, and by him intrusted: But it seemed to be agreed, that if an Executor become non Compos, the Spiritual Court may commit Administration, because that is a natural Disability.

## Fawtry *versus* Fawtry. Hill 3 W. & M. B. R.

(2) Administration of H's Goods may be granted to Wife or next of kin, or of part to one and part to the other; But Administration of Wife's Goods must be granted to the Husband. Administration cannot be granted of part of entire Debt to one, and part to another.

H. Died Intestate, leaving a Wife and a Brother: The Ordinary had granted the Administration of some particular Debts to the Brother, and of the residue to the Wife. Et per Ward the Court was moved for a Mandamus to grant Administration to the Wife. Sed per Cur. Where the Husband dies, the Ordinary is at Election either to grant Administration to the Wife or next a-kin; for this is grounded on the 21 H. 8. c. 5. Yet in that Case she shall have her share on the Statute of Distributions. But where the Wife dies, Administration must be granted to the Husband by 31 Ed. 3. Also the Court held the Ordinary may grant Administration to the Brother quoad part, and to the Wife for the rest; in which Case, neither can complain, since the Ordinary need not have granted any part of the Administration to the Party complaining. But if the Intestate leave a Bond of 100 l. the Ordinary cannot grant Administration for 50 l. to one Person and 50 to another, because this is an entire thing. Annua nec debitum, Judex non separat ipsum.

Manning

## Manning *versus* Napp. Trin. 4 W. & M. B. R.

H. Died Intestate leaving no Children or Kindred: The King appointed the Plaintiff to take out Administration; the Defendant, tho' he knew there was no Kindred, entered Caveats and put the Plaintiff to great Charge. For this cause the Plaintiff brought an Action. Upon Demurrer the Court doubted whether an Action would lie; because, tho' there was a damnum, yet it was absque injuria; for the Property of the Goods till Administration was in the Ordinary, and the Plaintiff had neither Jus in re nec ad rem. Otherwise had the Plaintiff been next of kin, because he had a Right to administer by the Statute; And the King's Appointment by Letters Patents was but a kind of Recommendation. For they held, That in Case of an Intestate without Kindred, the Ordinary may dispose in pios usus; but the usual Course is for some one to procure the King's Letters Patents, and then the Ordinary admits the Patentee to Administration; but the Court thought this was rather of Respect than of Right, and they denied the Opinion in 9 Co. Hensloe's Case, and held that Administrations originally belonged to the Bishops, and the Instance of some Lords of Manors is not a Proof of the contrary.

(3) Case by Administrator under the King's Letters Patents for maliciously hindring him by Caveats per quod he was put to great Charge, &c. ne gist. Property is in the Ordinary till Administration. Administration to Person dying Intestate without Kindred. Administrations belong'd to the Bishop originally.

## Hilliard *versus* Cox. Pas. 12 Will. III. B. R.

IN Debt by an Administrator on an Administration committed per Episcopum, L. &c. Defendant pleaded in Bar that the Intestate tempore mortis was resident in another Diocese; and it was held good upon Demurrer. Et per Cur. The simple contract Debts are Personal, and Administration must be committed of them where the Party dies. And if a Man have two Houses in several Dioceses, and lives most at one, but sometimes goes to the other, and being there for a Day or two dies, Administration of his Personal Estate shall be granted by the Bishop of this Diocese, for he was Commorant there, and not there as a Traveller.

(4) Count on Administration committed per Episc. L. Plea, That he was resident in another Diocese tempore mortis is a good Bar. Where H. has two Houses in several Dioceses, Administration of Personal Estate shall be granted by Ordinary where he died

## Gidley *versus* Williams. Hill. 12 Will III. B. R.

DEBT, and declares on a Bond as Administrator, not saying in the Body of the Declaration by whom Administration was committed, and concluding with a profert Literas Administratorias præd. Richardi, who was the Intestate. Defendant

(5) In narr. per Administrator. Want of alledging by whom Administration was committed is cured by pleading non est factum.

fendant pleaded Non est factum; and Verdict for the Plaintiff. And now Exception was taken to the Declaration Et per Cur.

1st, Want of shewing by whom Administration was committed, is naught upon Demurrer; for it might be by a Peculiar, and then it must be averred, cui Administrationis commissio de Jure pertinuit; Or loci illius Ordinarium. And there is a good reason why it should be set forth by whom Administration was committed; For the Defendant may contest the Right of the Person granting, and may plead Administration was granted to another, or that there were bona notabilia.

2dly, A Verdict does not help this, for it is not a Matter necessary to be proved upon this Issue, the Title of the Administrator being not then in Question.

3dly, They held, This Defect was cured by the Defendant's Plea in Chief, which admits the Plaintiff to be a good Administrator.

4thly, They held, That tho' the Verdict did not cure it at Common Law, yet it was now remedied by the 16 & 17 Car. 2. c. 8. And Judgment pro Quer.

## Blackborough *versus* Davis. Pas. 13 Will. III. B. R.

(6) Administration granted to the Grandmother, and Mandamus pray'd to the Spiritual Court to grant it to the Aunt, and denied. Administration void, when granted by a wrong Ordinary, and voidable, when granted to a wrong Person. Ecclesiastical Court may grant Administration to which they will of Kindred in equal degree.

Administration being granted to the Grandmother, the Aunt moved for a Mandamus to have it granted to her, urging that first Administration was void, she being nearer in degree; and that there needed no Repeal, this Administration being granted to a wrong Person, in which Case the very Grant of a new Administration amounts to a Repeal. 1 And. 303. Owen 50. Cro. El. 460. 1 Sid. 371. Holt C. J. contra.

1st, It is not void, as where Administration is granted in a wrong Diocese, but only voidable; for at that rate Trover would lie against the first Administrator, and there would be a nullity in all mean Acts. If Administration be committed to a Creditor, and after repealed at the Suit of the next a-kin, he shall retain against the rightful Administrator, and his disposal of the Goods, even pending the Citation, till Sentence of Repeal stands good.

2dly, If in equal degree, the Spiritual Court have Election, and the Grandmother is as near as the Aunt, because the discent to either would be a mediate discent, the Mediation of which is the Father, mediante Patre. It is enough at Law to say, Frater & hæres, or Soror & hæres. But the Court thought the Advantage on the Grandmother's Side, in this respect, that she stands in Linea recta.

3dly, This is a Matter contestable in the Spiritual Court, whereto she ought to apply her self, and it does not appear she has: Ergo the Mandamus denied.

4 After

After this the Aunt came and moved for a Mandamus to oblige the Ecclesiastical Court to cause a Distribution, and that was denied. Vide Title Distribution.

## Freke *versus* Thomas. Pas. 13 Will. III. B. R.

AN Administrator durante minore Ætate of an Administrator, may act and sue till the Administrator in whose Right he acts be of the Age of Twenty one Years; for Administrators are by the Statute, and one is not a legal Person in the Eye of the Law, capable to act for another as Trustee, till Twenty one. So that durante minore Ætate of an Administrator shall be understood during legal Minority, i. e. Twenty one, before which Age he is not by Judgment of Law fit for the Trust: Otherwise where it is the Act and Judgment of the Party, as where one is made Executor; for by the Spiritual Law he may be an Executor at Seventeen, and therefore an Administration durante minore Ætate of an Executor ceases at that time: Adjudged in Debt upon a Bond. Note also a necessity for this; for the Spiritual Court will not grant Administration to any one under Twenty one; and this is by Construction on the Statute of Distributions, because they are to give Bond, &c.

(7) Administration durante minore Ætate of Administrator ceases at the Age of 21; Of Executor ceases at the Age of 17.

## Burston *versus* Ridley. Mich. 1 Ann. B. R.

H. Entered into a Recognizance of 1000 l. before Glin C. J. of the upper Bench in 1658 to A. On a Certificate of this into Chancery, there issued a Writ of Extent reciting a Recognizance for the same Debt, taken before Glin C. J. of the Common Pleas, requiring the Sheriff to extend the Lands of the Conusor. Accordingly certain Lands were extended; and upon a Liberate delivered to J. S. who died possessed of Goods valoris 5 l. in the Diocese of London, and also in Durham. Lessor of the Plaintiff in Ejectment took Administration in Durham and also in London, and in that Right took out a new Extent and brought an Ejectment. And the Court held, That unless the first Extent was void, the second could not be good, for the Party could not have two Extents, nor two Satisfactions. But it was objected to the Plaintiff's Title that he should have had a Prerogative Administration. Sed Cur contra. For neither Archbishop has to do in the other's Province. If a Man leaves bona notabilia in several Dioceses of the same Province, there must be a Prerogative Administration. If one leaves bona notabilia in two Dioceses of Canterbury, and two Dioceses in the Province of York, there must be two Prerogative Administrations;

(8) Where there are bona notabilia in several Dioceses in the same Province, Prerogative Court must grant Administration but where in one Diocese of one Province, and in another Diocese of another Province, each Bishop must grant an Administration.

ſtrations; but if it be as here it is otherwiſe, and this Adminiſtration in the one Dioceſe and the other was held good.

## Adams *verſus Ter-tenants of* Savage. Paſ. 3 Ann. B. R.

(9) Adminiſtration in Dorſet no Title to a Judgment in any of the Courts at Weſtminſter.

SCire facias on a Judgment in B. R. as Adminiſtrator of J. S. and by his Profert ſhews an Adminiſtration granted by the Archdeacon of Dorſet. The Heir and Ter-tenants pleaded riens per diſcent, &c. and the Plea being adjudged naught, the Scire facias was abated by Judgment quod nihil capiat per breve; which in this Caſe the Court ſaid was a Bar to the Action of the Writ but not to the Action; and the reaſon of their Judgment was, becauſe the Plaintiff having made this Adminiſtration his Title, the Court could not intend any other, and the pleading over could not admit that to be a Title which to the Court appeared to be no Title.

## Denham *verſus* Stephenſon. Trin. 3 Ann. B. R. & 4 Ann. in Cam. Scacc.

(10) Declaration upon Adminiſtration granted by the Official of a Peculiar, Debito modo commiſſa fuit ſufficient without averring that he had Juriſdiction of Adminiſtrations.

WIllielmus Denham gen. Adminiſtrator, &c. cui Adminiſtratio bonorum & catallorum Jur. & Creditorum quæ fuerunt, A. B. tempore mortis ſuæ per Thomam Croſland Artium Magiſtrum Commiſſarium ſive Officialem peculiaris & ſpecialis Juriſdictionis de, &c. legitime fulcit. debito modo commiſſa fuit and concludes with profert hic in Cur. Literas, &c. and ſo declared in Debt againſt the Defendant as Heir at Law upon the Bond of his Anceſtor: Defendant demurred generally: Mr. Raymond argued, That the Court could not take notice that every Peculiar had a Right to grant Adminiſtration, and that it being a Juriſdiction againſt common Right, it ought to be averred according to the Precedents, cui de Jure Commiſſio Adminiſtrationis in hac parte pertinet. And the debito modo commiſſa affirms the Regularity of the manner of Proceeding, not the Sufficiency of the Power and Juriſdiction. Of this Opinion was the whole Court; and Salkeld, who was ready to argue it for the Plaintiff, was ſtopp'd by the Chief Juſtice, & quievit. Afterwards, when the Court came to give Judgment, Holt C. J. Gould & Powys, mutata Opinione, held the Declaration to be good, and that the debito modo was a ſufficient Averment; and the Chief Juſtice ſaid, there was no Peculiar but had the Power of granting Adminiſtration, and that this was a needleſs exactneſs, not ſo much regarded laterly, as it had been in former times, when it was thought not enough even to ſhew an Adminiſtration committed by a Biſhop, without averring there were nulla bona notabilia. Judgment pro Quer. Powel abiding by his former Opinion. Upon this Judgment a Writ of Error was brought in

Every Peculiar has Power of granting Adminiſtrations.

Cam. Scaccar. And Mr. Lutwyche for the Plaintiff insisted upon the reasons of Raymond, and cited all the Cases. Salkeld argued that every Ordinary hath Power to grant Administration. Et quod quicunque habet Ordinariam Jurisdictionem est loci illius Ordinarius, Linwood L. 1. T. 3. and the 31 E. 3. c. 11. ordains, That where any Person dies Intestate, the Ordinary shall commit Administration. That there is no Peculiar but what hath an Ordinary; for it is a Peculiar for that very reason, that it is exempt from the common Ordinary, and under a Peculiar or Special Ordinary of its own. 2dly, He insisted that Peculiars must be Royal, Archiepiscopal, Episcopal, or Archidiaconal; and that in every one of these, the Owner has a Power even of common Right to grant Administration. Vide All. 53. Declares of an Administration granted per Car. Regem; held good, for the King is supreme Ordinary, like Case 1 Bul. 4. from the nature of the thing, therefore 'tis the same in effect to say, Administration was granted by the Official of a Peculiar, as to say, it was granted by the Official of a Diocese. And as to its being against common Right, the Ordinary of a Peculiar does no more prescribe for his Ordinary Power or for his Peculiar, than the Bishop of a Diocese. Where the Lord of a Manor hath this Jurisdiction, he that has an Administration there declares of it as committed per A. B. Dominum Manerii cui Administrationis Commissio de jure pertinet per Consuetudinem infra Maner. præd. à tempore cujus contrarii Memoria hominum non existit usitat. & approbat. debito modo commissa fuit. And as to the Books and Cases, they are easily reconciled by this difference, viz.

Vid. 1 Saund. 402. Sty. 282.

Ordinary quid.

Peculiar quid

Kinds of Peculiars.

Thom. Entr. 342.

Where-ever the Power of him that grants Administration is by Commission, the Plaintiff in his Declaration must aver he had Authority, viz. cui Jurisdictio in ea parte pertinet, or legitima authoritate fulcitus. Thus 3 Cr. 431. per A. V. Theologiæ Professorem, naught; 3 Cro. 791. per A. B. decan. de L. naught; Hetley 68. per A. B. Chancellor of Chester naught; because these were by special Commission under the Ordinary; but where the Power of him that grants Administration is not by Commission, but by Office or Privilege, it need not be averred, because the Office imports the Power as incident, and the Law takes notice of the Office. Vide 39 H. 6. Pl. 9. Declares of Administration per Abbatem Westm. loci ill. Ordinar. good, for Ordinary implies as much. 11 H. 4. 64. Pl. 16. Declares of Letters of Administration from the Commissary of the Bishop, good; for the Law knows every Commissary must have that Power. So 3 Cro. 102. Lacy versus Smith; per A. B. officialem of the Bishop; good. So 3 Lev. 193. per such an Archdeacon is good. Judgment was affirmed per tot. Cur.

Where one grants Administration virtute Officii, Plaintiff need not aver his Authority; aliter where by Special Commission.

G Slaugh-

## Slaughter *versus* May. Mich. 3 Ann. B. R.

(11) Administration may be granted to A. during the Absence of J. S. but in narr. it must be averr'd that J. S. is absent.

H. Being Administrator durante absentia J. S. Executor brought an Action of Debt on a Bond, but did not aver where J. S. was absent, or that he was absent. Cur. 'Tis but reasonable the Ordinary have Power to grant Administration during Absence, as well as during Minority, or pendente lite; and such Administrator is accountable to the Executor: We will intend it is Absence beyond Seas, but the Plaintiff ought to aver he was absent. Judgment pro Def. per Cur.

## Clerk *versus* Withers. Mich. 3 Ann. B. R. Vide *Title* Execution.

## Weston *versus* James. Paſ. 9 Ann. B. R.

(12) Upon a Writ of Inquiry after interlocutory Judgment reviv'd by Scire facias sur Statute 8 and 9 W. 3. c. 10. the final Judgment must be against the Administrator and not the Inteſtate.

DEBT upon a Bond against an Administrator, Defendant pleaded Assets in his Hands to the value of 200 l. only, and that A. obtained a Judgment against the Inteſtate in Aſſumpſit by nil dicit, and that the Inteſtate died, and that after a Scire facias was awarded against the Defendant for Damages on the said Judgment, upon which he having no Cause, a Writ of Inquiry issued, and Damages thereupon found to the value of 300 l. and Judgment given thereupon for the Plaintiff quod recuperet dampna præd. against the said Inteſtate; and avers that he had no Assets Ultrà. To this Plea it was demurred. It was admitted that this Plea at Common Law had been naught, for by the Death of the Defendant the Action had abated, and Judgment could not be given against him after his Death; but the Question was on the 8 and 9 W. 3. c. 10. which after interlocutory Judgment gives a Scire facias against the Administrator in case of the Defendant's Death, which was compared to the case of a Judgment on the 17 Car. 2. c. 8. where the Defendant dies after Verdict. But to this it was answered, That the said Statute makes the Judgment good against the Defendant himself only, and makes not a Judgment against his Executor or Administrator; but by this Act, it is to be a Judgment against the Executors or Administrators of the Party, for they are expressly taken notice of for that end, and the Scire facias is to be against them, and all this appears on the same Record, and therefore this can never be made a Judgment against the Inteſtate himself, nor so pleaded; to which the Court inclined.

Advowſon.

# ADVOWSON.

## *Bishop of* Salisbury *versus* Phillips. Mich. 11 Will. III. B. R. Rot. 377. *In Error.*

Error of a Judgment in C. B. in Quare Impedit, Plaintiff counts that A. and B. were seized in Fee as Joint-tenants of the Advowson, ut de grosso, and by Indenture agreed from thenceforth to be seized thereof as Tenants in Common, and not as Joint-tenants, and they and their respective Heirs should present severally and by turns, and shews several Presentations alternately; and that A. died, and his Moiety descended to C. and makes his Title by Grant of the next Presentation from C. to D. his Executors, Administrators and Assigns; in whose Life the Church became void, and that D. made his Will and died, and it belongs to the Plaintiff as Executor to present: Bishop claims Title by Lapse; Plaintiff replies the Testator presented Symes within Six Months and the Bishop refused him; Defendant rejoined, he gave him Three Days time to prepare for Examination, and he never came again, Absque hoc, that the Bishop refus'd Symes at the Presentation of the Testator. Upon this Issue was taken, a Verdict pro Quer. and also Judgment in C. B. and now Error in this Court. Carthew objected, that the Plaintiff had made no Title; for the Agreement to present by turns did not sever the Right; the Indenture did not work a Partition, but an Agreement which is now broken, for which the Plaintiff may take his proper Remedy. This Cause was several times moved, and Holt C. J. held it to be a good Partition the first time it was spoken to, saying, That where the Thing and the Profits are the same, a Partition of the Profits is a Partition of the Thing; and tho' perhaps the Agreement cannot make Two Advowsons out of one, yet it has created several and distinct Rights to present alternately. Afterwards when Judgment was affirmed, the Chief Justice said, That a Composition might be either by Record, or by Deed, or by Parol; That if either Privies in Blood, as Co-partners, or Strangers in Blood, as Tenants in Common or Joint-tenants, agree by Record to present by turns, and one present, the other is not by a Usurpation put to a Quare Impedit; and that whether the Presentation be by one Privy to the Agreement or by a Stranger. Vide

(1) Quare Impedit. Declares upon an Agreement by Indenture, between Joint-tenants to present by turns.

Composition may be three ways. 1st, By Record, either between Privies in Blood or Strangers, and in case of a wrongful Present: The Patron is not put to a quare Impedit, but may sue a Scire facias.

2dly, By Deed, either between Privies or Strangers, which if once executed on all Sides H. may declare in Quare Impedit. without mentioning the Composition.
3dly, By Parol, between Privies only.

Vide West. 2. 5. 2 Inst. 362. 2dly, That if either Privies in Blood, as Parceners, or Strangers, as Tenants in Common or Joint-tenants agree by Deed to present by turns, the Composition is good; and if it be once executed on all Sides, he, that brings a Quare Impedit, need not mention the Composition, which shews the very Right and Inheritance to be severed, and that a separate Interest is vested in each of them to present alternately, and that the Plaintiff needed not have declared of the Composition or Indenture in this Case. Vide Dy. 29. 3dly, By Parol, for so a Composition may be between Parceners but between Strangers in Blood Composition cannot be without Deed. Vide F. N. B. 60. 62. d. f. 11 H. 4. 3. b. Judgment affirm'd.

# AGE.

## Anonymus. Mich. 3 Ann. B. R.

IT has been adjudged that if one be Born the first of February at Eleven at Night, and the last of January in the Twenty first Year of his Age at one of the Clock in the Morning, he makes his Will, of Lands, and dies, 'tis a good Will, for he was then of Age. per Holt C. J.

ALE-

# ALE-HOUSES.

## Stephens *versus* Watson. Mich. 13 Will. III. B. R.

PER. Stat. 1 Jac. Ale-house-keepers are to forfeit 10 s. to the Poor, if they permit any Inhabitant of the Place to sit tippling above an Hour. Vide 4 Jac. 1. c. 5. 21 Jac. 1. c. 7. 3 Car. 1. c. 3. against drinking.

Ale-house-keepers, how, and in what Cases Punishable.

Before the 5 and 6 E. 6. it was lawful for any one to keep an Ale-house without Licence, for it was a means of Livelihood, which any one was free to follow. But if it was disorderly kept, it was indictable as a Nusance. By 5 and 6 E. 6. c. 25. Two Justices, one of the Quorum, may suppress Ale-houses.

2dly, None are to keep Ale-houses unless licenced by Sessions or by Two Justices, upon a Recognizance not to allow gaming, and to keep good Rule and Order.

3dly, Any one that not being thus qualified keeps an Ale-house may be committed Three Days and held to a Recognizance, with Two Sureties, to be certified to Sessions.

Note, This Statute extends not to Inns, for they are for lodging of Travellers; But if an Inn degenerate to an Ale-house, by suffering disorderly tippling, &c. it shall be deemed as such.

If a Man keep an Ale-house without Licence, he may be committed for Three Days by the Act, but he is not indictable; because the Statute which makes it an Offence, has made it Punishable in another manner.

Nota, There is a difference between suppressing an unlicenced Ale-house and one that is licenced.

Where an Ale-house is licenced, the Justices, to suppress it, must either proceed upon the Recognizance, the Condition whereof must at least be broken; and therefore his having another Trade, or being a Bailiff, can be no Cause in such Case: Or by Indictment, and then there must be such Disorders as prove a Nusance.

Jurisdiction of Justices of Peace to suppress Ale-houses licenced and unlicenced.

But where an Ale-house is unlicenced, the Justices may suppress it at Discretion; for on the denial of a Licence no Appeal lies, and the Statute which gives the Justices a Power to suppress where they should think convenient, would signify nothing if

it did not extend to ſuch Caſes; for it cannot extend to Alehouſes that are licenced, becauſe they are not puniſhable without a Breach of the Recognizance. And as to thoſe that are unlicenced, if they be ſuppreſſed by Commitment of the Owner, the want of a Licence can only come in Queſtion, and not the Reaſon and Cauſe why it was denied.

## Aliens *vide* Allegiance, *Denizen*.

### Wells *verſus* Williams. Mich. 9 Will. III. C. B.

(1) Alien Amy or Enemy living here under Protection may bring Actions, becauſe ſuing is a Conſequence of Protection.

If an Alien Enemy comes hither ſub ſalvo Conductu, he may maintain an Action: If an Alien Amy comes hither in time of Peace, per Licentiam Domini Regis, as the French Proteſtants did, and lives here ſub Protectione, and a War afterwards begins between the Two Nations, he may maintain an Action; for ſuing is but a conſequential Right of Protection. And therefore an Alien Enemy that is here in Peace under Protection, may ſue a Bond; aliter of one Commorant in his own Country.

(2) Turks and Infidels not perpetui inimici.

Turks and Infidels are not perpetui inimici, nor is there a particular Enmity between them and us; but this is a common Error founded on a groundleſs Opinion of Juſtice Brooke; for tho' there be a difference between our Religion and theirs, that does not oblige us to be Enemies to their Perſons; they are the Creatures of God and of the ſame kind as we are, and it would be a Sin in us to hurt their Perſons. Per Littleton (afterwards Lord Keeper to King Charles I.) in his reading on the 27 E. 3. 17. M. S.

AMEND-

# AMENDMENT.

## Anonymus. Paſ. 5 Will. III. B. R.

WHEN a Declaration is come to be in Parchment, the Court can mend no farther than is allowable by the Statutes of Amendments, for 'tis then a Record; but while 'tis in Paper the Court may mend at Pleaſure, for 'tis not within the Statutes of Amendments.

(1) Reaſon of Amendments while in Paper.

## *The* King *verſus* Knolles. Trin. *6* Will. III. B. R.

INdictment of Murder. The Defendant pleaded that he was Earl of Banbury, &c. Attorney General replied, &c. Earl of Banbury moved to amend his Plea and had leave, (Holt doubting) becauſe the pleading was not perfected nor entered upon Record. And there have been ſeveral Amendments in Criminal Caſes. Vide 2 Cro. 529. 2 Ro. Rep. 59. Sid. 225. 243. Cro. Car. 144. Nota, The Plea was filed but not entered upon the Roll; And the Court held, that before Judgment, while things were in fieri and in Agitation, they had a Power over all Proceedings.

(2) Plea to Indictment of Murder amended after replication and before entry upon the Roll.

## *The* King *verſus* Harris. & al. Hill. *6* Will. III. B. R.

MOtion was made to amend an Information of Perjury, and oppoſed, becauſe the Defendant had pleaded. Et per Holt C. J. As to mending after Plea pleaded, there is no great Matter in that; After a Record has been ſealed up, I have known it amended, even juſt as it was going to be tried.

(3) Information may be amended after Plea pleaded.

## *The* King *verſus* Keat. Hill. 8 & *9* Will. III. B. R.

A Verdict General or Special may be amended by the Notes of the Clerk of Aſſize; but this is in Civil, not in Criminal Caſes. Vide 1 Ro. Rep. 82. A Special Verdict amended by the Notes

(4) Verdict may be amended by Notes of the Clerk of Aſſize in Civil Caſes, not in Criminal

Notes of the Counsel in the Cause after Error brought. Vide 3 Cro. 149, 150. Cro. Car. 145, 338. 4 Co. 52. 2 Co. 185.

## *Bishop of* Worcester's *Case.* Mich. 8 Will. III. B. R.

(5) Ejectment versus 7 Defendants, and all join in the Common Rule, and the Issue was right in the Plea Roll, &c. but the nisi prius Roll was versus 5 only; and after Verdict pro Quer. this was amended by adding the other Two Defendants.

EJectment against Seven Defendants who enter into the Common Rule for confessing Lease, Entry and Ouster, and plead to Issue: The Plea-roll was right, so was the Venire, Distringas, and the Jurata; but the Issue in the Nisi prius-Roll was between the Plaintiff and Five Defendants only, which was tried, and Verdict pro Quer. and an Amendment being moved for it was opposed, because it was to alter the Verdict, to subject the Jury to an Attaint, to make another Issue, and to make Two Defendants Guilty who were not tried: But it was amended; For nothing could be enquired of but the Title of the Lessor, and the Issue depended on his Title, which is not altered by this Amendment. And it must be considered that all Seven entered into the Common Rule, and that the Plea-roll, &c. are all right, and this cannot be intended other than the same Issue, and the Amendment is only to rectify a plain Mistake, and make that the Issue which was apparently intended to be so.

## Puleston *versus* Warburton. & al. Pas. 9 W. 3. B. R.

(6) Demise in Ejectment laid 1697 for 96, and not amendable after Verdict, because it would be another Title.

EJectment, Verdict was pro Quer. and now he moved to amend his Declaration; wherein he had counted of a Demise, 10 April 1697, instead of 1696; for 97 was not come at the time of the Trial. And the Court agreed that in a Judgment by Confession on a Warrant of Attorney, it had and might be amended in Ejectment, because without such Amendment the Agreement and Intent of the Parties could not be fulfilled, but denied it in the principal Case, because it altered the Issue and made another Title.

## Child *versus* Harvey. Mich. 11 Will. III. B. R.

(7) In the Distr. the Day of nisi prius was appointed after the Day in Bank, and after Verdict held not amendable by the Plea-roll, because the Judges Authority was confin'd to that Day.

A Scire facias on a Recognizance upon Issue non solvit it was found for the Plaintiff: Mr. Northey moved to set aside the Verdict, because in the Distringas and Jurata the Return was à die Sanctæ Trin. in tres Sept. nisi Johannes Holt Mil. 27 die Junii prius venerit, the Twenty Seventh Day of June being the Morrow after tres Trin. But the Plea-roll was right, for the Award there was tres Mich. It was agreed on all Sides that the Trial must be set aside unless the Mistake could be amended, because it appeared the Judge had no Authority to try the Issue,

and the Court held it could not be amended. The Court agreed that where the Distringas or Jurata are right, and the Amendment does not alter the Point in Issue, the nisi prius-Roll may be amended by the Plea-roll. So it was in the Bishop of Worcester's Case, and there the Distringas and Jurata were right. 2 Cro. 353. Dy. 260. Hutt. 81. 1 Cro. 595. But here neither Distringas nor Jurata are right. The Day appointed for the Nisi prius is impossible; and the Judge's Authority is confined to the Day. He has no Authority to try, Nisi Johannes Holt, &c. 27 Junii prius venerit; which cannot be. Where a Judge's Authority is confined to a Day, his Trial at another Day must be without Authority.

Where the Nisi prius-Roll may be amended by the Plea-Roll, and where not.

## Anonymus. Hill. 11 Will. III. B. R.

THE Clerk of the Treasury of the Common-Pleas attended with the Record here, and it was moved that the Transcript in B. R. might be amended by it. Hall opposed it, till they had the Costs of the Writ of Error allowed them. Et per Holt C. J. You should have insisted for the Costs in C. B. before the Party had liberty to amend. This way of amending the Record here by the Record there, is the Course of the Court, and only to save a Certiorari; for if the Record be right below, upon Diminution alledged, the Party may have a Certiorari of Common Right. Therefore these Amendments cannot be opposed; nor did I ever know it done, being only to save the Charge of a Certiorari.

(8) In case of Amendment of Record in B. R. by the Record in C. B. the Costs (if any) must be given below.

## Thompson *versus* Crocker. Pas. 12 Will. III. B. R.

NOrthey moved to amend a Writ of Error, which recited a Judgment given in Curiâ of the King, when it should be in Curia Regis & Reginæ; the Cursitor's Notes were right, and the misprision only in matter of form and not skill: Sed non allocatur; for first the Writ is a good Writ; there is no fault in the Writ, only it does not agree with the Record; and the Amendment is to make a new Writ. 2dly, The 8 H. 6. impowers us to amend in Matters precedent to the Judgment; but not to amend the Writ of Error. The intent of the Statute was to amend in support of original Judgments, and to avoid Writs of Error; but this may be to make an Amendment to make good the Writ of Error, and to reverse the Judgment. And it is the more absurd, because the Writ of Error is the Commission to the Court, and a Court cannot amend their own Commission.

(9) Variance between Writ of Error and Record, refus'd to be amended, tho' the Cursitor's Note was right.

Court cannot amend their own Commission.

## Anonymus. Trin. 12 Will. III. B. R.

(10) Amendment of Information without Costs.

SIR Bartholomew Shower moved to amend an Information of Forgery in Ten Places, and tho' opposed, the Motion was granted because it made no alteration of the Fact; and that without Costs or Imparlance.

## Cox *versus* Wilbraham. Pas. 13 Will. III. B. R.

(11) Amendment cannot be on Demurrer after Entry on the Roll.

COvenant; and assigns breach upon the Words that he had not made, done or suffered, any Act or thing whereby to incumber, &c. And the Breach was quod ad Sessionem Cestriæ tent. &c. anno quarto Jacobi secundi utlagat. fuit. Defendant demurred, and upon Argument the Declaration being held naught for incertainty, when or what Term the Outlawry was had, Mr. Cheshire moved to amend. He cited 1 Cro. 147. which was after Verdict, but said as to this Matter, there was no difference between Verdict and Demurrer; for the Words of the Act of E. 3. are Challenge of the Party; which must be meant Demurrer: Sed per Holt C. J. No; the Statute means the Parties Exception in Arrest of Judgment. If the Defendant had pleaded a Plea to the Right or in Abatement, it might be reasonable to allow an Amendment; But to amend upon Demurrer when this may be the Cause of the Demurrer, would be to ensnare the Defendant without Cause; Ergo disallowed.

## Leperd *versus* Germain. Pas. 2 Ann. B. R.

(12) Bill against J. G. Kt. Pl. in Abatement that he is Knight and Baronet, and denied to be amended.

ASsumpsit, and declares versus Sir John Germain, Kt. The Defendant pleaded in Abatement, he was a Knight and Baronet, the Plaintiff reply'd he was a Knight, &c. and Raymond moved to amend upon Payment of Costs, all being in Paper, and that the Action being by Bill, the Addition was not material, not being within the Statute of Additions: But denied to amend, because nothing to amend by, and the Defendant had taken Advantage of the Fault.

## Parsons *versus* Gill. Mich. 2 Ann. B. R.

(13) Plea-roll amended by the Paper-book signed by the Master.

IN Debt upon a mutuatus the Judgment was entered up as of Hill. Term, 1700, whereas the borrowing appeared to be 2 April. 1701. Error being brought to reverse this Judgment, Mr. Ward

Ward moved to amend the Judgment by the Paper-Book signed by the Master, which was the 2 Januarii 1700. Et per Cur. This was allowed to be amended, for 'tis but a slip of the Clerk who should have perused the Paper-book signed by the Master, which is Authentick enough to amend by. Vide 1 Cro. 147. Hob. 127. 1 Brownl. 16.

*The* Queen *versus* Tutchin. Mich. 3 Ann. B. R.

(14) Venire ret. 23 October Distringas test. 24; a discontinuance, and not amendable.

INformation for a Libel. The Defendant was found Guilty: And it was moved in Arrest of Judgment, that the Ven. fac. was returnable die lunæ prox. post tres Sept. Sanct. Mich. and that the Distringas and Nisi prius on the Roll was awarded in common Form right enough; but that the Writ of Distringas was tested 24 October, whereas the Venire was returned the 23. And this was held to be a Discontinuance; but the Question was, whether it might not be amended? It was argued it might be amended, and that it was amendable first at Common Law. 2dly, By the Statute of H. 6. 2. 2 Cro. 529. Cro. Car. 144. 1 Sid. 244. Dy. 346. 14. 1 Sid. 259. 4 E. 3. 9. 3 Lev. 14. 430. 2 Bulst. 35. Ray. 440. 1 Sid. 243. 66. 1 Keb. 191. 215. 1 Ro. Ab. 201. Cro. El. 572. Et per Holt, Powel & Powys. 1st, Whatever at Common Law might be amended in Civil Cases, was at Common Law amendable in Criminal, and so it is at this Day. 2dly, This was not amendable at Common Law because it would warrant a Trial that was tried without Authority, and the Amendment would be contrary to the Truth of the Fact. And it is a Mistake of the Clerk in Skill, and tho' a mis-awarding of Process on the Roll might be amended at Common Law the same Term, because it was the Act of the Court; Yet if any Clerk at Common Law issued out an erroneous Process on a right award of the Court, that was never amended in any Case at Common Law. 3dly, They held this not to be amendable by any Statute of Amendments. And Powel said, There were only Two Statutes of Amendments, the 14 E. 3. and 8 H. 6. the rest he reckoned to be Statutes of Jeofails and not of Amendments. And he held that the 8 H. 6. was only to enlarge the subject Matter of 14 E. 3. and that the 14 E. 3. extends only to Process out of the Roll, i. e. Writs that issue out of the Record, and not to Proceedings in the Roll it self; But that the 14 E. 3. extends not to the King, because of these Words, Challenge of the Party. And the 8 H. 6. has been always construed in imitation of the Act of E. 3. And the Exception in the Statute of H. 6. was only ex abundanti Cautela. And all

No difference as to Amendment between Cases Civil and Criminal at Common Law.

14 E. 3. & 8 H. 6. The only Statutes of Amendments. The others are Statutes of Jeofails.

H 2 Judges

Judges and Sages of the Law in all Ages, have taken it not to extend to the Crown. And the Cases on the other Side are not to be relied upon.

## Buckſom *verſus* Hoskins. Mich. 3 Ann. B. R.

(16) Scire facias variant from the Judgment not amendable after nul tiel Record, the Writ being not vitious in ſe.

ERror of a Judgment in C. B. and the Scire facias to aſſign Errors was quare Executionem habere non debet of a Judgment in Ejectment for two Meſſuages, whereas the Recovery was de uno Meſſuagio only: The Plaintiff in Error pleaded, nul tiel Record, and the Defendant moved to amend. He cited 1 Cro. 162. 163. 1 Ro. 197. 797. 22 E. 4. 6. 2 Cr. 372. Cr. El. 760. 2 Sid. 7. 12. Et per Holt C. J. Nothing appears to be vicious or informal to need an Amendment, and that there may be a good Judgment that agrees with it. The Writ is good, tho' improper for the Purpoſe, and we cannot put a deceit upon the Defendant, and make his Plea falſe when it was true. Cro. Ja. 372. was ſaid to be a ſtrained Caſe.

## Vavaſor *verſus* Baile. Hill. 6 Ann. B. R.

(17) Variance between Scire facias and Judgment, not amendable.

SCire facias on a Judgment, and by miſtake in the Scire facias the Plaintiff's Name was put for the Defendant's, ſcil. Radulphus for Jacobus; and they moved to amend, it being the fault of the Clerk: Denied, for the Writ does not appear to us to be wrong, and there may be ſuch a Judgment for ought we know.

## Inter *Lord* Pembroke *and Lord* Jeffreys coram Holt. *C. J.* & al. *upon a Reference from the Houſe of Lords.*

(18) Writ of Covenant not amendable by Common Law or Statute.

LORD Pembroke petitioned the Houſe of Lords for a Bill to ſet aſide an Amendment made of a Fine and common Recovery in the Grand Seſſions in Wales, whereby he had loſt the Benefit of a Writ of Error: And whether the Fine and Recovery was amendable in the ſaid Particulars, and the ſaid Amendments warranted by Law, was referred to the Judges. One was whereas the Writ of Covenant was teſted Six Months after the Dedimus for the Caption, the Court of Grand Seſſions had amended it. Et per Holt & al. 'Twas certified, that the Writ of Covenant being an Original, was not amendable either by the Com-

Common Law or by any Statute: That neither the 14 E. 3. nor the 8 H. 6. warrants such an Amendment: That there is no difference as to this purpose between Actions Amicable and Adversary, for No-body pretends to mend a Mistake in a Deed it self, and yet that surely is as much a common Assurance as a Recovery, and that Gage's Case, 5. Co. 45. is misreported and not Law. Hereupon a Bill was allowed, but was thrown out in the House of Commons.

Amicable Action, no more amendable than Adversary. Mo. 571. Noy. 171. Co. Ent. 244. 252. 3 Cro. 740.

## Bold's *Case*.

A Verdict General or Special may be amended by the Notes in the Book of the Clerk of Assize if there be a misprision: But this is to be intended in Civil and not in Criminal Cases. Vide Keil. 1. 3 Cro. 149. In Assumpsit; Defendant pleaded Payment for Part, and non Assumpsit for the rest, and the Jury found for both quod non Assumpsit, whereas for one it should be non Solvit; and the Record was delivered to the Clerk of the Assizes to amend, because it was his misprision; it appearing the Jury found both Issues for the Plaintiff. 3 Cro. 149. 150. Cro. Car. 145. 338. 4 Co. 52. 2 Cro. 185. A Special Verdict has been amended by the Notes of Counsel in the Entry; and that after a Writ of Error brought; for per Cur. 'Tis but what was found, and we may amend here what they might in Com. Banco.

(19) Verdict General or Special may be amended by the Clerk's Notes in Civil Cases, but not in Criminal.

Amer-

# Amerciaments and Fines.

### *Lord* Gerrard *versus Lady* Gerrard. Hill. 7 W. 3. B. R.

(1) Defendant may be amerced twice in the same Action, where there are two final independent Judgments.

IN Dower, Defendant confesses as to part, and Judgment is given against him, quod sit in Misericordia, And as to the rest he pleads in Bar, upon which there is a Demurrer, and Judgment is given against him, quod sit in Misericordia. And it was objected in Error that a Man ought not to be twice amerced in the same Action. Sed non allocatur: For both the Judgments are final and independent of one another. Aliter, where one Judgment is only interlocutory and depends upon another, as quod computet in Account.

### Linsey *versus* Clerk. Mich. 8 Will. III. B. R.

(2) No Judgment entred pro fine in Trespass in B. R. since Statute 5 & 6 W. 3.

IN Trespass, Assault and Battery, &c. There can be no Capiatur profine entred since 5 & 6 W. & M. but the Plaintiff is to have 6 s. 8 d. in Costs to pay so much to the King for the Fine. Before this Act when the Fine was pardoned, the Judgment was entered nihil de fine quia pardonatur. So it is now in C. B. upon this Statute, for they enter their Judgments nihil de fine quia remittitur per Stat. But in B R. Judgment is entered up without any notice taken of the Fine; for the Law is altered and taken away in effect by this Statute. Therefore not like the Case of a Pardon; for that does not alter the Law, but excuse the Party.

### Eyres *versus* Smith. Mich. 9 Will. III. in Scacc. *At* Serjeants-Inn.

(3) Estreats discharged, upon Motion in the Exchequer.

EYres sued a Writ out of C. B. versus Smith, directed to the Sheriff of York, who sent a Warrant to Simpson the Bailiff of the Liberty of Pomfret, who did not return the Writ; upon which he was amerced 50 l. (viz. time after time) and that was estreated into the Exchequer: Afterwards Eyres and Smith agreed, and upon producing a Certificate from the Attorney for the Plaintiff that the Debt was satisfied, these Amerciaments



were

were discharged upon Motion to the Barons. Note, There ought to be a Constat of the Estreats, and, as the Clerks said, the Court uses not to discharge the Amerciaments, but allow you to compound them.

## *The* King *versus the Mayor of* Hertford. Mich. 11 W. 3. B. R.

IN an Information in nature of a Quo Warranto, Issues were returned upon three several Distringas's. Mr. Ward moved for a Rule to estreat them. Et per Holt C. J. If it be an extraordinary Case, we can make a Rule to estreat the Issues; but otherwise the Course of the Court is to send them up into the Exchequer at the usual times, which are twice a Year, viz. the last Days of the two issuable Terms. But there is nothing extraordinary in this Case: And the Motion was denied.

(4) Issues never estreated by special Rule, unless in extraordinary Cases.

## *The* Queen *versus* Sumers. Paſ. 1 Ann. B. R.

INdictment for a Trespass and Riot, Defendant pleaded non Cul. and the Indictment was removed hither by Certiorari, &c. The Defendant went before the Master and Costs were taxed; and now Mr. Eyre moved he might go before the Master again, that the Prosecutor might be considered for his Charges below, the Master's Taxation before being only for Costs since the Certiorari. Et per Cur. The Master ought not to consider the Costs below, but only since the Certiorari and upon it; Then Mr. Eyre moved to aggravate the Fine; Et per Cur. You ought not to aggravate the Fine after the Party has been before the Master; if you do, we will set aside the Taxation of Costs.

(5) Costs tax'd upon a Certiorari are to be only the Costs in B. R. Prosecutor cannot move to aggravate the Fine after accepting his Costs.

## *The* Queen *versus* Templeman. Trin 1 Ann. B. R.

UPON a Motion to submit to a small Fine, after a Confession of the Indictment which was for an Assault, Holt C. J. took a difference, where a Man confesses an Indictment; and where he is found Guilty; In the first Case a Man may produce Affidavits to prove Son Assault upon the Prosecutor in mitigation of the Fine; otherwise where the Defendant is found Guilty; for the Entry upon a Confession is only non vult contendere cum Domina Regina & pon. se in gratiam Curiæ.

(6) Upon submitting to a Fine after confessing Indictment, Affidavits may be read to prove that the Prosecutor made the Assault; otherwise after Conviction.

Defen-

Judgment for a Fine may be given in the Defendant's Absence, upon an undertaking by a Stranger, but not for any corporal Punishment.

Defendants may submit to a Fine, tho' absent, if they have a Clerk in Court that will undertake for the Fine. Hill. 2. Ann. Hickeringil's Case was, that he and his Daughters were indicted for a Trespass, and Hickeringil only appeared on the Motion to submit to a small Fine. But where a Man is to receive any Corporal Punishment, Judgment cannot be given against him in his Absence, for there is a Capias pro Fine; but no Process to take a Man and put him on the Pillory. Vide Tit. Judgments —— Duke's Case.

## Brook *versus* Hustler. Hill. 4 Ann. B. R.

(7) Amercement may be general quod sit in misericordia, and affeer'd to a certain Sum.

DEBT for an Amerciament in a Court Leet. It was laid in the Declaration, That the Defendant was amerced per Cur. not saying in what Sum, and that it was affeered by Affeerers to such a Sum. It was objected that the Court ought to impose a Sum certain; And that by Affeerers is after to be mitigated. Vide Hob. 129. Lev. 206. Sed Cur. cont. The Amerciament ought to be General, quod sit in Misericordia; and that is to be ascertained by Affeerors.

# ANTIENT DEMESNE.

## Barker *versus* Wich. Mich. 3 W. & M. B. R.

(1) Ancient Demesne. How pleadable. If Manor is ancient Demesne, Lands held of the Manor impleadable in the Lord's Court only; Parcel in the King's Court and not the Lord's.

IN Ejectment, Defendant pleaded in Abatement that the Lands were parcel of the Manor of Bray, and that the Manor of Bray was Antient Demesne held of the Crown. And this was held naught per. tot. Cur. For hereby it must be understood the Lands in Question are part of the Demesnes; and supposing the Manor to be Antient Demesne, yet the Manor and the Demesnes of the Manor are impleadable at Common Law, and not in the Lord's Court; for then the Lord would be Judge in his own Cause: On the other side, Antient Demesne Lands held of the Manor, are impleadable in the Court of Antient Demesne, and there only. Vide F. N. B. 11 m. 1 Ro. 324. And therefore, because he does not plead that these were Lands held of the Manor of Bray, Judgment quod respondeat ouster.

## Hunt *versus* Burn. Hill. 12 Will. III. B. R.

Bracton calls these Tenants Villani privilegiati, and it seems they are free as to their Persons, not as to their Estates; for if Antient Demesne be to be tried, the Issue is, Whether Antient Demesne or Frank-Fee? The Privilege arises from the Constitution and Nature of the thing Coeval with the Government it self, at least as antient as any other Estate or Tenure whatsoever; We must suppose these Priviledges commenced by Act of Parliament, for they cannot be created by Grant at this Day; per Holt C. J.

(2) Tenants in antient Demesne are free as to their Persons, but not as to their Estates.

If you plead that the Manor of D. is Antient Demesne, you ought to averr it by the Record of Domesday, for that is the Trial of it: But if you plead, that such a Place is Parcel of a Manor which is Antient Demesne, then you ought to conclude to the Country; For Parcel or not Parcel is triable per pais, 2 E. 3. 15. b. Thomas de Grenham's Case: But it seems to me the other Side may traverse its being Antient Demesne. And so was done between Sanders and Welsh C. B. Pas. 9 Jac. Rot. 3165. Issue was, Whether the Manor of Otterbury was Antient Demesne? And the Court awarded, quod querens habeat recordum libri de Domesday hic in Octabis Hillarii. At the Day the Plaintiff had the Book brought in by a Porter. It appeared by the Book that Edward the Confessor Anno Regni sui decimo octavo, had given this Manor Abbati Rotononensi; and that this Manor was not in the Title of de terra regis: For all Lands held in Antient Demesne, which the Confessor had, were by William the Conqueror, Anno Regni sui vicesimo, written in the Book called Domesday, under the Title de terra Regis; And these are all held in Antient Demesne at this Day; but those which were given away by Edward the Confessor, and which are not written in the Book called Domesday under the Title de terra Regis, are not Antient Demesne. And a Respondeas Ouster was awarded.

Issue of ancient Demesne how triable.

Ancient Demesne is the Land under the Title de terra Regis in Domesday Book, and no other.

By a Recovery of the Land at Common Law, it becomes Frank-Fee for ever; But a Recovery against the Tenant is reversable by the Lord, by Writ of Deceipt; and such a Recovery makes it only Frank-Fee, quousque it continues unreversed; but where it is reversed, it becomes Antient Demesne again. Vide 5 E. 3. 61. 4 Inst. 270. Moor Pl. 285.

By Recovery at Common Law it becomes Frank-Fee.

I ANNU-

2

# ANNUITY, PENSION.

## Anonymus. Trin. 7 Will. III. in Scacc.

(1) King cannot grant an Annuity.

THE King cannot grant an Annuity, for his Person is not chargeable as the Person of a Subject; but if he grant it out of his Excise or any Branch of his Revenue, 'tis good; for there is somewhat therewith chargeable. Per Barones Scaccar.

## Smith *versus* Wallis. Pas. 12 Will. III. B. R.

(2) Pension issuing out of an Appropriation by Prescription, suable in the Spiritual Court.

Vide Prohibition.

A Pension out of an Appropriation, tho' by Prescription, is suable in the Ecclesiastical Court, for it could not begin but by the Grant and Institution of Spiritual Persons. And therefore if the Duty be traversed, it may be tried there; per Holt C. J. upon a Motion for a Prohibition, Vide 1 Ventr. 120. 3 Cro. 673. Where 'tis a Pension by Ordinance of the Bishop acting as Judge; Ordinamus & Constituimus. And where by Concurrence of the Bishop co-operating with the Patron, Vide N. Br. 52. Reg. 47. 3 Cro. 810. the Church it self charged. 1 Inst. 266. such Annuity cannot be releas'd to the Ordinary because it is Temporal.

APPEAL.

# APPEAL.

## Orbet *versus* Ward. Mich. 1 W. & M. B. R. Intr. Hill. 3 & 4 Jac. 2. Rot. 1018.

(1) Nul tiel Parish is a good Plea in Appeal.

Appeal of Murder for killing her Husband, against the Defendant, nuper de parochia Sancti Jacobi Westm. in Com. Midd. Gen. The Defendant in propria persona venit, and craves Oyer of the Writ and Retorn, and then per A. B. Attorn. suum pleads in Abatement, that there is a Parish named St. James within the Liberty of Westminster; but no Parish named St. James Westminster only: To which it was demurred, and the Cause was adjourned till next Term, when it was adjudged for the Defendant. For first, the Demurrer confesses the Matter pleaded in Abatement, viz. That there is no such Parish, which is a good Plea. 2dly, The Plea being by Attorney, ought not to have been received; and tho' it is received, yet it was wrong, and therefore void. The Consequence is, that the Cause is discontinued by the Adjournment.

In Appeal Defendant cannot plead by Attorney.

## Wilson *versus* Laws. Trin 6 W. & M. B. R.

(2) Appeal of Murder, Defendant demurrs in Abatement.

Wilson brought an Appeal of Murder against John Laws for killing his Brother Robert Wilson, and declares against the Defendant, for that he in parochia Sancti Ægidii in Campis, (such a Day) circa horam primam post meridiem ejusdem diei, did assault, &c. & in & super superiorem partem ventris juxta pectus & medium corporis percussit, pupugit & inforavit dans ei vulnus mortale, &c. Defendant craved Oyer of the Writ of Appeal and the Retorn, and then demurrs in Abatement, and pleads over to the Felony. After several Exceptions taken to the Retorn were over-ruled, Justice Giles Eyre held, That if the Retorn had been naught, the Defendant's Appearance could not have helped it; for Appearance helps only when the Party comes in and pleads to Issue, not when the Party comes in and challenges the Process upon the Account of its Defect. Vide 1 Ro. 789. Bul. 142. 2 Cro. 284. Yelv. 204. After this several Exceptions were taken to the Declaration. Upon which it was ruled, per Cur. 1st, That Circa horam primam was as cer-

Erroneous Process is aided by Appearance, where the Party comes in and pleads to Issue; otherwise where he challenges the defect.

What is sufficient Certainty in Count in Appeal.

certain as can be; for the Law does not tie a Man up to an exact Minute. 2dly, That the description of the Wound, in superiorem, &c. could not be more certain. 3dly, That percussit, pupugit & inforavit dans ei mortale vulnus, was better and more certain than if it had been, Et dedit, as the other Side would have had it. 4thly, That the Fact is well alledged in a Parish, tho' the Statute of Gloucester requires the Vill should be set forth; for the Parish shall be intended a Vill; And tho' there may be more than one Vill in a Parish, that shall never be supposed. And therefore if the Case happens to be so, it must come of the other Side to shew it. 1 Inst. 125. b. Judgment to answer over.

Parish shall not be intended to contain more than one Vill.

N. B. The Case of Widdrington versus Charleton. Trin. 11 Ann. In Appeal adjudged contra upon this Point, per Parker C. J. Powys & Eyre contra Powell.

## Armstrong versus Lisle. Hill. 8 Will. III. B. R.

(3) Vide Kelyng. 89.

Appeal of Death by Bill exhibited at the Sessions of Gaol-Delivery, and removed into B. R. by Certiorari.

LISLE was indicted at the Sessions of Gaol-Delivery for the County of Cumberland, for the Murder of Richard Armstrong; and was thereupon tried and convicted of Manslaughter. Immediately after the Verdict John Armstrong, Brother of Richard, put into Court a Bill of Appeal of Murder, and pray'd by his Counsel that it might be received and filed, and that the Defendant might be thereupon arraigned. But before the Appeal was arraigned, Lisle demanded the Benefit of his Clergy; And then the Bill of Appeal was by the Appellant's Counsel read in open Court, and Lisle appear'd to it and pray'd to be bailed, but refused to plead; upon which he was remanded to Gaol Quousque, &c. This whole Proceeding was entered upon the Record of the Indictment, together with the Conviction of Manslaughter, and return'd into B. R. upon a Certiorari; and the Appeal was also return'd, but upon the Record of that no mention was made of any Proceeding. Lisle was also brought up to the Bar by Habeas Corpus, the Return whereof being read, the Appellant moved for a Copy of it; Et per Curiam. It must be first filed, for it is not before us till filed, and we can order nothing concerning it till 'tis before us.

Being filed, the Appellee prayed his Clergy; to hinder which the Appellant took Exceptions to the Indictment, Conviction and Trial. Et per Cur:

This is the King's Record, in which you cannot assign Errors; You are a Stranger and perhaps the Prisoner has released these Errors to the King; and you have no Warrant of Attorney filed, and ought not to speak or be heard in the Cause.

Nevertheless he was not admitted to his Clergy this Day, and it was moved he might be bailed; but the Appellant opposed that, unless he might be permitted to arraign the Appeal, or un-

less the Appellee would give bail to the Appeal; for if he should get at large before the Arraignment of their Appeal, they could have no Process against him to bring him in again, and so the Appeal would be lost.

Et per Cur. An Appeal by Bill is always against one in Custodia, and he must be in Custody or else you cannot arraign him.

Then they urged he ought not to be bailed, because he was found guilty of Manslaughter, and no Clergy allowed.

Sed per Cur. Justices of Oyer and Terminer cannot bail in such Case, but this Court may do it at Discretion.

The King's Bench may Bail one convicted of Manslaughter.

Accordingly he was bailed generally on the Crown-side to appear de die in diem.

At another Day Mr. Sollicitor General prayed Judgment for the King against the Prisoner on the Indictment: And the Defendant being asked, what he had to say, why Judgment should not pass against him, prayed his Clergy.

Co. Entr. 355.

Et per Cur. Had the Defendant prayed it at the Sessions of Gaol-delivery, it could not have been denied him there: Now he is here we cannot give Judgment against him without asking, what he has to say why Judgment should not be given; nor can we deny him here, what could not have been denied him there. Hereupon his Clergy was allowed him, and he was tried by the Ordinary of ——— who gave him a Psalm to read, whereof he read the first Verse; And then Sir Samuel Astrey asked the Ordinary Legit vel non? Who answered, Legit. Whereupon the Executioner burnt him without the Bar on the Brawn of the left Hand, and then the Appellee prayed to be discharged.

Sed per Cur. You must still stand upon your Recognizance, and if you would discharge the Appeal, you must sue a Scire facias against the Appellant, and if he doth not appear, nonsuit him. Hereupon a Scire facias was taken out retornable at a common Day; And no Retorn being made by the Sheriff, the Prisoner moved again to be discharged.

Sed per Cur. You must take a new Day, and procure a Retorn, unless you can get the Appellant to appear gratis; as he may if he pleases; and accordingly the Appellant did appear.

And now it was questioned, Whether the Appellee ought to be arraigned again on the Bill of Appeal? Et per Cur. The Appellant must arraign the Appellee de novo, but is not to make a new Count; for the Arraignment is no Commencer but a Reviver thereof, like a Re-summons. Vide 2 Ro. Rep. 478.

Upon this the Appeal was arraigned in French by the Appellant's Counsel, who read the Count, and therein the Word Wound was used, which Holt C. J. took notice of and disliked, not being French.

Arraignment of Appeal.

And now the Clerk of the Crown going to arraign him likewise, it was objected by the Appellee's Counsel, That the Appeal being commenced before Justices of Oyer and Terminer and not by them determined, was therefore discontinued, and so no Appeal depending:

And

And that this Objection came in proper time now; lest they might by the Arraignment being compleated be estopped.

Appeal put sine die and not discontinued.

Sed per Cur. Tho' the Appeal was sine die, yet it was not discontinued, and the Retorn of the Certiorari makes a Continuance, and is sufficient to continue it against the Prisoner.

Then it was questioned, On what Side the Appeal should be arraigned? Et per Cur.

A Civil Cause is always on the Plea-Side, unless it come in by Attachment. And Mr. Aston said, Appeal, whether by Writ or Bill, was always arraigned in English on the Plea-Side, unless it came in by Certiorari; for then it was on the Crown-Side.

Accordingly it was ruled in this Case, but not to make a Precedent.

And now it became a Question, How the Appellant ought to appear and prosecute? Et per Cur.

Must be commenc'd in Person.

Every Appeal must be commenced in Person, but may be prosecuted by Attorney, unless where Wager of Battaile lies; in such Case he must commence in Person and prosecute in Person also. But where there is no Wager of Battaile, there it may be prosecuted by Attorney, for which there must be a Special Warrant of Attorney filed; And if the Plaintiff appear by Attorney, when he ought not, &c. this is a Discontinuance.

It was also moved that the Appellee might be bailed.

Bail in Appeal of Murder.

And the Court held he must be committed to the Marshal, upon the Appeal, and the Bail must be Corpus pro Corpore: And that the Recognizance may be either to the King or to the Party, as it was in Primrose's Case; yet it was held the better Course to take it to the King; and so it was done in this Case.

At last, upon the Appellee's Prayer, he was allowed to stand upon the old Recognizance till another Day, that he might have time to find Bail, and to plead, and every thing to be entered as of this Day.

At the Day appointed the Appellee pleaded the Indictment and Conviction of Manslaughter at the Sessions of Gaol-delivery, which was remov'd into B. R. and that no Judgment was thereupon given; and that at the time of the Conviction he was and yet is a Clerk, and then prayed his Clergy, and offered to read as a Clerk if the Court would have admitted him thereunto; and that afterwards sc. die Lunæ prox. post Crastinum Pur. Beatæ Mariæ Virg. last, being demanded by this Court, why Judgment should not be given against him, he pray'd the Benefit of Clergy; which being allowed, he read as a Clerk, and was burnt in the Hand, prout per Record. &c. with the usual Averments; and as to the Felony and Murder he pleaded not Guilty. The Plaintiff replied, that he demanded the Appellee to plead at the Sessions of Gaol-delivery, and that he refused. To which the Appellee demurred.

4

The

The Replication being naught and merely impertinent, the Question was upon the Bar, viz. Whether a Conviction of Manslaughter, on an Indictment of Murder, and Clergy allowed thereon, could be a Bar to an Appeal precedent or concurrent with the Indictment? For both being returned of one Sessions, which is but one Day in Law, the Appeal was concurrent at least with the Indictment, and precedent to the Conviction thereon; so that this was insisted on by the Counsel for the Appellee to be a Case at Common Law, and not within the 3 H. 7. c. 1. which extends not to an Appeal antecedent, but subsequent to the Indictment. Sed per Cur.

At Common Law, auter foits convict or acquit was a good Bar to an Appeal, for no Man's Life ought to be twice endangered for the same Offence: And so the Law would be at this Day, had not the 3 H. 7. c. 1. alter'd it; by which acquit or convict on an Indictment, is made no Plea in an Appeal, unless Clergy be had thereupon. The Words of the Statute are general; viz. in an Appeal, without saying, brought or to be brought; and therefore extend to all Appeals, whether Subsequent, or Antecedent, or Concurrent. And as for the having of Clergy it has been adjudged, that praying of Clergy is having of Clergy, within the Statute; for by praying, the Prisoner has done all that he could; and the default or delay of the Court in not granting when they should have granted it, ought not to turn to his Prejudice. Here was indeed no regular Prayer made to have Clergy at the Gaol-delivery, because the Defendant was never call'd to Judgment by the Court: And if the Court will not proceed to Judgment and ask the Party what he can say why Judgment should not be against him, whereby he has no opportunity to pray his Clergy, it is the default of the Court and not of the Party, and therefore shall not prejudice him: And the Plea in this Case was held a good Bar to the Appeal. But the Appellee was not discharged till Michaelmas Term following.

Conviction of Manslaughter with Clergy had, is a good Bar to an Appeal Antecedent, Concurrent, or Subsequent; And so it is if Clergy were not had, by the default of the Court.

## Wilmot *versus* Tiler. Paſ. 13 Will. III. B. R.

Appeal of Murder by Writ, and there was but Eleven Days between the Teſte and Retorn of the Writ; Defendant pleaded a Conviction of Manslaughter, and Clergy allowed. Et per Cur. The fault of the Retorn is cured by the Defendant's appearing and pleading in Chief; for the reason of Fifteen Days between the Teſte and Retorn of Originals, is to the end the Defendant may have time enough to come hither, computing Twenty Miles to a Day's Journey; according to which Allowance, if the Defendants be in England, they have time enough to come hither. Vide 2 Inſt. 267. Bract. Lib. 3. 135. Lib. 4. 238. If the Defendant would take Advantage of this

(4) In Writ of Appeal want of Fifteen Days between Teſte and Retorn, cured by pleading in Chief.

I defect

defect, he must plead specially, as in an Assize, nient Attach. per 15 Jours. Vide 12 E. 4. 11. 9. E. 4. 18. 1 Ventr. 7. And final Judgment was given.

### Loder's *Case*. Pas. 4 Ann. B. R.

(5) Plaintiff in Appeal must count in Person and not by Attorney. If the Plaintiff be not present he may be demanded and nonsuited, but such Nonsuit is not Peremptory, because before Appearance.

IN an Appeal of Murder Girdler offered a Warrant of Attorney for the Plaintiff, but that was disallowed, because the Plaintiff must count in Person. Then he arraigned the Appeal in French, and delivered in the Roll in Latin; upon reading whereof, the Court observed the Plaintiff counted per Attorn. suum. And the Court held 1st, That this had been a Discontinuance, if the Plaintiff himself had not been present in Court at the same time; But if he had been absent, the Plaintiff might have been demanded, and nonsuited: yet such Nonsuit had not been peremptory, for it is but a Nonsuit before Appearance. 2dly, The Court allowed the Words per Attorn. suum, to be struck out, because it made the Count agreeable to the Truth; and the Parchment was not a Record in Court till filed.

---

# APPEARANCE.

### Anonymus. Mich. 1 Ann. B. R.

Process was antiently entered upon the Roll.

HEretofore, when a Writ issued out of B. R. it was entered upon a Roll, so that tho' the Officer did not return the Writ at the Day, yet the Defendant might appear at the Day, and should be receiv'd so to do; either to save a Penalty, or his Inheritance, And so they did in the Common Pleas; They entered the Writ upon a Roll, by way of Recital viz. Dominus Rex misit breve suum clausum in hæc verba, &c. Per Holt C. J.

APPOR-

# Apportionment and Division.

## *Countess of* Plymouth *versus* Throgmorton. *In Error.* Hill. 3 Ja. 2. B. R.

IN Debt; the Plaintiff declared upon a Writing, whereby the Defendant's Testator had appointed the Plaintiff's Testator to receive his Rents, and promised to pay him 100 l. per Annum for his Service, and shews that the Defendant's Testator died three Quarters of a Year after, during which time he served him; and demands 75 l. for the three Quarters; Judgment for the Plaintiff in C. B. by Nil dic. and now upon Error brought Serjeant Holt argued, that without a full Year's Service nothing could be due, and that it is in the nature of a Condition Precedent: If I lease Land for Years, reserving 20 l. Rent yearly, and at the end of three Quarters be evicted, Lessor shall have no Rent, for Rent shall never be apportioned in respect of Time; so it is of Wages, Annuity and Debt. Annua nec debitum judex non separat. This being one Consideration and one Debt, cannot be divided. Judgment reversed.

(1) Entire Contract cannot be divided.

## Hawkins *versus* Cardee. Mich. 10 Will. III. B. R.

A Having a Bill of Exchange upon B. indorses part of it to J. S. who brings an Action for his Part, and the Defendant demurs, because the Contract cannot be divided. And Northey argued this was founded on the Custom of Merchants, and there may be such a Custom in Trade. Sed per Holt C. J. Where a Man's Contract has subjected him only to one Action, it cannot be divided so as to subject him to two. If the Grantee of a Rent-charge levy a Fine of part, he cannot compel the Tenant to attorn; Yet if he devise part, the Devisee shall distrain. If a Feoffment be made to a Man and his Heirs with Warranty, and he makes a Feoffment to two, the Warranty is gone. If two take Lands jointly with Warranty, and one makes a Feoffment over of his Part, the Warranty is gone as to him, but remains to the other, so as he may vouch for his Moiety. But by Common

(2) Indorsee of part of the Sum in a Bill of Exchange, cannot bring Action without shewing the other Part to be satisfied. Where H. by his Contract subjects himself to one Action only, it cannot be divided, so as to subject him to Two.

Law, if they had made Partition, their Warranty was lost. In the principal Case, the Plaintiff should have acknowledged Satisfaction for the rest.

# APPRENTICE. { Vide Title Orders of Justices.

## *The* King *versus* Peck. Mich. 10 Will. III. B R.

(1) Order of Justices that Executor shall keep Testator's Apprentice, quash'd.

HE Took an Apprentice in Husbandry according to the 5 Eliz. and died before the time of Apprenticeship expired: The Justices of the Peace at Sessions ordered the Executor to keep the Apprentice; but this was quashed in B. R. because of the great Inconvenience that might follow; for it may be the Executor has not Assets, and lives in another County. And Eyre J. said, That an Apprenticeship was a personal Trust between the Master and Servant, and determined by the Death of either of them. And by the Death of either of them the end and design of the Apprenticeship cannot be obtained; And it may be the Executor is of another Trade. He admitted Covenant would lie against the Executor; but in that there is no Inconvenience, because the Executor may make his defence by pleading no Assets or Debts of a higher Nature. Holt C. J. said, That by the Custom of London in these Cases, the Executor shall put the Apprentice to another Master of the same Trade. And that in other Places it would be very hard to construe the Death of the Master to be a Discharge of the Covenants; he said, it had been held that the Covenant for Instruction failed, but that he still continues an Apprentice with the Executor, quoad Maintenance. Adjournatur. Vide 2 Lev. 17. The Executor is liable in Covenant if he does not instruct him or find him another Master.

By Custom of London Executor shall place Testator's Apprentice to another Master of the same Trade.

The

## *The* King *versus* Fox Pas. 11 Will. III. B. R.

Indictment for using the Trade of a Taylor, not having served an Apprenticeship Seven Years, was quashed, because only said, Not having served as an Apprentice infra Regnum Angliæ aut Walliam; for it may be he did so beyond Sea; and if it were any where, it suffices.

(2) Service of Apprenticeship beyond Sea, sufficient to enable H. to use the Trade in England.

## Dillan's *Case.* Hill. 11 Will. III. B. R.

The Court held, 1st, That Justices may discharge an Apprentice, and may also order a Restitution of the Money within the Equity of the Statute. 2dly, That if the Master, being bound to answer at Sessions, does not appear, it is a Forfeiture of his Recognizance; but yet at the same time the Justices may proceed to make an Order against him.

(3) Jurisdiction of Justices over the Master.

## Anonymus. Hill. 11 Will. III. B. R.

The Justices may force a Master to take an Apprentice, for by the Statute the Justices are to put them out, and therefore must be construed to have consequentially a Power to compel the Master to receive him; And if the Master turn him away, they can make him refund. 1 Lev. 91. Upon an Order made at the Sessions to discharge the Apprentice, it did not appear that he applied himself first to a Justice of Peace, and Holt C. J. was of Opinion the Justice has Power to make an Order, and if obeyed by the Master, then the Sessions can have no Power; If disobeyed, then the Justice upon Complaint may bind the Master to the Sessions; And that the Sessions have no Power otherwise. Turton and Gould cont. That he could not bind over. Adjournatur.

(4) Justices may force a Master to take an Apprentice.

Per Holt C. J. that the Sessions have not originally Jurisdiction to discharge Apprentice.

## Froth's *Case.* 10 Will. III. *at* Surrey *Assizes.*

H. Serv'd seven Years as an Apprentice beyond Sea, but was not bound. This is sufficient to excuse him from the Penalties of 5 Eliz. per Holt C. J. at Surrey Assizes.

(5) Service beyond Sea excuses from 5 Eliz.

## *The* King *versus* Johnson. Trin. 13 Will. III. B. R.

(6) Sessions may discharge Apprentice by original Order, and order Money to be return'd. 1 Mod. 2. 1 Sand. 315.

Exception was taken to an Order for discharging an Apprentice, 1st, That the Complaint was made originally at Sessions without any previous Application to a single Justice out of Sessions. And 2dly, That the Justices had ordered Money to be returned. And now Holt C. J. delivered the Resolution of the Court, That the Order was good. If it had been a new Question, he should have held a prior Application to some Justice out of Sessions necessary; but after so many Orders affirmed in this Court, which have been otherwise, 'tis too late to unsettle that now. As to the Second Point, he never doubted that, for it is a Power consequential upon their Jurisdiction to discharge.

## Inter Inhabitantes Paroch. Castor & Aicles. Mich. 13 W. 3. B. R.

(7) Apprentice is not assignable.

Cannot be bound nor discharged without Deed.

A Poor Child being bound at Castor, his Master there assigned him over to another Master who lived in Aicles; And it was held, That the poor Child should gain a Settlement at Aicles where his second Master lived; for tho' the Apprentice was not assignable, yet that Assignment was not merely void; but amounted to a Contract between the two Masters, That the Child should serve the later. So that this Assignment is good by way of Covenant, tho' it be not an Assignment to pass an Interest. Vide 3 Keb. 304. 21 H. 6. 21. 22. One cannot be bound an Apprentice without Deed, nor discharged without a Deed.

## Barber *versus* Dennis. Trin. 2 Ann. B. R.

(8) Whatever Apprentice gains belongs to the Master, and he may have Action for it.

A Waterman's Widow took an Apprentice who went to Sea and earned Two Tickets, which came to the Defendant's hands: The Widow brought Trover for the Tickets, and had Judgment; For what the Apprentice gains he gains to his Master, and whether legally Apprentice or not, is no ways material, for 'tis enough if he be so de facto.

ARBITRE-

# ARBITREMENT.

## Freeman *versus* Bernard. Hill. 8 Will. III. B. R.

(1) Assumpsit; Defendant pleads in Bar an Award, that the Defendant or his Executors should release to the Plaintiff.

ASsumpsit for Hops; Defendant pleads a Submission of all Demands to the Arbitrement of J. S. so as it be made and ready to be delivered by such a Day, and that tiel jour (being before the Day in the Submission) J. S. made an Award, and thereby awarded, That the Defendant or his Executor should release to the Plaintiff, which he always was and is ready to do. Et per Cur. it was held;

1st, That the Award being pleaded to be made before the Day, it is in Consequence ready to be delivered, and its being ready to be delivered need not be averred. 1 Cro. 54.

Where the Award creates a new Duty, the old is extinguish'd thereby. But where it only ordains a Release to discharge the old Duty, it is otherwise.

2dly, That an Award may be a good Plea in Bar, tho' it be not performed, where-ever the Award does give a new Duty in lieu of the former; for a Submission implies a Promise to perform, so that the Party has a Remedy for that which is awarded; but where the intent of the Award is not to discharge the old Duty of its self and give a new one, but barely to cause a discharge of the old Duty, not by the Award it self, but by a Release as in the principal Case, the Award is no Plea in Bar of the old Duty. [This was the principal Point in this Case, and Quære if an Award unperformed, tho' it gives a new Duty, can be a good Plea after the time of Performance elapsed? Vide 6 H. 7. 11. Dy. 75. per How of Counsel in this Case.]

The Law supplies time of Performance.

3dly, The Chief Justice seemed to think the Award good, tho' no time was appointed for Performance; for the Law supplies the time; if there must be a Request, the Law says, it must be in convenient time after Request; if there needs no Request, but there must be a Tender, that must be likewise in convenient time. Vide 7 H. 4. 30. 31.

Award that the Party or his Executor shall release is good.

4thly, He inclined to think that the Disjunctive, he or his Executors might be helped, by construing that as to the Executors void: Not but that an Award may extend to Executors and bind them, Vide 1 Ventr. 249. & 3 Cro. 557. 600; But because the Executors, as Representatives, would be liable of Course.

## Reynolds *versus* Gray. Paf. 9 Will. III. B. R.

(2) Appointment of Umpire by Arbitrators, before the time for making the Award is expired, is void. When fuch Choice is revocable, and when not.

A Motion was made for an Attachment for not performing an Umpirage of H. chofen by Arbitrators who were appointed by Rule of Court. And it was held by Holt C. J.

That if Arbitrators chufe an Umpire before the time allowed for their Award be expired, 'tis ipfo Facto void, tho' they abfolutely refolve to make no Award themfelves: And that when their time is expired, if the Arbitrators chufe one, their Authority is executed, and they cannot revoke or chufe again, tho' the Perfon elect refufe to accept. Aliter, if they chufe their Umpire upon Condition, that he does accept the Umpirage, for then he is not Umpire unlefs he accept it. Rookesby doubted, whether an exprefs Condition would make a Difference, becaufe it feem'd to be implied.

## Bacon *verfus* Dubarry. Trin. 9 W. 3. B. R. Intr. Trin. 7.

(3) Submiffion by A. as Attorney for B. concerning Accounts between B. and C. good to bind A. but not B.

DEBT on a Bond; Defendant prayed Oyer, Condition was, Whereas there was a Controverfy between the Plaintiff and the Defendant, as Attorney to De Rutter, concerning certain Accounts between the Plaintiff and De Rutter; and the Plaintiff and Defendant had fubmitted the faid Controverfy to the Award of J. S. Arbitrator, if De Rutter ftood to the faid Award, then the Bond to be void, &c. Upon nul agard pleaded; the Award fet forth was, that the Defendant fhould pay the Plaintiff 400 l. And that the Plaintiff and Defendant fhould mutually releafe to each other. To this it was demurred, and it was held per Cur.

1ft, That the Submiffion was good, tho' the Defendant fubmitted for another; for one Man may undertake for another or be bound for another, but fuch Submiffion is good only to bind himfelf, and cannot bind the other; becaufe he is a Stranger to the Agreement of Submiffion.

2dly, That the Award is not good, becaufe, tho' the Defendant fubmitted, yet he fubmitted as Attorney, & ex parte alterius; and the Matter which the Defendant fubmitted was the Bufinefs and Controverfy of another, fc. his Principal. That a Releafe to the Attorney is no Difcharge as to the Principal, therefore this Releafe will not difcharge fuch Demands as the Plaintiff has againft De Rutter; fo if De Rutter is to pay the 400 l. he is to have nothing for his Money: It makes the Award of one Side only and not mutual. Aliter, had the Releafe been awarded to the Defendant for the ufe of De Rutter or de & fuper Præmiffis. And the Award being not fo, the pleading it to be made de & fuper Præmiffis cannot mend or extend it. And

Award pleaded as made de & fuper Præmiffis, not enough unlefs it appear to be fo in fe.

as to Nichol's Case, Holt C. J. said, It only proved that Money paid and accepted in pursuance of a void Award, might be pleaded or taken as an Accord with Satisfaction. Judgment pro Defendant. 1 Ro. 255. 254. Sty. 44. Hob. 49. 8 Co. 97. 2 Cro. 354.

Money paid on a void Award may be pleaded as Accord and Satisfaction.

## Anonymus. Pas. 10 Will. III. B. R.

(4) What shall be good Cause to set aside an Award made by Rule of Court, and what not. Vide Post

Where an Award is made by Rule of Court, it shall not be set aside; unless there was Practise with the Arbitrators, or some Irregularity; as want of Notice of the Meeting. Also you shall not take Exceptions to the Formality of it, but shall perform it. Per Holt C. J.

## Glover versus Barrie. Trin. 10 Will. III. C. B.

(5) Award that A. should beg B's. Pardon in such Manner and Place as B. shall appoint, is void.

DEBT upon a Bond conditioned that A. and B. should perform an Award; Defendant pleaded no Award made; Plaintiff replied an Award, which was that A. should pay B. 50 l. and that A. should beg B's. Pardon in such Manner and in such Place as B. should appoint; and that then, each Party should seal mutual Releases: The Court held this naught; for the Arbitrator was to determine, and not to make B. his own Judge in his own Cause; and tho' the Time and Place be but Circumstances, yet in this sort of Satisfaction, they make the most considerable Part. Ergo the Award was held void as to this Part.

## Anonymus. Mich. 12 Will. III. B. R.

(6) Award made under a Rule of Court, is quasi part of the Rule.

Where a Matter was referred by Rule of Court to the Determination of the Judges of Assize, It was moved that the Judges Determination might be made a Rule of Court. Et per Holt C. J. Where a Matter is referred to Arbitrators by Rule of Court, and they make their Award, we will compel a Performance of it as much as if the Award were part of the Rule; so a new Rule is needless.

## Mitchell versus Harris. Pas. 13 Will. III. B. R.

(7)

A Submission was to Two, so as they made their Award on or before the 29th of June; and if they made no Award, chuse an Umpire: They chose an Umpire on the 29th; and Exception was taken that they had the whole Twenty Ninth to make their Award. Et per Holt C. J. If there be a Submission to Two, so

as they make their Award before Midsummer, and if they cannot agree then to such Umpire as they chuse, so as he make his Umpirage before Midsummer, and an Umpire is chose accordingly, this is good and so will his Umpirage be, if made; because the Arbitrators had determined their Power before, by chusing an Umpire. And so it was resolved in the Case of Twisleton and Traverse; But if the Umpire be named in the Submission, he cannot make his Umpirage before the time given to the Arbitrators to make their Award in, be expired. Judgment pro Quer. nisi.

Where Umpirage may be made before the Time allowed to the Arbitrators, is expired and where not.

## Baily *versus* Cheesely. Pas. 13 Will. III. B R.

(8) Submission to Award, made a Rule of Court, tho' the Consent was only Conditional.

A Submission was to an Award by Bond, and in the end of the Condition of the Bond was this Clause: And if the Obligor shall consent that this Submission shall be made a Rule of Court; That then, &c. Upon Motion to make this Submission a Rule of Court according to the new Act of Parliament, it was opposed, because these Words do not imply his Consent; but if he would forfeit his Bond, he need not let it be made a Rule of Court; Yet because this Clause could be inserted for no other purpose, the Court took these conditional Words to be a sufficient indication of Consent, and made the Award a Rule of Court.

## Foreland *versus* Marygold. Trin. 13 Will. III. B. R.

(9) In Debt upon Bond to perform an Award, Omission in the Replication of a void part of the Award is no Variance; otherwise if not void.

DEBT upon a Bond to perform an Award; Defendant pleads no Award made; the Plaintiff replied and set forth an Award with a profert in Cur. and there were material Omissions. The Defendant craved Oyer, and demurred for the Variance between the Award set forth in the Replication and the Oyer; And in the Argument it was insisted for the Plaintiff, That in Debt on an Award the Plaintiff need not set forth more of the Award than makes for him. 1 Sid. 161. 1 Lev. 162. To which it was answered, That true it is, in Debt upon an Award the Plaintiff need not set forth more than makes for him; but it is otherwise in Debt upon a Bond, for there the Plaintiff must reply the whole Award. Holt C. J. In Debt upon a Bond to perform an Award if nul agard fait be pleaded, and the Plaintiff replies an Award, &c. and Issue is thereupon; in such Case, if there is material Variance between the Award given in Evidence, and the Award set forth in the Replication, it is against the Plaintiff; but if the Variance be only by Omission of that which is void, that is not a material Variance, being no material Part of the Award. Here the Variances are by Omissions that are Material; therefore

fore must be Judgment for the Defendant. Note also if the Plaintiff had not made a Profert, the Defendant's way had been to have pleaded Nul tiel Agard.

## Davila *versus* Almanza. Pas. 1 Ann. B. R.

A Matter was referred by Consent at Nisi prius to the Three Fore-men of the Jury; and before the Award was made one of the Parties served the Arbitrators with a Subpœna out of Chancery which hindered the proceeding to make the Award. And the Court held this a Breach of the Rule, and granted an Attachment, Nisi causa.

(10) Breach of a Rule of Reference made at Nisi prius.

## Morris *versus* Reynolds. Pas. 2 Ann. B. R.

UPON a Submission to the Award of the Three Fore-men of the Jury who made their Award, the Defendant moved to set it aside; because they went on without giving him time to be heard or produce a Witness; and Holt C. J. denied the diversity Pla. 4. He said the Arbitrators being Judges of the Parties own chusing, the Party shall not come and say they have not done him Justice, and put the Court to examine it. Aliter, Where they exceed their Authority; however the Award was examined and confirmed: And the Plaintiff moved for an Attachment for not performing it; And the Court held that the Non-performance while the Matter was sub Judice, was no Contempt. Then the Plaintiff moved for his Costs, and that was denied. Upon which Powel Justice said, that seeing they could not give the Party any Costs, he should never be for examining into Awards again.

(11) Reference to the Three Fore-men of the Jury. Regularity of their Proceedings examin'd into. While Award is under the Consideration of the Court, Non-performance is no Contempt.

## Anonymus. Pas. 2 Ann. B. R.

H. Bound himself in a Bond to stand to the Award of J. S. which Submission was made a Rule of Court according to the new Act of Parliament. The Party for whose Benefit the Award was made, moved the Court for an Attachment for Non-performance; which was granted: Pending that he brought an Action of Debt upon the Bond; and now Serjeant Darnell moved that he might not proceed both ways; and likened it to the Cases, where the Court stay Actions on Attorneys Bills, while the Matter is under Reference before the Master. Sed per Cur. the Motion was denied, and this diversity taken; where the Court relieve the Party by way of Amends in a summary way, as in the Case cited, there it is reasonable; otherwise here, where the Plaintiff has no Satisfaction

(12) Upon Award made a Rule of Court, the Party may proceed both by Action and Attachment at the same time.

tisfaction upon the Attachment. And the Defendant was put to answer Interrogatories.

## Bird *versus* Bird. Trin. 2 Ann. B. R.

(13) Quære, If an Award of Money to be paid to a third Person be good, unless it appear to be for the Benefit of one of the Parties?

DEBT upon a Bond. The Defendant pray'd Oyer of the Condition, which was for performing the Award of J. S. and pleaded Nul Agard fait. The Plaintiff replied and set forth an Award; which was that the Plaintiff and Defendant should pay each a certain Sum yearly to A. for the use of Mrs. Bird their Mother. Mr. Broderick took an Exception to the Award, that this was to award a thing to be done to a third Person, who is a Stranger to the Submission, and consequently of a Matter out of the Power of the Arbitrators. Holt C. J. was of Opinion that a general Award of Money to a Stranger was good; for it shall be intended the Submittants were bound as Trustees, or were liable to pay the same; And the Payment shall be intended for their Benefit, unless the contrary appear. Powell Justice contra. It must appear to be for their Benefit, and it shall not be so intended, unless it does appear; but in the principal Case he held, that it should be intended to be for their Benefit, or rather that it appeared to be so, because the Payment was to be for the use of the Mother. Vide 5 Co. Salmon's Case. 3 Cro. 4. 758. 1 Ro. 247, 259. 2 Lev. 235. Afterwards the Matter was referr'd to the Counsel on both Sides, so no Judgment was given.

## Simon *versus* Gavil. Trin. 2 Ann. B. R.

(14) Award that all Suits shall cease is final.

A Submission was of all Controversies pending; the Arbitrator awarded that all Suits now pending between the Parties should cease, and that the Defendant should pay 10 l. in full of all Demands, and release all Demands till the time of the Award; and upon the Payment of the Ten Pounds the Plaintiff should release to him, &c. Upon a Writ of Error of the Judgment given in C. B. the Court held first, That an Award that all Suits pending should cease is final: For the meaning is not that the Party shall be nonsuit, or should give over, and begin again; but that the Suit should cease absolutely for ever; So that the Right it self is gone, because the Remedy is quite taken away; for if his Suit fails, he has no Remedy to come at his Right. Vide 1 Ro. Ab. 51. 1 Lev. 58. 2dly, An Award of a general Release of all Demands till the time of the Award is good; for nothing New shall be intended to arise in the mean time; and if any new Controversy or Demand did happen in the mean time, the Award as to that new Demand or Controversy is void; for that was not within the Submission, and therefore it is a good Performance of it to tender a Release of all Matters in Controversy

Award to make general Release of all Demands to the time of the Award is good for so much as goes to the time of the Submission and void for the Residue.

troversy to the time of the Submission, which is all he is bound to release. Also if a new Controversy has happened, which is not to be intended; he, that pretends to excuse the Non-performance, ought by his pleading to set it forth, and shew it. Vide 3 Lev. 180. contra. 3dly, If the Plaintiff would not receive the Ten Pounds because he would not be obliged to release, when the Defendant tendered, and he refused, he was as much obliged to release upon the Tender and Refusal, as if he had actually received the Money. Sir Thomas Parker pro Quer.

## Oates *versus* Bromil. Trin. 3 Ann. B. R.

(15) Parol-Award may be pleaded ready to be delivered, &c.

DEBT on a Bond conditioned to perform an Award, ita quod it be made and ready to be delivered by such a Day: Defendant pleaded no Award, Plaintiff replied a Parol-Award, and avers it was made and ready to be delivered by such a Day. Defendant demurred: Salkeld for the Plaintiff insisted a Parol-Award was deliverable; for a Man is said to deliver a Message as well as a Letter, and that there is an Oral as well as a Manual Tradition; And as a Parol-Award is capable of Delivery, for it is ready to be delivered from the time it is agreed upon. Dy. 218. 3 Bul. 34. Co. Ent. 128. And notwithstanding Serjeant Broderick on the other Side urged importunately, and cited a late Case in C. B. as he said, in Point, the Court on Consideration gave Judgment pro Quer.

2 Ventr. 242.

## Winter *versus* Garlick. Trin. 3 Ann. B. R.

(16) Award to pay the Costs of such a Suit is uncertain.

AWard that the one Party shall pay the other Ten Pounds and the Costs of a Suit now depending in an inferior Court, and then to give mutual Releases. Per Cur. To pay such Costs as the Master shall tax is good; for, Id certum est, quod certum reddi potest: But this is uncertain, and carries it farther than has hitherto been allowed. Adjournatur. 1 Cro. 383. 2 Ventr. 242. 243.

## Knight *versus* Burton. Mich. 3 Ann. B. R.

(17) Award that a Suit in Chancery shall be dismiss'd is good.

AWard that a Suit in Chancery should be dismissed: Objected; He may dismiss and begin again; that 'tis like an Award to be nonsuit. Curia. An Award to be nonsuit is not good, for it is not final in the Nature of the Thing; but we will intend this to be meant of a substantial Dismission and perpetual Cesser in this Case. If a Man be to deliver up a Bond to be cancelled by such a Day, and he sues and gets Judgment in the

Interim, and then delivers up the Bond, this is a Performance in the Letter, but not in the intent, so will such a Dismission in Case a new Bill be brought afterwards.

Armitt *versus* Breame. Mich. 3 Ann. Intr. B. R. Hill. 2 Ann.

(18) If an Award be pleaded without Date, it must be computed from the Delivery.

DEBT upon a Bond, with Condition to perform the Award of J. O. &c. of all Differences between the Plaintiff and Defendant, concerning a piece of Ground used as a Wharf, and several Erections thereupon, which were Nusances to the Plaintiff's House. The Defendant pleaded that the Arbitrators made no Award. The Plaintiff replied and set forth an Award, whereby it was awarded that the Defendant should enjoy the Wharf, and the Erections should be pulled down within the space of fifty eight Days, from the Date of the Award. The Defendant demurred, and it was objected, That the Award was pleaded without any Date; and that it did not appoint who should take down the Erections, and therefore it was uncertain. Et per Cur. The Day of the Delivery of a Deed is the Day of the Date, tho' there is no Date set forth: If a Deed bear Date one Day, and be delivered at another; it was really dated when delivered, tho' the Clause of geren. Dat. be otherwise: So it is in the Case of this Award, the making is the Date. And in this Case Powell, Powys and Gould, held, That tho' it was not said who should remove the Erections, yet that was supplied by the Law; they shall be removed by him on whose Ground they stand, which in this Case appears to be the Defendant's. Vide Sty. 365. 1 Rol. 164. 5 Co. 78. Cro. El. 472. Mo. 39. Holt C. J. semble contra, as to this Point. And Judgment was given for the Plaintiff by three Judges against Holt C. J.

Parsloe *versus* Baily. Mich. 3 Ann. B. R.

(19) An Award of a collateral Thing in Satisfaction is a good Plea without shewing a Performance.

IN Trespass, it was held heretofore that an Award of a collateral Thing in Satisfaction was no good Plea, unless the Defendant shew'd a Performance; for they likened this to an Accord and Satisfaction which is no Plea unless it be executed; yet they held that where the Award was not of a collateral Thing but of a Sum of Money, that such an Award was a good Plea; and the reason of the difference which they went upon was, that there was a Remedy to be had upon the Arbitrement in the later Case, not in the former: But now the Law is held otherwise, and an Arbitrement is a good Plea, whether it be of Money or a collateral Thing, as a Hat or a Horse; And the reason is because the Submission is a mutual Promise, upon which an Action lies, and Performance need not be averred in either Case, for the Remedy is alike Per Holt C. J. But Powell Justice contra. It must be averred where the Award is of a collateral Thing.

# ARREST of JUDGMENT.

## Peachy *versus* Harrison. Trin. 9 Will. III. C. B.

(1) What matter of Record may be taken Advantage of in Arrest of Judgment, and what not.

IT is not a good Exception in Arrest of Judgment, that there is no Warrant of Attorney filed, tho' that be matter of Record and may be assigned for Error. The reason is, because, tho' it be a matter of Record, yet it is not of that Record before the Court, but of another.

## Anonymus. Pas. 11 Will. III. B. R.

(2) If the Distringas be returnable within Term, and there happen not to be four Days between the Trial and the end of the Term, yet Judgment shall be entered that Term.

INdictment in B. R. for a Misdemeanor, was tried three Days before the end of the Term, and Judgment was entered the same Term; so that the Defendant had not four Days to move in Arrest of Judgment. And the Question was, Whether this Entry of the Judgment was regular, and whether it should not have been stayed till the Term following? Et per Holt C. J. If there be four Days and more between the Trial and the end of the Term, Judgment ought not to be entered within the four Days; but if the Distringas be retornable within the Term, and the Party is tried within two or three Days before the end of the Term, the Judgment shall be entered that Term, tho' there be not four Days to move in Arrest of Judgment; So it was settled in the Case of Knox and Levarr, upon a Conference between Scroggs C. J. and Sir William Jones Attorney General, contrary to the Report of Sir Samuel Astrey.

Two manners of taking Advantage in Arrest of Judgment.

Arrest of Judgment is either for matter Intrinsick, i. e. such as appears by the Record it self, which will render the Judgment erroneous and reversible; or Extrinsick, i. e. some foreign Matter suggested to the Court which proves the Writ is abated, for it is not enough that it proves the Writ is only abateable: The old Course of taking Advantage in Arrest of Judgment was thus: The Party after a general Verdict having a Day in Court, (for so he has as to matters of Law tho' not of Fact,) did assign his Exceptions in Arrest of Judgment by way of Plea; and it was called Pleading in Arrest of Judgment. Vide 21 H. 7. 37. b. Pelh. 125. 1 Bulst. 5. Rast. 47. a. 56. b. 127. a. 197. a. 268. b. 288. a. 432. a. 494. b. Co. Ent. 50. a. 53. a. b. 120. a. 572. a. 657.

a. 11 H. 7. 10, 11. 2 Saund. 333. Sty. 426. This differed from moving in Arrest which was done by one as Amicus Curiæ where the Party was out of Court. Vide Co. Entr. 295. b. the manner of doing it, Vide 2 Ro. 716. 9 E. 4. 11. a. 4 H. 7. 9. 5 H. 7. 23. Rast. 107.

### *The* Queen *versus* Darby. Mich. 1 Ann. B. R.

(3) DARBY being convicted on an Information for Subornation of Perjury, and Judgment entered quod capiatur pro Fine, and a Capias issued, whereupon he was taken and brought into Court, where he offered to move in Arrest of Judgment; But the Court was of Opinion it was out of time, for that the Judgment quod capiatur was a final Judgment, and the subsequent Entry is only for the certainty of the Time.

### Wood *versus* Shephard. Trin. 2 Ann. B. R.

(4) The Course of moving in Arrest of Judgment.

IT is against the antient Course of the Court to make a Rule to stay Judgment, unless the Postea be brought in; but the Court, if there be probable Cause shewn, will order the Postea to be brought in. Et per Cur. If one moves in Arrest of Judgment, he ought to give notice to the Clerk in Court of the other Side; But the better way is to give a Rule upon the Postea for bringing it into Court, for that is a Notice of it self.

---

# ARREST de CORPS.

### Wilson *versus* Tucker. Trin. 7 Will. III. B. R.

(1) Arrest on a Sunday void.

ARrest on a Sunday is a void Arrest, insomuch that the Party may have an Action of false Imprisonment for it.

Genner *versus* Sparks. Trin. 3 Ann. B. R.

(2) No Arrest can be without actual touching the Defendant.

GEnner a Bailiff having a Warrant against Sparks, went to him in his Yard, and being at some distance told him, he had a Warrant, and said he arrested him: Sparks having a Fork in his Hand, keeps off the Bailiff from touching him, and retreats into his House. And this was moved as a Contempt. Et per Cur. The Bailiff cannot have an Attachment, for here was no Arrest nor Rescous: Bare Words will not make an Arrest; but if the Bailiff had touched him, that had been an Arrest, and the Retreat a Rescous, and the Bailiff might have pursued and broke open the House; or might have had an Attachment or a Rescous against him; but as this Case is the Bailiff has no Remedy, but an Action for the Assault; for the holding up of the Fork at him when he was within reach, is good Evidence of that.

# ASSETS.

Deering *versus* Torrington. Trin. 2 Ann. B. R.

(1)

IF H. take a Bond for another in trust, and die, this is not Assets in the Hands of the Executor of H. So if the Obligee assigns over a Bond, and covenants not to revoke and dies, that Bond is not Assets in the Hands of the Executor of the Obligee.

Buckley *versus* Pirk. Trin. 9 Ann. B. R. Rot. 28.

(2)

IF Executor of Lessee for Years enter into the Tenements, no part of the Profits, unless what is over and above the Rent, shall be Assets; but is receiv'd by the Executor as Tertenant, and appropriated to the Use of the Lessor. Vide Title Executors.

Erby

## Erby *versus* Erby. In Canc. Trin. 1714.

(3) THE Creditors of J. S. brought a Bill for Debts, which Debts were by Mortgages, Judgments and Bonds; upon one of the Bonds the Defendant was outlawed, and upon one of the Judgments the Recoverer had brought an Action of Debt, and the Question being concerning Priority of Payment, it was objected, 1st, That the Judgments were by Confession, and it was not equitable that it should be in the Power of the Party to prefer one Creditor to another; but that seem'd to be over-ruled: And as to the Outlawry the Court ruled, that being only upon mesne Process before Judgment, it did not alter the nature of the Debt, nor create a Lien upon the Land in this Case: But that where there is an Outlawry and a Seizure thereupon, the Debt attaches upon the Land, and shall be preferred to a Judgment tho' prior to the Outlawry, but that it is the Seizure that gives that Preference.

Outlawry upon Mesne Process does not make the Debt a Lien upon the Land.

It was also objected that bringing Debt upon the Judgment was a Waiver of the Lien created by that Judgment; for he can only extend the Land that the Party had at the time of the later Judgment; but the Court held that bringing Debt upon a Judgment did not postpone this to other Judgments, and that it was the Act of the Attorney, and that it would be no Waiver, because there was no other Remedy after the Year and Day at Common Law.

Bringing Debt upon a Judgment is no Waiver of Lien created by that Judgment.

# ASSIGNMENT.

## Barker *versus* Damer. Hill. 2 W. & M. B. R. Rot 635.

(1) BArker made a Lease for Years of Land in Ireland, and the Lessee covenanted to pay the Rent in London; Barker assigned his Reversion, and the Assignee brought Covenant in London for the Rent; The Defendant pleaded to the Jurisdiction, That the Lands lay in Ireland, and on Demurrer the Plea was held good, for this is a local Covenant and adheres

Action of Covenant cannot be brought in England for Rent reserv'd on a Lease of Lands in Ireland.

 to

to the Land. The Lessor himself could not have maintained an Action for this in England, and the Statute transfers it to the Assignee in the same Plight that the Lessor had it; and the Payment being to be made in London alters not the Case. Vide f. c. Shower 191.

## Pitcher *versus* Tovey. Paf. 4 W. & M. B. R. Intr. Mich. 3 W. 3. Rot. 61.

(2) Lessee assigns to A. A. assigns to B. without notice to the Lessor; Lessor cannot have Covenant against A. for Arrears of Rent incurr'd after the Assignment to B.

3 Lev. 295. 2 Vent. 228.

Covenant against the Defendant as Assignee of A. who was Executor of B. to whom the Plaintiff made this Lease, wherein B. the Lessee covenanted for him, his Executors and Assignes, to pay a yearly Rent of 10 l. and the Plaintiff assigned for Breach two Years Rent, after the Assignment to the Defendant, due and unpaid: The Defendant as to one Year's Rent, confessed the Action, and as to the Residue he pleaded, that before that Rent became due, he granted and assigned the said Premisses to H. and all his Estate and Interest therein; virtute cujus, H. entered and was possessed, whereupon the Plaintiff demurred, and the Court of C. B. held, That this Plea was naught, because the Defendant does not shew that he gave notice to the Plaintiff of this Assignment, or that the Plaintiff had accepted H. for his Tenant, and the Lessee ought not to have it in his Power to put a Tenant upon his Landlord without notice. And there is a Privity of Estate, tho' not of Contract, between the Plaintiff and the Defendant, for which reason the Court of C. B. gave Judgment for the Plaintiff: But upon a Writ of Error in B. R. that Judgment was now reversed; and the Court held, That there was no Privity of Estate or Contract between the Plaintiff and Defendant; And these failing the Plaintiff's Action must fail likewise, because that must be founded upon the Privity of Estate or Contract, the one or the other, and the Court denied Kighly's Case. Sid. 338. Ray. 162. 2 Keb. 260. And as to the Objection that it might be assigned to a Beggar, the Court answered, it was the Lessor's own fault and folly to take the first Assignee for his Tenant, and that the Lessor was not without Remedy; for that he might bring Covenant against the Lessee's Executors, or might distrain upon the Land. And as to the Case in Co. Lit. 269. b. between Landlord and Tenant, that where the Tenant makes a Feoffment, the Landlord must avow upon his Tenant for the Arrears due in his time, notwithstanding the Feoffment they said it was so in this Case, for Covenant will lie against the Defendant for the Rent due in his time before Assignment, but not after.

Woodward *versus* Marshall. Mich. 8 Will. III B. R.

(3) Attornment.

THE Plaintiff declared as Assignee of a Reversion by a Fine, for Rent due, and upon an ill Plea and Demurrer; Holt C. J. objected, that the Plaintiff had set forth no Attornment, without which the Revection could not pass. Dee for the Plaintiff answered, That this being an Action of Covenant, it was founded on the Privity of Contract, and differed from an Action of Debt which was founded on the Privity of Estate. Holt C. J. Unless the Reversion pass'd by the Assignment the Covenant cannot pass, for there is nothing wherewith it can be transferr'd; but per Curiam No-body appearing for the Defendant, let the Plaintiff take Judgment.

# ASSISE.

Savier *versus* Lenthall. & al. Hill. 1 W. & M. B. R.

(1) In Assise Demandant nonsuited, because not ready to count instanter on the Tenant's demand.

ASsise for the Office of Marshal of the K. B. against Lenthall and four others. Counsel was ready at the Bar to arraign it in French. The Recognitors did not appear, but the Chief Justice ordered the Writ to be read; and he said, it might be returnable at any common Day, or Return-Day. The Plaintiff also did not appear, and the Court ordered the Assise to be adjourn'd till the next Day. Then the Assise was arraign'd, and the Tenant demanded that the Demandant should count against him. The Demandant was not ready, and pray'd that it might be adjourn'd till another Day, but it was denied; for this is festinum remedium, and the Tenant is to plead presently, which he cannot do when he hath nothing to plead to: Whereupon the Demandant was nonsuit. Et nota, The Court told him he might bring a new Assise.

I Saveris

### Saveris *versus* Briggs. Pas. 5 Will. III. B. R.

IN Assise, if the Defendant plead in Abatement he must plead over in bar at the same time: Also no Imparlance shall be allowed without good Cause, because it is festinum remedium; and if there be several Defendants, and any one of them do not appear the first Day, the Assise shall be taken by default against them.

(2) Appearance, Imparlance, pleading in Assise.

---

### ACTION ON THE CASE FOR WORDS. *Vide* Title *Words*.

---

# ATTACHMENT.

### Forster *versus* Brunetti. Mich. 8 Will. III. B. R.

ATtachment lies not for not performing an Award made upon a Rule of Court without a personal Demand. Holt C. J. remembred the first Attachment of this kind was in Sir John Humble's Case in Kelynge's time; in which, and ever since, a personal Demand has been thought necessary. In such Cases of Awards tho' they be not legally good, Attachment lies for Non-performance, Aliter if impossible; but the Party is excused as to that part which is impossible only. Mich. 9 W. 3. B. R. Harrison versus Bewman.

(1) Attachment lies for not performing Award, tho' not strictly good in Law, if not impossible. But Personal Demand is necessary.

### Anonymus. Mich. 10 Will. III. B. R.

RULE was made to put off a Trial, super solutione custagior. and the Costs not being paid and the Trial put off, the Plaintiff moved for an Attachment but had it not; for the Court said he should have gone on.

(2) Exposition of Rule super solutione custag.

## Hall *versus* Mister. Mich. 11 Will. III. B. R.

(3) Attachment upon an Award of the three Foremen, a Verdict being given for Security.

IF a Rule be made at Nisi prius to refer a matter to the three Foremen of the Jury, and that the Plaintiff shall have a Verdict for his Security; after the Award made the Plaintiff may either enter up Judgment on the Verdict, or have an Attachment for not obeying the Rule of Court, it being in his Election which way he will execute the Award; and this was affirmed by Mr. Northey and at the Bar, to be the constant Practice. Tourton and Gould (in the absence of the Chief Justice) doubted of it, because the Verdict stood still on Record. To which Northey answered, There could not be a Judgment entered on such Verdict without leave of the Court: And the Attachment was granted.

## Anonymus. Hill. 9 Ann. B. R.

(4) For contemptuous Words spoke of the Court, Attachment goes without a Rule to shew cause.

MOtion was made for an Attachment against the Defendant on Affidavit, that being served with a Rule of Court to shew Cause why an Information should not be filed against him, he said, He did not care a Fart for the Rule of Court. And Northey Attorney General insisted, he ought to be first heard to shew Cause against it. Et per totam Cur. He shall answer in Custody, for it is to no Purpose to serve him with a second Rule, that has slighted and despised the first. It is to expose the Court to a further Contempt. And accordingly the Defendant was brought in and entered into a Recognizance to answer Interrogatories. Vide plus Title Contempt.

AT-

# ATTAINDER.

Rex *versus* Morphes. *At the* Old Baily coram Holt *C. J.* Treby *C. J.* Powell *and* Powys, *Oct. 9. 1696.*

ON a Commission of Oyer and Terminer upon the Statute 28 H. 8. c. 15. One Morphes was indicted of High Treason, and demanded the Benefit of the 7 W. 3. c. 3. Whereupon this Question arose, sc. Whether an Attainder upon this Statute wrought Corruption of Blood? Et per Cur. No Attainder of Piracy wrought Corruption of Blood, for it was no Offence at Common Law. But an Attainder of Treason works Corruption of Blood in all Cases, where-ever the Treason be done, except only Attainders before the Constable, Marshal or Admiral: The reason of which was, because there could be no Record made of it; but here there is.

(1) Attainder of Treason by Commission on 28 H. 8. c. 15. works Corruption of Blood.

*Sir* Salathiel Lovel's Case. Hill. 8 A. *in* Dom. Procerum.

H. Was seized of Lands for three Lives, and attainted for counterfeiting the King's Coin, on the Statute 8 and 9 W. 3. by a Proviso of which Statute, Corruption of Blood is saved, and thence it became a Question, Whether H. had forfeited the Lands, which the King, as forfeited, had granted to Baron Lovell. The Baron brought a Bill in Scacc. to redeem, and had a Decree; and an Appeal was brought in the House of Lords, and it was held by the Judges, That in the case of an Attainder of Felony, the Forfeiture of the Estate to the Lord is only by way of Escheat, pro Defectu tenentis, and the not discending is the Consequence and Effect of the Corruption of Blood or Incapacity; But in Treason the Lands come to the Crown as an immediate Forfeiture, and not as an Escheat. And the Forfeiture and Corruption of Blood are distinct Parts of the Penalty; so that the Forfeiture may be saved and yet the Corruption remain, or the Corruption be saved and the Forfeiture remain: And accordingly it is so provided by several Statutes; and by Consequence that the Lands were forfeited in the principal Case.

(2) One attainted of Treason in counterfeiting the Coin, on Statute 8 and 9 W. 3. shall forfeit his Lands, tho' Corruption of Blood is saved by that Act.

# Attorney and Sollicitor.

Vide Title Privilege.

## Berkenhead *versus* Fanshaw. Hill. 2 W. & M. B. R. Rot. 750.

(1) Statute 3 J. 1. c. 7. extends only to Attorneys of the Courts at Westminster.

INdebitatus Assumpsit was brought by an Attorney, for Fees and Disbursements, in defending Suits in an inferior Court, and in the Court of B. R. The Defendant pleaded 3 J. 1. c. 7. Et per Cur. 1st, The Statute may as well be pleaded to an Indebitatus Assumpsit as to the Action of Debt, unless a special Promise be laid; But to a special Promise or an Insimul Computasset, 'tis no Plea. 2dly, The Statute does not extend to Attorneys in inferior Courts, but only to Attorneys in the Courts at Westminster, So that it is no Plea as to the Plaintiff; Ergo Judgment pro Quer.

## Latuch *versus* Pasherante. Mich. 8 Will. III. B. R.

(2) Attorney's Consent binds the Client, tho' contrary to his express Orders.

ASsumpsit. The Defendant pleaded non Assumpsit infra sex Annos; The Plaintiff replied, and for want of the Defendant's joining Issue in due time, the Plaintiff's Attorney signed Judgment; but afterwards consented to accept the Joinder in Issue: But upon Motion to the Court to compel him to accept it, it was opposed, because the Plea was a hard Plea, and the Client had notice of the Advantage, and order'd the Attorney to insist upon it. The Court said, that since it was a hard Plea they would not have compelled him, if he had not consented, to waive the Advantage, but now they would hold him to his Consent: And as for the Client, he was bound by the Consent of his Attorney, and they could take no notice of him.

## Anonymus. Mich. 10 Will. III. B. R.

(3)

PER Holt C. J. The Course of this Court is, where an Attorney takes upon him to appear, the Court looks no farther, but proceeds as if the Attorney had sufficient Authority, and leaves the Party to his Action against him.



Anony-

## Anonymus Trin. 11 Will. III. B. R.

(4) Motion was made to compel an Attorney to appear for J. S. And the Court held he was not compellable to appear for any one, unless he take his Fee or back the Warrant; and then they will compel him.

## Goring *versus* Bishop. Mich. 10 Will. III. B. R.

(5) Writings left in Attorney's Hands.

Where Writings come to an Attorney's Hands in the way of his Business as an Attorney, the Court upon Motion will make a Rule upon him to deliver them back to the Party; But where they come to his Hands in any other manner, or on any other Account, the Party must resort to his Action.

## Oades *versus* Woodward. Hill. 1 Ann. B. R.

(6) Judgment by Confession upon a Warrant of Attorney, may be entred in the Vacation as of the Term precedent, tho' the Defendant died in that Vacation.

Woodward gave a Warrant of Attorney to confess a Judgment, and died within a Year after in time of Vacation, before the Essoin Day of the subsequent Term, which was Easter Term; the Attorney after his Death entered up the Judgment as of the precedent Term, but brought not the Roll in before the Essoin Day of Easter Term; And it was now moved to have the Judgment set aside, the Warrant of Attorney being revoked by the Death of the Party, Et per Holt C. J. 1st, By the Course of the Court a Warrant of Attorney to confess a Judgment is not revocable, and the Court will give leave to enter up the Judgment, tho' the Party does revoke it, but it is determinable by the Party's death; but if the Party dies in the Vacation, the Attorney may enter up the Judgment that Vacation as of the precedent Term, and it is a Judgment at the Common Law as of the precedent Term, tho' it be not so upon the Statute of Frauds in respect of Purchasors, but from the signing; so that this Judgment being a Judgment at Common Law as of Hillary Term, it was a Judgment entered when the Party was alive, and therefore good without all Question, if the Roll had been brought in before the Essoin Day of Easter Term; but that not being done, the Question will be, whether we can now admit it to be filed? By the Course of the Court, all the Rolls of Hillary Term ought to be brought in before the Essoin Day of Easter Term, and made part of the Bundle of Hillary Term; and it is for this reason that what is done in the Vacation is looked upon as an Act of the Term preceding; and there cannot be a post terminum Roll received without leave upon Motion, which the Court does

Post terminum Roll cannot be filed without leave of the Court.

does not grant, but when it appears that No-body can be prejudiced, for 'tis dangerous; and he said that Practice should never have his Consent to be allowed again, for by this means the Statute of Frauds and the Act for docquetting of Judgments will be frustrated; for if the Court allow the filing of this Roll in Easter Term as a Judgment of Hillary, when it was not among the Rolls of that Term, how shall Purchasors avoid the Consequence of it, when it was neither docquetted nor brought in: Upon this Account the Court disallowed the filing.

## Anonymus. Trin. 2 Ann. B. R.

(7) Judgment shall not be set aside because Attorney appear'd without Warrant if he be sufficient.

AN Attorney appeared and Judgment was entred against his Client, and he had no Warrant of Attorney; and now the Question was, if the Court could set aside the Judgment? Et per Cur. If the Attorney be able and responsible, we will not set aside the Judgment. The Reason is, because the Judgment is regular, and the Plaintiff ought not to suffer; for there is no fault in him; but if the Attorney be not responsible or suspicious, we will set aside the Judgment; for otherwise the Defendant has no Remedy, and any one may be undone by that means.

## Parson *versus* Gill. Trin. 2 Ann. B. R.

(8) Memorandum amended by the Warrant of Attorney on the same Roll.

AT the top of the Plea-roll it was entered that the Plaintiff Po. lo. suo J. S. Attornatum suum, and the Memorandum was that the Plaintiff venit & protulit, &c. but did not say venit per Attornatum suum or in Propria Persona sua. Upon this there was a non sum Informatus entred and Judgment pro Quer. And Error being brought in the Exchequer Chamber, it was moved to amend the Declaration by the top of the Plea-roll: And it was objected, that this was but an Entry of the Clerk, and there might be no Warrant given or filed; But Holt C. J. held it might be amended by the Plea-roll. In C. B. the Warrant of Attorney is always filed by it self on a distinct File, but the Course of this Court was always to enter them on a particular Roll for that purpose till C. J. Wright's time, and he altered the ancient Course, and caused them to be entered on the top of the respective Plea-rolls to which they belong, and it is practised at this Day. Till a Warrant of Attorney is filed or entered, it is not a matter of Record; But a Man may appoint an Attorney in Court upon Record, and a Warrant of Attorney upon the Plea-roll is as well and as much a Record as it would be upon any other Roll: And it cannot be intended but that the Plaintiff declared by Attorney, the Attorney's Name being to the Judgment-Paper, viz. J. S. pro Quer.

## Lamb *versus* Williams. Hill. 2 Ann. C. B.

IN Trespass in C. B. Verdict was for the Plaintiff, and his Attorney entered a remittit damna as to part and Judgment for the rest; and it was held, That the Attorney has Authority by his being constituted Attorney to remit Damages; and that a remittitur need not be by the Plaintiff in Propria Persona, as a Retraxit must.

(9) Remittit damna may be by Attorney, Retraxit must be in Propria Persona.

## Gregg's *Case*. Pas. 5 Ann. B. R.

EXecutor of an Attorney brought an Action for Fees, and Law-Business done by his Testator; Defendant moved to refer the Plaintiff's Demand to the Master; but denied, because all the Business was done in another Court; otherwise had the Business been done in this Court, or partly in this: And besides the Plaintiff was an Executor.

(10) Reference of Attorney's Bill to the Master.

## Burr *versus* Atwood. Pas. 5 Ann. B. R.

ERror on an Award of Execution against Bail. The Record of the principal Judgment was returned, and it was objected, that the Plaintiff at the return of the Scire facias appeared by J. S. his old Attorney, and prayed an alias; and that J. S. acted on as Attorney throughout the whole, and yet had no other Warrant than the old one, which was given him in the original Action. Et per Holt C. J. Any one might sue out or pray the Scire facias, and therefore the old Attorney might; but when the Scire facias is return'd then the Plea commences, and a new Warrant of Attorney ought, to have been enter'd, which is by entring, quod Querens ponit loco suo, &c. For the Warrant to appear in the principal Action is no Warrant to appear in the Scire facias against the Bail; because this is a new Cause and a different Record. Also the Chief Justice said, that upon this Writ of Error, the Record of the Judgment against the Principal, ought not to have been certified. Judgment revers'd.

(11) Warrant of Attorney for the Plaintiff in the Action against the Principal, cannot extend to the Suit against the Bail, but there must be a new one.

# ATTORNMENT.

## Gwam *and* Ward *versus* Roe. Trin. 5 Will. III. B. R.

(1) Lessor makes a second Lease and before the first expires levies a Fine; Attornment by the first Lessee to the Conusee is sufficient.

A Makes a Lease for Years to B. reserving Rent, and afterwards leases to C. rendring Rent; Then A. levies a Fine to the Conusee and his Heirs, to the use of the Conusee and his Heirs; The first Lease expires, the second Lessee enters, and the Conusee brings Debt against the second Lessee for Rent arrear: Upon Demurrer 'twas objected on the part of the Defendant, that here was no Attornment of the second Lessee alledged, and that it ought to be in this Case, because the Plaintiff came in by the Common Law and not by the Statute of Uses, quod fuit concessum: Also it was said the Plaintiff could not without Attornment have maintained an Action against the first Lessee, quod Curia concessit, but held there was a plain difference between the first Lessee and the second: At the time of the Fine, the Reversion was expectant on the first Lease, notwithstanding the Grant of the second Lease; for that continued only an Interesse termini, and did not alter the Reversion, which remained entirely expectant on the first Lease, as it was before; Therefore the fine passed but one Reversion, and that expectant upon one particular Estate, and consequently there could be but one Attornment, viz. from the first Lessee and not from the second. Judgment pro Quer.

## Hudson *versus* Jones Mich. 5 Ann. B. R.

(2) Upon Issue non concessit, an Attornment need not be given in Evidence.

IN Replevin the Avowant made Title by Grant of a Reversion in the locus in quo expectant on an Estate for Life to the Plaintiff, unto which Reversion there was a Rent incident, ad quam quidem concessionem, the Plaintiff (being particular Tenant) did attorn: The Plaintiff pleaded non concessit modo & forma; and the Question on Trial before Holt C. J. was, whether the want of Attornment might be given in Evidence upon this Issue? And being made a Point for the Resolution of the whole Court, it was urged for the Plaintiff, That upon non Concessit the Operation and Effect of the Grant is put in Issue, and a Deed, if it be ineffectual, is void; If the Grantee dies before

 Attornment,

Attornment, it can never be made good; If a second Grant be made and Attornment obtain'd to that, the first Grant is avoided. That upon non Feoffavit Livery must be proved; per que, &c.

On the other Side it was said, That in pleading a Grant of a Reversion, an Attornment is always alledged, but not of a Feoffment: And if a Feoffment be of a Manor, 'tis neither necessary to alledge a Livery nor an Attornment, because it is res integra, and the Tenants are supposed to be numerous; Yet if the Feoffee avow on any particular Tenant for Rent, &c. he must shew his Attornment. Yel. 135. Also in pleading a Grant of a Reversion, the Plaintiff must alledge a Venue for the Attornment, which shews it was traversable, and that which is traversable and not traversed is admitted. To this Opinion the Court inclined; but held that upon riens passa par le fait, Want of Attornment might be given in Evidence; because the Operation of the Deed is put in Issue, and Livery differs, for that is the Act of the Feoffor to complete his Feoffment, but this is the Act of another, and nothing farther remains on the part of the Grantor.

In pleading a Feoffment of a Manor, it is not necessary to shew the Attornment of the Tenants.

Afterwards the Court held, That an Attornment need not be given in Evidence upon non Concessit, tho' it must be pleaded; and tho' it must be pleaded, yet it need not be pleaded with a Venue, but shall be tried where the Land lies, upon which it is supposed to be made as a Surrender is. And the reason of their Opinion was, because 'tis traversable, and whatever is traversable and not traversed is admitted, and the Grant is perfect as far as the Grantor can perfect it. Vide 1 And. 220. 221. 1 Lev. 192. Hutt. 102. 2 Co. 61. Dyer. 91.

Attornment pleadable without Venue, and triable where the Land lies.

# AUDITA QUERELA.

## Langston *versus* Grant. Mich. 3 W. & M. B. R.

(1) Audita Querela is no superfedeas.

AUdita Querela is no Superfedeas; and therefore Execution may be taken out, unless a Superfedeas be sued forth; And if the Audita Querela be founded on a Deed, it must be proved in Court before a Superfedeas shall be granted.

## Clerk *versus* Moor. Mich. 6 W. 3. B. R.

(2) In Audita Querela, where the Party is in Custody Scire facias is the proper Process. Otherwife Venire and Distress Infinite.

MOOR had Judgment in Debt against Sir Richard Clerk and one Beale, and Beale was taken in Execution, and was set at large by the Plaintiff's own consent. Hereupon Sir Richard Clerk sued an Audita Querela quia timet against Moor, praying he might also be discharged from the Judgment, &c. He sued out two Writs of Scire facias, and two Nichils were returned; and he moved for a Superfedeas relying on 1 Lev. 140. But it was denied per Cur. for the Process of Scire facias is improper: Where the Suit is quia timet, and the Party at large, the proper Process is Venire, and Distress infinite; But where the Party is in Execution, there he may either have a Scire facias or a Venire. And Co. Ent. 88. is the only Scire facias on a Matter in Pais where the Party was not in Execution. Vide Mo. 811. 2 Cro. 29. 3 Cro. 634. 2 Saund. 144. Mo. pl. 447.

## Anonymus. Hill. 10 Will. III. B. R.

(3) Process in Audita Querela.

IF an Audita Querela be founded upon a Record, or the Party be in Custody, the Process upon it is a Scire facias; but if it be grounded on Matter of Fact, or the Party not in Custody, the Process is a Venire. Moor. 811. Trin. 12. W. 3. B. R. held so again.

Anonymus. Paſ. 12 Will. III. B. R.

Where the Party has a Matter which he might have pleaded to the Scire facias in his Diſcharge, and two Nichils are returned, and Judgment againſt him, the Court will relieve him upon Motion without putting him to an Audita Querela; Aliter in Caſe a Scire feci be returned.

(4) Where two Nichils are return'd the Court will relieve upon Motion without Audita Querela.

# AVOWRY.

Foot's *Caſe*. Paſ. 2 W. & M. B. R.

Replevin for taking of his Horſe in quodam loco vocat. the common Marſh; the Defendant pleaded, That he took it in quodam loco vocat. the Plot abſque hoc, That he took it in præd. loco vocat. the common Marſh. Unde petit Judicium de nar. prædict. &c. Et pro Retorno habendo, he makes Conuzance under his Maſter's command by Diſtreſs for Rent Arrear; the Plaintiff replied in bar of the Conuzance and traverſed the Seiſin, which the Defendant alledged in his Maſter, to which it was demurred. Et per Cur. The Traverſe of the Place was only in Abatement, and the Defendant did do right to make Conuzance pro retorno habendo; for otherwiſe he could not have a Retorn and Damages: But the Plaintiff ſhould not have traverſed the Matter of this Conuzance, and therefore having done ſo and Demurrer joined upon it, Holt C. J. held it a Diſcontinuance.

(1) In a Plea in Abatement in Replevin, (except that of Property) the Defendant muſt ſuggeſt Matter for a Return, but that is not Traverſable

Cowne *verſus* Bowles. & al. Mich. 2 W. & M. B. R.

Replevin againſt 3 Defendants, viz. A. B. and C. The Defendants appeared by Attorney and made Conuzance, and upon Iſſue and Trial the Plaintiff was nonſuit and Judgment for the three Defendants; The Plaintiff brought a Writ of Error and aſſigned for Error, that A. one of the Defendant's was an Infant, and

(2) Matter of Abatement not aſſignable for Error after pleading in Chief.

and yet had appeared by Attorney. Et per Cur. The Plaintiff shall not assign this for Error; because he might have pleaded this in Abatement to the Conuzance in the Replevin, for the Avowant or Conuzant is an Aor to that purpose. Vide 3 Mod. 248. 48. E. 3. 10. 1 Rolle's. Ab. 781.

## Butcher *versus* Porter. Hill. 4 W. & M. B. R.

(3) Where the Defendant pleads Property he need not make a Suggestion pro ret. habendo.

Replevin; The Defendant pleaded in Abatement Property in a Stranger; Upon Demurrer the Court resolved these two Points. 1st, That the Defendant may plead Property in a Stranger, either in Bar or Abatement. 2dly, That where a collateral Matter is pleaded in Abatement, the Defendant shall not have a Retorn without making an Avowry; But where the Plea in Abatement is to the Point of the Action, as Property is, the Defendant shall have a Retorn without Avowry; for whether the Property be in the Defendant or a Stranger, the Defendant ought to have a Retorn, because he had the Possession which was illegally taken from him by the Replevin, when the Plaintiff had no Right.

## Anonymus. Hill. 8. Will. III. B. R.

(4) Where Defendant pleads Prisal in auter lieu, he must make Suggestion for return.

In Replevin, the Defendant pleaded that the Cattle were taken in Auter lieu, absque hoc, &c. Et per Cur. This is not enough, but the Defendant must go on and make an Avowry pro retorno habendo; yet such Avowry is only a Suggestion to bring him within the Statute of H. 8. for Damages. Before that Statute no Damages were given, and without such a Suggestion, he is not within the Statute; but that being only for a particular purpose it is not traversable.

## Weeks *versus* Speed. . . . . 13 Will. III. B. R.

(5) Discontinuance in Replevin.

Replevin for taking Cattle in quodam loco vocat. the Bills in quodam alio loco ibidem vocat. the Boggs: The Defendant avowed the taking in prædicto loco in quo, &c. quia H. was seized in Fee of the locus in quo, &c. The Plaintiff demurred, because here are two Places alledged, and the Avowant has only answered to the locus in quo, &c. which is but one of the two Places. Et per Curiam, It is a Discontinuance.

Pratt *versus* Rutlidge. Trin. 13 Will. III. B. R.

IN Replevin the Defendant avowed and the Plaintiff being nonsuit, brought a Writ of second Deliverance, whereupon it was mov'd to stay the Writ of Enquiry of Damages. Et per Cur. This is a Supersedeas to the retorno habendo, but not to the Writ of Enquiry of Damages, for these Damages are not for the thing avowed for, but are given by the Statute of 21 H. 8. c. 19. as a Compensation for the Expence and Trouble the Avowant has undergone. Vide Pal. 403. Lat. 72.

(6) Second Deliverance is a Supersedeas to the retorno habendo, but not to the Writ of Enquiry.

# AUTHORITY.

Parker *versus* Kett. Pas. 13 Will. III. B R.

EJectment; Upon Trial this Case was made for the Opinion of the Court, viz. Charles Kett being seized in Fee of a Copyhold, demised it to his Wife for Life, Remainder to Charles his Son in Tail, and if he died without Issue under Age, Remainder to Elizabeth his Wife in Fee. Mr. Keck the Master in Chancery was Steward of this Manor by Patent, ad exercendum per se vel deputatum. Mr. Keck appointed one Clerk to be his Deputy, who acted as such many Years, and was sent for by Charles Kett to take a surrender of the Lands. Clerk went not himself, but by a Writing under his Hand and Seal, appointed A. and B. to be his Deputies, jointly and severally, only to take this surrender, which was done by A. accordingly, and afterward presented; and Elizabeth Kett the Defendant admitted thereupon, by Clerk; Et per Holt C. J. who delivered the Opinion of the Court.

It is Essential to a Deputy to have the whole Power of his Principal, and a Covenant or Constrain it is void.

1st, Clerk who was Mr. Keck's Deputy, (and so it is of any other Deputy, where a Deputy may be appointed,) had full Power to do any Act or Thing which his Principal might have done. That is so essentially incident to a Deputy, that a Man cannot be a Deputy to do any single Act or Thing, nor can a Deputy have less Power than his Principal: And if his Principal

cipal makes him covenant that he will not do any particular thing which the Principal may do, the Covenant is void and repugnant; As if the Under-Sheriff covenant that he will not execute any Process for more than 20 l. without special Warrant from the High Sheriff; this is void, because the Under-Sheriff is his Deputy, and the Power of the Deputy cannot be restrained to be less than that of his Principal; save only that he cannot make a Deputy, because it implies an Assignment of his whole Power, which he cannot assign over. That by Consequence A. was as well authorised by Clerk's Writing, given him under Hand and Seal, as if Mr. Keck himself had given it; of which there could be no Question, it being to do a particular Act.

Deputy cannot make a Deputy, but he may empower another to do a particular Act.

2dly, Tho' A. acted in his own Name, without reciting his Power or any relation to it, yet this taking of a Surrender must be good; for he must be considered either as an Attorney, or Under-Deputy. Suppose the first, the Law is plain; where a Man does such an Act as he cannot do, so as to be effectual any otherwise than by virtue of his Authority, that shall be taken to be in Execution of his Authority: But where a Man has an Interest and Authority, and does an Act without reciting his Authority, it shall be taken to be done by virtue of his Interest. 6 Co. 17. And tho' an Under-Sheriff must act in the Name of the High Sheriff, because the Writs are directed to the High Sheriff, and for other particular Reasons; yet any other Deputy may act either in his own Name or the Name of his Principal. So is the Judgment of Comb's Case, tho' in arguing it is said otherwise: And so it is of an Attorney, but it is more regular to act in the Name of the Principal. Lastly, Supposing him to be an Under-Deputy, as if he had not been constituted to do a particular thing, but to be Clerk's Deputy, this had been void, and he had no real Authority; Yet even that Constitution would have given him the Colour and Reputation of an Authority, to act as a Steward de Facto. And what he does as such, is sufficient among the Tenants, for they have no Power to examine his Authority, nor is he to render them any Account of it. The Cases of Mo. 109. 110. 1 Lev. 288. 2 Cro. 552. 2 Ro. 7. 101, 130. are stronger. And so it is of an Executor de Facto. i. e. a Tort Executor.

Deputy may act either in his own Name or that of his Principal.

Acts of a Steward de Facto sufficient amongst the Tenants of the Manor.

Authorities by Letter of Attorney are either General or Special; thus a Letter of Attorney may be to sue in Omnibus Causis motis & movendis, or to defend a particular Suit. Sir Philip Sydney, when he went to travel, gave a Letter of Attorney to Sir Thomas Walsingham to act and sell all his Lands, and all his Goods and Chattels, and this was held good: Where the Authority is particular, the Party must pursue it; If the Act varies from it, he departs from his Authority, and what he does is void; but that must be intended of a Variance not in Circumstance, but of a Variance Material and Substantial, as where the

In the case of a particular Authority circumstantial Variance will not make the Act void.

the Person, the Thing, the Estate or the Date is mistaken; as if a Warrant of Attorney be to Hugh Barker, and the Execution is pleaded to be by Hu. Bar. Vide Title Variance, 73.

# BAIL in Civil Cases.

## Anonymus. Mich. 11 Will. III. B. R.

(1) On a removal out of an inferior Jurisdiction, Plaintiff here is bound to accept the Bail below, except in London.

If the Plaintiff in the Action sue the Bail-Bond, he cannot refuse the same Persons to be Bail to the Original Action; but if the Plaintiff proceed against the Sheriff by Amerciaments, he is not compellable to accept those Persons that were Sureties to the Sheriff, to be Bail to his Action: So if a Cause be removed by Habeas Corpus out of the Marshalsea or any other inferior Court, and the Bail there offer to be Bail to the Action, here the Plaintiff is compellable to take them, because he might but did not except to them below. Aliter where a Cause comes hither out of London; for the sufficiency of the Bail there, is at the Peril of the Clerk, and he is responsible to the Plaintiff; so that the Plaintiff had not the Liberty of excepting against them; and the Clerk is not responsible if they be deficient in this Court, tho' he was in London; Per Holt C. J.

## Tilly versus Richardson. Hill. 1 Ann. B. R.

(2) Upon Error in Parliament of Judgment affirmed in B. R. new Bail is requir'd.

DEBT on a Bond in C. B. Judgment for the Plaintiff. Error was brought in B. R. and Bail put in according to the Statute, and Judgment affirmed; thereupon Error was brought in Parliament, and the Clerk of the Errors refused to allow the Writ, unless the Party would give a new Recognizance; and Broderick moved it ought to be allowed without; being not requirable by the 3 Jac. 1. c. 8. Sed per Cur.

The first Recognizance does not include Payment of Costs to be assessed in the House of Lords, and those Costs ought to be paid, and therefore a new Recognizance ought to be given within the intent of the Statute, and it is not the Business of this

Court to examine whether Bail was put in upon the first Writ, for the want of that does not hinder the Process of the Writ of Error, but only makes it no *Supersedeas*.

Rules of Practice about putting in Bail, and excepting thereto.

IN any Action or Suit the Plaintiff must except within Twenty Days after Bail put in, and notice thereof and of their Places of Abode, or otherwise the Bail shall be filed. Upon a Habeas Corpus; the Plaintiff has 28 Days to except against filing the Bail offered, upon a Cepi Corpus 20, per Clerk Secondary. Trin. 11 W. 3. B. R. In Error where the Plaintiff finds Bail, the Defendant hath Twenty Days to except, and he need not give the Plaintiff notice that he excepts; but he cannot take out Execution without serving the Plaintiff with a Four Days Rule to put in better Bail. Mich. 3 Ann. B. R. And in other Cases if the Plaintiff excepts, he must give the Defendant notice, to save the perpetual Trouble of searching the Judges Books.

## Williams *versus* Williams. Pas. 8 Will. III. B. R.

(3) Render, when a complete discharge of the Bail.

A Sued B. in Three Actions, and he put in Three Bails; Plaintiff recovered in all; Defendant rendred himself, and one of the Bails entered an *Exoneratur* on the Bail-Piece, the rest did not. Et per Cur. The rendring is a discharge in posse as to all; but not complete and actual as to all, till Exon. entered upon all.

## Page *versus* Price. Mich. 8 Will. III. B. R.

(4) Bail by Executors and in inferior Courts.

ACtion against an Executor in an inferior Court, and special Bail put in. It was removed by *Habeas Corpus* in C. B. and the Court held he should put in Bail to appear to a new Original within two Terms, (but not after) nor to pay the Condemnation-Money. In the same Case it was held, That in Debt against an Executor on a Judgment suggesting a *Devastavit*, he shall give Bail, for there the Action is in the *debet & detinet*. Et Trin. 11 W. 3. B. R. fuit dit. per Holt C. J. That in all Cases where a Cause comes in by *Habeas Corpus*, the Defendant shall find special Bail, save in the Case of an Executor; and that this they do in Favour and Indulgence to inferior Jurisdictions.

## Holland *versus* Serjeant. Mich. 10 Will. III. B. R.

(5) Construction of Statute 4 and 5 W. 3. c. 21.

H. In Custody of the Sheriffs of London upon an Execution was charged according to 4 and 5 W. 3. c. 21. in their Custody, and for want of proceeding in two Terms after, he was

was discharged upon Common Bail, according to the Course where Persons are charged in Custody of the Marshal; for by this Act, the Plaintiff has the same Benefit as if the Defendant was in Custod Mar. And therefore it is but reasonable there should be the same Rule for the Defendant.

Etherick *versus* Cowper. Hill. 10 Will. III. B. R.

(6) How the Sheriff shall be charg'd for taking insufficient Bail.

If the Sheriff take insufficient Bail for the Defendant's Appearance, and the Plaintiff will not accept them, he is liable to an Action as well as to Amerciaments per Holt C. J. sed Trin. 2 W. 3. B. R. Gravener versus Soams, it was held, That no Action lay against the Sheriff for taking insufficient Bail; but he shall be amerced if he has not the Body; But if the Plaintiff take an Assignment of the Bail-Bond, tho' the Bail be insufficient, the Court will not amerce him.

Note, The Plaintiff now takes an Assignment of course, but the old way was first to give a Rule to the Sheriff to bring in the Body, before you could take an Assignment; so at this Day you serve the Sheriff with a Rule to bring in the Body, before you move to amerce him. Per Cur.

Anonymus. Mich. 10 Will. III. B. R.

(7) Merits of the Cause not in Question upon bailing.

Defendant shewed the Composition Act, and that the Plaintiff's Debt according to the Composition he had made with the rest of his Creditors was under ten Pounds; and that the Plaintiff would be bound tho' a Non-Subscriber: Yet the Defendant was held to special Bail, because non constat, that the Plaintiff will be bound, for he may deny the absconding, &c. So that this would be to determine the Merits of the Cause, viz. That he was bound by the Composition. Aliter, If the Plaintiff had subscribed, or had been summoned before a Judge, and the matter had received a determination.

*Dux* Ormond *versus* Brierly. Trin. 10 Will. III. B. R.

(8)

In an Action upon a Replevin Bond, common Bail shall be filed.

## Anonymus. Hill. 11 Will. III. B. R.

(9) Merits of a Caufe not in Queftion upon bailing.

THE Merits of a Caufe fhall not be tried in a Motion for Bail. In an Action of Debt upon a Bond, the Defendant fays it was per durefs, that will not excufe him from fpecial Bail, for the Court will not determine the Merits upon fuch a Motion, nor put a flur upon the Plaintiff's Caufe, which ought to come down fairly to Trial without Prejudice; fo if he fays it was ufurious. Per Holt C. J.

## Anonymus. Hill. 11 Will. III. B. R.

(10) Bail in an Action for Money won at Play.

IN an Action for Money won at play, Gould and Turton were for denying fpecial Bail, for fince the Plaintiff played upon Tick, they would not help his Security, and they were for making it a Rule of Court. Holt C. J. contra. That the Practice has been otherwife; and the Contract if under 100 l. is lawful, and the Plaintiff ventured his Money againft it. That they could not fo far difcountenance what the Law allowed, and to fay they were not to better his Security fince he play'd upon Tick, would as well prove that there fhould be no Bail in an Indebitatus Affumpfit, &c. The Rule for fpecial Bail ftood.

## Anonymus. Hill. 11 Will. III. B. R.

(11) Bail in Debt upon a Bond to perform Covenants.

IN Debt upon a Bond to perform Covenants, no Bail fhall be given, but with refpect to the Breaches and the Damage done thereby; but the Meafure of that fhall be taken from the Plaintiff's Oath.

## Anonymus. Hill. 11 Will. III. B. R.

(12) Where Additional Bail is put in, the whole Entry fhall be of the laft Term.

THERE was a Queftion if Bail be put in in one Term, and new Bail is added the next Term after, if this fhould be a Bail as of the firft Term or only of the Term when added? The Clerks differ'd, but the Court was of Opinion it was only Bail of that Term when the additional Bail was put in; for they faid it was not Bail till compleated and accepted, and making the additional Bail to be Bail of the firft Term, might do a wrong to a third Perfon, who might be a purchafer after the firft, and before the additional Bail was put in. Per Cur.

Anony-

## Anonymus. Hill. 11 Will. III. B. R.

(13) Render before retorn of the Latitat not pleadable to an Action on a Recognizance of Bail.

UPON non eft inventus returned on the Capias againft the Principal, the Bail's Recognizance is forfeited in ftrictnefs of Law; but by the Courfe of the Court, if the Principal be rendered before the Return of the Alias Scire facias againft the Bail, the Court will ftay Proceedings. But inftead of a Scire facias againft Bail, the Plaintiff brought Debt upon the Recognizance, and the Bail pleaded a Render before the Return of the Latitat, i. e. a Latitat actually fued out and entered, Et per Cur. Tho' this cannot be pleaded, yet the Plaintiff fhall not by this new Courfe prevent the Grace of the Court, we will allow a Render in this Cafe of an Action of Debt, as well as a Scire facias, and that at any time before the Return of the Latitat, and perhaps may inlarge the time; the Court denied the Cafe in 3 Keble Miles and Bateman. Vide Ray. 14. But in regard there had been pleadings in this Cafe, the Defendant was ordered to pay Cofts.

## Lyell *verfus* Manucapt. Galletly. Trin. 12 Will. III B. R.

(14)

H. has a Judgment obtained againft him and he renders himfelf before the Return of the Capias, but never gives the Plaintiff notice of his Render, nor gets the Bail-Piece difcharged: The Plaintiff proceeds to Judgment againft the Bail, upon a Scire facias, and the Court would not relieve them upon Motion, becaufe no Exoneratur was entered, and a Scire facias returned; but put them to their Audita Querela.

## Lumley *verfus* Quarry. Paf. 1 Ann. B. R.

(15) Upon removal by Habeas Corpus, the Court will Examine into the caufe of Action.

AN Action was brought againft the Defendant for a Ship and Cargo, and the Queftion was, Whether the Defendant fhould be difcharged upon common Bail? It was alledged for the Plaintiff, that the Caufe came in from London by Habeas Corpus, and therefore they ought to have fpecial Bail of courfe: But Holt C. J. held that the Court here could Examine into the Caufe of Action upon a Habeas Corpus, and took this diverfity, that if the caufe of Action were fuch as required Bail, tho' it were under the value of 10 l. they would hold the Defendant to Bail: But if the Action was vexatious, or fuch as required no Bail, as an Action againft an Executor, they would difcharge him upon common Bail; Upon which it was urged for the Defendant, that what he did with relation to this Ship and Cargo, was as Judge of the Admiralty in the Weft Indies: Therefore no reafon why he

should be held to Bail: On the other Side it appeared, that the Defendant had the Ship and Cargo in his own Custody, which was intermedling further than the Duty of his Office warranted; and for this reason he was held to Bail; but otherwise had not.

In a like Case viz. an Action remov'd by Habeas Corpus, the Court held there must be Bail here; for else the Defendant by his own Act puts the Plaintiff in a worse Condition than he was below; but they could consider the quantum of the Sum, in which the Bail ought to be taken, if the Action appeared to them to be vexatious. M. 3 Ann. B. R.

## Genbaldo *versus* Cognoni. Mich. 3 Ann. B. R.

(16) In B. R. if the Sum recovered exceed the Sum in the Ac etiam the Bail is not liable.

Plaintiff brought an Action of Trespass, Assault and Battery by Bill of Middlesex, with an Ac etiam for 40 l. and recovered 100 l. and the Court held, the Bail should not be liable for more than the Ac etiam; for that is the Measure and Ground of his Undertaking: Then the Question arose, whether he should be liable for 40 l. and Holt C. J. held he was not liable at all; for his Recognizance is to answer the Condemnation; and since that cannot be, he is bound to nothing: And Clark the Secondary affirmed, there was a Rule of Court, that where the Plaintiff recovers a greater Sum than is laid in the Action, the Bail shall not be chargeable in ista actione: Another Question arose, whether here was any Bail? For there cannot be Bail without a Writ, and here the Writ was returnable of Michaelmas Term, whereas the Bail was of a Term precedent, Et sic pendet.

BAIL

# BAIL in Criminal Cases.

## Fitz-Patrick's *Case*. Trin. 7 Will. III. B. R.

FITZ-Patrick was committed to Newgate by the Privy Council, for aiding Colonel Dorrington to escape out of the Tower, where he was committed for High-Treason; and being brought here by Habeas Corpus was bailed; because tho' the Commitment was for High-Treason, yet there was no Prosecution, and a Sessions was past.

(1) Bail for default of Prosecution.

## *The* King *versus* Keat. Mich. 8 Will. III. B. R.

MR. Keat was indicted of Murder, and also for stabbing; and the Jury found him guilty of Manslaughter, and as to the rest, found a special Verdict; and Sir Bartholomew Shower moved he might be bailed; but it was denied, for he is found expresly to be guilty of Manslaughter, and in that Case, Bail is never allowed till Clergy had.

(2) Convict of Manslaughter not bailable before Clergy had.

## Lisle's *Case*. Mich. 8 Will. III. B. R.

LISLE, who was indicted of Murder, and found Guilty of Manslaughter, was bailed before Clergy had. Vide Appeal.

(3)

## *Lord* Aylesbury's *Case*. Hill. 8 Will. III. B. R.

ONE committed for Treason or Felony, ought to enter his Prayer the first Week of the Term or Day of the Sessions, next after his Commitment, or he shall not have the Benefit of the Habeas Corpus Act; but if an Act of Parliament be made which takes away the Power of bailing for a time, he need not then enter his Prayer, for that is thereby dispensed with; But then he ought to enter it the first Week of the Term or Day of the Sessions, after the expiration of that Act of Parliament; and for

(4) H. ought to enter his Prayer on the Habeas Corpus Act, to be tried, the first Week of the Term or Day of Sessions after Commitment.

for want thereof, the Benefit of the Habeas Corpus Act was denied; but because the Defendant had been long in Prison, and his Trial had been delayed, and Affidavit was made that his Life was in danger, the Court bailed him.

## *Lord* Mohun's *Case*. Mich. 9 Will. III. B. R.

(5) H. found guilty of Murder by the Coroner's Inquest, bailable; otherwise if indicted.

IF a Man be found guilty of Murder by the Coroner's Inquest, we sometimes Bail him; because the Coroner proceeds upon Depositions taken in writing which we may look into. Otherwise if a Man be found guilty of Murder by a Grand-Jury; because the Court cannot take notice of their Evidence, which they by their Oath are bound to conceal. Et per Cur. There is no difference between Peers and Commoners as to Bail.

## Marriot's *Case*. Mich. 9 Will. III. B. R.

(6) Bail in Misdemeanor.

MArriot was committed for forging Indorsements upon Bank-Bills; and upon a Habeas Corpus was bailed; because the Crime was only a great Misdemeanor; for tho' the forging the Bills be Felony; yet forging the Indorsement is not.

## Anonymus. Trin. 11 Will. III. B. R.

(7) One indicted of Murder ought not to be bailed upon Affidavits of the Evidence.

J. S. being committed upon an Indictment for Murder, moved to be bailed, and this within less than three Weeks of the Sessions: Rokeby and Turton were for bailing him; because the Evidence upon the Affidavits read, did not seem to them sufficient to prove him Guilty. Holt C. J. and Gould contra. The Evidence does affect him, and that is enough. The allowing the favour of Bail may discharge the Prosecution; therefore it is not fit the Court should declare their Opinion of the Evidence beforehand; for it must prejudice the Prisoner on the one Side, or the Prosecutor on the other.

## Rex *versus* Davison. Trin. 12 Will. III. B. R.

UPON a Habeas Corpus to bring up the Body of one Davison a Quaker, the Cause return'd was a Writ of Excommunicato Capiendo, which recited a Significavit of an Excommunication for teaching School without a Licence, and the Court doubting whether this was an Offence, desired to hear Counsel upon it; and then Mr. Northey moved he might be bailed in the mean time; and cited several Authorities that a Man might be bailed, while the Legality of the Return is under the Consideration of the Court. Vaugh. 157. Lat. 174. 1 Cro. 552. 557. and also Price's Case. Mich. 29. Car. 2. B. R. Who was taken upon an Excommunicato Capiendo, and brought up by Habeas Corpus and bailed, while the Return was under Consideration; and in that Case the Court being against Price upon the Return, his Counsel insisted that he could not be committed again, and thought they had got an Advantage that way, but notwithstanding that he was recommitted. He cited also Clerk's Case, who was committed by the Vintner's Company, and bail'd by Holt C. J. at his Chamber. Upon these Authorities the Defendant was bailed, and the Entry was, traditur in ballium & interim curia advisare vult, and the Condition of the Recognizance was to appear the first Day of the Term, and from Day to Day; and if the Court should adjudge the Return good, to render his Body to Prison. The Chief Justice said they bailed Men in Execution upon an Audita Querela; and by the Petition of Right, must bail or remand Men in convenient time. The same Rule was made this Term in Reynolds's Case, (who was committed by the Court of Aldermen, for assisting to marry a City-Orphan) while the Court considered the Return.

(8) H. taken on Excommunicato capiendo, bailable while the return of the Habeas Corpus is under the Consideration of the Court.

## Anonymus. Trin. 1 Ann. B. R.

THE Defendant in an Indictment in B. R. being bailed on the Indictment, and likewise in a Civil Action then pending against him in C. B. rendered himself in discharge of his Bail in the Civil Action to the Fleet, and from thence by Habeas Corpus he moved himself to the King's Bench and escaped. His Bail to the Indictment moved that their Recognizance might not be estreated, pretending he was taken out of their Custody by his Commitment to the Marshal; sed non allocatur, for they must take care of him there, and they might have had him committed in discharge of them. Ex motione Broderick and Raymond.

(9) Render in discharge of Bail in an Action, will not discharge the Bail on an Indictment.

P Dr.

## *Dr.* Watson's *Case.* Mich. 1 Ann. B. R.

(10) Bailing during Advisement is discretionary, and the Court will refuse it if Defendant pleads a false Plea.

DR. Watson, late Bishop of St. David's, was taken on an Excom. Capiendo and brought into B. R. by Habeas Corpus, and pleaded to the Writ, that he was a Lord of Parliament, and moved to be bailed, while the Retorn was under Consideration. And Powell said, Tho' it had been done, it was in their Discretion, and was contrary to the Statute of Westminster; and he did not think it Discretion upon such a Plea, which every Body knew to be false; He being deprived by Commissioners of Delegates, of which Powell was one on the Appeal. Holt C. J. agreed; and that tho' they could not take judicial notice of the Falsity of his Plea, yet it should lead their Discretion, and he was not bailed.

## Domina Regina *versus* Layton. Pas. 4 Ann. B. R.

(11) Upon Error of a Conviction for a Forcible Detainer, Defendant refused to be bailed.

LAyton and others were committed by the Lord Mayor of London, upon his view for a Forcible Detainer, and fined 100 l. and committed in Execution, and the Record of the Conviction was removed by Certiorari, and the Defendant brought a Writ of Error coram nobis, and assigned Error in Person; and now it was moved they might be bailed. Vide 1 Cro. 557. Keb. 43. Sid. 320. 2 Keb. 173. Broderick contra urged, That in Error to reverse an Outlawry the Court will take Bail, but not to reverse a Judgment in an Indictment: At last the Court refused to Bail him, being in Execution for a Fine, and having committed a very notorious Breach of the Peace in the Heart of the City; tho' a long Vacation was coming on.

BAI-

# BAILIFF.

## Trevilian *versus* Pyne.

REplevin; Defendant makes Conusance as Bailiff to B. Plaintiff pleads that he took them de injuria sua propria, absque hoc that he was Bailiff to J. S. To this it was demurred: And after Argument, the Traverse was held to be well taken; and a difference observed between an Action of Trespass quare Clausum fregit, and an Action of Trespass for taking Cattel or Replevin. In the first Case if the Defendant justifies an Entry to the Close by Command, or as Bailiff to one in whom he alledges the Freehold to be, the Plaintiff shall not in his Replication traverse the Command; because it would admit the Truth of the rest of the Plea; viz. That the Freehold was in J. S. and not in the Plaintiff, which would be sufficient to bar his Action, whether the Defendant was impowered by J. S. to enter, or not impower'd; for it is not material that the Defendant has done a wrong to a Stranger, if it be none to the Plaintiff: But in the other two Cases, if the Defendant justifies taking my Cattle as Bailiff to J. S. in whom he lays a Title to take them, as for Distress, or other Cause, there it may be material to traverse the Command or Authority; for tho' J. S. had right to take the Cattle, yet a Stranger who had no Authority from him, will be liable; so that both Parts of the Defendant's Plea in this Case must be true, and therefore an Answer to any Part is sufficient; so in Trespass for taking Goods. Aliter in Trespass quare Clausum fregit. Vide 1 Lev. 50. 2 Ven. 196, 215. Yelv. 148. 3 Lev. 20. contra. 1 Ro. Re. 46. Cro. El. 14.

(1) In Trespass for taking Goods or Replevin, if the Defendant makes Conusance, Traverse of the Command is sufficient; Aliter in Clausum fregit.

## Matthews *versus* Carew. Mich. 1 Ann. B. R.

TRespass for taking his Tankard; Defendant pleaded that at a Court-Leet at Westminster presentatum fuit, That the Plaintiff in a Cellar within the Leet did melt Tallow, ad Commune Nocumentum, &c. for which he was amerced 5 s. by the Jurors Unde habuit Notitiam, and for that being requested, he did not pay, the Defendant as Bailiff to the Dean and Chap-

(2) In Justification as Bailiff to a Court Leet, for levying an Amercement, some Estreat of the Court or Warrant of the Steward must be shewn.

ter, & per eorum mandat. distrained: Et per Cur. 1st, It is sufficient to plead presentatum fuit without averring in Fact that he did melt, &c. for non refert as to him whether the Offence was done or not, since there was a Presentment: And the Court took a difference between a Replevin and Trespass; in the first, the Bailiff is an Actor, and is to recover, which shall be upon the Merits; But in Trespass as in this Case, the Bailiff is only to excuse the Wrong. Vide 3 Cro. 885. 26 H. 8. 8. 3 Leon. 14.

But Secondly, This Plea is naught, because the Defendant justifying as Bailiff, ought to have set out some Estreat of the Court, or Warrant from the Steward, and to have justified under that. Vide Mo. 573, 607, 847. 3 Cro. 698. 748.

# BANKRUPTS.

## Cary *versus* Crisp. Pas. 1 Will. & Mar. B. R.

(1) Property not transferr'd out of the Bankrupt till Assignment.

IN an Indebitatus Assumpsit; The Defendant pleaded that the Plaintiff became Bankrupt, and Commission was taken out, and so all his Goods, &c. belonged to the Commissioners, &c. The Plaintiff demurred and had Judgment; for till an Assignment the Property of the Goods is not transferred out of the Bankrupt. Vide Statute 1 Jac. 1. c. 15. §. 13.

## Paine & al. *versus* Teap & al. Hill. 2 W. & M. C. B.

(2) Outlawry of the Bankrupt after an Act of Bankruptcy committed, cannot defeat the Interest the Creditors have acquired in his Estate.

UPON an English Bill in the Exchequer the Barons prayed the Opinion of the Judges of C. B. The Case was, H. becomes Bankrupt, and long after was outlawed. The King made a Lease of the Profits of his Lands, and also a Grant of his Chattels: Afterwards a Commission of Bankrupt was taken out; and the Question was, whether or how far this Outlawry, Lease and Grant, should prejudice the Creditors of the Bankrupt?

And first, it was taken for certain, That where a Person is indebted to the King, and also to a Subject, the King shall have Preference

Preference in Payment. 2dly, That no subsequent Act of the Bankrupt can defeat the Interest his Creditors have by his Bankrupcy in his Estate. 3dly, That the King hath by Common Law such a Power to require his Subjects to answer all Demands of Law and Justice, that not appearing upon Process is such a Contempt of Law, that the Person Guilty is put out of the Law, forfeits his Goods and Chattels, 11 H. 6. 17. his Leases for Years, 9 H. 6. 21. and his Trust in such Leases, 2 Ro. 807. Hob. 214. and the Profits of his Lands of Freehold. 9 H. 6. 20. 21 H. 7. 7.

Resolved therefore, 1st, That the Creditors are not hurt by the Outlawry; for that was his own Act and by his own Default, and the voluntary permitting himself to be outlawed, shall not prejudice them. 2 Sid. 115. 2dly, That the Assignee of the King's Lease having paid 37 l. for it, is a Purchasor within the 21 Jac. 1. c. 19. not to be impeached by the Commission sued out five Years after the Bankrupcy.

## Came *versus* Coleman. Trin. 2 W. & M. in Cam. Scacc. Intr. in B. R. Mich. 1 Jac. 2. Rot. 166.

(3) Lying in Prison upon arrest is an Act of Bankrupcy. Otherwise if he put in Bail. Vide infra Pl. 7. . . . . contrà.

INdebitatus, for Money had and receiv'd to his Use; on a special Verdict the Case was, H. being a Silk-man owed B. 100 l. and to C. 50 l. B. arrests him for the 100 l. in the Sheriffs Court and had Bail: After that, viz. within a Month, H. pays off C. and after that rendered himself in discharge of his Bail in B's. Action. And Note, 21 Jac. 1. c. 19. says, He shall be a Bankrupt from the time of the first Arrest Et per Cur. That is and must be taken from the time of the first Arrest, upon which he lies in Prison, not where he puts in sufficient Bail, for that might be infinitely prejudicial and mischievous; and no Man could ever safely pay or receive from a Tradesman. Adjudged in B. R. and affirmed in Error in Cam. Scacc.

## Newton *versus* Trigg. Trin. 3 W. & M. B. R. Intr. Mich. 1 Jac. 2. Rot. 226.

(4) Innkeeper not within the Statutes about Bankrupts.

AN Innkeeper being also Part-owner of a Ship, and having 51 l. Stock in the Ship, absconded: Eyre Justice held, as to the Share of the Ship that that was nothing; for that it is not a Stock in Potentia to Trade with, that will make a Bankrupt; but there must be a trading therewith in Facto. And he held that an Innkeeper could not be a Bankrupt, for he is not like a Trader; he must receive all Comers, and feed them and lodge them, taking a reasonable Rate, which if he do not, he is Indictable. Holt J. C. concurred, and that he is not taken notice

 of

of in Law, as a Trader, but as an Host, Hospitator; and he is paid not meerly for his Provisions, but also for his Care, Pains, Protection and Security; and he buys Meat and Drink, not for sale or trading, but for Accommodation. And an Innkeeper cannot make a Contract ad libitum; nor does he buy to sell at large, but to Guest only: And the Chief Justice held, That where-ever a Man buys and sells under a particular Restraint and Limitation, he is not a seller within the Statute, as a Commissioner of the Navy, and so of a Farmer. Vide Shower's Reports, 3 Mod. 326.

Buying and selling under a particular Restraint is not within the Statute.

## Bird *versus* Sedgwick. Pas. 5 W. & M. B. R.

(5) An English Subject trading from Foreign Parts hither, may be a Bankrupt.

A Gentleman of the Temple went from thence to Lisbon, where he turned Factor, and traded to England, and broke: Blencowe argued that the Statutes about Bankrupts do not extend to Persons out of the Realm; The subject of them is Cases of Arrests, Outlawries and departing out of the Realm; and the 21 Jac. 1. which extends to Aliens, is only Aliens resident here; Yet the Court held him a Bankrupt, by reason of his trading hither and back again, which gained him a Credit here. Per Cur. on a Trial at Bar.

## Hopkins *versus* Ellis. Trin. 2 Ann. coram Holt *C. J.* *At* Nisi prius *at* Guild-hall.

(6) Plain Act of Bankrupcy cannot be purged by dealing afterwards; Otherwise if doubtful only.

UPON an Issue directed out of Chancery, whether Bankrupt or not at such a time, it was held per Holt C. J. That if H. commits a plain Act of Bankrupcy, as keeping House, &c. tho' he after goes abroad and is a great Dealer, Yet that will not purge the first Act of Bankrupcy, but he will still remain a Bankrupt; But if the Act was not plain but doubtful, then going abroad and dealing, &c. will be an Evidence to explain the Intent of the first Act; for if it was not done to defraud Creditors and keep out of the way, it will not be an Act of Bankrupcy within the Statute: Also if after a plain Act of Bankrupcy he pays off or compounds with all his Creditors, he is become a new Man.

## Smith *versus* Stracy. Trin 2 Ann. coram Holt *C. J.* *At* Nisi prius *at* Guild-hall.

(7)

IN Trover the Case was; J. S. was arrested at the Suit of H. and put in Bail; afterwards upon a Scire facias at another's Suit, his Goods were sold to the Plaintiff; after this J. S. renders

ders himself in discharge of his Bail and goes to Prison. And Holt C. J. inclined (contrary to the Case of Duncomb and Walter in 3 Lev. 57. wherein he was of Counsel but not satisfied with the Judgment.) That J. S. was a Bankrupt from the time of the Arrest, not from the Render only; for if H. is arrested at the Suit of A. and puts in Bail, and that pending, is after arrested at the Suit of B. and goes to Prison and lies two Months, he is by the Act of Parliament Bankrupt from the time of the first Arrest by A. But it appearing in this Case that the Commission was taken out before the two Months were expired from the Render, it was held to be ill taken out, J. S. not being then a Bankrupt. And thereupon the Plaintiff had a Verdict.

If Defendant renders in discharge of his Bail, and lies two Months, he is a Bankrupt from the Arrest. Q. & vide supra pl. 3.

## Kiggil *versus* Player. Pas. 7 Ann. B. R.

(8) Assignee has the Property by relation from the time of the Bankrupcy, so as to avoid all Mesne Acts. V. 2. Ro. 554.

Assignee of Commissioners of Bankrupcy brought Trover on their own Possession, ut de bonis suis propriis; and that they came to the Hands of the Defendant and he converted them: And upon Evidence it appeared the Conversion was by executing a Fieri facias on the Goods in the Declaration, after the Bankrupcy, and before the Assignment, and it was not proved that the Plaintiff had demanded them; and this being made a Case, it was argued, That by Assignment the Assignee had a Property by relation from the very time of the Bankrupcy, and there was no mesne interval of time; as where one takes out Letters of Administration, he has a Property from the Death of the Intestate, and may declare generally ut de bonis suis propriis, even before an Administration sued out: But Holt denied this, and said, he ought to declare specially, and so the Plaintiff might have done in the principal Case, and he relied upon the Case of Perry and Bowyer; and said the Assignee was in by relation from the time of Bankrupcy, so as to avoid all mesne Acts, but not so as to be actually invested with the very Property. Adjournat.

## *Resolutions of the Judges upon the Statute* 4 *and* 5 Ann. c. 17. *in* Serjeant's-Inn *in* Chancery-lane, Dec. 3. 1706.

1st, THAT the first Clause of the Act extends only to such as shall first become Bankrupts after the 24th Day of June, 1706. who are understood to be those against whom no Commission of Bankrupcy was sued out before that time: And if the Certificate of the Commissioners do not mention the Party to have first become a Bankrupt after that time, it ought to be disallow'd for that Cause: But it is however thought fit and agreed, that before the Certificate be disallowed, some Proof be made

Resolutions of the Judges upon the Statute 4 and 5 Annæ against Frauds committed by Bankrupts

made by the Creditors of the Party's being a Bankrupt before that time.

2dly, That there ought to be a Certificate of the Allowance or Disallowance made upon the Reference, and that remitted to the Lord Keeper.

3dly, That the Act having impowered the Judges to determine prout, &c. there is by Implication a Power given them, to examine Witnesses vivâ voce, and that the said Method be taken where Witnesses are to be had; But where there are no Witnesses, that the Copies of Affidavits filed in Chancery and sworn before a Master extraordinary, be received and read; and that Affidavits taken before the Judges to whom the matter is refer'd, may be read.

4thly, That the Judges make out Summons for Witnesses.

5thly, That the second Clause in the Act extends to those that were Bankrupts before the 10th of March, 1705. against whom there were Commissions then sued out and subsisting; If the Matters were determined and Commission closed, or if superseded or repealed, or Commissioners all dead, unless the same were renewed or revived or Procedendo's in reasonable time, viz. within half a Year at least, then not within this Clause, and the Certificate to be disallowed.

# Bargain and Sale of Goods.

## Callonell *versus* Briggs. Trin. 2 Ann. coram Holt *C. J.* *At* Nisi prius *at* Guild-hall.

(1) Where one thing is to be the Consideration of the other, tho' there be mutual Promises, Performance must be averr'd.

AN Agreement was, that the Defendant should pay so much Money six Months after the Bargain, the Plaintiff transferring Stock. The Plaintiff at the same time gave a Note to the Defendant to transfer the Stock, the Defendant paying, &c. Et per Holt C. J. If either Party would sue upon this Agreement, the Plaintiff, for not paying, or the Defendant for not transferring, the one must averr and prove a Transfer or a Tender, and the other a Payment or a Tender; for transferring in the first Bargain, was a Condition precedent;

 and

and tho' there be mutual Promises, yet if one thing be the Consideration of the other, there a Performance is necessary to be averred, unless a certain Day be appointed for Performance: 1 Saund. 319. If I sell you my Horse for 10 l. if you will have the Horse, I must have the Money, or, if I will have the Money, you must have the Horse; therefore he obliged the Plaintiff either to prove a Transfer, or a Tender and Refusal within the six Months.

Langfort *versus Administratrix of* Tiler. Pas. 3 Ann. coram Holt *C. J. At* Nisi prius *at* Guild-hall.

(2) Earnest only binds the Bargain, and on default in the Vendee, Vendor may sell to another.

THE Defendant who was Administratrix to her late Husband, used to deal in Tea in his Life-time, and bought four Tubs of the Plaintiff at so much per Tub, one of which she paid for and took away, leaving 50 l. in Earnest for the other three; And Holt C. J. ruled. 1st, That the Husband was liable upon the Wife's Contract, because they co-habited. 2dly, That notwithstanding the Earnest, the Money must be paid upon fetching away the Goods, because no other time for Payment is appointed. 3dly, That Earnest only binds the Bargain, and gives the Party a Right to demand; but then a Demand without the Payment of the Money is void. 4thly, That after Earnest given, the Vendor cannot sell the Goods to another, without a default in the Vendee; and therefore if the Vendee does not come and pay and take the Goods, the Vendor ought to go and request him; and then if he does not come and pay, and take away the Goods in convenient time, the Agreement is dissolved, and he is at Liberty to sell them to any other Person.

# BARON and FEME.

## Nelthrop & Ux. *versus* Anderson. Mich. 4 W. & M. B. R.

(1) Trover by Baron and Feme ad dampnum of both, naught after Verdict.

TRover by Baron and Feme, and the Plaintiffs declare quod cum Possessionat. fuerunt, &c. the Defendant converted ad dampnum ipsorum; held naught after Verdict; for the Possession of the Wife is the Possession of her Husband, and so is the Property; so that the Conversion cannot be to the damage of the Wife, but of the Husband only.

## Buckley *versus* Collier. Mich. 4. W. & M. B.R. Rot. 20.

(2) Baron must bring Action alone for Work done by the Wife during the Coverture, unless there be an express Promise to the Wife.

BAron and Feme declared, That the Defendant being indebted to them for Work done by the Wife, in making him a Peruke, he promised to pay and had not paid, ad dampn. ipsorum, &c. To this there was a frivolous Plea, and upon that a Demurrer. The Plaintiff cited, 2 Cro. 205. 3 Cro. 61, 96. 1 Cro. 438. But relied principally upon Burchet's Case. Per Cur. Burchet's Case differs; there was an express Promise to the Wife, and to that the Husband assented by bringing an Action thereupon: But here is no express Promise laid to the Wife; here is nothing but the Promise in Law, and that must be to the Husband, who must have the Fruits of his Wife's Labour, for which he may bring a quantum meruit: Also the Advantage of the Wife's Work shall not survive to the Wife, but go to the Executors of the Husband; for if the Wife dies, her Debts fall upon the Husband; and therefore so shall the Profits of her Trade to the Husband's Executors. But this must be intended of Work done during the Coverture, and not after. Judgment pro Def.

(3) If H. be in Custody, a Declaration cannot be delivered against him and his Wife, but process must be sued out, and Wife arrested.

## Carpenter *versus* Faustin. Hill. 7 Will III. B. R.

ACtion was brought against Baron and Feme for a Battery done by the Wife; the Husband was a Prisoner in the King's Bench before the Action brought, and the Plaintiff delivered a Declaration to the Turnkey of the Prison against Husband

band and Wife for this Battery; and upon Rules given to plead, Judgment was entered by Nil dicit against both, and the Wife taken in Execution. Sir Bartholomew Shower moved that this was irregular; for upon delivery of the Declaration, the Husband should have filed Common Bail for him and his Wife; or should have made an Attorney for him and his Wife, who should have appeared for them: Et per Holt C. J. The Plaintiff ought to have sued out Process against Husband and Wife, and the Sheriff should have returned a non est inventus for the Husband, and a Cepi corpus for the Wife; and then upon Common Bail filed for her, there might be Judgment against both: It was objected, If there be Process against Baron and Feme, and non est Inventus for the Baron, and a Cepi as to the Feme, she shall be discharged. Vide 2 Cro. 445. To which Holt answered, No; she shall not be discharged but upon Common Bail, and then new Process shall go against the Baron with an idem dies given to the Wife. Vide 1 Mod. 8. accord. And because no Bail was entered for the Wife the Judgment was set aside. Postea Hill. 8 W. B. R. In another Case Holt C. J. held, If an Action be brought against Husband and Wife, and the Husband is arrested, he shall give a Bail-Bond for the Appearance of him and his Wife, and must put in Bail for both; But if one bring an Action against the Husband only, he cannot declare against Husband and Wife.

In Actions against Baron and Feme, Baron shall give a Bail-Bond or file Bail for both.

## Chamberlain *versus* Hewson. Hill. 7 Will. III. B. R.

(4)

Husband may release Costs adjudg'd to the Wife in the Spiritual Court, unless there be a separation and Alimony allow'd.

MRS. Hewson the Wife of Colonel Hewson, sued Mrs. Chamberlain in the Spiritual Court for adultery with her Husband, and obtained a Sentence against her and Costs; Colonel Hewson released these Costs to Mrs. Chamberlain, notwithstanding which, Mrs. Hewson prosecuted her in Court Christian for the Costs; Upon which it was moved here for a Prohibition. And it was urged contrà, That the principal Matter was of Ecclesiastical Conuzance, and that they ought not to be hindered to determine a Matter which is incident and necessary. Et per Holt C. J. If a Feme Covert sue another in the Spiritual Court for Incontinence with her Husband and recover 10 l. Costs, and the Husband release them, she is by this barred: So it is if Husband and Wife be divorced à Mensa & thoro, and a Legacy is left to the Wife and the Husband release it, she is thereby barred; for the Marriage continues, and the Husband hath all her Right; but if the Husband and Wife be divorced à Mensa & thoro, and the Wife has her Alimony and sues for Defamation or other Injury, and there has Costs, and the Husband releases them, this shall not bar the Wife, for these Costs come in lieu of what she hath

Q 2 spent

spent out of her Alimony, which is a separate Maintenance, and not in the Power of her Husband.

## Deerly *versus the Dutchess of* Mazarine. Hill. 8 Will. III. B. R.

(5) Divorce intended.

ASsumpsit for Wages and Money lent, on non Assumpsit the Defendant proved she was married, and her Husband alive in France: The Jury found for the Plaintiff, upon which, as a Verdict against Evidence, she moved for a new Trial, but 'twas denied; for it shall be intended she was divorced: Besides the Husband is an Alien Enemy, and in that Case why is not his Wife chargeable as a Feme sole, as much as if he had abjured or been banished? Which was the Case of the Lady Belknap and Weyland. Co. Lit. 132. b. 133. a.

## Todd *versus* Stoakes. Mich. 8 W. 3. coram Holt *C. J.* *At* Nisi prius *at* Guild-hall.

(6) Wife cannot charge her Husband, after notorious separation by consent, with separate Allowance.

THE Plaintiff was an Apothecary, and served the Defendant's Wife with Physick, who lived separate from her Husband, and had a separate Allowance of 20 l. per Annum: Et per Holt C. J. If Baron and Feme separate by consent, and she has a separate Allowance, 'tis unreasonable she should have it still in her Power to charge him; and it is not to be presumed, but Tradesmen that deal with her trust her on her own Credit, and not on the Credit of her Husband, and a personal Notice is not necessary; 'tis sufficient that it be publick and commonly known.

## Woodyer *versus* Gresham. Mich. 9 Will. III. B. R.

(7) Scire facias by Baron and Feme upon a Judgment recover'd by the Feme, while sole, and after Execution awarded Feme dies, it survives to the Husband. Vide 3 Mod. 186.

JUdgment was recovered by a Feme sole, who after married, and her Husband and she sued a Scire facias, and had an Award of Execution, but before Execution executed the Wife died: The Husband sued out a new Scire facias, to which it was demurred: Shower objected, that the Award on the first Scire facias made no alteration, for the Execution still must be grounded on the first Judgment and not upon the Award, and that this being a Chose en Action must go to the Administrator of the Wife, and not the surviving Husband. Et per Holt C. J. This Case differs not from the Case of Obrian and Ram, which was in this Court, Mich. 3 Jac. 2. Rot. 192. Judgment was recovered against a Feme sole, who after married; a Scire facias was sued out against the Husband and Wife, and Judgment quod habeat ex-

ecutionem suam against Husband and Wife, de debito & dampnis prædict. After this Award and before Execution executed, the Wife died, and after her death a new Scire facias was issued against the Husband, and he was held chargeable; which proves that the Award or Judgment quod fiat Executio on the Scire facias, makes a plain alteration; for the Husband surviving, had not been liable upon the first Judgment only: By the same reason, the Award upon the Scire facias is attached in the Husband and shall survive, for it is but equal the Husband should charge in the same measure he may be charged.

## Yard *versus* Ellard. Mich. 10 Will. III. B. R.

(8) Husband of Feme Executrix gives a new Day to Debtor of the Testator, who makes a new Promise, Husband may bring the Action without joining the Wife.

ASsumpsit; quod cum Defendens Indebitatus fuisset Uxori ipsius, Quer. ut Executrici A. in decem libris pro arreragiis redditus, & in Consideratione quod ipse querens concessisset ei ulteriorem diem pro solutione inde, idem Defendens præd. querenti promisisset solvere dictas decem libras, &c. Verdict on non Assumpsit pro Quer. And now it was objected that the Wife was not joined, and that she is an Executrix and may survive, and the Money will be Assets, and her Life must be averred. Vide Yelv. 84. Et per Cur. That is true; And farther, if before Recovery the Husband had died, she had been restored to her Action for the Arrears, for that Duty was not extinguished by the new Promise: On the other Side, if the Wife had died, the Husband could not have sued, which is the reason her Life must be averred; but notwithstanding all this, the Action is well brought without joining the Wife, because she was not privy to this Contract, and the Husband was to receive the Money and might release it, the Administration being devolved on him; And the Recovery of the Husband will amount to a Devastavit, because his Executor will be entitled to sue out Execution, and so it differs from a Judgment where the Action is brought in the Name of the Husband and Wife.

## Anonymus. Hill. 1 Ann. B. R.

(9) Marriage revokes a Warrant of Attorney given to confess Judgment against Feme; Aliter if to her.

WArrant of Attorney was given to confess Judgment to a Feme sole who afterwards married. In this Case the Court gave leave notwithstanding the Marriage to enter Judgment, For that the Authority shall not be deemed to be revoked or countermanded, because it is for the Husband's Advantage; like a Grant of a Reversion to a Feme sole who marries before Attornment: yet the Tenant may attorn afterwards; Aliter, if a Feme sole gives a Warrant of Attorney and marries; for that is to charge the Husband. Ex Motione Mr. King.

Ether-

## Etherington *versus* Parrot. Pas. 2 Ann. Coram Holt *C. J. At* Nisi prius *at* Guild-hall.

(10) Wife's Contracts bind the Husband from his presumed Assent only; not where he expresly dissents before-hand.

IN Case for Goods sold and delivered, the Evidence to charge the Defendant was, that the Defendant's Wife bought the Goods to make her Clothes, and that they co-habited; On the other Side it was proved she was very Extravagant, and used to pawn her Clothes for Money, and get Drink with the Money: That she had pawned one Suit that cost 7 l. for 20 s. and being redeemed by the Husband, pawned them again for less; and that she needed no Clothes when she bought these, and that the Defendant the last time he payed the Plaintiff, warned the Plaintiff's Servant not to trust her any more, and to give his Master notice of it. Et per Holt C. J.

If a Husband turns away his Wife, he gives her Credit where-ever she goes, and must pay for Necessaries for her.

But if she runs away from her Husband, he shall not be bound by any Contract she makes.

On the other Side, while they Cohabit, the Husband shall answer all Contracts of hers for Necessaries; for his Assent shall be presumed to all necessary Contracts, upon the account of Cohabiting, unless the contrary appear.

But if the contrary appear, as by the warning in this Case, there is no room for such a Presumption. And there was no necessity in this Case; and notice to the Servant was sufficient.

If a Woman takes up Materials and pawns them before they are made into Clothes, Husband is not liable.

Also the Chief Justice said, That if a Woman takes up Goods, as Silk for the purpose, and pawns them before they are made into Clothes, the Husband shall not pay for them; because they never came to his Use: Otherwise if made up and worn, and then pawned.

## Warr *versus* Huntly. Pas. 2 Ann. Coram Holt *C J. At* Nisi prius *in* Middlesex.

(11) Money earn'd by the Wife living separate, shall go towards her Maintenance.

THE Case was, An ordinary working-man married a Woman of the like Condition; and after Co-habitation for some time the Husband left her, and during his absence, the Wife worked, and this Action being brought for her Dyet, 'twas held, that the Money she earned should go to keep her.

## Russell & Ux. *versus* Corne. Hill. 2 Ann. B. R.

(12) Imprisonment of Wife per quod negotia of the Husband infecta remanser. ad dampnum of both held well after Verdict. Matter may be laid by way of aggravation, for which no Action will lie.

TRespass and false Imprisonment, by Baron and Feme, per quod negotia domestica of the Husband remanserunt infecta ad grave dampnum ipsorum. After Verdict for the Plaintiffs, it was objected in Arrest of Judgment, That here being a special Damage laid to the Husband, the Action should have been brought by him alone. But it was held good, because matter may be laid for aggravation of Damages, for which no Action would lie; as breaking his House and beating his Daughter; and yet Trespass will not lie for beating his Daughter. And the Plaintiff had Judgment.

## Robinson *versus* Greinold. Pas. 3 Ann. Coram Holt *C. J. At* Nisi prius *at* Guild-hall.

(13) Husband not liable for Necessaries of the Wife after Elopement notorious, unless he takes her again.

THO' the Wife be ever so lewd, yet while she cohabits with her Husband, he is bound to find her Necessaries and pay for them; for he took her for better for worse; So if he runs away from her, or turns her away: But if she goes away from him, when such separation becomes notorious, whoever gives her Credit, does it at his Peril; for the Husband is not liable, unless he takes her again; for then it is as if a Woman had eloped at Common Law, she thereby lost her Dower; but if she came again, and the Husband received her, the Right of Dower is revived.

## Haydon *versus* Gould 4 Julii, 9 Ann. *At the Court of Delegates in* Serjeant's-inn Fleet-street.

(14) Marriage by a mere Layman and Cohabitation, will not intitle the Man to Administration to the Woman. Q. As to the Woman and Issue?

ONE had Issue three Daughters. Margaret married to Richard Gould; Elizabeth who married Franklin; and Rebecca who married Haydon; Rebecca deposited 180 l. in the Hands of Gould, and took his Bond payable to Franklin for her use; Rebecca died, and Haydon her Husband took Administration: And now Richard Gould and his Wife sued a Repeal upon this Suggestion, That Rebecca and Haydon were never married, and it appeared in Fact that they were Sabbatarians, and married by one of their Ministers in a Sabbatarian Congregation, and that they used the Form of the Common-Prayer except the Ring; and that they lived together as Man and Wife as long as the Woman lived, viz. seven Years: On the other Hand it appeared, That the Minister was a mere Lay-man and not in Orders; Upon which the Letters of Administration were repealed,

and new Administration granted to Margaret Gould, &c. And now that Sentence upon an Appeal was affirmed by the Delegates; for Haydon demanding a Right due to him as Husband, by the Ecclesiastical Law, must prove himself a Husband according to that Law, to intitle himself in this Case; And tho' perhaps it should be so, that the Wife who is the weaker Sex, or the Issue of this Marriage who are in no fault, might intitle themselves by such Marriage to a temporal Right, yet the Husband himself who is in fault, shall never intitle himself by the mere Reputation of a Marriage, without Right. In this Case it was urged, That this Marriage was not a mere Nullity, because by the Law of Nature the Contract was sufficient; And tho' the positive Law ordains that Marriage shall be by a Priest, yet that makes such a Marriage as this Irregular only, but not void; unless the positive Law had gone on and ordained it expresly to be so. Vide Mo. 169. 170. Bract. lib. 4. c. 8, 9. 3 Ja. 1. c. 5, 13. But the Court ruled ut supra: And a Case was cited out of Swinb. where such a Marriage was ruled void; And an Act of Parliament was made to confirm the Marriages contracted during the Usurpation, viz. 13 Car. 2. c. 35. and the constant form of pleading Marriage is, that it was per Presbyterum Sacris Ordinibus constitutum.

# BASTARD.

## Pride *versus the Earls of* Bath *and* Montague. Hill. 6 Will. III. B. R.

(1) The Rule that H. shall not be bastardiz'd after his Death holds only in the Case of Bastard eigne & Mulier puisne 3 Lev. 340.

Ejectment by Pride against the Earls of Bath and Montague; Pride the Plaintiff made Title, as Heir to George Duke of Albemarle, proving himself the Son of one, who was Brother to the Duke, and that the Duke died without Issue. The Defendant gave Evidence, that Duke George had Issue Duke Christopher, who conveyed to him: Plaintiff gave Evidence that Duke Christopher was a Bastard, begotten of such a Woman, who at the time of her Marriage with the said George Duke of Albemarle, was married to another Man, who was then and yet living. Upon this it was objected, that since

since Duke George and this Woman lived together as Man and Wife, and were now dead, the Plaintiff could not be admitted to bastardize the Issue, who was dead also; and who, during his whole Life, was reputed and taken to be the legitimate Son of the Duke, and styled by the Duke himself in his Deed of Settlement, and his last Will and Testament his Son and Heir; Et quod justum non est aliquem post mortem facere bastardum. The Court held this true of such a Bastard as is meant of by Litt. in his Case of Bastard eigne and mulier puisne, i. e. such a Bastard as is born before the espousals of a Father and Mother who marry afterwards; and said the Rule extended only to that Case. If H. marries a Woman and that Woman marries again, living H. the last Marriage is void without any Divorce; and the Jury shall try the Fact which proves it no Marriage: And the reason, why the Spiritual Court cannot give Sentence to annul a Marriage after the Death of the Parties, is because the Sentence is given only pro salute Animæ, and then 'tis too late.

Spiritual Court cannot give Sentence to annul Marriage after Parties are dead, because they proceed only pro salute Animæ.

## Rex *versus* Barebaker.

(2) Order to pay, &c. till the Child shall be 14 Years old, is ill.

ORder of Justices to pay so much Money by Week, till the Child is 14 Years of Age, is naught; for the Justices have no Power but to indemnify the Parish; and that is only to oblige him to maintain the Child as long as it is or may be chargeable.

## Wood's *Case*. Mich. 10 Will. III. B. R.

(3) Bastard born in B. pending an illegal Order of Removal of the Mother from A. to B. (which is after reversed) is settled in A.

A Woman big with Child was removed by Order of two Justices from A. to B. and was there brought to Bed; B. appealed, and on the Appeal, the Woman was sent back to A. Et per Curiam; So ought the Child; for all was suspended by the Appeal: And now the Mother's Right of settling upon B. is avoided ab Initio.

## Inter. Inhabitan. Paroch. Westbury & Costham. Trin. 3 Ann. B. R.

(4)

A Poor Woman with Child being unmarried, was by Order of two Justices, removed from Westbury in Wilts to Costham, and brought to Bed there. Costham appealed at the next Sessions, and the Order was reversed: Afterwards, by Order of two Justices, the Child was sent to Costham, they appealed, and the Order was confirmed. At last all was removed into B. R. Et per Cur. The Birth at Costham did not settle the Child there, because it was under an illegal Order procured by Westbury, which

Order being reversed, the matter is no more than this, that they unjustly procured the Woman to go thither.

## Regina *versus* Murrey. Mich. 3 Ann. B. R.

(5) If H. be ultra mare during the whole time of his Wife's going with Child, the Child is a Bastard; otherwise not.

UPON a special Order of Sessions the Question was, If the Husband be ultra mare, and during the time the Wife be got with Child, whether this Child be a Bastard within the 18 of Elizabeth cap. 3? Et per Cur. If the Husband was out of the four Seas during all the time of the Wife's going with Child, the Child is a Bastard; but if he were here at all within the time, it is legitimate, and no Bastard. And because it did not appear by the Order that the Husband was absent all the time, the Order was quashed.

## Regina *versus* Weston. Trin. 4 Ann. B. R.

(6) Money may be ordered to be paid to the Overseers.

Order quash'd because the Words of Adjudication were in the singular Number instead of the Plural.

By 18 Eliz. c. 3. Sessions must proceed on Recognizance. By 3 Car. 1. may commit.

THE Defendant being adjudged the Father of a Bastard by two Justices, Exception was taken to the Order. 1st, That he was ordered to pay so much weekly to the Overseers of the Poor; Sed non alloc. For as before the Institution of Overseers, the Justices might in these Cases order the Money to be paid to two or three of the Inhabitants, so now they may to the Overseers. The Second Exception was, That it was said we the said two Justices doth adjudge, &c. which is the Singular instead of do; and 1 Cro. 489. was cited to make this good. That was an Indictment on the 3 H. 7. c. 2. against Fulwood and others, quod ipsi cepit for ceperunt; but the Roll of that Case being searched, which is in Hill. 13 Car. 1. rot. 24. inter placita coron. the Indictment was ceperunt and not cepit; wherefore this Order was quashed. Note, This Cause came into Court Pas. 4 Ann. by Habeas Corpus; And the Case was that Weston had appeal'd to the Sessions where the Order was confirm'd, and he committed for not paying the Money order'd: And Mr. King took this Exception to the Return of the Habeas Corpus, viz. that the Sessions should have proceeded against him upon his Recognizance. Et per Holt C. J. If they proceed on the 18 Eliz. the Sessions has no Power to commit, but to proceed on his Recognizance: But if on the 3 Ca. 1. the Sessions may commit as the two Justices might have done; that is, unless the Party put in Security to perform the Order, or to appear at the next Sessions.

## Inter *the Pariſhes of St.* George *and St.* Margaret's Weſtminſter. Mich. 5 Ann. B. R.

(7) Child begotten after Divorce à menſa & thoro, ſhall be taken to be a Baſtard; otherwiſe after voluntary Separation, unleſs found that the Huſband had no Acceſs.

UPON a ſpecial Order of Seſſions, wherein the Fact was ſtated for the Opinion of the Court, the Caſe was, That H. was divorced à menſa & thoro, and afterwards his Wife lived with one Ellis in Adultery, in the Pariſh of St. Giles, and had ſeveral Children called Ellis, and regiſtred as his. Et per Cur. When a Woman is ſeparated from her Huſband by ſuch a Divorce, the Children ſhe has during the Separation, are Baſtards; for we will intend a due Obedience to the Sentence, unleſs the contrary be ſhewed; but if Baron and Feme without Sentence, part and live ſeparate, the Children ſhall be taken to be legitimate, and ſo deemed till the contrary be proved; for Acceſs ſhall be intended: But if a ſpecial Verdict find the Man had no Acceſs, it is a Baſtard; and ſo was the Opinion of my Lord Hale in the Caſe of Dickens and Collins.

## Inter *the Pariſh of* Budworth *and Townſhip of* Dumply *in* Lanc. Hill. 5 Ann. B. R.

(8)

UPON an Order made thirty Years ago, on the Pariſh of Budworth, for Maintenance of a Baſtard Child, born in the Townſhip of Nether Dumply within that Pariſh, which Order was now removed before the Court by Certiorari, It was held,

Order for Maintenance does not determine the Settlement of a Baſtard.

1ſt, That an Order made upon the Overſeers of any Pariſh by two Juſtices, for raiſing a Sum towards the Maintenance of a Baſtard or poor Perſon, does not determine the Settlement of that Perſon in that Pariſh; for the Right of Settlement is not conteſted but preſumed.

Statute 13 and 14 Car. 2. c. 12. §. 21. relates only to Maintenance of Poor, not Baſtards.

2dly, That the Clauſe in the Statute of the 13 and 14 Car. 2. c. 12. which provides that diſtinct Townſhips of large Pariſhes in the Northern Countries, ſhall reſpectively provide for their Poor, under the Penalty mentioned in the 43 Eliz. c. 2. muſt be underſtood with reſpect to the Maintenance of poor and impotent Perſons, and not with reſpect to Baſtards who are provided for by other Statutes: But if a Baſtard be grown up, and by accident grow impotent, he may be relieved as a poor Perſon within that Statute.

Regina *versus* Odam. Mich. 12 Ann. B. R.

(9) Justices may order Payment of a Sum in gross.

ORder for Maintenance of a Bastard Child was excepted to by Mr. Page. Because the Defendant is upon sight of the Order to pay 9 l. in Gross, and after that so much weekly. Et per Cur. By the Statute the Justices are to take Order for Relief of the Parish, and Keeping of the Child, by payment of Money weekly, or other Sustentation; and this may be only indemnifying the Parish for Money laid out before the reputed Father was found.

# BILLS of EXCHANGE.

Clark *versus* Mundall. 3 W. & M. Coram Holt *C. J.* *At* Nisi prius *at* Guild-hall.

(1) A. gives to B. a Bill of Exchange on C. in Payment of a former Debt. Not allow'd as Evidence on non Assumpsit, unless paid.

A Having a Bill of Exchange payable to him, and he being indebted to B. in a Sum of Money, sends and indorses this Bill to B. Afterwards B. brought Assumpsit against A. for the Money, and on non Assumpsit, A. gave in Evidence this Bill of Exchange indorsed, and that it had lain so long in B's Hands after it was payable, and reckoned it as Money paid and in his Hands, but it was disallowed; for a Bill shall never go in discharge of a precedent Debt, except it be part of the Contract that it should be so. If A. sells Goods to B. and B. is to give a Bill in satisfaction, B. is discharged tho' the Bill is never paid, for the Bill is Payment: But otherwise, a Bill should never discharge a precedent Debt or Contract; but if part be receiv'd it shall be only a discharge of the old Debt for so much.

Hodges

## Hodges *versus* Steward. Pas. 5 W. & M. B. R.

IN an Action on the case on an inland Bill of Exchange brought by the Indorsee against the Drawer, these following Points were resolved.

1st, A difference was taken between a Bill payable to J. S. or Bearer, and J. S. or Order; for a Bill payable to J. S. or Bearer, is not assignable by the Contract, so as to enable the Indorsee to bring an Action if the Drawer refuse to pay, because there is no such Authority given to the Party by the first Contract, and the effect of it is only to discharge the Drawee, if he pays it to the Bearer, tho' he comes to it by Trover, Theft, or otherwise: But when the Bill is payable to J. S. or Order, there an express Power is given to the Party to assign, and the Indorsee may maintain an Action.

(2) Bill payable to H. or Bearer is not assignable to charge the Drawer.

2dly, Tho' an Assignment of a Bill payable to J. S. or Bearer, be no good Assignment to charge the Drawer with an Action on the Bill; yet it is a good Bill between the Indorsor and Indorsee, and the Indorsor is liable to an Action for the Money; for the Indorsement is in nature of a new Bill.

But such Assignment charges the Indorsor.

3dly, It being objected, That in this Case, there was no Averment of the Defendant's being a Merchant, It was answered by the Court, that the drawing the Bill was a sufficient merchandizing and negotiating to this purpose.

Drawing a Bill makes a Merchant to that purpose.

4thly, The Plaintiff declared on a special Custom in London, for the Bearer to have this Action. To which the Defendant demurred, without traversing the Custom; so that he confessed it, whereas in truth, there was no such Custom; and the Court was of Opinion that for this reason, Judgment should be given for the Plaintiff; for tho' the Court is to take notice of the Law of Merchants, as part of the Law of England; yet they cannot take notice of the Custom of particular Places; and the Custom in the Declaration being sufficient to maintain the Action, and that being confessed, he has admitted Judgment against himself.

5thly, 'Twas held that a general Indebitatus Assumpsit will not lie on a Bill of Exchange for want of a Consideration, for it is but an Evidence of a Promise to pay, which is but a Nudum pactum; and therefore he must either bring a Special Action on the Custom of Merchants, or else a general Indebitatus against the Drawer for Money receiv'd to his Use. Judgment pro Quer.

General Indebitatus will not lie on a Bill of Exchange.

Pinkney

## Pinkney *versus* Hall. Hill. 8 Will. III. B. R.

(3) Acceptance of Bill upon two Partners by one, binds both, if it concerns the Joint-trade.

BY the Custom of England where there are two joint Traders and one accepts a Bill drawn on both for him and Partner, it binds both, if it concerns the Trade; otherwise if it concerns the Acceptor only in a distinct Interest and Respect.

## Clark *versus* Pigot. Pas. 10 Will. III. B. R.

(4) Blank Indorsement, does not actually transfer the Property without some further Act.

CLARK having a Bill of Exchange payable to him or Order, puts his Name upon it, leaving a vacant space above, and sends it to J. S. his Friend, who got it accepted; but the Money not being paid, Clark brought an Indebitatus Assumpsit against the Acceptor: And it was objected on Evidence, that the Property was transferred to J. S. Et per Holt C. J. J. S. had it in his Power to act either as Servant or Assignee: If he had filled up the blank Space making the Bill payable to him, that would have witnessed his Election to have received it as Indorsee; but that being omitted, his Intention is presumed to act only as Servant to Clark, whose Name he would use only in order to write the Acquittance over it.

## Anonymus. Mich. 10 Will. III. Coram Holt *C. J. At* Nisi prius *at* Guild-hall.

(5) Trover for a Bank Bill will lie against a Person finding it, but not against his Assignee.

A Bank Bill payable to A. or Bearer, being given to A. and lost, was found by a Stranger, who transferr'd it to C. for a valuable Consideration; C. got a new Bill in his own Name, Et per Holt C. J. A. may have Trover against the Stranger who found the Bill, for he had no Title, tho' the Payment to him would have indemnified the Bank; but A. cannot maintain Trover against C. by reason of the Course of Trade, which creates a Property in the Assignee or Bearer.

## Anonymus. Mich. 10 Will. III. Coram Holt *C. J. At* Nisi prius *at* Guild-hall.

(6) Indorsor is liable only in default of Drawer. Vide Infrà Harry *versus* Perritt contrà

A Bill of Exchange being made payable to A. or Order, A. indorses it to B. B. cannot sue A. unless he first endeavour to find out the first Drawer to demand it of him; for the Indorsor is only a Warrantor for the Payment of the Drawer, and therefore liable only on his default; and such endeavour must be set forth in the Declaration.

## Allen *versus* Dockwra Mich. 10 Will. III. Coram Treby *C. J. At* Nisi prius *a* Guild-hall.

A Bill was drawn on Sutor payable in three Days; Sutor broke, the Person to whom it was payable kept the Bill by him four Years, and then brought Assumpsit against the Drawer: Et per Treby C. J. When one draws a Bill of Exchange, he subjects himself to the Payment, if the Person on whom it was drawn refuses either to accept or pay: Yet that is with this Limitation, that if the Bill be not paid in convenient time, the Person to whom it is payable shall give the Drawer notice thereof; for otherwise the Law will imply the Bill paid, because there is a Trust between the Parties, and it may be prejudicial to Commerce, if a Bill may rise up to charge the Drawer at any distance of time; when in the mean time all Reckonings and Accounts are adjusted between the Drawer and Drawee.

(7) At Common Law Drawer was not chargeable unless he had notice of Drawee's Non-payment in convenient time.

## Jackson *versus* Pigot. 10 Will. III B. R.

THE Plaintiff declared on a Bill of Exchange drawn by J. S. on the Defendant, dated the 25th of March, 1696. payable a Month after Sight, and that postea scilt. 27th of April, 1697. he shewed it to the Defendant, and he promised to pay it secundum tenorem billæ præd. After Verdict for the Plaintiff on non Assumpsit, it was moved in Arrest of Judgment that this manner of declaring was absurd, it being impossible to pay secundum tenorem billæ at the time of the Promise. Et per Cur. Where the time of Payment is past at the Acceptance of the Bill, the Acceptance can be only to pay the Money; and if he was so absurd as to promise to pay the Money secundum tenorem billæ; yet that is no more in Law now, than a Promise to pay the Money generally. But it is better to declare in such Case on a general Promise to pay the Money. Per Holt C. J.

(8) Promise to pay secundum tenor. billæ after the Day past.

## Lambert *versus* Pack. Paf. 11 Will. III. Coram Holt *C. J. At* Nisi prius *in* London.

AN Action on the Case was brought on a Bill of Exchange against the Indorsee, and it was ruled by Holt C. J. upon Evidence. 1st, That there is no need to prove the Drawer's Hand, because, tho' it be a forged Bill, the Indorsor is bound to pay it. 2dly, The Plaintiff must prove that he demanded it of the Drawer, or him upon whom it was drawn, and that he refus'd to pay it, or else that he sought him and could not find him; for otherwise he

(9) What things are necessary to be proved to charge Indorsor of a Bill of Exchange in an Action by the Indorsee.

he cannot resort to the Indorsor. 3dly, That this was done in convenient time; for if they stand and are responsible a convenient time after the Assignment and no Demand made, the Indorsee shall not charge the Indorsor. The time for foreign Bills is three Days, and no Allowance is to be made for Sundays and Holydays: Serjeant Wright cited a Case of one Tracy, who stood a Week after the Indorsement, and the Indorsee lost his Money; which Holt C. J. thought was to strait; but such Matters must be left to the Jury. 4thly, It is a Question whether notice must be given, or no; but 'tis fair to give notice. 5thly, That the demand must be proved subsequent to the Indorsement; for if it was precedent, he could only act as Servant to the Indorsor; and so the Demand was insufficient to charge the Indorsor. 6thly, If a Man indorses his Name upon the back of a Bill Blank, he puts it in the Power of the Indorsee to make what use of it he will, and he may use it as an Acquittance to discharge the Bill, or as an Assignment to charge the Indorsor. 7thly, In Cases of Bills purchased at a discount, this is the difference; If it be a Bill payable to A. or Bearer, 'tis an absolute Purchase; but if to A. or Order, and it is indorsed Blank, and filled up with an Assignment, the Indorsor must warrant it as much, as if there had been no discount.

If a Bill be endorsed with the Name only, it may be filled up by the Indorsee with an Assignment to charge the Indorsor, or an Acquittance. So it is tho' purchased at discount.

## Starky *versus* Cheeseman. Mich. 11 Will. III. B R.

(10) Declaration against Drawer is good without laying an express Promise.

PLaintiff declared on a Bill of Exchange against the Drawer, shewing that the Party on whom it was drawn, refused to pay it, per quod onerabilis devenit, &c. but laid no express Promise: He also laid an Indebitatus Assumpsit and a quantum meruit. There was Judgment by default and a Writ of Enquiry, and now Carthew moved in Arrest of Judgment, that he has set forth the Custom, but has not declared on an express Promise; And he argued that it is not enough to set forth a Contract for Goods, ratione cujus the Defendant became indebted, &c. nor a Submission to an Award, ratione, &c. And that without alledging an express Promise, it must be taken for a mere Action of Deceit upon the Warranty, to which the proper Answer is non Cul. and then it cannot be joined with the Indebitatus Assumpsit and quantum meruit. Vide Hard. 486. Hob. 180. 2 Keb. 695. Win. 24. 1 Cro. 302. 1 Ro. 302. 2 Cro. 306. 2 Ro. 366. 1 Keb. 878. 1 Sid. 160. Northey answered, that it was sufficient to count upon the Custom; because the Custom makes both the Obligation and the Promise. And Holt C. J. held the drawing of the Bill was an actual Promise; and Judgment was given pro Quer.

## Mitford *versus* Wallicot. 12 Will. III. B. R.

(11) Acceptance after the time of Payment elapsed is good, and Amounts to a Promise to pay the Money generally.

THE Plaintiff declared on a Bill of Exchange dated the 28th of October, payable at double Usance; and that the Defendant on whom it was drawn, accepted the same the 31st of December, and promised to pay secundum tenorem billæ præd. and it was objected in Arrest of Judgment after Verdict, that there could be no Acceptance to pay secundum tenorem billæ; because the time of Payment was elapsed at the time of the Acceptance: Sed non allocatur; For if after the time of Payment is elapsed, H. accepts the Bill, the Acceptance is good; and the substance of the Promise is to pay the Money. Judicium pro Quer.

## Clerk *versus* Martin. Paſ. 1 Ann. B R.

(12) Action lay not on a promissory Note before the Statute.

A Note was given by the Defendant, whereby he promised to pay to the Plaintiff or Order, so much Money. The Plaintiff brought an Action on this Note, and declared on the Custom of Merchants; and likewise laid a general Indebitatus Assumpsit, and on the general Issue intire Damages were given. Upon Motion in Arrest of Judgment the Court held, That this is not within the Custom of Merchants, and being no Specialty no Action can be grounded on it; Then 'twas answered, that being void no Damages could be intended to be given for it: Sed non allocatur; For it is not a matter insensible; but insufficient in Law. And Judgment was arrested.

## Potter *versus* Pearson. Paſ. 1 Ann. B. R.

(13)

ERror of a Judgment in the Common Pleas on a like Note; The Plaintiff declared, that there was a Custom within London among Merchants trading there, that if a Merchant signed a Note, promising to pay to J. S. or Order, &c. that he became bound by the Custom to pay, &c. And A. Cherley would have distinguished this from the foregoing Case, being laid as a special Custom in London, and that confessed by the Judgment by Nil dicit. Sed per Holt C. J. This Custom to oblige one to pay by Note without Consideration is void and against Law. Ex nudo pacto non oritur Actio. The Judgment was reversed.

## East *versus* Essington. Mich. 1 Ann. B. R.

(14) In Declaration on a first Bill, want of Averment, that the second and third were not paid, aided after Verdict.

INdorsee declared on a Bill of Exchange against the Drawer, And the Bill was, Pray pay this my first Bill of Exchange, my second and third not being paid; And the Indorsement was set out in this manner, that the Drawee indorsavit super billam illam, content. billæ illius solvend. to the Plaintiff, without shewing that it was subscrib'd. On non Assumpsit and Verdict pro Quer. It was objected in Arrest of Judgment that there was no Averment that the second and third Bill was not paid, which is a Condition Precedent: Sed non allocatur. Et per Cur. That must be intended, for the Plaintiff could not otherwise have had a Verdict: And for the same reason also, the Indorsement which was likewise excepted against as set forth in the Declaration, was held good, being aided by the Verdict, the Court comparing it to an Action of Debt, by an Assignee of a Reversion, without shewing an Attornment, which on non debet, is aided by Verdict; for if the Indorsement be necessary to transfer the Bill, so is the Attornment to pass the Reversion. Ergò, as the Attornment shall be supplied by the Jury's finding Debet, so shall the Indorsement by their finding Assumpsit.

## Lucas *versus* Haynes. Pas. 2 Ann. B. R.

(15) Indorsement of the Name only does not transfer the Property.

IN Trover for a Bill of Exchange, the Case upon Evidence was, That the Plaintiff had a Bill of Exchange drawn upon the Defendant, and sent it by J. S. to the Defendant to get it accepted; J. S. left it with the Defendant, and afterwards the Bill being lost, the Plaintiff brought Trover for it, and J. S. was now the Plaintiff's Witness for this matter, and because the Plaintiff had indorsed the Bill, it was objected that J. S. could not be a Witness; And this point being saved, the Court were all of Opinion that the bare Indorsement, without other Words purporting an Assignment, does not work an alteration of the Property; for it may still be filled up, either with a Receipt or an Assignment, and consequently J. S. is a good Witness.

## Butler *versus* Crips. Trin. 2 Ann. B. R.

(16) Bill payable to me or order.

PER Holt C. J. Pay to me or my order so much, is a Bill of Exchange, if accepted, and this is the only way to make a Bill of Exchange without the intervention of a third Person.

Borough

## Borough *versus* Perkins. Mich. 2 Ann. B. R.

(17) In declaring upon inland Bills against the Drawer, Protest need not be set forth.

ERror of a Judgment in C. B. In case on an inland Bill of Exchange brought against the Drawer, and Judgment for the Plaintiff by Nil dicit: Mr. Raymond for the Plaintiff in Error urged, that it doth not appear by the Declaration that the Bill was protested, and since the Statute 9 and 10 W. 3. no Action lies against the Drawer unless there be a Protest made as that Act requires, and this ought to appear in the Declaration; for at Common Law the Party had no Remedy against the Drawer, without notice first given him of Non-payment. And if the Statute does not make the Protest necessary, it does nothing. Mr. Parker cont. It does not appear the Bill was accepted by under-writing, without which it is not within the Statute, and without it a Protest cannot be made; for a Protest was not necessary at Common Law in case of inland Bills, as it was in case of foreign Bills; but supposing it were within the Statute, yet the Protest need not be set forth in the Declaration, but this is to be considered at the Trial; for if the Drawer receive Damage for want of a Protest, and the Damage amounted to the Value, 'tis a total Discharge; if less, yet for so much. Holt C. J. In inland as well as foreign Bills of Exchange, the Person to whom it is payable must give convenient notice of Non-payment to the Drawer; for if by his delay the Drawer receive Prejudice, the Plaintiff shall not recover: A Protest on a foreign Bill was part of its Constitution; on inland Bills, a Protest is necessary by this Statute, but was not at Common Law; but the Statute does not take away the Plaintiff's Action for want of a Protest, nor does it make such want a Bar to the Plaintiff's Action; But this Statute seems only in case there be no Protest, to deprive the Plaintiff of Damages or Interest, and to give the Drawer a Remedy against him for Damages if he make no Protest. Quod Powell concessit, and that a Protest was never set forth in any Declaration since the Statute.

Protest was not necessary to charge the Drawer of inland Bills at Common Law.

## Buckley *versus* Cambell. Hill. 7 Ann. B. R.

(18) Usances; the time must be averr'd.

THE Plaintiff declar'd upon a Bill of Exchange drawn at Amsterdam, payable at London at two Usances, and did not shew what the two Usances were, and Judgment was given pro Def. for the Court could not take notice of foreign Usances which varied, being longer in one Place than another.

## Hill & al. *versus* Lewis.

(19) H. indorsed two Notes in Satisfaction of a Debt, and before receipt the Drawer broke. Quære, Whether the Indorsor could be charged?

ACtion upon the Case for 170 l. 10 s. The Plaintiff declared several ways, viz. 1st, Upon two Bills of Exchange against the Indorsor. 2dly, Upon a Mutuatus. 3dly, An Indebitatus Assumpsit for Money laid out for the use of the Plaintiff. Upon non Assumpsit pleaded, the Case upon Evidence was. Moor a Gold-smith subscribed two Notes payable to the Defendant; the Defendant on the 19th of October indorses these two Notes, and gives them and eight others to one Zouch, to whom he was indebted; Zouch the 19th of October, betwixt the Hours of eleven and twelve, brought these Notes to the Plaintiffs, being Gold-smiths, and they accepted them, and gave to Zouch other Bills, and some Money; and afterwards the same Day, the Plaintiffs receiv'd Money upon other Bills of the said Moor, and might have had the Money due upon these Two Bills if they had been demanded; but in the Night following about Midnight, Moor broke and ran away, and whether the Plaintiffs or Indorsor should lose this 170 l. 10 s. was the Question.

And the first Question was, Whether the Acceptance of these Bills in Satisfaction for so much Money, be a good discharge of the Indorsor? And Holt C. J. held, That Gold-smiths Bills were governed by the same Laws and Customs as other Bills of Exchange; And every Indorsement is a new Bill, and so long as a Bill is in Agitation, and such Indorsements are made, all the Indorsors and every of them, are liable as a new Drawer. That by the Law generally, every Indorsor is always liable as the first Drawer, and cannot be discharged without an actual Payment, and is not discharged by the Acceptance of the Bill by the Indorsee; but by the Custom, this is restrained, viz. The Acceptance is intended to be upon this Agreement, &c. That the Indorsee will receive it of the first Drawer, if he can, and if he cannot, then that the Indorsor will answer it, as if the first Drawer be Insolvent at the time of the Indorsement, or upon demand, refuses to pay it, or cannot be found. And the Indorsor is not discharged without actual Payment, until there is some neglect or default in the Indorsee, as if he does not endeavour to receive it in convenient time, and then the first Drawer becomes insolvent.

By Custom the Indorsor is only liable in default of the first Drawer.

The second Point was, what shall be thought convenient time to endeavour to receive such Bill? Et per Holt C. J. In case of foreign Bills, he upon whom it is drawn, hath three Days to pay it, and the Indorsee of such foreign Bill, need not demand Payment until the said three Days be expired, and if he upon whom the Bill is drawn, become insolvent in the said time, the Indorsor is chargeable, and after the three Days, the Indorsee may protest it; And it seems the same time ought to be allowed for inland Bills, tho' 'twas

Indorsee must have convenient time to demand it.

urged that for foreign Bills a longer time was required, in respect the Drawee was to receive Advice from the Drawer.

And the Chief Justice in his Direction to the Jury said, That what should be thought convenient time, ought to be according to the usage among Traders in such Cases, and upon all the Circumstances. That the Plaintiffs had ten Bills delivered to them together; and that perhaps they had other Affairs that hindered them from going presently to receive these two Bills, and that they receiv'd two other Bills the same Day. The Chief Justice left it to the Jury to consider, whether the time in this Case were convenient time or not; And if the Plaintiff had convenient time to receive his Money, then to find for the Defendant, otherwise for the Plaintiff. And they upon Consideration found for the Plaintiff, upon which the Plaintiff prayed to take the Verdict upon the Indebitatus Assumpsit. Et per Chief Justice, you cannot take the Verdict upon any part of the Declaration, but that to which Evidence was given, and here 'twill be good, if found upon the Bills of Exchange; but if the Evidence be applicable to any other part of the Declaration, you may take it upon any such part to which the Evidence is applicable. And because Zouch had sworn that he received the Benefit of, and had been satisfied with the Bill he took of the Plaintiff, by which the Defendant was discharged against Zouch; the Verdict was taken upon the Indebitatus Assumpsit for Money laid out for the Defendant's use; And it seemeth the Indorsement by the Defendant to the Plaintiff was good Evidence of a Request to pay the said Money to Zouch. Now Exception was taken that one Bill was payable to the Defendant only, without the Words, or his Order, and therefore not assignable by the Indorsement; and the Chief Justice did agree that the Indorsement of this Bill did not make him that drew the Bill chargeable to the Indorsee; For the Words, or to his Order, give Authority to the Plaintiff to Assign it by Indorsement; and 'tis an Agreement by the first Drawer that he would answer it to the Assignee: But the Indorsement of a Bill which has not the Words, or to his Order, is good, or of the same effect betwixt the Indorsor and the Indorsee, to make the Indorsor chargeable to the Indorsee.

Convenient time is according to the Usage of Traders, and Circumstances of particular Cases.

Verdict may be taken upon any part of the Declaration, to which the Evidence is applicable.

Assignment of Note not payable to Order, charges the Indorsor not the Drawer.

## Harry *versus* Perrit. Trin. 9 Ann. B. R.

Action on a promissory Note against the second Indorsor, and the Plaintiff declared without any Averment, that the Money was demanded of the Drawer, or the first Indorsor. And this was held good upon Motion in Arrest of Judgment; for the Indorsor charges himself in the same manner as if he had originally drawn the Bill.

(20) Indorsor charges himself in the same manner as the Drawer.

BISHOPS

# Bishops, Archbishops, &c.

## *Bishop of St.* David's *versus* Lucy. Pas. 11 W. 3. B. R.

Bishop cited before the Archbishop in Person, for Simony.

THE Bishop of St. David's, was sued in a Court held at Lambeth, before the Archbishop of Canterbury himself in Person, for Simony, and several other Offences, and now he moved for a Prohibition; and the suggestion was, that he was cited to Lambeth and not to the Arches, and also that he was cited before the Archbishop himself, and not before his Vicar General, and the proceeding against him was in order to a Deprivation. Et per Curiam.

Bishop may Judge in Person or by Vicar General.

1st, The Archbishop hath a provincial Power over all the Bishops of his Province, and may hold his Court where he pleases; and he may convene before himself, and sit Judge himself; and so may any other Bishop, for the Power of a Chancellor or Vicar General is only delegated in ease of the Bishop.

Bishop may be punish'd in the Archbishop's Court for any Offence against the Duty of his Office.

2dly, The Court held, that the Spiritual Court might proceed to punish him for any Offence done against the Duty of his Office as Bishop, and as it relates to that. For Ecclesiastical Persons are subject to the Canons; those of 1640. have been questioned, but no doubt was ever made as to those of 1603. And as the Clergy are under different Rules and Duties, it is but reasonable that if an Ecclesiastical Person offend in his Ecclesiastical Duty, he should be punishable for it in the Ecclesiastical Court, especially if it be in a matter, for which he is not punishable at Common Law; And it is but fit the Clergy should have a Power to purge their own Body from scandalous Members. Cawdry's Case is remarkable, for he was deprived for preaching against the Common-prayer; and yet being the first Instance, there was another Punishment appointed by the Statute. Vide 31 E. 3. c. 4. 2 Inst. 586. The Ecclesiastical Court may punish any Ecclesiastical Officer for Extortion. They may punish for forging of Orders. Vide Keb. 39. They may punish Perjury committed in a Spiritual Court, and a spiritual matter, as Matrimony; not in a temporal matter, as in Contracts. (but this is not settled per Holt) Vide 3 Cro. 788. Simony is determinable in the Spiritual Court and not here; for it was not supposed at Common Law, which is the reason there was no Damages in

Ecclesiastical Court may punish a temporal Offence, if committed in an Ecclesiastical Court, or matter.

a Quare Impedit. Vide 4 Co. 49. b. 3 Inst. 204. Bishop deprived for Dilapidations.

A Prohibition being denied, the Archbishop went on and gave Sentence of Deprivation against the Bishop of St. David's; upon this the Bishop of St. David's appealed to the Delegates; And in Mich. 11 W. 3. suggesting that by the Common Law the Archbishop alone could not deprive a Bishop, and that the Delegates refused to admit his Allegations, he moved for a Prohibition, urging that all Bishops were Barons, and inter se Peers. Et quod par in parem imperium non habet. And that tho' a Bishop may be censured, yet he cannot be deprived by an Archbishop, because their Temporalties which are protected by Common Law, are concerned; Vide 14 E. 3. c. 3. But it ought to be done by Convocation, [which Holt C. J. said was a new Fancy of Sir Bartholomew Shower's] or by Ecclesiastical Commission.

Mich. 11 W. 3.

Hereupon Holt C. J. and the rest held, an Archbishop had Power over his Suffragans and might deprive them; that Bishops are Coordinate, or Pares jure Divino, but not jure Humano, otherwise their Institution would be to no end. That their Peerage is by reason of their Barony; that several Abbots sate in the House of Lords in former Times, and it might as well be pretended they were therefore exempt from the Bishop and could not be deprived. That by the Common Law the Archbishop has a metropolitical Jurisdiction; and that Archbishops are over Bishops, as well as Bishops are over the other Clergy; That his Power was usurped upon and diminished by the Pope, but restored to its extent at Common Law, by the Statute of H. 8. That by allowing his Power to visit, all is admitted; for he that may visit may deprive as well as censure, these being but several degrees of Ecclesiastical Punishment; and by the 26 H. 8. and the 1 Eliz. c. 1. the only Power given to the Ecclesiastical Commissioners was to visit, without a Word of Deprivation; Yet they were always allowed a Power to deprive: From the Time of H. 2. till H. 8. there hardly is an Instance of the deprivation of a Bishop. And it is true, that before the 17 Car. 1. c. 11. confirmed, by 13 Car. 2. c. 12. which takes away the Court of High Commission instituted by 1 Eliz. those Deprivations that are of Bishops, are by the Court of Ecclesiastical Commissioners; yet the reason of that was only because it was the easier and shorter way. That it is not to be questioned but a Bishop may be deprived, Vide 11 Co. 49. he may be deprived for Dilapidations. And it is as plain that the Law takes notice of no other Power that regularly can deprive him; for if Issue be whether a Parson be deprived or not, the Court must write to the Bishop; and if Issue be whether a Bishop be deprived or not, this Court must write to his Archbishop to certify; and to what purpose should the 23 H. 8. c. 9. against citing out of the Diocess, save the Power of the Archbishop over his Bishops, if he had no Power? Vide to the

Bishops are Pares jure Divino not Humano.

Archbishop has a metropolitical Jurisdiction over Bishops by Common Law; Usurp'd by the Pope; But restor'd by the Statute of H. 8. He, that can visit, can deprive.

Upon Issue, whether Parson be depriv'd, Court write to the Bishop; whether Bishop be depriv'd, to the Archbishop

2

the same purpose 29 Car. 2. c. 9. 13 Car. 2. c. 11. The Prohibition was denied, and ordered that the Suggestion be entered on Record, that the Court might enter their Reasons of denial. Et per Holt C. J. If it be insisted on, a Prohibition cannot be moved for, till the Suggestion be entered on a Roll. Afterwards Holt C. J. said, that the Bishop of St. David's moved the House of Lords for a Writ of Error upon this denial of a Prohibition, and it was there held, no Writ of Error lay.

Strictly Prohibition cannot be moved for, till Suggestion entred on the Roll.

Antiently Bishopricks were Donative by the King. Conferr'd by Investiture.

Bishopricks in England were antiently Donative by the King, and with good reason, for the King was Patron; he indowed them with their Lands and Baronies, and then the Ceremony was Investiture *per annulum & baculum*, the one a Symbol of the spiritual Marriage with the Church, the other of the pastoral Care and Charge over Christ's Flock. After many Scuffles between the Popes and Kings of England, 'twas settled at last in King John's Time, First, That the King should suffer a free Election, but that that should be founded on his Conge d'eslire. And 2dly, That the Bishop should not have his Temporalties till he swore Allegiance to the King; But that Confirmation and Consecration should belong unto the Pope; by which means he gained in Effect the disposal of Bishopricks, till 25 H. 8. which takes away the Papal Jurisdiction, *quod vide*. Afterwards by the 1 E. 6. c. 1. all Bishopricks were made Donative; but the 8 Eliz. c. 2. has restored the Statute of the 25 H. 8. and thereby hath made them Elective in England; But in Ireland they are Donative by Letters Patent at this Day. Note, By the Council of Lateran, and the Decrees of Alexander 3. no Man was to take a Benefice from Lay-hands, per Whitlock Witherington, 69. b. per Doderidge, That the original Letter of Agreement is to be found in Matthew Paris and Eadmerus. Vide 1. Jones. 160. Lat. 37.

Manner of creating and translating Bishops.

The manner of making a Bishop, as well in Case of Translation as new Creation is thus. When a Bishop dies, the Dean and Chapter certify the King in Chancery and pray his Licence to elect; Upon this, the King gives his Conge d'eslire, upon which they elect, and then certify the King, Archbishop and Party; and then the King by his Letters Patent gives his Royal Assent, and commands the Archbishop to confirm and consecrate him; Whereupon the Archbishop examines the Election and the Party, and then confirms the Election and Consecration himself. This is the manner of proceeding in Creations, and it holds likewise in Case of Translation, save only that he is not consecrated, for a Consecration is like an Ordination, *Character indelibile*, and suffices for ever. See 1. Jones. 160.

Consecration and Confirmation, not Election, makes former Preferments void.

When a Bishop is translated, the old See is not void by the Election, till that Election is confirmed; for tho' he be elected, the King may not consent, nor the Archbishop confirm; and it is not

I reaso-

reasonable they should lose their old Presentment till they gain the New. 1 Jones 162.

And in case of Creation, not till Consecration. Per Doderidge; Widdrington. 69. b.

As there are four things required to complete a Parson sc. Presentation, Admission, Institution and Induction; so there are four things analogically requisite in making of a Bishop: Election, which resembles Presentation; Confirmation, which resembles Admission; Consecration, which resembles Institution; and Installation or Inthronization, as in the Case of an Archbishop which resembles Induction. Per Doderidge; Widdrington 69. b.

Requisites to complete a Bishop.

Heretofore when a Bishop was to be translated, there was no Election, for the Rule of the Canon Law was, Electus non potest eligi; and because 'twas pretended he was married to the first Church, which Marriage could not be dissolved but by the Pope, thereupon Petition was made to the Pope, and upon the Pope's Consent, the Party was translated; this was said to be by Postulation. Vide Widdr. 48. b. sed per Cur. This was an Usurpation and against Law, and restrained by 16 R. 2. and 9 H. 4. c. 8. and Translations are ever by Election, and not by Postulation. 1 Jones, 160.

Translation antiently was by Postulation to the Pope.

# Breach in Actions of Debt, Covenant, Case, &c.

Coleman *versus* Sherwin. Mich. 1 W. & M. B. R.

(1) A. and B. Dimiserunt imports a joint Covenant as to the Interest granted;

In Covenant, The Plaintiff declared that the Defendant and one J. S. demised to the Plaintiff for seven Years, virtute cujus he entered and was possessed; And the Defendant and one A. by his Command, entered upon the Plaintiff; And that neither the Defendant nor the said J. S. had or ought to have demised the Premisses, but at the time of the Demise, one R. was seized in Fee; The Defendant pleaded that J. S. was seized and had Power and Right to demise, absque hoc, that R. was seized, &c. And absque hoc, that the Defendant entered and kept him out; The Plaintiff

T tiff

tiff demurred. Et per Cur. 1st, There being no express Covenant, the Action is founded upon the Covenant in Law implied in the Word Dimiserunt; And therefore as the Interest granted by that Word is joint, so is the Covenant imported by it: And then the Action as to this Breach of their being not seized at the time of the Demise, ought to have been against both the Lessors, and cannot be maintained against the Defendant alone; But as to the other Breach, viz. That the Defendant and one A. entered, the Action is well enough brought against him only; for it is his own Act, and in Construction, each did Demise, and it is a several Covenant as to their own Acts subsequent. 2dly, The Court held, That as the Plaintiff might well assign several Breaches, the Defendant might as well pursue and traverse them; but Judgment was given for the Defendant, because the Action was not against both the Lessors, and the Plea was good. Vide Show. 79. Mesme case.

But several as to subsequent Acts. Where Plaintiff assigns several Breaches, Defendant may traverse severally.

## Meredith *versus* Alleyn. Pas. 2 W. & M. B. R. Intr. Hill. 1 W. & M. Rot. 20.

(2) Where Defendant pleads matter of Excuse that admits a Non-performance, Plaintiff need not assign a Breach in his Replication. Shower, 148.

DEBT upon a bottomree Bond; Defendant craved Oyer. And the Condition was, that if such a Ship returned within ten Weeks, and gave an account of the Profits, then, &c. The Defendant pleaded, that the Ship was lost and did not return; the Plaintiff replied the Ship was not lost, Et hoc petit quod inquiratur per patriam. The Defendant demurred and shewed for Cause, that no Breach was assigned in the Replication: Shower argued for the Defendant, that without a Breach, the Plaintiff had no Cause of Action, and the Condition by craving Oyer, is become part of the Record. And he relied upon 1 Saund. 102. But the Court gave Judgment in this Case for the Plaintiff. Et per Holt C. J. In all Cases (that of a Bond to perform an Award excepted) if the Defendant pleads a special matter that admits and excuses a Non-performance, the Plaintiff need only answer and falsify the special matter alledged; for he that excuses a Non-performance, supposes it; and the Plaintiff need not shew that which the Defendant hath supposed and admitted; But if the Defendant pleads a Performance of the Condition, tho' it be not well pleaded, the Plaintiff in his Replication must shew a Breach, for then he has not a Cause of Action unless he shew one. The reason of that Case of the Award is single; it is because, tho' an Award be made, yet it may be void in whole or in part: And therefore the Plaintiff must not only shew the Award, that the Court may see that there was an Award, but must also set forth the Breach, that it may appear likewise that the Non-performance was of a good part of the Award, and not of a void part thereof; for in that it need not be performed. 2 Cro. 472.

Reason of the difference in Debt upon Bond to perform Award.

Stagg

## Stagg *versus* Hind. Trin. 6 W. & M. B. R.

(3) Breach, that 3 l. for a Year at Lady-day last, was arrear, &c. well on general Demurrer.

IN Covenant the Plaintiff declared, that the Defendant covenanted to pay yearly, during the Plaintiff's Life, at the two Feasts of Michaelmas and Lady-day, 3 l. 6. s. 8 d. by equal Portions, and for Breach assigned, that 3. l. 6 s. 8 d. for a Year at Lady-day last was arrear and unpaid: The Defendant demurred, and objected that it does not appear when the Money became due; for it might be behind and unpaid at Lady-day, and yet might become due at Michaelmas, or the Lady-day before. But the Court held this well enough upon general Demurrer, and gave Judgment pro Quer.

## Smith *versus* Sharp. Mich. 7 Will. III. B. R.

(4) Agreement to convey to H. or his Assigns. Breach that he did not convey to H. Good.

DEBT for 500 l. upon Articles in C. B. and Judgment by Nil dicit. A Writ of Error was brought in B. R. It was assigned for Error, that whereas the Defendant was to tender a Conveyance to the Plaintiff, his Heirs or Assigns, the Breach assigned was, that the Defendant had not tendered a Conveyance to the Plaintiff, and so not pursuant to the Covenant, by which he is to tender to the Plaintiff or his Assigns. Vide 3 Cro. 348. Accord. Sed per Cur. The difference is between doing a thing to a Man or his Assigns, and by a Man or his Assigns; if a thing be to be done by a Man or his Assigns, the Breach must be in the Disjunctive, that it was not done by him or his Assigns. But where a thing is to be done to a Man or his Assigns, it is sufficient to assign for Breach, it was not done to him; for an Assignment shall be intended to be done to the Plaintiff himself, and if he assign his Interest, then to the Assignee, and if he did assign over his Interest, that ought to be shewed on the other Side. Judgment affirmed.

Diversity between Covenant to do an Act to or by H. or his Assigns.

## Farrow *versus* Chevalier. Trin. 11 Will. III. B. R.

(5) Covenant not to buy or sell within two Years. Breach, That diversis diebus & vicibus, between such a Day and such a Day, he sold to H. and several other Persons, held well after Verdict.

COvenant by the Master against his Servant, on a Covenant not to buy or sell without the Master's Leave within two Years; and Breach assigned that he had diversis diebus & vicibus, between such a Day and such a Day, sold to H. and to several other Persons unknown, Goods to the value of 100 l. Issue was upon this and Verdict for the Plaintiff, and moved in Arrest of Judgment, that the Breach was uncertain as to Times and Persons; Cases cited pro & con. 3 Cro. 916. 2 Cro. 567.

Ray. 8, 9, 10. Sty. 420, 428. Et per Holt C. J. In Debt on a Bond to perform Covenants, the Replication must shew a certain Breach; but in Covenant 'tis enough to assign a general Breach. And this is certain enough; for 'tis so described, that if another Action be brought, the Defendant may plead a former Recovery for the same Cause, and aver this to be the same selling. Gould J. agreed and said, That in Debt for a Penalty on a Statute, 'tis not enough to assign a Breach in this manner, because every Offence intitles to a distinct Penalty; but here the Action being only for Damages, it is well enough. Judgment pro Quer.

Diversity.

## Harmon *versus* Owden. Mich. 12 Will. III. B. R.

(6) Assumpsit to deliver Corn upon or before the fifth of January, into a Barge, to be brought by the Plaintiff. Breach that he did not deliver upon the fifth of January, is Good.

CASE, for that the Defendant in Consideration of 20 l. promised to deliver on or before the fifth of January, twenty Quarters of Corn out of a Ship into a Barge, to be brought by the Plaintiff to receive the said Corn, and assigns for Breach, That the Defendant non deliberavit the said twenty Quarters super dictum quintum diem Januarii. Defendant pleaded non Assumpsit, and Verdict for the Plaintiff; It was moved in Arrest of Judgment, that the Defendant might have delivered the twenty Quarters before the fifth of January. After Debate it was held per Holt C. J. upon great Consideration. 1st, That this was good without the Verdict, for the Barge was to be brought by the Plaintiff, and the Defendant was to deliver the Corn into that Barge, so there must be a Concurrence of both Parties. The Defendant could not make a Tender to oblige the Plaintiff to accept before the last Day; And therefore since the last Day is the time appointed, when the one is obliged to deliver, and the other to accept, it shall not be presumed, that the Plaintiff was there before the time, ready to accept the Corn with his Barge. Vide 3 Cro. 14. 73. 2dly, That it was clearly helped by the Verdict; because if there had been an actual Delivery, it might have been given in Evidence upon non Assumpsit, and then the Jury could not have found for the Plaintiff. Vide 1 Sid. 15. 1 Saund. 228. 1 Ven. 119. Judgment pro Quer.

Vide 2 Keb. 411.

Tompkins *versus* Pincent. Mich. 1 Ann. B. R.

DEBT for Rent; The Plaintiff declared upon a Demise made the 25th of August 11 W. 3. of a Messuage, Habendum for seven Years, incipiend. à 24 die Januarii, Reddendum quarterly at the four most usual Feasts in the Year, sc. Michaelmas, St. Thomas, Lady-day and Midsummer, the Rent of 3 l. 10 s. per Annum; the first Payment to be made at Michaelmas next; and shews that 14 l. de redditu prædicto prò uno Anno finito, 24 Decembris, Anno 13 W. 3. aretro fuerunt, &c. Unde Actio, &c. The Defendant demurred. Mr. Mompesson took this exception to the Declaration, That there is no Year ending the 24th of December, but it ends at St. Thomas's-day, according to the Reddendum, which is the 21st of December; quod Curia concessit: For where special Days of Payment are limited by the Reddendum, the Rent must be computed according to the Reddendum, and not according to the Habendum; and the computation of the Rent according to the Habendum is only where the Reddendum is General, scilicet, yielding and paying quarterly so much Rent; Upon which the Plaintiff prayed leave to discontinue, and had it.

(7) If in a Lease special Days of Payment are limited by the Reddendum, the Rent must be computed according to that, and not the Habendum.

Vivian *versus* Campion. Pas. 4 Ann. B. R.

THE Plaintiff as Heir declared, That his Ancestor per Indenturam suam, cujus alteram partem Sigillo of the Lessee, (omitting Sigillat.) hic in Curiam profert, did demise; and that the Lessee covenanted to repair from time to time, and to leave in repair; and then shewed that his Ancestor died Anno 10 W. 3. and for Breach assigned quod primo Apr. Anno tertio Reginæ nunc, & per 10 Annos ante tunc, the Premisses were out of repair. After Verdict for the Plaintiff it was moved in Arrest of Judgment, first, That the Word Sigillat. is wanting. 2dly, That part of the ten Years incurred in the Life of the Ancestor, and that this was a hard Action. Et per Holt C. J. 1st. The want of Sigillat. is cured by the Verdict, and the pleading over. 2dly, If the Premisses were out of repair in the time of the Ancestor, and continued so in the time of the Heir, it is a Damage to the Heir; And the Jury give as much in Damages as will put the Premisses in repair; but hereby no Damages are given in respect of the length of time they continued in decay; but in respect of what it will cost at the time of the Action brought to put the Premisses in repair; therefore per decem Annos was frivolous; And he said that this is not a hard Action; and good Damages are always given in these Cases, because the Damages recovered ought to be applied to the repair of the Premisses.

(8) Heir assigns Breach that the Premisses were out of repair, tali die & per 10 Annos, which included his Ancestor's time; held well.

BY-

# BY-LAWS.

*The City of* London *verſus* Vanacre. Trin. 11 W. 3. B. R.

(1) Franchiſe granted to a Corporation may be regulated by By-law.

UPON a Habeas Corpus, the Conſtitution of the City of London as to the Election of Sheriffs was return'd, and alſo the Cuſtom for making By-laws; and that 7 Car. 1. a By-law was made, that no Free-man of the City choſen to be Sheriff of London, ſhall be exempted from that Office, unleſs he will take his Oath that he is not worth 10000 l. and bring with him ſix Perſons as Compurgators, ſuch as ſhall be approved of; And that upon open Proclamation made in Guild-hall of ſuch Choice, he being called to come and take upon him the Office of Sheriff at the next Court, and enter into a Bond of 1000 l. to take upon him the ſaid Office, upon default ſhall forfeit the Sum of 400 l. and if he does not pay that within three Months, ſhall forfeit 400 l. more. Upon the Motion for a Procedendo it was objected. 1ſt, This is not within the Cuſtom for making By-laws, becauſe the Conſtitution of Sheriff is by the Charter of King James, which is within Time of Memory; Sed non allocatur: For where a Franchiſe is granted for the Benefit of a Body Politick, the Body Politick has Power incidently to regulate that Franchiſe for the Publick Benefit. And this By-law is only to require ſubſtantial Perſons to undergo that Office; And as every Member has the Benefit of the Franchiſe, ſo they are compellable by Penalties to undergo the Charge and Burdens to which the Body Politick is liable. Second Objection, That the Party Elect may be indicted for Refuſal; Sed non allocatur; for tho' he may be indicted and fined to the King, yet that will not ſave the City-Franchiſe; therefore that ſhall not hinder the Forfeiture on the By-law. Third Objection, That the By-law does not provide that the Party ſhall have any notice of his being elected, and the Perſons who are the Subjects of the By-law are all the Free-men; And it is not the Free-men but the Livery-men, who are to be preſent at the Election. Sed non allocatur: For ſuppoſing that, yet the Free-men are repreſented by the Livery-men; and he that is repreſented muſt take notice as much of the Act of the repreſentative Body, as if preſent; beſides, the Election is a notorious thing, and there is a Proclamation notifying it.

Members are compellable to undergo Offices of the Corporation by By-law; Even in Caſes where they may be indicted. He that is repreſented muſt take notice of the Act of the Body Repreſentative.

Cuddon *versus* Eastwick. Hill. 2 Ann. B. R.

A By-law that all Strangers coming into the Port of London, should imploy City Porters, to carry their Goods, &c. was held Naught; Et per Cur. They may make a By-law that none but Free-men shall be Porters; but to confine Strangers to none but such as are City Porters, is unreasonable. 1st, Because if the City will appoint no Porters, they have no Remedy against the City. And 2dly, Strangers cannot know who are City Porters, nor compel them to serve them. Vide post, Title Corporation.

By-law that all Strangers shall imploy City Porters ill.

# CARRIER.

Lane *versus* Cotton. Pas. 12 Will. III. B. R.

A Carrier is liable in respect of his Reward, and not of the Hundred's being answerable over to him; For the Hundred is liable by the Statute of Winchester, but he was so at Common Law; and the reason why Robbery did not excuse him, was, because it might be by Consent and Combination carried on in such a manner, that no Proof could be had of it. Per Holt C. J.

Carrier liable in respect of his Reward.

Certio-

4

# Certiorari, Recordari. {Vide Title Habeas Corpus.

## Rex *versus* North. Hill. 8 Will. III. B. R.

(1) Certiorari not to be serv'd after the Jury Sworn.

THE Defendant was indicted before Justices of the Peace, and pleaded not Guilty; and after the Jury were gone out to consider of their Verdict, he delivered in a Certiorari; and the Justices return'd the Verdict, and it was held well; for it cannot be delivered after the Jury is Sworn.

## Anonymus. Pas. 9 Will. III. B. R.

(2) Lies not to Justices of Gaol-delivery.

A Motion was made for a Certiorari to remove an Indictment of Barretry, found at the Sessions of Gaol-delivery; and one Nurse's Case was cited, wherein such a Motion was granted; But per Cur. 'Tis never granted to remove an Indictment found before Justices of Gaol-delivery, without some special Cause; so it is of the Old-baily; and if such Certiorari should be granted, and the Cause suggested should afterward appear false, a Procedendo should be awarded.

## Groenwelt *versus* Burwell. Trin. 12 Will. III. B. R.

(3) Certiorari lies on a Judgment given by the Censors of the College of Physicians for male Practice.

THE Censors of the College of Physicians have Power by their Charter, confirmed by Act of Parliament, to Fine and Imprison for male practice in Physick; and accordingly they condemned Dr. Groenvelt for administring insalubres pillulas & noxia Medicamenta, and fined and imprisoned him: And the Question being, whether Error or Certiorari lay, &c? it was held per Holt C. J.

1st, That Error would not lie upon the Judgment, because their Proceeding is not according to the Course of the Common Law; but without Indictment or formal Judgment; yet,

2dly, That a Certiorari lies; For no Court can be intended exempt from the Superintendency of the King in this Court of B. R. It is a Consequence of every inferior Jurisdiction of Record, that their Proceedings be removeable into this Court, to inspect

inspect the Record, and see whether they keep themselves within the Limits of their Jurisdiction. Vide 3 Cro. 489. By the 23 H. 8. c. 5. the Commissioners of Sewers are to certify their Proceedings into Chancery; And the 13 Eliz. c. 9. says, the Commissioners shall not be compelled to make any Certificate; Upon this, by mistake, they thought themselves not accountable on a Certiorari, and refused to obey a Certiorari issued out of the King's Bench; and for this the whole Body of the Commissioners were laid by the Heels.

## Anonymus. Mich. 8 Will. III. B. R.

(4) Variance between Writ and Order.

A Certiorari was to remove an Order against J. S. touching foreign Salt, which being removed appeared to be an Order touching Salt; (without foreign) and it was held not to be removed, for this Cause, there being no such Order.

## Dr. Sands's Case. Pas. 10 Will. III. B. R.

(5) Certiorari to remove Conviction of Recusancy, denied.

THE Oaths appointed by the Statute of the 1 W. & M. c. 8. were tendered to Dr. Sands by two Justices of the Peace, and he refusing to take them, it was certified to the Judge of Assize, and by him into the Exchequer, according to the Statute of the 7 and 8 W. 3. c. 27. And now a Certiorari was prayed to remove it hither, and a surprise and trick upon Dr. Sands was suggested. Also the Case of James Duke of York was cited, who being presented upon the 3 Jac. 1. c. 4. for not coming to Church, at the Quarter-Sessions, it was removed hither by Certiorari. But Holt C. J. held, it could not be granted, because it would perfectly evade the Statute; for when it is once in this Court, it cannot be sent back again, which would render the Statute of no effect, because the Party cannot be proceeded against here; And that the Case of the Duke of York was the only Case wherein it was ever done.

## Anonymus. Hill. 11 Will. III. B. R.

(6) Exceptions to be taken to Orders of Sewers before the filing.

WHere Orders of Commissioners of Sewers are removed into B. R. by Certiorari, the Court does not file them, but hear Counsel upon the matter of them before filing; for if they are good, the Court must grant a Procedendo, which they cannot do after they are filed. Sed per Cur. Trin. 4 Ann. B. R. We will file them in any Case where no apparent Danger is likely to ensue by the delay.

## *The Case of* Cardiffe-bridge. Trin. 12 Will. III. B. R.

(7) Certiorari lies to Juſtices of the Peace in Wales, and Counties Palatin

CErtain Orders of Justices for repairing Cardiffe-bridge, were removed hither by Certiorari, and one Objection was made, that this Court could not send a Certiorari to the Justices of the Peace in Wales; because it might be sent by the Court of Grand Sessions, which was as the King's Bench, and which by this means was skipped over and rendered useless. Sed non allocatur: 'Tis the constant practice to send them into the Counties Palatine, and yet they have original Jurisdiction, and the same Courts within themselves. The Council for the Welſh Jurisdiction said, this differ'd, because the Jurisdiction of Counties Palatine was derived from the Crown; but this was not regarded. And the Chief Justice said, That in Cases of Sewers, this Court enquires into the nature of the Fact before they grant a Certiorari, that no mischief may happen by Inundations in the mean time; but this is only a discretionary Execution of their Authority, for where-ever any new Jurisdiction is erected, they are subject to the Inspections of this Court by Writ of Error, or by Certiorari and Mandamus.

## Rex *verſus* Levermore. Trin. 12 Will. III. B. R.

(8) A Certiorari issued to remove a Conviction of Deer-stealing, and the Justices return'd two Affidavits, and a Warrant to distrain, and the Return was quashed as imperfect.

## Rex *verſus* Brown. & al. Mich. 12 Will. III. B. R.

(9) Variance. Certiorari to remove Indictment againſt A. will not remove Indictment againſt A. and B.

WIlliam Brown, Francis Wood and Leonard Fosbrook, were jointly indicted at the Sessions; and Brown was also severally indicted; and Wood and Fosbrook and one J. S. were indicted in another Indictment, and a Certiorari was awarded to remove all Indictments, in quibus iidem Willielmus, Franciſcus & Leonard. indictati ſunt; without saying vel aliquis eorum indictat. exiſtit. Et per Cur. None of the Indictments are removed, but only the joint Indictment first mentioned, and the Justices below may proceed on the others without Contempt.

## Domina Regina *versus* Paroch. *St.* Mary's *in the* Devises. Pas. 1 Ann. B. R.

On a Certiorari to return an Order, it was returned, cujus quidem tenor sequitur in hæc verba, and not, qui quidem ordo sequitur in hæc verba; and it was quashed for this reason.

(10) The very Order must be return'd.

## Regula Generalis. Pas. 1 Ann. B. R.

A Rule was made that no Certiorari should be granted to remove Orders of Justices, from which the Law has given an Appeal to the Sessions, before the matter be determined on the Appeal, because it hinders the Privilege of appealing; and that if any Order be removed before Appeal, it should be sent down again: But if the time of Appeal be expired, that Case is not within the Rule. Per Holt C. J. But afterward in Mich. 4 Ann. B. R. in the Case of the Inhabitants of Shellington, it was held, that Advantage must be taken of this Rule upon the Motion to file the Order, for that after it is filed, it is too late.

(11) Orders of Justices not to be remov'd before the time of Appeal expir'd.

## Domina Regina *versus* Nash. Mich. 1 Ann. B. R.

The Defendant was convicted of Deer-stealing, and a Warrant was awarded to the Constable to levy, &c. He accordingly distrained, and then came a Certiorari to remove the Conviction; and after the Record removed, the Constable sold the Goods, but would not part with the Money or return the Warrant. And the Court held,

(12) Certiorari is no Supersedeas to an Execution begun before that issued.

1st, That the Constable might well proceed in the Execution after the Certiorari, because it was begun before, and the Certiorari no more stays it than a Writ of Error of a Judgment in C. B. stays the executing of a Fieri facias already begun to be executed. And in that case if the Sheriff returns want of Buyers, the Common Pleas may award a Venditioni exponas, notwithstanding the Writ of Error pending.

2dly, That this Court had no Power over the Warrant, being granted before the Certiorari issued, and therefore they refused to make a Rule upon the Constable to return it; comparing it to the case of a Writ of Execution delivered, &c. before a Writ of Error. But they said the Justices might fine him if he would not return his Warrant, or deliver over the Money to the Prosecutor.

## Croſs *verſus* Smith. & al. Hill 1 Ann. B. R.

(3) Certiorari lies to all inferior Juriſdictions.

A Writ of Error was brought in B. R. of a Judgment in the Court of the Iſle of Ely, in an Action upon the caſe for Words. The Error aſſign'd was, that a Certiorari iſſued out of C. B. to remove the Cauſe, and was allowed, and yet they proceeded below afterwards. The Defendants in Error pleaded a Grant to the Biſhop of Ely of Conuſance of Pleas, and ſhew'd an allowance of it in this Court, 21 E. 3. and that the Cauſe aroſe within the Juriſdiction, and that they return'd this matter to C. B. upon the Writ of Certiorari, and ſo the Court below had good Authority to proceed, and to this Plea there was a Demurrer. And three things were inſiſted on for the Defendant in Error. 1ſt, That no Certiorari ought to lie to the Court of Ely by reaſon of the Franchiſe, which is a Conuſance of Pleas; and becauſe the Court above cannot proceed on the Record removed by the Certiorari, but the Plaintiff muſt be driven to his new Original. 2dly, Becauſe the Certiorari, admitting it lay, was no Superſedeas. 3dly, That the Cauſe below could not be removed by the Certiorari, becauſe the Plaint was not entered at the time of the Teſte, but after the Teſte, and before the Return of the Writ. But per Cur. As to the firſt matter it is not the Plaintiff's Expence but the Defendant's Liberty that is to be conſidered in this Caſe. For if the Franchiſe be tenere placita, then this Court hath a concurrent Juriſdiction, and the Defendant may chuſe whether he will be ſued there, or in the King's ſuperior Courts; for he may be a Stranger in the Franchiſe and not able to find Bail there, and it may be dangerous to be tried by a Jury of Strangers. Beſides, as the Statute of the 27 H. 8. ſays, there is as much difference between the King's Miniſtry of Juſtice in his ſuperior Court, and his inferior Courts, as between being governed by the King in Perſon, and by his Deputy; therefore it is that this Court hath a Superintendency, and to prevent Oppreſſion, may award a Certiorari to any inferior Court, and the Subjects Right to Writs of Certiorari appears by the 43 Eliz. c. 5. and 21 Jac. 1. c. 23. which reſtrains the abuſe of them. 2dly, A Certiorari lies to a Franchiſe that hath a Conuſance of Pleas, which is more than a bare Franchiſe tenere placita. 3dly, It lies to an exempt Juriſdiction, for that Franchiſe is only for the benefit of the Defendant, which he may wave if he pleaſes. And even in caſe of a cuſtomary Proceeding by foreign Attachment, if a Defendant cannot find Bail below, he may bring a Certiorari, and on putting in Bail above the Cauſe ſhall go on there. As to the ſecond Objection the Court held, a Certiorari was a Superſedeas, by the ſame reaſon that a Habeas Corpus is. Vide 1 Cro. 160, 261. 2 Jon. 209. and that therefore all Proceedings

after a Certiorari allowed, were erroneous; and that an Attachment would have lain, if they had not allowed the Certiorari. As to the third Objection it was held, that the Plaint was well removed; for a Certiorari is like a Recordari, which removes all things pending at any time between the Teste and the Return. Vide 1 Vent. 63. 1 Ro. Abr. 395. F. N. B. 71. a. c. 3 H. 6. 30. b. New Thes. Brev. 37. 3 Brownl. 335.

## Domina Regina *versus* Bothell. Trin. 2 Ann. B. R.

(14) Not to be allow'd without Bail.

CErtiorari was to remove an Indictment, and there being no Bail indorsed upon the Writ, the Court said, the Writ should not have been allowed, for it was against the late Act of Parliament.

## Domina Regina *versus* Porter. Mich. 2 Ann. B. R.

(15) Certiorari not proper after Conviction, unless where Error lies not, or Fine ought to be set in B. R.

H. Being indicted and convicted for beating certain Officers, on the Statute of 14 Car. 2. obtained a Certiorari to remove the Indictment, &c. in B. R. And Northey Attorney General moved for a Procedendo, urging it was inconvenient that a Certiorari should be granted after Conviction and before Judgment, because the Justices who tried the Cause were best able to set the Fine. Et per Cur. A Certiorari lies after a Conviction and before Judgment, for perhaps it may be proper to give Judgment in this Court; and sometimes it happens that a Writ of Error will not lie: however a Writ of Error will lie in this Case, because 'tis a formal Proceeding grounded on a Indictment: And therefore because the Party if grieved might have Remedy by Writ of Error, and it was not so proper to set the Fine in this Court, a Procedendo was granted. And Holt C. J. said, that upon a Conviction at the Assizes, if the Judge of Assize doubt of the Judgment he may remove the Record into this Court by Certiorari; and that upon Judgment here a Writ of Error of a Record, coram vobis residen. lies; and that it is the Course of the Crown-Office and was so done by C. J. Scroggs.

## Anonymus. Mich. 2 Ann. B. R.

(16) Return in English allow'd.

ONE that made and sold Cyder was convicted for not paying the Duty upon the late Statute; and on a Certiorari to remove the Conviction, the Justice made his return in English, which Mr. Cheshire moved to quash, but it was allowed to be good in this Case.

Domina

## Domina Regina *versus* Dixon. Hill. 2 Ann. B. R.

(17) Certiorari ought to be to remove Indictment and Conviction, where Defendant is convicted.

A Certiorari after Conviction ought to be to remove the Indictment and Conviction, and if it make mention of the Indictment only, and not of the Conviction, it may be quashed; And if the Party take it out before Conviction, but will not use it till after, he ought to lose the Benefit thereof.

## Regina *versus* Knatchbull, & al. Hill. 3 Ann. B. R.

(18) Certiorari not granted to Justices of Gaol-delivery, unless for special Cause.

A Motion was moved for a Certiorari to remove an Indictment found at the Assizes in Kent, against Mr. Knatchbull and others; but denied, tho' earnestly press'd for; also the same thing was done in Mr. Thornbury's Case, who, with others, was indicted at the Old Bayly for a Jacobite Conventicle, and it was pressed by him in Person to have a Certiorari, intimating Partiality and Prejudice in the Lord Mayor and Aldermen against him; but at last it was denied for this particular reason, viz. That the Motion happened in the end of Hillary Term, so that it would occasion a delay of Justice: Otherwise it seems they would have granted it.

## Domina Regina *versus* White. Pas. 4 Ann. B. R.

(19) Certiorari to remove Orders; Fiat must be signed by a Judge; —— to remove Indictments, both Writ and Fiat.

A Certiorari was granted to remove an Order of Sessions made by the Justices of Northamptonshire, for removing a High Constable and putting in another: Sir James Mountague moved for a Procedendo, because the Writ was made out on the Saturday before the Term, Teste the 12th of February, and the Fiat was not signed 'til the first Day of this Easter Term, and a Procedendo was granted for this Irregularity: And it was held, that in Writs of Certiorari granted to remove Orders, the Fiat for making out the Writ must be signed by a Judge, and the Writ it self need not; but in Case of Writs of Certiorari to remove Indictments, the Fiat must be signed and the Writ to, and that the later is required by the late Act of Parliament: And Holt C. J. said, That if the Fiat had been signed on the same Day the Writ was taken out, that would have been well, because it was before the Essoin Day; but a Fiat signed this Term, cannot warrant a Certiorari tested the last Day of last Term; Also they held, High Constables might be removed, as well as Petit Constables, and the Justices at Sessions were the best Judges of that matter.

High-Constables removable.

## Nehuff's *Case*. Paf. 4 Ann. B. R.

MR. Mountague moved for a Certiorari to remove an Indictment at the Old Baily for a Cheat: The Case was, That the Defendant borrowed 600 l. of a Feme Covert, and promised to send her fine Cloth and gold Dust as a Pledge, and sent no gold Dust, but some coarse Cloth worth little or nothing; they offered to try it the same Term, which would be a Benefit to the Prosecutor, who by the Course of the Old Baily could not try it so soon; and the Court granted a Certiorari, because the Fact was not a matter Criminal, but it was the Prosecutor's fault to repose such a Confidence in the Defendant; And because it was an absurd Prosecution, and the Defendant offered to try it that Term.

(20) Certiorari not granted to the Old Baily, unless for Special Cause.

## Domina Regina *versus* Barnes. Mich. 4 Ann. B. R.

AN Order was made against A. and the Certiorari was to remove all Orders against A. and B. Et per Cur. This shall not remove the Order against A. alone, but it ought to be for all Orders against A. and B. or either of them.

(21) Variance.

## *Sir* Godfrey Kneller's *Case*. Paf. 5 Ann. B. R.

IF there be a forcible Detainer, and an Inquisition taken, and then a Certiorari to remove the Inquisition, and then there is a new forcible Detainer, the Justices may notwithstanding the Certiorari, record the Force; but they cannot proceed to award Restitution: So if after the Inquisition, and before the Certiorari, there had been a forcible Detainer, the Justices might have recorded the Force; but all Proceedings upon such Inquisition are stopped.

(22) After Certiorari to remove Inquisition of forcible Detainer Justices cannot award Restitution.

CHAL-

# CHALLENGE.

## Anonymus. Trin. 1 W. & M.

(1) Challenge for Favour.

UPON a Trial at Bar the Question was, whether the Fair called Way-hill Fair, should be kept at Way-hill, or at Anderry? And one of the Jury was challeng'd because he lived at Way-hill; and the Objection was, that the Fair occasioned Manure to improve the Ground. On the other Side it was considered that the Fair occasioned trampling of the Grass: This being a Challenge to the Favor, two of the Jurors were sworn to be Tryers, and their Oath was, You shall well and truly try whether A. (the Jury-man challenged) stand indifferent between the Parties to this Issue.

## Rex & Regina *versus* Warrington. & al. Pas. 3 W. & M. B. R.

(2) Where two Persons are Sheriff, and one is challeng'd, the Venire shall be directed to the other.

INformation for a Riot committed in Chester; It was suggested upon the Roll that one of the Sheriffs was a Defendant, upon which the Venire facias was prayed and directed to the other Sheriff. Upon not Guilty pleaded, the Jury found them Guilty; after which it was moved in Arrest of Judgment that the Venire should have been awarded to the Coroner, because both Sheriffs make but one Officer, or rather that both Persons make but one Sheriff; Sed non allocatur: For tho' one be challenged, the other may execute the Writ, but he does it in the name of both; as where one arrests a Man or neglects to arrest a Man, the Arrest or Neglect, is the Act or Neglect of both. The Coroners are not the proper Officers of the Court, in any other case but where the Sheriff is absolutely improper; not where there is no Sheriff at all. If the Sheriff die the Coroner cannot execute, &c. In the case of two Coroners, if one be challenged, the other must act, and yet both make but one Officer; so in this case one Sheriff is challenged, ergo the other must act. Mo. 199.

Anonymus.

COOKE being indicted for High Treason and the Jury called, he offered to ask the Jurors, in order to challenge them, if they had not said he was guilty, or would be hanged? Et per Cur. This is a good Cause of Challenge, but then the Prisoner must prove it by Witnesses, not out of the Mouth of the Juryman: A Juryman may be ask'd upon a Voir dire, whether he hath any Interest in the Cause? Whether he hath a Freehold? For these do not make him Criminal; but you shall not ask a Witness or Juryman, Whether he hath been whipped for Larceny, or convict of Felony? Or whether he was ever committed to Bridewell for a Pilferer, or to Newgate for Clipping and Coining? Or whether he is a Villain or outlawed? because that would make a Man discover that of himself which tends to Shame, Crime, Infamy or Misdemeanor: So it is in this Case, the Answer would charge him with Misdemeanor or Misbehaviour. Et per Powell Justice. In a Civil Cause you may perhaps ask a Man if he has not given his Opinion before-hand upon the Right? for he might have done that as Arbitrator between the Parties: Otherwise in this Case, Cooke's Trial, 21, 28.

(3) Juryman may not be examin'd to any Matter criminal or infamous, in order to challenge.

# CHANCERY.

## Anonymus. Mich. 1689. In domo Procerum.

A Man limited an Estate to Trustees for Payment of Debts and Legacies: The Trustees raised the whole Money, and the Heir prayed to have the Land; and this was opposed, because the Trustees had not applied the Money, but converted it to their own Use, so that the Debts and Legacies remained unpaid: It was resolved, That the Heir should have the Land discharged, and the Legatees should take their Remedy against the Trustees; For the Estate was Debtor for the Debts and Legacies, but not for the Faults of the Trustees, and therefore is only liable so long as the Debts, &c. should or

(1) Land settled in Trust to pay Debts is discharged as soon as the Money is raised, tho' misapplied by the Trustees.

X might

might be paid. And where the Land has born once its burden, and the Money is raised, it is discharged and the Trustees liable.

## Best *contra* Stamford. Mich. 4 Ann. In Canc.

(2) Term created for a special Purpose, after that determined is attendant on the Inheritance.

FEME Sole seised in Fee, upon her Marriage with A. makes a Lease to Trustees for 100 Years, in trust for the Husband for his Life, Remainder to her self for Life, Remainder to the Issue of that Marriage, Remainder to the Wife, her Executors and Administrators; Husband dies without Issue; she marries a second Husband and dies: Whether this Term should be attendant upon the Inheritance, or should go to the Husband as a Term in gross was the Question. Et per Cur. 'Tis a Term attendant, because the Trust for which it was created is at an End, the first Husband being dead without Issue: As where a Term is created to raise Portions, and the Portions are paid; or a Termor purchases the Inheritance in trust, the Term shall be attendant. And as for the second Husband, it cannot be intended that he was then thought of.

In Equity, Land agreed to be sold shall go as Money; and Money agreed to be laid out in Land, as Land.

Money articled to be laid out in Land, shall be taken as Land, in Equity; for this Court is to enforce the Execution of Agreements, and therefore looks upon Land agreed to be sold, as Money, and Money agreed to be laid out in Land, to be in fact a Real Estate, which shall descend to the Heir; Sed Quære, If Money be articled to be laid out in Land, in a Marriage-Settlement, upon failure of Issue, and there is no Issue, but Debts by simple Contract; whether this Money shall be taken as Land, and thereby defeat Creditors?

## Anonymus. 27 Junii 1707. *At Lord Chancellor's House.*

(3) Where Lands are devised to pay Debts, Debts barred by the Statute of Limitations shall be paid.

Where Bond shall carry Interest beyond the Penalty.

IT was held, 1st, That if one by Will or Deed subject his Lands to the Payment of his Debts, Debts barred by the Statute of Limitations shall be paid; for they are Debts in Equity, and the Duty remains; the Statute has not extinguished that, tho' it hath taken away the Remedy. 2. It was held, That if there be a Bond-Debt, and the Interest hath out-run the Penalty, it shall not carry Interest beyond the Penalty; for the Design of the Settlement was not to increase the Debt beyond what is due, but to give a farther Security; however, if the Devisee or Trustee neglects to pay in a reasonable Time, he shall, after such neglect, pay Interest beyond the Penalty; per Cowper, Lord Chancellor.



Ano-

## Anonymus. Mich. 6 Ann. In Canc.

If a Trustee or Executor compound Debts or Mortgages, and buy them in for less than is due upon them, he shall not take the Benefit of it himself, but other Creditors and Legatees shall have the Advantage of it; and for want of them the Benefit shall go to the Party who is entitled to the Surplus; but if one acts for himself, and being not in the Circumstances of a Trustee or Executor, buy in a Mortgage for less than is due, or for less than it is worth, he shall be allowed all that is due upon the Mortgage; for he stands in the Place of him that assigned, viz. the Mortgagee, who might have given it to him gratis; and what is due must be the Measure of our allowance, and not what he gave; for that might have been more than it is worth, as well as less; and since he runs the Hazard if loss happens, he ought to have the Benefit in case it turns to advantage: So said and admitted, per Cowper, Lord Chancellor.

(4) Trustee buying in Debts for less than is due, shall not be allowed for the whole. Otherwise of one purchasing in his own Right.

## Cuthbert *contra* Peacock. Mich. 6 Ann. In Canc.

H. Owed his Niece A. 100 l. by Bond, and having two other Nieces B. and C. makes his Will, and bequeaths 300 l. to his Niece A. and to his two other Nieces 200 l. a piece. After that he borrowed another 100 l. of his Niece A. and being indebted to her in 200 l. died; and to prove the 300 l. should go in Satisfaction of the Debt, Mr. Vernon insisted, that it was the Rule in Equity, and had been often decreed, That where a Testator being indebted, gives his Debtee a Legacy greater than his Debt, it shall go in Satisfaction; for a Man shall be intended to be just before he is kind; otherwise where a Legacy is less, for that is neither to be just nor kind, and shall not be taken to go in Satisfaction of any part. Cowper Lord Chancellor said, It might be as good Equity to construe him to be both just and kind, if he intended to be both; That if any part of this 300 l. be applied to the Payment of the Debt, as for so much it is not a Gift, whereas a Legacy must be taken to be a Gift or Gratuity: And there being Assets, and some Proofs of the Testator's greater kindness to A. than his other Nieces, his Lordship decreed her the whole 300 l. over and above her Debt.

(5) Legacy to a Creditor, greater or less than his Debt, how to be taken.

Legacy must be taken to be a Gift.

## Kemp *contra* Coleman. Mich. *Vacation*, 6 Ann.

(6) Bond given to refund part of Portion without Father's Privity, is void.

PER eundem Dominum Cancellar. inter Kemp & Coleman, Mich. Vac. 1707. It was laid down as a Rule in Equity, That where the Son without the Privity of the Father or Parent treating the Match, gives a Bond to return or refund any part of the Portion, 'tis void.

## Grimston *contra Lord* Bruce & Ux. In Canc. 1707.

(7) Lands devised to J. S. paying the Heir 20000 l. within 20 Years, at 1000 l. per Annum; Heir entred for Non-payment, as for Forfeiture, and Devisee reliev'd.

H. Devised his Lands to J. S. and his Heirs, on Condition to pay 20000 l. to the Heir at Law, viz. 1000 l. per Annum, for the first sixteen Years, and 2000 l. per Annum after that, till the whole should be paid; the Heir entered for Non-payment of one of the 1000 l. per Annum, and J. S. brought his Bill; and it was objected, That the Condition restores the Heir, and that Chancery ought not to aid in Disherison of him: But it was resolved by Cowper, Lord Chancellor,

In cases of Forfeiture, Equity can relieve where they can give Satisfaction.

1st, That the Entry of the Heir in this case, was only to inforce the Payment of his Principal, as where a Mortgagee enters; and that the Court can give him Interest for the same from the Time it became payable, and that where-ever the Court can give Satisfaction or Compensation for a Breach of Condition, they can relieve.

Interest.

2dly, That for every 1000 l. from the Time it became payable, the Legatee or Heir should have Interest, because both the Sum and Time of Payment were certain and past.

Taxes.

3dly, That there is to be no deduction of any Taxes, because it is not to issue nor arise from the Lands, but is given as a Sum in gross, secured by Entry on the Lands for Nonpayment.

## Higgins *contra* Derby. Mich. *Vacation*, 6 Ann.

(8) Remainder of a Term limited to Daughters after a Limitation in Tail. If the Estate Tail was contingent and never took Effect, the Daughters shall take; otherwise not.

TRUST of a Term of Years was declared to the Husband for Life, Remainder to the Wife for Life, Remainder to the first Son of their Bodies, and the Heirs Male of the Body of such first Son (and so on to every other Son) and for want of Sons, then to the Daughters of the said Husband and Wife: The Husband and Wife died, and there was no Son of the Marriage, but there was a Daughter, and the Question was, Whether she should take by virtue of this Limitation, it being after a Limitation in Tail to the Sons? Et per Cowper, Lord Chancellor, Where the Limitations to the Sons ever took effect, and the

the Estate vested, the Remainder and Limitation to the Daughters becomes void: But if there never was a Son, as it happened in this Case, the Remainder is good; for the Limitation must be construed, if there be a Son, then to him, if no Son but a Daughter, then to her.

But upon reading the Settlement it appeared to be thus, And in Default of Issue Male of the Body of the said Husband, then to the Daughters: And therefore it was held, That the Husband took an Estate Tail, and for that reason the Limitation to the Daughters was held void, being after a plain Limitation in Tail to the Husband.

## Whitlock *contra* Waltham. 27 Jan. Hill. 7 Ann. *At the Rolls.*

(9) Payment of Interest of Mortgage to the Scrivener is good, if he has the Bond or Mortgage-Deed.

THE Interest of a Mortgage was paid to and receiv'd by the Scrivener that put out the Money; the Scrivener proved insolvent, and the Question was, who should bear the Loss? And it was admitted in this case, First,

That if the Scrivener be intrusted with the Custody of the Bond he may receive the Interest; and tho' he fails, yet the Mortgagee shall bear the Loss: And that so it is also in such case, if he receive the Principal and deliver up the Bond; for being intrusted with the Security it self, it shall be presumed, he is intrusted with a Power over it, and with a Power to receive the Principal and Interest, and the rather because the giving up of the Bond upon the Payment of the Money, is a Discharge thereof; otherwise, if the Obligee take away the Bond, for then he hath no Authority to receive any Money.

So of Principal, if he deliver up the Bond;

2dly, If a Scrivener be intrusted with the Mortgage-Deed, not the Bond, he hath only Authority to receive the Interest, but not the Principal; because the giving up the Deed is not sufficient to restore the Estate, but there must be a Re-conveyance, whereas the giving up a Bond, is in Law, an extinguishment of the Debt.

Otherwise of Mortgage-Deed.

3dly, That tho' the Scrivener has neither the Custody of the Mortgage nor the Bond, yet if the Mortgagee agrees that the Mortgagor shall pay the Interest to the Scrivener, the Interest may be well paid to the Scrivener, as long as the Mortgagee lives.

If Mortgagee agree, 'tis well during Mortgagee's Life, tho' he hath neither Bond nor Mortgage.

4thly, That if the Mortgagee dies, and his Executor comes to the Scrivener and receives Interest of him, and at his Hands, that became due after the Death of the Mortgagee; this is a good Payment; and if after such Receipt the Scrivener breaks, the Mortgagor shall not bear the Loss; for it was the Mortgagee that trusted the Scrivener, and the Executor came into the Agreement, and thereby renewed it, supposing it was determined by the Death

And after his Death, if Executor agree to it expresly or by Implication.

Death of the Mortgagee, but it was rather an Agreement than an Authority and could not dye with the Party. Nota, This was the principal Case, and affirmed by Cowper, Lord Chancellor.

## York *contra* Stone, & al. Nov. 16. Mich. 8 Ann: In Canc.

(10) A Mortgage does not revoke a Will in toto, but severs the Jointenancy of the Trust of a Term.

THREE Persons being jointly interested in the Trust of a Term of Years, one of them mortgaged his third Part; and the Question was, whether the Jointenancy was severed in this Case? It was admitted to be a settled Point in Chancery, That if H. makes his Will, and devises his Land to one in Fee, and after mortgages his Land to another in Fee, this is no total Revocation, but the Equity of Redemption shall pass by the Devise: But Cowper, Lord Chancellor, held, That a Jointenancy is an odious Thing in Equity; that as to the Case of the Will, it might be for the Benefit of the Mortgagor, that his Will should not be revoked; but that it is to the Disadvantage of the Mortgagor, that the Jointenancy should continue; because, if he happen to dye first, all his Estate and Interest goes from his Representatives to the Survivor, unless it be construed a Severance.

## *Duke* Hamilton *contra Lord* Mohun, 20 Maii, 9 Ann:

(11) Covenant before Marriage to release the Wife's Guardian within two Days after, of all Accompts of Mesne Profits, set aside in Equity.

ONE of the Marriage-Articles was, That the intended Husband should within two Days after the Marriage, for the Peace of the Family, release the Guardian of the young Lady (the Lady Gerard) of all Accompts of the mean Profits of an Estate that belonged to the Lady: Et per Cowper, Lord Chancellor, Admitting there was no Surprize or Concealment, yet this Covenant ought to be set aside as extorted from the Husband, who could not have the Daughter but upon these Terms; and that where-ever a Mother or Father, or Guardian, insists upon private Gain or Security for it, and obtains it of the intended Husband, it shall be set aside; for the Power of a Parent or Guardian ought not to be made use of to such Purpose: You shall not have my Daughter unless you do so and so, is to sell Children and Matches. And he held these Contracts with the Father, &c. to be of the same Nature with Brokage-Bonds, &c. but of more mischievous Consequence, as that which would happen more frequently; and that it is now a settled Rule, That if the Father on the Marriage of his Son, take a Bond of the Son, that the Son shall pay him so much, &c. 'tis void, being done by Coercion while he is under the Awe of his Father.

## Corbett & Ux. *contra* Maidwell. Trin. 9 Ann. In Cancell.

A Bill was brought for raising the Wife's Portion out of a reversionary Term expectant on her Father's Death: The Case was, Thomas Maidwell, the Father of the Plaintiff's Wife, upon his Marriage, settled to the Use of himself for Life, Remainder to Trustees for 500 Years, Remainder to the Heirs Male of his Body by his intended Wife, and if he should happen to dye without Issue Male of his Body by his Wife, and there should be one or more Daughters of their two Bodies, which should be unmarried, or not provided for at the Time of his Death; such Daughter (if but one) should have 2000 l. and 30 l. per Annum issuing out of the Profits till the Portion should become due; the Portion to be payable at the Age of Eighteen, or Day of Marriage, and a Power for the Trustees to raise it by Sale or Mortgage of the Term, or Perception of Profits. There being but one Daughter of this Marriage and no Son, the Wife died, and the Daughter being above the Age of Twenty-one, and married to the Plaintiff, the Question was, whether the Trustees could raise her Portion in the Life of her Father? and on great Consideration it was held by the Lord Cowper, Lord Chancellor,

( 12 ) A Term limited in Remainder after the Father's Death, in trust for raising Daughter's Portions at such an Age or Marriage; when either happens the Portions may be raised in the Father's Life-time.

1st, That tho' a Term is limited in Remainder to commence after the Death of the Father, yet if the Trust is to raise a Portion payable at the Age of Eighteen, or Day of Marriage; without question the Daughter shall not wait the Death of her Father, but at the Age of Eighteen, or Marriage, may compel a Sale of the Term.

2dly, So it is if the Trust of a Term for raising Daughters Portions be limited to take effect, in case the Father dies without Issue Male by his Wife, and the Wife die without Issue Male, leaving a Daughter, in such case the Term is saleable in the Life of the Father.

So if on contingency, and the Contingency happens in the Life of the Father.

That so far it had been carried already, but he doubted whether he could have gone so far in case the Matter were Res integra; but that the reasoning upon which it had been founded was, That by the Death of the Mother the Possibility of Issue Male was extinct: That all that was contingent in the Case has happened: It is become impossible that there should be Issue Male, and as to the Father's Death, that's not contingent, for all Men must die, and it is now the same Thing to say, when the Father shall die without Issue Male by his Wife, as to say when the Father shall die.

And if this case had gone no farther, it had been no more than that the Father is Tenant for Life, Remainder to Trustees for 500 Years for raising Daughters Portions payable at the Age of Eighteen,

Eighteen, or Marriage, and now all contingencies being happened, and out of the Case, it should seem within the reason of the first Resolution.

That the Case of Greaves and Mattison, 2 Jo. 201. comes fully up to this Resolution: Sir Edward Greaves made a Settlement to the Use of himself for Life, Remainder to the Use of his first Son in Tail Male, Remainder to Trustees for forty Years, Remainder to himself in Fee: The Term is declared to be in Trust, that in case it should happen that the said Sir Edward should die without Issue male of his Body, then the Trustees should raise 5000 l. for Daughters Portions payable at the Age of Twenty-one, or Marriage, with a Provision for maintenance in the mean Time. The Wife died, leaving two Daughters, and no Issue male, and by Pemberton, Dolben and Raymond, it was resolved, That the Right to the Portion was vested by the Mother's Death without Issue male in the Life of the Father; for otherwise the Father might live so long that the Portions might be of little Service.

Thus far the Court has gone for Convenience, that young Women may have their Portions when they most want them.

But not before the Contingency happened.

But in the principal Case, the Daughter, who is the Subject of this Provision, must be a Daughter unmarried or unprovided for at the Time of the Father's Death, which is a Contingency not yet happened, and therefore it comes not within the reason of either of the Rules.

As to the 30 l. per Annum for maintenance he held, That must be intended in case the Father die without Issue male, leaving a Daughter under the Age of Eighteen, or not married, because otherwise this Absurdity must follow, That the Daughter must be paid Maintenance-Money in the Life of the Father, out of the Profits of a Term that is not to commence till after the Father's Death.

That this case was too strong for the Court to attempt to get over, and to do it would create great Confusion; and it would be to no purpose for any one to make Deeds, if the Arguments of Convenience or Inconvenience should prevail to over-rule them. Bill dismissed.

## Whitecomb *contra* Jacob. Trin. 9 Ann. In Canc.

(13) Merchant's Goods in the Hands of the Factor not liable to Debts of a superior Nature; otherwise of Money.

If one imploys a Factor and intrusts him with the disposal of Merchandize, and the Factor receives the Money and dies indebted to debts of a higher Nature, and it appears by Evidence, that this Money was vested in other Goods, and remains unpaid, those Goods shall be taken as part of the Merchant's Estate, and not the Factor's; but if the Factor have the Money, it shall be looked upon as the Factor's Estate, and must first answer the Debts of a superior

tior Creditors, &c. for in regard that Money has no Ear-mark, Equity cannot follow that in behalf of him that imployed the Factor.

Vane *versus Lord* Bernard. Mich. 1 Georg. In Canc.

LORD Bernard upon his Marriage, in consideration of a Portion of 10000l. settled the Castle of Raby, &c. to the Use of himself for Life, without Impeachment of Waste, Remainder to his Son for Life, &c. The Son brought a Bill against his Father the Lord Bernard, to enjoin him from pulling down the Castle; and Cowper, Lord Chancellor, granted an Injunction, because this was an abuse of the Power and derogatory to the Grant; the Intent of that Privilege being only in order to cut down Timber, and open new Mines.

(14) Injunction to prevent the pulling down a Castle granted against Tenant for Life, dispunishable of Waste.

# CHAPLAIN.

Brown *versus* Mugg. Mich. 12 Will. III. B. R.

TRESPASS for taking his Tithes in Inkborow: By a special Verdict it was found, That the Defendant being possessed of the Benefice of Stockton, and a Chaplain extraordinary to the King, was presented, instituted and inducted to the Rectory of Inkborow, being above the annual Value of 8l. per Annum; That the Benefice of Stockton did thereby become void, and continued so for two Years; when the Defendant was presented to it again by the King, as upon a title of Lapse, and thereunto instituted and inducted; and that Stockton was above the Value of 8l. per Annum. Et per Cur. 1st, A Presentation of the King of his own Chaplain does import a Dispensation which the King himself, as supream Ordinary, has a Power to grant, and he shall have the Benefit of holding a Plurality without any previous Dispensation: But if the King's Chaplain be presented to a second Benefice by a Subject, a Dispensation is necessary, and must be obtain'd before his Institution to the second Living. 2dly, A Chaplain extraordinary is not

(1) King's Chaplain extraordinary is not capable of a Plurality within 21 H. 1. c. 13 & 14.

Dispensation is not necessary, where the King presents his Chaplain to a second Benefice.

not a Chaplain within the Benefit of the Statute of the 21 H. 8. c. 13 & 14. but only the Chaplains in Ordinary. Judgment for the Plaintiff, which was affirmed in Cam. Scacc. by a Majority of one. Note, He has no waiting Time, but has only an Entry of his Name in the Book of Chaplains. A Chaplain within the 21 H. 8. ought to be retain'd under Seal. 3 Cro. 424. Godb. 41. If the King have a special Title and present generally, 'tis void. Hob. 302. Et per Holt, after Institution and Induction a Presentation by the King is void, tho' it be ad corroborandum; but he must obtain a Patent of express Grant.

# Charitable Uses.

## Dominus Rex *versus Lady* Portington. 4 W. & M.

(1) Absolute Devise: No Averment can be admitted, of Trust for superstitious Uses, by Stat. of Frauds.

ON a Traverse to an Inquisition post mortem Annæ Barlow the Jury found for the King, by reason the said Anne had devised her Land to superstitious Uses: But a Case was made as followeth,

Anne Barlow devised to the Lady Portington and her Heirs, absolutely without any Trust; That she did it for the Good of her Soul, and that the Devisee owned that this Estate was not her's, but belonged to God and his Saints. The Question was, Whether this Devise could be averred to be in Trust to a superstitious Use? And the Court of King's Bench held it could not, and that both from the Statute of Frauds, and from the Nature of the Thing. Supposing the Devisee was a Nun, it was considered how the Law was then; and the Court held, That a Monk now might purchase, because that part of the Canon Law, whereby his Disability arose, is now abolished, and the Common Law takes no Notice of him.

But discoverable by Information in Scacc.

After this, viz. 26 May, 1693. an Information was preferred in the Exchequer for a Discovery, and an Application of the Devise to an Use truly charitable.

Statute of Frauds.

And it was held, 1st, That the Statute of Frauds did not bind the King, but took Place only between Party and Party. 2dly, That the King, as Head of the Commonwealth, is obliged by the Common Law, and for that purpose intrusted and im-

powered to see that nothing be done to the Disherison of the Crown, or the Propagation of a false Religion, and to that end entitled to pray a Discovery of a Trust to a superstitious Use. 3dly, This Use being superstitious, is meerly void, and for that reason the King cannot have it: Yet however it is not so far void as that it shall result to the Heir, and therefore the King shall order it to be applied to a proper Use.

Devise to superstitious Uses is void, but neither the Heir nor the King shall have it, but the King shall apply it to a charitable Use.

## Mr. *Attorney General contra* Shelley, 1712. In Canc.

SIR R. Combe devised an Annuity out of his Land for the Maintenance of Watford School; and now upon a Bill in Chancery brought by the Attorney-General on the behalf of the Charity, it was objected, That all the Tertenants of the Lands charged ought to be brought before the Court: Sed Cur. contra: For every part of the Land is liable, and the Charity ought not to be put to this difficulty; but the Tertenants may, if they seek a Contribution, undertake to make them Parties to the Information, or help themselves by such Course as they think fit.

(2) To a Bill for a charitable Use, all the Tertenants need not be made Parties.

## Genner *versus* Harper. In Canc. Trin. 1714.

A Tenant in Tail made a nuncupative Will, and gave a Rent of 20 l. per Annum out of the Estate Tail for erecting of a Free-School, and ordered that his Executors should purchase other Lands for the Maintenance of the said School: This Will was made before the Statute of Frauds, but the Testator died after; And now it was held by Harcourt, Lord Chancellor, that at Common Law Lands were not deviseable; That the 31 H. 8. impowers the Owner to devise, but as much requires that his Will of Lands shall be in writing, as the Statute of Frauds requires his Will of Lands should have three Witnesses; and therefore if such Will want but one Witness, it is void to all Intents and Purposes; and the Statute of the 43 of Eliz. which favour'd Appointments to Charities, is now repealed pro tanto by the Statute of Frauds.

(3) Devise of Lands to charitable Uses, not in writing, or without three Witnesses, is void.

# Churches, Chappels, Church-wardens, &c.

## Woodward *versus* Makepeace. Trin. 1 W. & M. B. R.

(1) H. only occupying Lands in a Parish is taxable to a Rate for Bells.

WOODWARD, who lived in the Diocese of Litchfield and Coventry, but occupied Lands in the Parish of D. in the Diocese of Peterborough, was there taxed in respect of his Land, as an Inhabitant, towards a Rate for new-casting of the Bells, and because he refused to pay, was cited into the Court of the Bishop of Peterborough, and libelled against for this matter. Et per Cur. 1st, This is not a citing out of the Diocese, within the Statute 32 H. 8. c. 9. for he is an Inhabitant where he occupies the Land, as well as where he personally resides. Vide Cro. Jac. 321. Cro. Car. 97.

Vide Poph. 197. 2 Brownl. 10. Lat. 103. Win. 53. 1 Bul. 20. 2 Ro. 291. 3 Cro. 659. 2 Ro. R. 270.

2dly, Tho' he does not personally live in the Parish, yet by having Lands in his Hands he is taxable; and whereas it was pretended the Bells were but Ornaments it was held, they were more than mere Ornaments; that they were as necessary as the Steeple, which is of no use without the Bells; and Holt C. J. said, If he be an Inhabitant as to the Church, which is confessed, how can he not be an Inhabitant as to the Ornaments of the Church?

## Ball *versus* Cross.

(2) Inhabitants of a Chappelry are liable to the Repairs of the Mother-Church, unless exempt by Custom; not where there is only a late Erection.

THE Inhabitants of a Chappelry within a Parish were prosecuted in the Ecclesiastical Court, for not paying towards the repairs of the Parish-Church; and the case was, those of the Chappelry never had contributed, but always buried in the Mother Church, till about Henry the Eighth's Time the Bishop was prevailed on to consecrate them a Burial-place, in consideration of which they agreed to pay towards the Repair of the Mother-Church: All which appeared upon the Libel; and Holt Chief Justice held,

That by Common Law the Parishioners of every Parish are bound to repair the Church, but by the Canon Law the Parson is obliged to do it, and so it is in foreign Countreys. In London the

London.

Pa

Parishioners repair both Church and Chancel, tho' the Freehold is in the Parson, and it is part of his Glebe, for which he may bring an Ejectment.

In the principal Case, those of a Chappelry may prescribe to be exempt from repairing the Mother-Church, as where it buries and christens within it self, and has never contributed to the Mother-Church; for in that case it shall be intended co-eval, and not a latter Erection in ease of those of the Chappelry; But here it appears, that the Chappel could be only an Erection in ease and favour of them of the Chappelry; For they of the Chappelry buried at the Mother-Church till Henry the Eighth's Time, and then undertook to contribute to the repairs of the Mother-Church.

## Pierce *versus* Prouse. Trin. 7 Will. III. B.R.

CHURCH-WARDENS assess'd a Rate for Repairs of the Church, and after libelled against a Parishioner for not paying it. Et per Cur. being moved for a Prohibition,

(3) Church-Rate to be assess'd by the Parishioners, not the Church-wardens.

1st, The Parishioners ought to assess the Rate, and not the Church-wardens. 2dly, The Parishioners are only bound to repair the Church, and not the Chancel, for that is to be repaired by the Parson.

## Harman *versus* Renew. Mich. 7 Will. III. B. R.

ON a Motion for a Prohibition to a Suit in the Consistory-Court of London, on the Stat. 22 Car. 2. cap. 11. which unites the Parish of St. Mary Bothew, to the Parish of St. Swithin, against the Parishioners of the Parish of St. Mary B. to have a Contribution to the Repair of the Church of St. Swithin, Holt C. J. said, That at Common Law, by Concurrence of Parson, Patron, and Ordinary, Churches might be united to one another, but not Parishes.

(4) Union of Churches was at Common Law, not of Parishes.

It was said, per Powell J. in a Case in C. B. That Union was of Spiritual Conusance till 37 H. 8. c. 21. and then the Temporal Court took Conusance of it; and that the Incumbency of the Churches united is extinct; But Tithes and Modus continue afterwards: But per Treby C. J. The ancient Church or Rectory remains not, but this is a new Creature, a new Church, new Patronage, a Novum aliquod tertium.

Morgan

## Morgan *versus the Archdeacon of* Cardigan. Hill. 8 Will. III. B. R.

(5) Return to a Mandamus to swear in a Church-warden, insufficient, and a peremptory Mandamus granted.

MANDAMUS to the Archdeacon to swear a Church-warden being duly elected; the Archdeacon made this Retorn, That he was Pauper lactarius & servus minus habilis, &c. and thereupon a peremptory Mandamus was awarded; For the Church-warden is a temporal Officer, he has the Property and Custody of the Parish-Goods, and as it is at the Peril of the Parishioners, so they may chuse and trust whom they think fit; and the Archdeacon has no Power to elect or controll their Election.

## Britton *versus* Standish. Hill. 3 Ann. B. R.

(6) Q. Whether H. be suable in the Ecclesiastical Court for not going to his Parish-Church.

BRITTON was libelled against in the Spiritual Court by Mr. Standish the Parson of the Parish, for not coming to his Parish-Church on Sundays, to which he pleaded, That he went to another Church more commodious for him: Upon this matter suggested, there was a Prohibition, and the Plaintiff declared therein; and the single Question was, Whether he was compellable to go to his Parish-Church? It was said he was compellable, because every Parson was obliged not to allow a Parishioner of another Parish to partake of Sacraments with him. Vide 2 Spel. Conc. 141. Lyn. 184. 233. Reform. L. Eccl. 106. Sparr. Coll. 77, 78, 126, 236, 237, 181, 31. Rubrick in fine; and that this is allowed by Common Law 2 Rol. Re. 438, 455. Hard. 406, 407. in Point, and that the Spiritual Court is to judge of the Excuse. March 93. And by the Act of Uniformity, every Man is required to resort to his Parish-Church: On the other side 'twas argued, That the Distribution into Parishes was by the Common Law, and that if this Distribution did in consequence bring People under a new Obligation, such Obligation ought to be examinable by the Common Law; that the Statute of Uniformity has been always looked upon as sufficiently complied with by going to any Church, and the 23 El. imposes the Penalty upon any one that absents from Church, contrary to the 1 Eliz. and that if these Acts are construed to give a Jurisdiction, that Jurisdiction must be to the Courts of the Common Law and not the Ecclesiastical Courts.

Entire neglect of going to Church, is punishable in the Ecclesiastical Court.

In this case it was agreed, That every Man was obliged to go to some Church or other, and that an intire neglect was punishable in the Ecclesiastical Court; and that it was a good Charge prima facie, That a Man went not to his Parish-Church, because he shall not be supposed to go to any other: And the Court seemed to be of Opinion, That tho' the Act of

Uniformity be taken to be introductive of a new Law, yet the Thing being purely of Ecclesiastical Conusance, and proper for their Examination, a Consultation ought to go; but there was no Resolution.

Presgrave *versus the Church-wardens of* Shrewsbury. Hill. 3 Ann. B. R.

(7) Parishioners cannot prescribe to dispose of Pews, exclusive of the Ordinary.

A Prohibition was prayed to a Suit in the Spiritual Court, where the Parishioners prescribed to dispose of the Pews, exclusive of the Ordinary: Sed per Cur. That cannot be: The Ordinary's not acting might be because there was no occasion for his intermeddling; but that cannot vest the Right in them who are only a Corporation capable of Goods, but not of Inheritance. Sed adjournatur.

# Church of *England*, Religion, Dissenters, *&c.*

Rex & Regina *versus* Larwood. Hill. 6 W. & M. B. R.

(1) Information for refusing to take upon him the Office of Sheriff. Adjudg'd, That Dissenters are not exempt by the Toleration Act, from doing Acts necessary to qualify themselves for Offices, according to 13 Car. 2. Stat. 2. c. 1

AN Information was exhibited against the Defendant for neglecting and refusing to take upon him the Office of Sheriff of Norwich, setting forth the Charter of H. 4. whereby that City is made a County, and to have two Sheriffs to be chosen by the Commonalty, and also the Charter of Car. 2. confirming the former, but granting farther, that one Sheriff shall be chosen by the Mayor, Sheriffs, and Aldermen only; and that the Defendant being chosen by the Mayor, Sheriffs and Aldermen, had notice, but did not appear nor take the Oaths, nor take upon him and execute his Office: The Defendant pleaded the Stat. 13 Car. 2. and that he had not qualified himself by taking the Sacrament according to the Usage of the Church of England, within a Year before the Election: The Attorney-General replied, That by Law he ought to have done it; the Defendant rejoined, the Act of

of Toleration, and that he was a Protestant Dissenter, and excused by that Statute, and thereupon there was a Demurrer.

All the Judges concurred; first, That the Rejoinder was a Departure, because it did not fortify the Plea, and should have been pleaded at first, when he had an Opportunity and might have done it.

Toleration-Act is a private Stat.

2dly, That the Toleration-Act is a private Statute, and the Court can not take notice of it, unless it be pleaded; and the Reasons are, First, because Time out of Mind there was an established Church of England, and an established Discipline in the Church, which all Persons were bound to observe before the Reformation. Vide Lyn. 8. And all Persons are obliged to do so by the Statute of Ed. 6. and Q. Eliz. and the Law took no notice of Dissenters till this Act. 2dly, Because the Act does not extend to all Dissenters, but only to such Dissenters as go to the Quarter-Sessions, and take and subscribe the Declaration.

In the rest of this case the Court differed; S. Eyre Justice, held, 1st, The Mayor, Sheriffs and Aldermen, had no Power to make such Election, because the Charter granted by Hen. 4. to the Commonalty could not be divested, but by Surrender or by Forfeiture. 2dly, Because the Defendant was rendered incapable by the 13 Car. 2. and ought not to be twice punished, viz. lose his Office by virtue of the Statute, and be punished at Common Law by Judgment in this Information: And he relied on a Case which is now published in 2 Vent. 247.

G. Eyre and Holt C. J. contra; They held the Election good, notwithstanding the Charter of H. 4. not that the King can resume an Interest he has already granted, unless the Grantee concur; but in this case the Corporation had concurred, by accepting a new Charter; which, 'tis true, they may use as a new Grant or Confirmation; but in this case, having made their Elections according to the Method prescribed by the new Charter, 'tis Evidence of their Consent to accept it as a Grant. Vide 2 Cro. 313. 21 H. 7.

A new Charter may be used as a new Grant, or a Confirmation.

Also they held the Design of the 13th Car. 2. was not to exempt any Person from executing or serving in any Office to which he was obliged before, but to qualify him for executing Offices; for the Act intended to discourage Dissenters, and not to favour them; whereas, if this Plea should be allowed, the Act would enure to their Advantage.

2 Vent. 248. King hath a Right to the Service of his Subjects. None can be exempt from the Office of Sheriff, but by Stat. or Charter.

That the King hath an Interest in every Subject, and a Right to his Service, and no Man can be exempt from the Office of Sheriff, but by Act of Parliament or Letters Patent. Vide Mo. 111. Sav. 43. 9 Co. 46.

Lastly, No Man can take advantage of his own Disability: No Man can plead he is a Fool, or Non compos; but if a Non compos is indicted, the Judges must acquit him Ex Officio, for the King takes care of all such Persons; but if a Man is disabled

abled by Judgment to bear an Office, he is excused, Nam judicium redditur in invitum: Yet where he may remove the Disability, as in case of Excommunication, he shall take no advantage of his Disability; so in this Case: For which Reason Judgment was given against the Defendant.

# COMMON.

Rex *versus* Fox. Mich. 6 W. & M. B. R.

THE Inhabitants of one Parish had Common appendant in certain waste Grounds which lay in another Parish; and the Question was, Whether the Commoner should pay Taxes for this, and should be assessed in the Parish where the Waste lay, or in the Parish where his Farm lay; and it was held, That he ought to be assessed where his Farm lay; for it is incident, and will pass by the Grant of the Farm, &c. So that it is to be considered as a part of the Farm, and the Farm to be taxed the higher.

(1) Farmer ought to be taxed for Common appendant in the Parish where the Farm lies.

Emerton *versus* Selby. Hill. 2 Ann. B. R.

REPLEVIN, The Defendant avowed for Damage-feasant in his Freehold; Plaintiff pleaded in bar, That he was seised of a Cottage, and prescribed to have Common in the Defendant's Land for all Beasts levant and couchant, as appendant to his Cottage: This was held good upon Demurrer, for a Cottage contains a Curtilage at least, and there is no difference between a Messuage and Curtilage, as to this; and the Stat. De extentis Manerii says, a Cottage contains a Curtilage, and we will suppose a Cottage has at least a Court-yard to it: Also a Cottage by the Statute ought to have four Acres of Land: And Holt C. J. said, he remembred the Trial of an Issue, whether levant and couchant, before C. J. Hale, who held the Foddering of the Cattle in the Yard Evidence of Levancy and Couchancy. Vide Co. Lit. 5. Co. Ent. 649.

(2) H. may prescribe for Common appendant to his Cottage.

## Crowder *versus* Oldfeild. Hill. 4 Ann. B. R.

(3) How Copyholder shall make title to Common within or without the Manor.

Quære.

COPYHOLDER, that has Common of Pasture in the Wasts of the Lord out of the Manor, has the same as belonging to his Land, and if he infranchise the Copyhold-Estate, still his Common remains. To this he makes his Title in pleading in the Lord, viz. That the Lord of the Manor, Time out of Mind, had Common in such a Place for himself and his customary Tenants. Vide Co. Ent. 9, 10. But where a Copyholder has Common in the Wastes within the Manor, that belongs to his Estate; and if the Estate be enfranchised, the Common is extinct. So held in this Case, which see at large Tit. Jeofails.

# CONDITION.

## Thomas *versus* Howell. Trin. 4 W. & M. B. R.

(1) Condition made impossible by Act of God.

ONE devised to his eldest Daughter, upon Condition she should marry his Nephew on or before she attain'd the Age of Twenty-one. The Nephew died young, and the Daughter never refused, and indeed never was required to marry him: After the Death of the Nephew, the Daughter being about seventeen married J. S. and it was adjudg'd in C. B. that the Condition was not broken, being become impossible by the Act of God; and the Judgment was afterwards affirmed in Error in B. R.

## Anonymus. Mich. 9 Will. III. C. B.

(2) Condition to make A. a Lease for Life, or pay him 100. A. dies; his Executors shall have 100 l.

CONDITION was to make the Obligee a Lease for Life by such a Day, or pay him 100 l. Obligee died before the Day; and adjudged that his Executor shall have the 100 l. per Treby C. J. and the Ground of Laughter's Case was denied to be universal.

## Thorpe *versus* Thorpe. Paf. 13 Will. III. B. R. Rot. 253.

(3.) Condition precedent.

IN an Action upon the Cafe, the Plaintiff declared of a Colloquium concerning a Mortgage, whereupon the Plaintiff agreed to releafe his Equity of Redemption in two Clofes, and in confideration thereof the Defendant promifed to pay him 7 l. and to acquit him of all Money due on the Mortgage; and that the Defendant in confideration of the faid Agreement, and that the Plaintiff had promifed to perform every Thing on his Part, promifed to perform every Thing on his Part. Et in facto dicit, That tho' he had perform'd all on his Part, the Defendant hath not paid him the 7 l. The Defendant pleaded, That after the Promife made, the Plaintiff gave him a Releafe of all Actions; the Plaintiff craved Oyer of the Releafe, and by the Oyer it appeared to be a Releafe of the Equity of Redemption, and hereupon the Plaintiff demurred; and the Court held, That the Plaintiff was not entitled to the 7 l. nor to an Action for it, until he made a Releafe of the Equity of Redemption, and therefore the Promife being not broken at the Time of the Releafe is not difcharged by the Releafe, tho' it be a Releafe of all Demands. Vide Cro. 171. 5 Co. 70. And as to the mutual Promifes, the Court faid, they related to an Agreement, which makes the Releafe a Condition precedent. And Holt C. J. laid down this Rule,

Releafe of all Demands will not releafe a Promife unbroken, or future Act.

That in executory Contracts, if the Agreement be that the one fhall do an Act, and for the doing thereof the other fhall pay &c. The doing of the Act is a Condition precedent to the Payment, and the Party who is to pay fhall not be compelled to part with his Money, till the Thing be performed for which he is to pay. Vide 15 Hen. 7. 10. b. 1 Ven. 177, 214. But upon this Rule he took thefe Diverfities:

Agreement that A. fhall do, and for the doing B. fhall pay; the later is a Condition precedent.

Firft, If a Day be appointed for Payment of the Money, and the Day is to happen before the Thing can be performed, an Action may be brought for the Money before the Thing be done; for it appears, the Party relied upon his Remedy, and intended not to make the Performance a Condition precedent. 48 E. 3. 2, 3. 7 Co 10. b. 1 Vent. 147. 1 Saund. 319.

But Time fix'd for Payment will vary the Conftruction.

2dly, Where a certain Day of Payment is appointed, and that Day is to happen fubfequent to the Performance of the Thing to be done by the Contract, in fuch Cafe Performance is a Condition precedent, and muft be averred in an Action for the Money, and fo is 1 Jones 218. to be underftood. Vide Dyer 76. Pl. 30. cont. and 1 Ro. 414, 415. But thefe and fome other Books which are contrary, are not Law; for every Man's Bargain ought to be performed as he intended it: When he relies upon his Remedy, it is but juft that he fhould be left to it according to his

Condition to be conftrued from the Intent of the Parties.

Agreement; but on the contrary, there is no reason a Man should be forced to trust where he never meant it: And therefore, If two Men should agree, one, that the other should have his Horse, the other, that he will pay 10 l. for him, no Action lies for the Money till the Horse be delivered. Vide Dyer 30. Pl. 203. 2 Mod. 33. was denied. Judgment pro Quer. in C. B. and now affirmed upon a Writ of Error in B. R. Vide the Case of Callonel versus Briggs tit. Bargain and Sale of Goods, Pl. 1.

Pullerton *versus* Agnew. Trin. 2 Ann. B. R.

(4) Void Condition makes the Lien void, where it is part of it; otherwise where it is indorsed or underwritten.

SCIRE FACIAS against Bail reciting a Recognizance taken in the Time of the late King William III. wherein the Condition was, That the Defendant should render his Body Prisonæ Mar. Marefch. Dominæ Reginæ nunc. It was urged that the Condition was impossible, and in consequence the Recognizance single. Et per Holt C. J. Where the Condition is underwritten or indorsed, there that is only void, and the Obligation is single; but where the Condition is part of the Lien it self, and incorporated therewith, if the Condition be impossible, the Obligation is void; and the Court inclining that it was ill, the Plaintiff prayed his Writ might be abated for his own Expedition.

*Archbishop of* Canterbury *versus* Willis. Mich. 6 Ann. B. R.

(5) Condition to exhibit an Inventory into the Spiritual Court before such a Day; Defendant, in Excuse, must not only plead that no Court was held, but also that he was there ready.

IN an Action of Debt upon a Bond, with Condition to make an Inventory, and exhibit the same into the Ecclesiastical Court before such a Day, it is not enough for the Defendant to plead, that there was no Court held, but he must plead also, That he was there ready, &c. for he must shew he has done all that could be done on his Side towards a Performance: Thus, if the Condition of a Bond be to levy a Fine in Octabis Sti. Hilarii, by which Condition the Plaintiff is to sue out the Writ of Covenant, it is not enough for the Defendant to plead, That no Writ of Covenant was sued out; but he must plead, that he was there ready at the Day, &c. and no Writ of Covenant was sued out; And so if one be bound to pay Money to J. S. at a certain Time and Place, it is not enough for the Defendant to say, that the Obligee came not, without saying, that he was there ready, per Holt C. J. in the Resolution of this Case, which see at large, Tit. Executors.

# CONFESSION.

## Jones *versus* Bodinham. Trin. 8 Will. III. B. R.

TRESPASS for taking his Cattle in A. Defendant justified a Taking in B. by Process with an impossible Teste, virtute cujus he took them, and traversed the Taking in A. Upon this Traverse issue was join'd, and found for the Plaintiff, and Damages assessed: It was objected in Arrest of Judgment, that this issue was immaterial, for it is all one where the Defendant took them, since he took them without Warrant, the Process being void; Quod fuit concessum. It was moved then for a Repleader. Et per Holt C. J. A Repleader cannot be where there is a Trespass confessed, and the Verdict was set aside, and a Writ of Inquiry awarded, because the Issue being immaterial, the Jury had no Power to enquire of Damages: And Judgment was entered for the Plaintiff on the Confession, and not upon the Verdict. Vide Mo. 696. Yel. 89. 1 Cro. 25, 214. Hob. 327. 2 Ro. 99. 3 Cro. 722, 778, 227, 214, 445. 2 Cro. 678. 1 Saun. 128. Ray 458.

(1) Verdict for the Plaintiff set aside, and Judgment entred by Confession upon the Matter of the Plea.

## Staple *versus* Haydon. Trin. 2 Ann. B. R.

WHERE the Defendant pleads an ill Plea, but the Matter, if well pleaded, might have amounted to a good Bar or Justification, Judgment can never be given against the Defendant, as by Confession; but where the Matter tho' never so well pleaded could signify nothing, Judgment may in such case be given, as by Confession, as if in case for calling him Thief the Defendant should justify, for that he received a Thief. Dit per Holt C. J. in the Resolution of this Case, which see at large Tit. Default.

(2) After a frivolous Plea, Judgment may be entred, as by Confession; otherwise if only mispleaded.

CON-

# CONSPIRACY.

Domina Regina *versus* Best & al. Trin. 3 Ann. B. R.

Conspiracy, tho' nothing be done in pursuance of it, is an Offence; and that whether it be to charge with an Offence Temporal or Ecclesiastical.

INDICTMENT was, That the Defendants intending to oppress and defame H. did falsly and maliciously contrive, conspire, meet and agree falsly to charge the said H. to be the Father of a Bastard-child, of which such a Woman went big; and in pursuance thereof did falsly affirm him to be the Father; upon Demurrer it was urged, That H. might be the Father because it was not averr'd that he was not the Father. It was agreed by the Court, 1st, That several People may lawfully meet and consult to prosecute a guilty Person; otherwise, if to charge one that is innocent, right or wrong, for that is indictable. That so it is here, That the Conspiracy is the Gist of the Indictment, and that, tho' nothing be done in prosecution of it, it is a compleat and consummate Offence of it self, and whether the Conspiracy be to charge a temporal or an Ecclesiastical Offence on an innocent Person, it is the same Thing. 2dly, It need not be averred that H. is innocent, for it is said that the Defendant did falsly affirm him to be the Father, and Innocence is to be intended till the contrary appears. Vide 2 West's Prec. Pl. 102. 42 E. 3. 14. The Venue must be where the Conspiracy was, not where the Result of the Conspiracy is put in Execution: And Confederacies are one of the Articles in the Commission of Oyer and Terminer, to be enquired of.

Confederacies, one of the Articles of Oyer and Terminer.

# CONSTABLE.

THE High Constable was an Officer at Common Law before the Statute of Winton, as well as Petit Constable, and they are Officers to the Justices of Peace, as the Sheriff is to the Court of King's Bench. Per Curiam, in the Case of the Queen and Wyat, which see Tit. Indictments.

## Fletcher *versus* Ingram. Hill. 8 Will. 3. B. R. Intr. Mich. 7 W. 3. Rot. 107.

(1) Constable chosen at the Leet bound to serve under a Penalty, but that cannot be distrain'd for without express Custom.

REPLEVIN for taking his Mare; the Defendants made Conusance, that the Locus in quo is within the Manor of Shewston, where there is a Court-Leet, and that the Jury of the said Leet, Time out of Mind, have chosen one of the Inhabitants within the Manor to be Constable, and that the Person so chosen, by the said Custom is to serve or forfeit a reasonable Penalty, to be impos'd by the Jury at the said Leet; That the Plaintiff was elected accordingly, and order'd to take upon him the Office under the Pain of 40 s. and thereof had Notice, but neglected, which was presented at the next Leet, and he had thereby forfeited 40 s. For which the Defendants, as Bailiffs to the Lord, took the Distress. Et per Cur. (Upon Demurrer) Of common Right the Constable is to be chosen by the Jury in the Leet, and if the Party chosen be present, and refuse, the Steward may fine him; if absent, the Homage must present his Refusal at the next Court, and then he shall be amerced; also if the Party chosen be present, he shall take the Oath in the Leet; if absent, before the Justices of Peace, who still administer the Oath to him as Conservators of the Peace at Common Law: But a Custom ought to be alledged for distraining for the Penalty, and Judgment was given for the Plaintiff.

## *Case of the Vill. of* Chorley. Trin. 11 Will. III. B. R.

(2) Sessions of the Peace may appoint a Constable.

THE Village of Chorly having no Constable, the Justices of Peace, by Order of Sessions, appointed one to serve there. Et per Holt C. J. A Constable may be chosen in the Tourn or Leet. A Village and a Constable are correlatives, but

a

a Hamlet has no Constable. The Justices have all along exercised a Power of appointing Constables, and we will intend they have a sufficient Authority for it; but the Stat. 13 & 14 Car. 2. c. 12. gives them Authority to do it only in the particular Cases therein mentioned. And as to the Authority of a Constable out of his Parish the C. J. said, That if a Warrant be directed to the Constable by Name commanding him to execute it, tho' he is not compellable to go out of his own Precinct, yet he may if he will, and shall be justified by the Warrant for so doing; but if the Warrant be directed to all Constables, &c. generally, it shall be taken respectively, and no Constable can execute the same out of his Precinct.

If a Warrant be directed to a Constable by Name, he may execute it out of his Precinct.

# CONTEMPT. { Vide Title Attachment.

## Toler's *Case*. Paf. 12 Will. III. B. R.

The Writ and Suit of an Infant is subject only to the Direction of the Prochein Amy, and not of the Infant.

A. An Infant sued a Writ of Appeal against B. as Heir to C. for the Murder of C. and D. was admitted as Prochein Amy to A. after the Writ was sued out, and before it was retornable. At the Day of the Retorn the Court was moved, that the Sheriff might return his Writ. The Under-sheriff in his excuse shewed the Court, that the Infant, who was Plaintiff, with some others his Relations came to him, and required him to deliver back the Writ to them, and that he did deliver it accordingly: And it was insisted that it was common for them to deliver Writs back to the Party when he desired it; and tho' the Plaintiff was an Infant, yet an Infant might recal the Writ, for an Infant may disavow his Guardian, 2 Bulst. 59. and he may disavow his Suit, 1 Ro. 288. Holt C. J. contra, The Suit is subject only to the Direction of the Guardian, and so is the Writ. The Infant can no more dispose of the Writ than he can prosecute it, and he has no more power over it out of Court than in Court. 'Tis true, upon the Return of the Writ the Infant may be Nonsuit; and if he appear, he may be Nonsuit after appearance, but then the Appellee shall be arraigned at the Suit of the King. So if an Infant comes in and disavows the Suit, the Court may discharge the Guardian;

I and

and yet that is strange, for to enter a Retraxit is Error; but supposing the Court might have done it, what is this to the Under-Sheriff? How comes he to take upon him to judge of it? He has delivered the Writ without Authority, and this is a Contempt. Et per omnes Justic. præter Turton, The Under-Sheriff was fined and committed notwithstanding his Clerk in Court offered to undertake for the Fine. After this the Court of Chancery was moved for a new Writ of Appeal, but it was denied (ut audivi.)

Sheriff fined and committed for delivering Infant's Writ of Appeal to him.

# Continuance and Discontinuance.

## Bisse *versus* Harcourt. Pas. 2 W. & M. B. R. Intr. Hill. ult. Rot. 217.

INDEBITATUS ASSUMPSIT. The Defendant pleaded an Attainder of High Treason in Disability. The Plaintiff replied, a Pardon prout per Exemplification. inde, &c. (which was held good) Et pet. judicium & dampna sua. To which it was demurred and held, That there was a Discontinuance by the Misconclusion of the Replication; for an ill Prayer of Judgment is as none.

(1) Wrong Prayer of Judgment in Replication makes Discontinuance.

## Walwin *versus* Smith. Trin. 3 W. & M. B. R. Rot. 361.

DEBT was brought upon a Bond, in the Court of the Corporation of Hereford, conditioned to perform Articles. The Defendant pleaded performance: The Plaintiff replied and assigned a Breach, whereupon issue was joined. And then there was an Entry, that the Mayor was removed and another chosen, but no Day was given to the Parties, nor any Court held; But after this a Venire was awarded, and the Issue tried. Upon a Writ of Error brought in B. R. it was objected, that the Stat. 32 H. 8. c. 30. did not extend to inferiour Courts, and that it help'd only Discontinuances of Pleas or Process, and not of the Court. But per Holt C. J. It is a remedial Law, and shall be

(2) Stat. 32 H. 8. c. 30. extends to all Discontinuances, as well of Court as Process, in inferiour as in superiour Courts.

construed to extend to all Discontinuances, and that as well in inferiour as superiour Courts; and indeed inferiour Courts have most need of such Assistance. Gregory's Case, which is of a Penalty given by Statute to be recovered in any Court of Record, which must be taken strictly for those at Westminster, differs; for that is a Penal Law, and the Courts at Westminster are those which the King's Attorney-General attends.

## Moor *versus* Green. Mich. 6 W. & M. B. R.

(3) Outlawry of Plaintiff, between Action brought and Plea pleaded, need not be pleaded puis darrein Continuance.

IN Debt upon a Judgment brought in Trin. Term, the Defendant imparled till Mich. Term, and then pleaded in Bar, that the Plaintiff die Lunæ prox' post fest. Sti. Martini was outlawed, to which the Plaintiff demurred. It was urged, that the Outlawry was mesne between the Action brought and the Plea pleaded, and that all matters in discharge of the Action, which happen after the Action brought, ought to be pleaded puis darrein Continuance, Vide Yelv. 140. But the Court compared this to the common Case of a Judgment confessed by an Executor after an Action brought, which is never pleaded puis darrein Continuance; but as this Case is. And in these Cases the Time of the Outlawry, and the Time of the Judgment, and when it was, appear in themselves.

## Price *versus* Parker. Pas. 8 Will. III. B. R.

(4) Discontinuance by Leave of the Court may be after special Verdict, not after general.

UPON a Motion to discontinue upon Payment of Costs, the Court held, That after a general Verdict there can be no leave given to discontinue; but that after a special Verdict there may, because that is not compleat and final; but in that Case it is great Favour. The same Point was so ruled, inter Reeve and Gelding. Pas. 5 & 6 W. & M. B. R.

## Barber *versus* Palmer. Trin. 13 Will. III. B. R.

(5) Plea, Puis darrein Continuance is a Waiver of the Bar.

IF after a Plea in Bar the Defendant pleads a Plea puis darrein Continuance, this is a Waiver of his Bar, and no advantage shall be taken of any Thing in the Bar.

## Weeks *versus* Peach. Mich. 13 Will. III. B. R.

REPLEVIN for taking Chattels in quodam loco vocat. A. Ac etiam in quodam al. loco vocat. B. The Defendant avowed the taking in prædict. loco in quo, &c. for that such a one was seised of the locus in quo, &c. To this the Plaintiff demurred. Et per Cur. The locus in quo relates only to one place, so that there is a Discontinuance, the Avowry not being an Answer to the whole Declaration; and this Difference was taken per Holt C. J. If a Plea begin with an Answer to the whole, but in Truth the Matter pleaded is only an Answer to part, the whole Plea is naught, and the Plaintiff may demur; but if a Plea begin only as an Answer to part, and is in Truth but an Answer to part, 'tis a Discontinuance, and the Plaintiff must not demur, but take his Judgment for that as by Nil dicit; for if he demurs or pleads over, the whole Action is discontinued.

(6) If a Plea to the whole answers but part, 'tis demurrable; if a Plea to part answers but part, the Plaintiff must take Judgment for the rest.

## Curluis *versus* Padley. Pas. 2 Ann. B. R.

IN Debt, the Declaration was of Michaelmas Term, and the Plea-Roll of Easter, and no Continuances entered, and this upon Demurrer was shewed to the Court as a Discontinuance; but they said, The Practice is never to enter Continuances till the Plea-Roll be entred up, tho' the Declaration be of four or five Terms standing.

(7) Continuances are not entred in B. R. till the Plea-Roll is made up.

## Turner *versus* Turner. Pas. 2 Ann. B. R.

IN Debt upon a Bond the Defendant pleaded a Composition, and this being argued several Times at Bar, upon Demurrer at last the Court gave a Rule for Judgment, Nisi Causa. And being stirred again, the former Rule was made absolute. The next Day Mr. Mountague moved to discontinue, alledging, That this was a Sham Plea, and no such Composition ever made, and cited 1 Saund. 39. 23. 2 Saund. 73. But per Holt C. J. After a Rule Nisi, and then a peremptory Rule for Judgment, it was never done: The Rule of the old Books was, if after an Exception was stirred and the Court had given their Opinions, the Plaintiff would be so hardy as to demur, he must do it at his Peril, and so it is here.

(8) Plaintiff cannot discontinue after Rule for Judgment for the Defendant.

Market *versus* Johnson. Hill. 3 Ann. B. R.

(9) Plea to part, if Plaintiff don't take Judgment for the rest, makes a Discontinuance.

Several bars may be pleaded to several Parcels of a Debt on Bond.

DEBT upon a Bond of 500 l. the Defendant as to 225 l. parcell. de prædict. 500 l. pleads Payment; the Plaintiff demurred. Et per Cur. This is only a Plea to part; for in Debt upon a Bond a Man may have several Pleas in Bar, as suppose the Plaintiff is sued as Executor, the Defendant may plead the Release of the Testator for part, and for the residue the Release of the Plaintiff: So a Man as to part may plead Payment, and as to the rest an Acquittance; then there being no answer as to the residue, here is a Discontinuance for the residue; and the Plaintiff should have taken Judgment by Nil dicit. Et nota, This was in Hillary Term, and the Plea was delivered in Michaelmas, but made up as of Hillary, which being observed the Plaintiff took Judgment still, and the Court held he might do it; and it was said, That tho' the Plea was delivered in Michaelmas, yet it being only a Plea to enter, it might be entered as of Hillary, and so Trick for Trick.

Vide Co. Ent. 142. In Debt upon a Bond there is issue joined as to part, and Demurrer joined as to the rest, both are continued for a long Time by Cur. advisare vult, &c. at last a Discontinuance is recorded, viz. Recordatur per Cur. such a Day of May, Term. Paf. Anno, &c. quod illud Placitum non habet diem ultra Octabas Sci. Hillarii.

(10) Regina *versus* Tutchin. Vide *this Case*, *Title* Amendment, Pl. 14.

# CONVICTIONS.

## Domina Regina *versus* Dyer. Trin. 2 Ann. B. R.

DYER was convicted on the Stat. 7 Jac. 1. c. 7. for buying imbezilled Yarn, and it set forth, Whereas Complaint had been made unto A. and B. &c. And whereas the Defendant was summoned to appear before them, and by vertue thereof did appear on Tuesday the 17th Day of April, 1702. &c. It was objected, That there was no such Day as Tuesday the 17th Day of April, 1702. and indeed the 17th Day was Friday, so that the Time of the Summons being impossible, it was the same Thing as if there had been no Summons, and a Summons was necessary. Vide 2 Bulst. 48. 9 H. 6. 44. Plo. 31. Dy. 95. Ray. 192. 2 Jo. 50. 12 H. 7. 12. Et per Cur. Upon the Complaint the Justices ought to make a Memorandum and issue a Summons, and if the Party will not appear, or can not be found, he may proceed. In the principal Case, it is manifest, there could be no such Day, and therefore he could not appear thereupon, and when one Day is set forth his Appearance on another cannot be intended: Therefore the Conviction was quashed.

(1) Summons necessary in summary Convictions.

Where the Time is impossible, it is as no Summons.

## Domina Regina *versus* Barnaby. Trin. 2 Ann. B. R.

ON a Certiorari was return'd a Conviction upon the 43 El. c. 7. setting forth, Whereas Complaint has been made unto us, &c. by Sir R. B. that the Defendant in the Night-time cut down divers Lime-Trees of the said Sir R. B. &c. The Justices awarded that he should pay so much for Damages. The Defendant was stiled Gentleman in the Order, and it was objected, 1st, That a Gentleman was not within the Statute which speaks of Vagabonds and such base People, and inflicts a base Punishment, viz. Whipping, which the Law did never intend for a Gentleman. 2dly, That the Conviction is uncertain, for want of shewing the Number of Trees.

(2) In Convictions on 43 El. c. 7. the Number and Nature of the Trees must be set forth.

Curia. To the first, Whether the Defendant be a Gentleman, or not, is not material, for if a Man of Quality will do a base or mean Thing, there is no Reason or Justice why he should be exempted from the Punishment: The Quality of the Offender is ra-

rather an Aggravation than a Lessening of the Offence. To the second, the Number as well as the Nature of the Trees should be expressed, for this is like an Action of Trespass in this respect, That the Plaintiff is to recover Damages, of which the Number and Nature of the Trees is to be the Measure; and if an Action of Trespass shall hereafter be brought for these Trees, this Conviction ought to be a Plea in Bar. 3dly, The Plaintiff in this Case pretended he had Title, and offered to plead it to the Conviction, as was done in 3 Cro. 821. and in 5 Co. St. John's Case. Powell Justice held, That could not be done, for if the Defendant had Title, and the Property was in question, then the Justices had no Jurisdiction, and then he is not without Remedy; for he may have his Action on the Case against the Justice, or him that executes the Sentence: On the other side; If the Justices had a Jurisdiction, we have no Power to question their Judgment, and this is a new Thing without Precedent. Powis and Gould agreed. Holt C. J. contra, (who indeed started this Point) That St. John's Case was a Precedent for this way of Pleading to a Conviction, and that it was and must have been done so there, or else the Point of the Dagge could not have come in question: He said it was as reasonable to falsify the Proceedings before the Justices in this manner, as by an Action against them; And as to what Powell said of a Remedy by Action he answered, That if this Order were confirm'd, no Action would lie against the Justices, or him that executes the Sentence, for then it is supported by the Authority of this Court; and he said it was hard that this Court should by their Judgment give an Authority to that which ought not to have been done. Note, It was said the Record of St. John's Case was not to be found. The Conviction was quash'd upon the second Point.

By three Judges against Holt C. J. refus'd to receive a Plea to such Conviction, and St. John's Case denied.

If a Judgment of Justices is confirm'd by B. R. no Action lies against them or the Officer.

## Domina Regina *versus* King. & al. Hill. 10 Ann. B. R.

A Conviction for Dear-stealing was remov'd against A. and B. wherein Judgment was given that each should forfeit 30 l. and 'twas objected, that there ought to be but one 30 l. forfeited: Sed non allocatur, for the Words of the Act are, That they shall respectively forfeit 30 l. Cro. El. 480. Mo. 453. Noy 60. And this Penalty is not in Nature of a Satisfaction to the Party grieved, but a Punishment on the Offender, and Crimes are several, tho' Debts be joint, which per Powell distinguishes this from the Case of Partridge and Naylor in Cro. El. 480. and Noy 62.

(3) Respectively forfeit in Statute, makes the Forfeiture several upon each Offender.

# Conuzance of Pleas. {Vide Title Courts inferior.

## Cotton *versus* Johnson. Hill. 2 W. & M. C. B.

(1) Suggestion made upon the Roll without the Nient dedire, or Confession of the other Party, is well.

IN Trespass and Ejectment for Lands in A. in the Isle of Ely, after Non cul. pleaded, a Suggestion was entered, quod nullus justiciarius vel Minister Domini Regis insulam illam ingredi potest ad aliquam Jurat. extra, &c. and so prays a Venire to R. the next Village in the County of Cambridge. Et quia videtur Justiciariis rationi consonum conceditur, &c. And it was objected, That the Nient dedire. i. e. quia Def. hoc non dedicit, or else the Confession of the Defendant, should have been entered, and that so are the Precedents. Curia, Either way is good. If it be not true, you may bring Error; if it be true, then it is right.

## Foster *versus* Mitton. Hill. 10 Will. III. B. R.

(2) Demand of Conuzance, and the Method of Entry thereof.

SERJEANT Wright came into Court and demanded Conuzance of Pleas for the Bishop of Ely, in an Action of Trespass quare clausum fregit, which was pending in this Court being removed hither by Certiorari: And first of all, the Warrant of Attorney, under the Bishop's Seal in Latin, was read, and then the Record of the Plea, as it stood; And the Record went on. Et modo ad hunc diem, venit Episcop. Eliensis per J. S. Attorn. suum Et pet. cognition. &c. quia dicit, That the Place where, &c. is within the Liberty of the Bishop of Ely, and that alias scilt. Mich. 20 E. 3. B. R. Rot. 34. in Trespass, Assault and Battery, and Hill. 21 E. 3. Rot. 21. B. R. in Trespass quare, &c. and Hill. 17 & 18 Car. 2. Rot. 229. B. R. in Trespass and Ejectment, and in 35 Car. 2. Rot. 151. Trespass, Assault and Battery, this Privilege was allowed, and so prays his Privilege habendi cognitionem, and then the Entry went on, Et quæsitum est of the Defendant si quid dicere queat quare, &c. super quo allocatur, &c. and then Day is given upon the Roll to the Parties at Ely, &c. Et dictum est Episcopo quod in cæteris justitia fiat. The two last Records were produced in Court; but because the old Records were not produced, and it was the last Day of the Term it was adjourned. Holt C. J. doubted as to this sort of Pleading, for he said, The true Way of Pleading was

An immemorial Usage ought to be shewn, and then an Allowance in B. R. or in Eyre.

was to alledge an immemorial Usage, and then also produce the Allowance in B. R. or in Eyre; for such Privilege lies not in Prescription, but in Grant: And because, if the Charter were before Time of Memory, viz. before 1 R. 1. the said Charter could not be pleaded, Therefore by the Stat. De quo Warranto 6 E. 1. you may say an usage Time out of Mind, which is an Argument of an ancient Grant, and shew the Allowance. But without such Usage the Presumption of Law fails. Vide Kellw. 189, 150. 1 Sid. 103. and in that case you ought to shew your Patent.

The Record of the Allowance must be produced.

This was moved again in Trinity Term, and Holt C. J. asked for the Record of E. 3. and they had only a Copy thereof, whereupon he said, that the Record should have been produced, for the Entry is inspect. Record. &c. also he said, there was no need to plead several Allowances; 'twas enough to plead one, and rely on it.

(3) Cross *versus* Smith. Vide *this Case*, *Title* Certiorari.

# Copyhold and Copyholder.

## Dudfeild *versus* Andrews. Trin. 1 W. & M. C. B. Rot. 760.

(1) Steward of a Copyhold Manor may take Surrenders out of the Manor.

STEWARD of a Copyhold Manor may without Custom take Surrenders out of Court, for he hath the Power of the Lord, and the Lord may do it; But why not out of the Manor, since 'tis granted he may out of Court, and it may be convenient, but can be prejudicial to no Body? Vide 2 Cro. 526. 1 Leo. 227 con. 1 Inst. 59. 1 Ro. 500. There are two sorts of Customs, viz. General throughout all Manors which the Court takes Notice of; Particular, which must be pleaded. Et per tot. Cur. There is as much reason, that the Steward should take Surrenders out of the Manor as the Lord, and that he should do it out of the Manor as out of the Court.

## Glover *versus* Cope. Mich. 3 W. & M. B. R. Intr. Pas. ult. Rot. 267.

PER Curiam, The Surrenderee of a Copyhold Reversion may bring Debt or Covenant against the Lessee within the Equity of the 32 H. 8. cap. 3. for 'tis a remedial Law, and no prejudice can arise to the Lord, and whether he is in the per or in the Post, is not material; for a Bargainee may maintain Covenant within this Statute, and yet no doubt but he is in the Post, and Yelv. 222. was a hasty Resolution; and Hob. 178. only an extrajudicial Opinion: Judgment for the Plaintiff. Note, The Words of the Act are, No Person being a Grantee or Assignee of any Reversion.

(2) Surrenderee of Copyhold is within the Equity of the Stat. 32 H. 8. c. 3.

## Benson *versus* Scot. Pas. 5 & 6 W. & M. B. R.

IN Ejectment a special Verdict was found, viz. A Custom, that the Tenants of the Manor having a Mind to alien, might surrender into the Hands of two Copyholders, &c. That Scot being a Copyholder in Fee, did surrender, &c. to the Use of the Plaintiff in Fee and died, leaving his Wife, who claimed her Free-Bank by the Custom, and at the next Court the Surrender was presented, and thereupon the Plaintiff admitted; and the Question being, whether the Surrenderee, or the Wife for her Frank-Bank, should have these Lands, it was adjudged for the Plaintiff; for the Wife's Title does not commence till after the Death of the Husband, and then only to those Lands of which he died seised; but the Plaintiff's Title began by the Surrender; for the Admittance relates to that; and that the Case of two Jointenants, 1 Inst. 59. b. rules this Case.

(3) Admittance relates to Surrender, and Surrenderee's Title begins from thence.

## Brittle *versus* Dade. 7 Will. III. C. B.

EJECTMENT. The Defendant pleaded, that the Land was held of the Manor of D. which is ancient Demesne. The Plaintiff replies, Quod bene & verum est, That the Lands aforesaid are held de Decano & Capitulo de Wigornia ut de Manerio, &c. which is ancient Demesne, but that the Lands are Copyhold-Lands: The Defendant rejoins, Ex quo prædict. the Plaintiff cognovit the Lands to be ancient Demesne, 'tis no matter whether they are Copyhold or Frank-Fee, Plaintiff demurs; Et per Cur.

(4) Ancient Demesne.

Copyhold Lands are parcel, Freehold Lands are held, ut de manerio.

1st, The Replication is repugnant, for Lands held ut de Manerio must be Frank-Fee; for Copyhold-Lands are parcel of the Manor, and cannot be held ut de Manerio: And therefore the Replication by saying they are held ut de Manerio, and yet they are Copyhold, is repugnant.

Writ of Right lies not of Copyhold.

2dly, The Rejoinder is naught; for if they be Copyhold an Ejectment lies: 1st, Because Copyholds are of so base a Nature, that a Writ of Right will not lie, N. B. 12. a. 2dly, It would be inconvenient because Copyholds are parcel of the Demesnes of the Manor, so that if they are triable in the Lord's Court, the Lord might be Judge and Party, and therefore per Treby C. J. the Jurisdiction of the Lord's Court extends to Land holden of the Manor only, and not to Land parcel of the Manor. Judgment Quod breve cassetur. 3 Lev. 405.

## Eastcourt *versus* Weeks. Trin. 10 Will. III. C. B. Rot. 355.

(5) Cause of Forfeiture of Copyhold does not descend to the Heir.

EJECTMENT on the Demise of Anne Eastcourt; a special Verdict was found, that the Lands in question are Copyhold parcel of the Manor of Newton, and that Will. Weeks was Copyhold-Tenant in Possession for Life, and Sir Will. Eastcourt Lord, That Sir William died, and the Manor, &c. descended to his two Sisters, Mary and Anne. That Weeks suffered his House to be ruinous, and made a Lease of his Copyhold for ten Years, and that Mary died, per quod all descended to Anne her Sister and Heir; that Weeks died, and his Wife entered claiming her Widow's Estate, and that Anne entered for the permissive Waste of the Husband, and his Lease for ten Years without Licence: Et per Cur. 'Twas admitted in the Case that these were both causes of Forfeiture, but the Question was, Whether the Plaintiff could take Advantage of this Forfeiture? Et per Powell, At Common Law the Heir was entitled to take Advantage of any causes of Forfeiture in the Time of his Ancestor, but Waste and cessavit; Waste he could not, because it is a personal Wrong, which dies with the Person; Cessavit he could not, because the Tenant by the Statute has Liberty to save himself by Tender of Arrears, which are not due to the Heir, but to the Executors. In all other Cases the Estate determines by the Act of Forfeiture, and tho' the Tenant hold in Possession, 'tis a Disseisin to the Lord, if he will. 1 Ro. 508. 1 Inst. 59. Godb. 47. 1 Inst. 233. Fitz. Trespass 254. 1 Jones 136. Palm. 438, 439. And this Election of making it a Disseisin being annexed to the Inheritance descends to the Heir, Noy 57. 1 Leon. 242. 1 Inst. 63. 1 Ro. 508. And where there are two Coparceners, and one will take Advantage of a Forfeiture and the

other not, there must be an Apportionment. 1 Inst. 355. Kellewey 105.

Treby C. J. Nevil and Blencow held, That the continuing in of the Tenant after Forfeiture was no Disseisin at Election of the Lord. 'Twas admitted, That if Tenant for Years or Life make a Feoffment or levy a Fine, 'tis a Forfeiture, and also a Determination of their Estate and a Disseisin; but if Tenant for Years make a Lease for a longer Term than he has, they held it no Disseisin nor Forfeiture, because 'tis only a Contract between him and his Lessee, which does not operate on the Interest of the Lessor to affect it with any Prejudice.

Tenant for Years makes Feoffment, 'tis a Forfeiture; otherwise of a Lease for longer Term.

They held, That a Lease by a Copyholder was a Forfeiture, because 'twas a Breach of Trust, Mo. 272, 392, 184. and that it was a personal Wrong as much as Waste, which cannot be transferred by Descent, but must be took Advantage of by him that was wronged.

Also they held that the Estate of the Copyholder was not determined, because the Lord by Acceptance of Rent, &c. might affirm it.

Lastly, They held the Election must be made by both the Parceners; that the Thing is intire, and that therefore the surviving Sister could not elect after the Death of her Sister; and as to the Case of Co. Lit. where the Aunt and Niece are said to join in Waste, they much doubted of it, for the Books cited do not warrant that Opinion, and other Authorities are contrary. Mo. 34, 110. 40, 127.

## Kettle *versus* Townsend. Tempore Will. III. In Canc.

(6)

ONE devises a Copyhold-Estate to his Grandson, and Sommers, Lord Chancellor, decreed the Will good, and that Equity ought to supply a Surrender as well as in case of a Son; that a Grandson was a Son, and the Grandfather was bound to provide for him: But the House of Lords reversed this Decree, and held, Equity ought not to supply such a Defect in Disfavour of the Heir at Law, unless it were in favour of a Son or a Daughter; and not then neither, if it was to disinherit the eldest Son; but it was not material that such a Son was provided for before, nor how far, for the Father only is best Judge whether he has fully advanced his Child, or not.

Equity ought only to supply a Surrender against the Heir, in favour of a Son or a Daughter; but prior Provision is not material.

## Smartle *versus* Penhallow. Intr. Hill. 13 Will. III. B. R. Rot. 380.

(7) Custom in a Manor to grant Lands by Copy to two or three Persons for their Lives, Habend. successivè, &c. Grant to A. habend. to him during the Lives of A, B, and C. is warranted by the Custom.

IN Ejectment a special Verdict was found, viz. That the Lands in question were parcel of the Manor of Tregoan, of which the Bishop of Exeter, Lessor of the Plaintiff, was seized; and that by Custom of the Manor the said Lands are demiseable by Copy of Court-Roll to two or three Persons for their Lives, and the Life of the Survivor, Habendum successivè sicut nominantur in Charta, & non aliter, and that the Lord is to have a Heriot on the Death of every Tenant dying seised. They farther find one Nosworthy was Tenant for Life of the Manor by Grant from the Predecessor of this Bishop; and that he by Copy granted the Tenement in question to A. and his Assigns, for the Lives of B. and C. and of the said A. and that Nosworthy is dead. The Question was, Whether this Grant be warranted by the Custom? And it was urged for the Plaintiff, That A. has the whole Estate, and that B. and C. are not named to take an Interest but by way of Limitation; and that if A. die, here is room for an Occupant, which is to put a Tenant upon the Lord without his Consent: Also if A. should become Bankrupt, this Estate would be assignable; and upon this Lease the Lord can have but one Heriot, whereas in the customary Leases the Lord is to have three. They admitted that where a Power or Custom warrants a greater Estate, it will warrant a lesser, as if the Lord may grant for three Lives, he may for one: But then it must be of the same Nature. If H. has a Power to lease for three Lives, he cannot lease for 500 Years, tho' it be a lesser Estate in Law. If a Bishop make a Lease for 30 Years, 'tis wholly void as to the Successor, because his Power is exceeded; so in this case.

On the other side 'twas argued pro def. That this was no greater Estate than what the Custom allowed; That if this Grant had been made to A. B. and C. habendum successivè for their Lives, they might have surrendered to three others, and the Lord was compellable to admit them, and they would have an Estate pur auter vie. That if the Tenant may by his own Act make such an Estate, 'tis most unequal to say that the Lord cannot. As to the Lord 'tis the same Thing, whether A. takes for his own Life, and the Life of B. and C. or A. B. and C. take for their Lives: And there cannot be an Occupant of Copyhold-Lands, neither are they within the Statute of Frauds to be Assets or devisable; and as to the Heriot, it will be due on the Death of every Assignee that is admitted.

If Copyhold Tenant pur auter vie die, the Lord shall enter; and no Occupancy is.

Holt C. J. 1st, There can be no Occupant of a Copyhold-Estate for the prejudice it would do the Lord: But if the Copyholder being Tenant pur auter vie die, the Lord shall enter. As if

if there be Tenant for Life of a Copyhold, Remainder to another for Life, and Tenant for Life commits a Forfeiture, the Lord shall enter. If H. grants a Rent out of his Lands to A. pur auter vie, and A. dies, shall not the Rent cease? What is the Reason? Because here wants a Grantee. So it is here; an Occupancy is for supplying a Freehold: In Copyholds the Freehold is in the Lord; the Tenant has only an Estate at Will.

Rent to A. pur auter vie, ceases by A.'s Death.

Occupancy is only to supply a Freehold.

2dly, He held that the Custom consisted in three Parts: 1st, The Constitution of the Estate, viz. by Copy. 2dly, The Extent for three Lives. 3dly, The manner of the Estate, which by Operation of the Custom differs from the Constitution at Common Law, viz. to three habendum successivè.

What is done here is not so much as the Custom: The Custom enables him to grant for three Lives, and he grants but for one. If the Custom be to grant in Fee & non aliter, yet the Lord may grant for Life, or to A. for Life, Remainder to B. in Tail. If the Custom be to grant for Life, the Lord may grant durante viduitate. Vide 3 Cro. 323, 373. This is not like the Case of a Bishop's Lease: That cannot be good for any part, because the Statute ties it up to an express Form. Aliter perhaps had it been that Bishops should make Leases for any number of Years not exceeding such a Number.

Bishop's Lease exceeding the Stat. is void as to the Successor in toto.

As to the supposal of the Bankrupcy, Powell at first doubted upon that inconvenience, saying it could not be good if it prejudiced the Lord; but Holt thought that made no difference; for if the Copyholder being Bankrupt, his Estate was assigned, the Assignee would have the Estate determinable upon the Death of the Copyholder, and then the Heriot would be due, and not by the Death of the Assignee; for so it was originally, and cannot be altered by any Act of the Copyholder; but per tot. Cur. This is a Supposal not in the Case, and therefore it was not determined. Judgment pro Def. per tot. Cur.

Act of the Copyholder can't alter his Estate in prejudice of the Lord.

# CORONER.

## Rex & Regina *versus* Bunney. Mich. 1 W. & M. B.R.

Upon quashing Inquisition, the Coroner makes a new one super visum; upon a Melius Inquirendum, the Sheriff or Commissioners by Affidavits.

If a Coroner's Inquest be quash'd, the Coroner must take a new Inquest super visum Corporis; but if a Melius Inquirendum be granted on a Male se gessit of the Coroner, the new Inquiry must be before the Sheriff or Commissioners, not super visum Corporis, but upon Affidavits; for none but the Coroner can inquire super visum Corporis, and he is not to be trusted again: But when an Inquisition is quash'd, 'tis as if no Inquisition had been taken.

Clerk's *Case*. Vide *Title* Indictments, &c.

# CORPORATION.

## Butler *versus* Palmer. Trin. 11 Will. III. B. R.

(1) Elections to be made by the Body at large, may be restrain'd to a select Number.

In an Action for a false Return of a Mandamus it appeared, That King Edward III. granted to the Burgesses of Dartmouth a Charter to elect a Mayor de seipsis annually, and by Constitutions made in the Reign of Q. Elizabeth and K. James the First, and long Usage in pursuance thereof, the Method was for the Common-Council to propose two Persons for the Freemen to chuse one out of them: That thus it continued till 1641, and then a By-Law was made for repealing all former By-Laws, and ordaining that for the future Elections should be made by the Freemen at large; and accordingly the two succeeding Elections were made. In the Year 1684. the old Charter was surrendered; but that Surrender was never in-

 rolled,

to..s, and a new Charter granted, under which new Charter the Town made a By-Law repealing the By-Law made in 1681. The Court resolved, 1st, That tho' by the Grant of Edw. 3. the Election was to be by the Freemen at large, yet this might be restrained and regulated by Usage and By-Laws, to the Choice of one out of two only. 2dly, That the By-Law in 1681 had well restored the ancient and primitive Constitution, and repealed those By-Laws that altered it. 3dly, That the Surrender of the old Charter was void for want of an Inrolment. 4thly, As to the new Charter, and By-Law made under it the Court held, That if those that were Members under the old Charter, happened to be the only Persons that acted, they should be deemed to act by vertue of their ancient and true Right, but if commixt with others that were only Members under the new Charter, tho' the old Members were the Majority, yet they must be taken to act by vertue of the new Charter, and then what they did was void.

Surrender of Charter, void without Inrolment.

Where Members under a good old Charter join with Members under a bad new one, the Act is void.

## East-India Company's *Case*. Pas. 12 Will. III. B. R.

INDIAN Action against the East-India-Company for 5000 l. it was moved, That the Sheriff might retorn exemplary Issues, because several Writs of Distringas had been already served to no purpose; and the Court said, he should retorn good Issues, and if he did not, the Plaintiff might bring an Action against him, but at last he was ordered to attend.

## Anonymus. Trin. 12 Will. III. B. R.

PER Holt C. J. My Lord Coke says, That a Corporation must have a Name; but that must be understood to be either expressed in the Patent, or implied in the Nature of the Thing, as if the King should incorporate the Inhabitants of Dale with Power to chuse a Mayor annually; tho' no Name be given, yet it is a good Corporation by the Name of Mayor and Commonalty. So the City of Norwich is incorporated to be a Mayor and Sheriffs by the Charter of Hen. 4. and are called Mayor, Sheriffs and Commonalty.

(2) Corporation must have a Name either expressed in the Grant, or implied in the Nature of the Thing.

A Corporation aggregate may appoint a Bailiff to distrain without Deed or Warrant, as well as a Cook or Butler, for it neither vests nor divests any sort of Interest in or out of the Corporation. So held inter Cary & Matthews in Cam. Scacc.

Corporation aggregate may appoint a Bailiff without Deed.

The

## The Mayor of Thetford's Case. Hill. 1 Ann. B. R.

(3) Corporation may do an Act upon Record without their common Seal, but not in pais.

UPON a Mandamus to the Mayor and Commonalty of Thetford, the Return was made in the Name of the Corporation, but without the common Seal, or the Hand of the Mayor set to it: Mr. Sloane moved, That the Mayor might be obliged to sign it or seal it with the Corporation Seal, alledging that it was not a Corporate Act to charge the Corporation without the common Seal, nor the Act of the Mayor without his Hand to it. After search of Precedents, which were found both Ways, Holt C. J. held, and the rest concurred, That tho' a Corporation cannot do an Act in Pais without their common Seal, yet they may do an Act upon Record; and that is the Case of the City of London every Year, who make an Attorney by Warrant of Attorney in this Court, without either Sealing or Signing; and the Reason is, because they are estopped by the Record to say it is not their Act. So if an Action be brought against a Corporation here for a false Return, they are estopped to say, it is not their Return, for it is Responsio Majoris & Communitatis upon Record. Neither is the Hand of the Mayor necessary, for he is liable in his private Capacity without it; and it is sufficient Evidence against him, That the Writ was delivered to him, and that there is Return made, for then it is incumbent on the Mayor to shew the contrary. At Common Law no Officer was bound to sign a Return. The Statute of York obliges a Sheriff to do it, but extends not to a Coroner, Mayor, or other Officer. And the Mayor or any other Magistrate of this Corporation that procured this Return, is liable not only in their corporate but their private Capacity.

At Common Law no Officer was bound to sign a Return.

## Caddon versus Eastwick. Hill. 2 Ann. B. R.

(4) A Corporation may make a Fraternity; and also By-Laws to bind strangers for publick Convenience.

UPON a Habeas Corpus was return'd an Action of Debt for the Penalty of a By-Law made by the Common Council of the City of London. The By-Law was, That whereas the Company and Fellowship of Porters had been Time out of Mind a Company and Fellowship; it was ordain'd, That they should still remain and continue for ever a Company and Fellowship, and that no Master of any Boat, &c. from place to place to, &c. should unload or send on shore any Goods, but by such Persons as were free of the said Company: To which it was objected, 1st, That the City of London could not make a Corporation. 2dly, That a Corporation could not make a By-Law to bind strangers, unless founded on publick Convenience. Et per Cur.

3 The

The City of London cannot make a Corporation, for that can only be created by the Crown; but this is only a Fraternity, not a Corporation, and a Corporation may make a Fraternity. A Corporation is properly an investing the People of the Place with the local Government thereof, and therefore their Law shall bind Strangers; but a Fraternity is some People of a Place united together, in respect of a Mystery and Business, into a Company, and their Laws and Ordinances cannot bind Strangers, for they have not a local Power or Government.

Difference between Corporation and Fraternity.

# COSTS.

## Blachly *versus* Fry. Mich. 8 Will. III. B. R.

(1) Full Costs in Trespass.

IN Trespass quare Clausum fregit, and for cutting his Corn and carrying it away, the Jury found the Defendant guilty of all but the carrying away; and Gould moved for full Costs on the 22 & 23 Car. 2. cap. 9. Holt C. J. Where the Trespass is done clamando titulum, or the Title may come in Question, there shall be full Costs. In Stroud's Case for entring his Close and digging Turf, full Costs was allowed: But the Judge of Assize, viz. North C. J. certified, that the Freehold came in question. So in Judge Eyre's Case, in an Action on the Case for stopping his Way, Adjournat. Vide Ray 487. 2 Keb. 756. 2 Ven. 215. 2 Keb. 849.

## Dominus Rex *versus* Edwards. Hill. 8 Will. III. B. R.

(2) Crown pays Costs for Amendment, but not for not going on to Trial.

IT was said per Cur. That the King shall pay Costs for an Amendment, but shall not pay Costs for not going on to Trial; but where there is a Prosecutor, he shall pay Costs for Amendments, and for not going on to Trial both; but then there must be an Affidavit of the Name of him who is the Prosecutor, for that does not appear upon the Indictment: And if the Defendant does not know the Prosecutor, he ought to apply to the Attorney-General, who will inform him.

## Thomas *versus* Lloyd. 10 Will. III. B. R.

(3) No Costs on Demurrers to Pleas in Abatement.

ASSUMPSIT, The Defendant pleaded his Privilege as an Officer of the Exchequer in Abatement, and the Plea being held good upon Demurrer, there was Judgment quod billa cassetur. Et per Cur. It was held upon the 8 & 9 W. 3. c. 11. That the Defendant should have no Costs; for the Act extends only to Demurrers in Bar, and not in Abatement, because it speaks of Suits which are vexatious, which does not appear to the Court on Pleas in Abatement; but on Demurrers in Bar, where the Court see the Merits of the Cause, it does, and it would be very hard if the Defendant should have Costs against the Plaintiff in such a Case, when the Plaintiff could have none against the Defendant, tho' he should have had Judgment quod respondeat ouster.

## Garland *versus* Extend. Mich 2 Ann. B. R.

(4)

THE Defendant having pleaded in Abatement, the Plaintiff demurred, and Judgment was given for the Defendant. And Mr. Branthwaite moved to have Costs upon the Stat. 8 & 9 W. 3. But it was denied, for the Judgment in this Case is not given upon the Merits, but quod billa cassetur, and the Statute meant only to give Costs, where the Merits of the Cause was determined upon the Demurrer. If Judgment had been for the Plaintiff upon this Demurrer, it had not been final, but only a respondeas ouster, and the Plaintiff could have had no Costs by the Statute, which therefore ought to have the same Exposition as to the Defendant.

## Domina Regina *versus* Danvers, & al. 6 Ann. B. R.

(5) Information against three, and one only acquitted; he shall not have Costs on 4 & 5 W. & M. c. 18.

IN an Information against Danvers and others, one Defendant was acquitted, and the rest found guilty at the Assizes; and tho' the Judge did not certify a probable Cause, yet it was held that the Prosecutor was not liable to pay this Defendant Costs; because till the 8 & 9 W. 3. the Plaintiff never paid Costs in any Action, if but one Defendant was found guilty, and the Act of 4 & 5 W. & M. c. 18. cannot be intended to make Prosecutors otherwise liable, than as Plaintiffs were before in other Actions.

Vide plus Tit. Damages.

# Cottages and Inmates.

Dominus Rex *versus* Everard. Hill. 13 Will. III. B. R.

A Presentment was made at a Court-Leet for erecting a Cottage contrary to the 31 Eliz. cap. 7. not laying four Acres of Land to it, according to the Statute de terris mensurandis: It was excepted, first, That this was but an Ordinance. 2 Cro. 603. But per Cur. 'twas held a Statute. 2dly, That the Caption is Ad Cur. vis. Franc. Pleg. cum Cur. Baron. whereas the later Court has no Authority to take such Presentments, ergo it is illegal, because incertain which took it. 2 Keb. 139. 10 Ed. 4. 15. a. Et per Holt C. J. Where there are several Commissions, of which each have Authority to proceed for the same Thing, but in a different manner, it ought to appear by which of these it was taken; but here only one Court has Jurisdiction in the Matter, and it must be taken as a Caption by that Court that had Authority to proceed in it. Also, if the Words had been Et Cur. Baron. the Objection had been stronger. 3dly, That the Year of our Lord was in English Figures: But the Year of the King being at length, the Anno Domini was held Surplusage.

The Ordinance de terris mensurandis is an Act of Parliament.

Diversity where two Courts have Jurisdiction of the same Thing, and where not.

# COVENANT.

## Cole's *Case*. Hill. 3 W. & M. B. R.

(1) H. lets a House excepting two Rooms, and is disturbed therein, Covenant lies not; otherwise if excepting a Passage thereto, and is disturbed in that.

By Indenture H. leases a House, excepting two Rooms, and free Passage to them. The Lessee assigns, and the Assignee disturbs the Lessor in the Passage thereto, and for this Disturbance the Lessor brought Covenant. Et per Cur. The Action lies; the Diversity is this, If the Disturbance had been in the Chamber, 'tis plain then no Action of Covenant would have lain; because it was excepted, and so not demised: Aliter, where the Lessee agrees to let the Lessor have a Thing out of the demised Premisses, as a Way, Common, or other Profit apprendre; in such case, Covenant lies for the Disturbance. Vide 3 Cro. 657. Mo. 553. And this Covenant goes with the Tenement and binds the Assignee. Judgment pro quer.

## Griffith *versus* Harrison. Mich. 5 W. & M. B. R.

(2) Intention is in some Cases traversable.

An Action was brought by the Plaintiff as Executor, on a Covenant in an Assignment of a Lease, for quiet Enjoyment free and clear, and freely and clearly discharged, or otherwise indempnified of and from all Arrears of Rent, &c. and the Plaintiff assigned a Breach, that so much Rent was in Arrear; the Defendant to part pleaded Payment to the Lessor, and to the rest of the Rent alledged to be in Arrear, that he left Money in the Hands of the Plaintiff ea Intentione quod solveret to the Lessor; and upon Demurrer Mr. Northy objected that the Plea was not good, because the Intention was not traversable. Holt C. J. contra; In some Cases the Intention is traversable, as if A. be indebted to B. by Obligation, and by simple Contract, and pays Money to B. the Intention to which Debt it shall be applied is traversable: And the Court inclined that this Plea was good, but held clearly, that if it had been reliquit ad solvendum it had been good, and that non reliquit modo &

 forma

forma had been a good Traverse: But the Court took Exception to the Assignment of the Breach, for that the Plaintiff did not shew a Disturbance in the Enjoyment, or other special Damnification, without which the Rent being behind, is not a Breach of the Covenant, Tollard's Case, 1 Ro. Abr. 433. and took this Diversity, viz. Where the Counterbond or Covenant is given to save harmless from a penal Bond before the Condition broken, there if the penal Sum be not paid at the Day, and so the Condition not preserved, the Party to be saved harmless, does by this become liable to the Penalty, and so is dampnified, and the Counterbond forfeited; but if the Counterbond be given after the Condition of the Obligation be broken, or to save harmless from a single Bill without a Penalty, there the Counterbond cannot be sued without a special Damnification. So here, Rent remaining in arrear, and not paid, is not a Damage, unless the Plaintiff be sued or charged, and if paid any Time before such Damage incurred by the Plaintiff, 'tis sufficient.

Where Bond or Covenant to indemnify is made before Condition of the first Bond broken, 'tis forfeited by the Breach; otherwise if given afterwards, or to indemnify against single Bill.

## Green *versus* Horne. Pas. 6 W. & M. B. R. Intr. Trin. 5 W. & M. Rot. 831.

(3)

In Covenant the Plaintiff declared, That A. being indebted to him, and arrested at his Suit, the Defendant, in consideration that he would order the Bailiff to let A. go at large, undertook and covenanted with the Plaintiff to bring in the Body of the said A. and deliver him into the Custody of the said Bailiff such a Day, &c. The Defendant prayed Oyer of the Deed, which was I (the Defendant) do promise and engage my self to bring in the Body of A. to the Custody of B. Bailiff, such a Day; and thereupon it was demurred: Et per Cur. First, The Plaintiff cannot set forth Matter of Fact in his Declaration not contain'd in the Deed it self so as to alter the Case; therefore all such Matter of Fact so alledged or averred is immaterial. 8 Rep. 151.

Matter out of the Deed, that alters the Case, cannot be averred.

2dly, The Plaintiff is no Party to the Deed, nor so much as named in it, and tho' Covenant may be brought on a Deed-Poll, yet the Party must be named in the Deed. 1 Roll. Ab. 517.

H. cannot bring Covenant, unless named in the Deed.

Brew-

## Brewster *versus* Kitchell. Hill. 9 Will. III. B. R.

(4) Covenant to discharge from Taxes, extends to subsequent Taxes of the same Nature; not of different Nature.

THIS was a feigned Action on the Case upon a Wager, in order to settle a Difference about the Deduction of Taxes out of a Rent-charge. Upon Non Assumpsit pleaded, the Jury found a special Verdict, viz. That A. being seised of Lands in Fee, by Deed dated 1649. granted a Rent-charge to one Brewster and his Heirs, and covenanted for farther Assurance, and on the same Deed there was an Indorsement, that the Rent was to be paid clear of all Taxes; afterwards A. confirmed the Grant, and covenanted to pay the Rent-charge clear of all Taxes. By the Land-Tax 3 W. & M. 4 s. per Pound is laid upon Land, and Power given to the Tenant to deduct 4 s. in the Pound, with a Proviso not to alter Covenants or Agreements of Parties. Et per Cur.

Such a Covenant, if made in the Year 1640, would not have freed the Rent-charge from the Taxes imposed by these Acts; because there was no such parliamentary Tax in being, or known at that Time; but because there were such Taxes in the Year 1645, which was before the Grant, therefore this Covenant must be construed to extend to them; for otherwise it would signify nothing: And Holt C. J. held in this Case,

Grantee of Rent-charge cannot bring Covenant against an Assignee of the Land.

1st, That the Heir of the Grantee could not maintain an Action of Covenant against the Assignee or Lessee of the Grantor; but only against the Grantor and his Heirs; for a Warranty, tho' a Covenant real, does not bind the Land, till Judgment had in a Warrantia Chartæ, much less that which is only a personal Covenant. An Assignee of Land may have Covenant against the Covenantor and his Heirs, where the Covenant runs with the Land. 42 E. 3. 5. 5 Co. Spencer's Case; but Covenant will not lie merely against one as Assignee of Land. Hard. 87. pl. 5.

Diversities where a Covenant is avoided by subsequent Statute, and where not.

2dly, Where the Question is, Whether a Covenant be repealed by Act of Parliament, this is the difference, viz. where H. covenants not to do an Act or Thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the Statute repeals the Covenant: So if H. covenants to do a Thing which is lawful, and an Act of Parliament comes and hinders him from doing it, the Covenant is repealed. Vide Dy. 27. pl. 178. But if a Man covenants not to do a Thing which then was unlawful, and an Act comes and makes it lawful to do it, such an Act of Parliament does not repeal the Covenant.

## Northcote *versus* Underhill. Mich. 10 Will. 3. B. R.

IN Covenant the Plaintiff declared, that the Defendant by his Deed did grant, bargain, and sell to the Plaintiff and his Heirs, provided that if the Grantor paid so much Money, it should be lawful for him to re-enter, and that he covenanted to pay the said Money to the Plaintiff, and a Breach was assigned in Non-payment of the Money: After Judgment by Default, and a Writ of Enquiry executed; Mr. Carthew objected, that nothing passed by the Deed for want of Enrollment, quod fuit concessum, and from hence he inferred, That the Covenants were void like the Case in Raymond 37. where H. grants all the Residue of his Term, which should be unexpired at the Time of his Death, and covenants for quiet Enjoyment, and gives a Bond to perform that Covenant, and it was held that the Bond and Covenant were void. Et hoc fuit concessum per Holt C. J. because that was a relative and dependant Covenant. It refers to an Estate, and is to wait upon it; and if there be no Estate granted, the Covenant fails; but in this Case the Covenant to pay the Money is a distinct, separate and independant Covenant, and it is not material whether any Estate passed, and the Plaintiff need not shew it, nor say quod defendens concessit, but the best Way is to declare with a Quod cum Testatum existit, &c. and Judgment was given for the Plaintiff.

(5) Where a Conveyance of Land is void, so as no Estate passes, all dependant Covenants are void also; otherwise of Covenants independant.

## Grescot *versus* Green. Pas. 12 Will. III. B. R.

LESSEE covenanted for him and his Assigns to rebuild and finish a House within such a Time, and after the Time expired the Lessee assigned over the Premisses, the House not being built and finished according to the Covenant. Et per Holt C. J. This Covenant shall not bind the Assignee, because it was broke before the Assignment; aliter if broke after, as if Lessee had assigned before the Time expired.

(6) Assignee is not liable for Breach incurred before Assignment.

CO-

# Courts and Jurisdictions inferiour.

## Groenvelt *versus* Burwell. Trin. 12 Will. III. B. R.

(1) Power to examine, hear, and punish, is a judicial Power.

BY the Charter of the College of Physicians London the Censors are empowered to have the Government of all Persons practising Physick in London, and within seven Miles round, with Authority to punish pro mala praxi by Fine and Imprisonment, and accordingly they condemn'd Dr. Groenvelt for administring insalubres pillulas & noxia Medicamenta, and fined and imprisoned him; and the Question was, Whether a Certiorari lay on such a Judgment. Et per Holt C. J. Where-ever a Power is given to examine, hear, and punish, it is a judicial Power, and they in whom it is reposed act as Judges: And where-ever there is a Jurisdiction erected with Power to fine and imprison, that is a Court of Record, and what is there done is Matter of Record, 8 Co. 60. 38. This appears from the Stat. Westm. 2. c. 11. by which it is enacted, That Auditors assigned by the Lord may commit the Party accomptant to Prison for Arrears: And it is held, That the very Lodging of this Power in them, made them Judges of Record: Nulla curia quæ recordum non habet potest mandare carceri. And whereas before that Statute, in an Action of Debt for such Arrears the Defendant might wage his Law, since that Statute he cannot, because they are a Debt arising by Matter of Record.

Court having Power to fine and imprison, is a Court of Record.

## Rex *versus* Gilbert.

(2) In a Presentment in a Leet, it is not necessary to shew coment, nor quo jure the Court is held.

A Presentment in a Court-Leet for a Nusance was removed by Certiorari, and Selby took an Exception to it, That it was not shewn coment, nor quo Jure this Court was held, whether by Patent or Prescription, which he urged ought to be done, for that the Leet is not of common Right, but is taken out of the Tourn, and the Tourn is of common Right; such Derivation therefore must be either by Grant or Prescription: But the Court over-ruled the Objection, and said, the Precedents were all in this manner.

## Anonymus. Paſ. 1 Ann. B. R.

(3) Proceedings in inferiour Courts.

If a Jury in an inferiour Court will not agree on their Verdict, the Way is as in other Courts, to keep them without Meat, Drink, Fire or Candle till they agree, and the Steward may from Time to Time adjourn the Court till they do agree. Generally a Levari facias is not the Process of the Hundred-Court, but by Custom it may be, and all Hundred Courts have this Custom; but the true Process at Common Law is Diſtringas. All Misdemeanors in judicial Officers are a Contempt of the Court of B. R. and Attachments go daily against Stewards, for granting Attachments against all the Party's Goods, and Holt C. J. remembred a Case of the Mayor of Hereford, who gave Judgment for his own Lessee in Ejectment: But for Error in Judgment a Judge is not punishable: All this was held by the Court on Motion for an Attachment against a Steward for discharging a Jury before they gave a Verdict.

All Miſdemeanors of judicial Officers, are Contempts of B. R.

## Domina Regina *verſus* Hill. & al. Trin. 1 Ann. B. R.

(4) Attachment againſt a Judge of a Corporation-Court.

JUDGMENT was given in the Town-Court of Briſtol, and Costs taxed and a Scire Facias taken out against the Bail, and a Year afterwards the Court granted a new Trial, and set aside the first Judgment, and an Attachment was granted against the Judge for this Cause.

## Lucking *verſus* Denning. B. R.

(5) Officer executing Proceſs of inferiour Courts is juſtified, tho' the Cauſe be out of the Juriſdiction, unleſs it appear to be ſo

CASE against a Serjeant at Mace for the Escape of one in Custody by vertue of a Process of the Court of the Sheriffs of London in an Action of Debt upon a Bond sued there; and upon Non cul. it appeared that the Bond was made out of the Jurisdiction of the Court; and thereupon it was objected, That the proceeding upon the Bond was coram non judice and all void, and the Serjeant was a Trespasser, and they cited 2 Bulſt. 64. 2 Mod. 30. 1 Ro. 545. 809. 1 Sid. 125. 1 Lev. 95. Hob. 267. Lut. 935. 1560. 2 Mod. 196. March. 117. Stat. Weſtm. 1. c. 35. Et per Holt C. J. To which Powell and the rest agreed,

1ſt, Where an inferiour Jurisdiction is confined to Persons, as the Marſhalſea was to those of the Houshold, if it appears on the Face of the Declaration, that the Persons that sue are qualified to sue, tho' in Fact they are not; yet if the Defendant does not plead to the Jurisdiction, but comes in and admits it, he shall ne-

ver take Advantage of this afterwards, but is estopped and concluded: But if it is not averred in the Declaration that the Person is qualified to sue, and within their Jurisdiction, all the Proceeding is void, and coram non judice, and Trespass lies against the Officer.

2dly, Where the inferiour Jurisdiction is confined to some particular Things, and the Suit there is for something else, of which they have no Jurisdiction, all is void, and by no Admission can be made good.

3dly, Where they are confined to place, viz. to all Contracts arising within such a District, tho' the Contract arise out of the District, yet the Court may award Process, and the Officer may execute it, unless it appear to him that it arose extra Jurisdictionem; as if this Bond had been dated at York, and that was the Case. 1 Roll. 809. but he is not bound to enquire, either whether there be a Cause of Action, or where it arose; and may proceed in his Duty unless the contrary appear to him. Et nota, The Plaint is general without any Averment quod fuit infra Jurisdictionem, but that is supplied by the Count; And if a Matter arises extra Jurisdictionem, and the Plaintiff declares of it as infra Jurisdictionem, the Defendant may plead to the Jurisdiction of the Court, and if that be over-ruled, may have a Prohibition on the Statute of Westminster: But if he waives that and pleads to the Merits, he can never then have a Prohibition, nor can he take Advantage of their Want of Jurisdiction, for by the Averment of the Count, and his own Admission, he is estopped to say that it was a Matter that arose out of their Jurisdiction. It is impossible the Court should know where a transitory Matter arises, unless the Defendant acquaints them with it. Judgment pro quer.

Where a Matter is averr'd to be within the Jurisdiction, the Defendant must plead to the Jurisdiction; otherwise he is estopp'd.

# CUSTOMS.

## Lovelace's *Case.* Trin. 12 Will. III. B. R.

ERROR upon a Judgment in the Court of Canterbury: The Exception was, That the Court was laid to be Time out of Mind, and the Process of the Court also was laid to be Time out of Mind, which they said was making one immemorial Thing subsequent to another; sed non allocatur, for Customs may be Time out of Mind, and yet not co-eval. Vide 2 Keb. 721.

(1) Customs not co-eval.

## *Mayor,* &c. *of* Winton *versus* Wilks. Pas. 4 Ann. B. R.

AN Action on the Case was brought by the Corporation of the City of Winchester, wherein they declared, Quod cum Winton est antiqua civitas, and that there was a Custom there quod non liceat alicui præter homines liberos, de Gild. Mercatoria civitatis prædict. to exercise a Trade in the said City, unless being brought up an Apprentice to it within the said City; that the Defendant nevertheless did exercise, &c. Upon Motion in Arrest of Judgment the Cause was set down in the Paper, to the End it might be determined whether there could be such a Custom in any City but London? For the Plaintiff it was urged, That there might be such a Custom in London, and that this was settled in Wagoner's Case. And they said that the Reasons of Wagoner's Case might as well maintain such a Custom in Winchester as in London; and that tho' the Customs of London are confirmed by Acts of Parliament, yet those Acts extend only to good Customs, for bad Customs are void and cannot be confirmed: They said a reasonable Commencement might be intended, and cited Palm. 2, 3, 4, 5. 2 Cro. 803. 1 Leon. 262. Reg. 105. 11 Co. 53. On the other side it was argued, That of common Right every Man had liberty to trade; that he could not restrain himself from this Liberty even in a particular Place without a Consideration, because Trade was a great Benefit to the Publick and the Party's Means of Livelihood, and therefore Custom could not put such a Restraint upon the Party, and ought not to be permitted to do it, unless it gave him a Consideration, or some Equivalent.

(2) Custom that none shall trade in a Town besides Persons free of the Gilda Mercatoria there. Qu. Whether valid in any place except London?

Dd 2 Holt

Holt C. J. Notwithstanding Wagoner's Case, such a Custom and a By-Law upon it came in question in the 19 Car. 2. in C. B. in the Case of the Town of Colchester and was not determined. All People are at Liberty to live in Winchester, and how can they be restrained from using the lawful Means of living in a Place where they have a lawful Liberty to live? This was the Foundation, and the Cause of making the Statute 5 El. Such a Custom is an Injury to the Party and a Prejudice to the Publick. The Case of London differs; they have by Custom the bringing up of the Youth of the City, and therefore they by Custom have Power to make Infants Apprentices, to assign Apprentices, and by Custom after such Apprenticeship they are free: Other Cities have no such Custom. 2dly, This Declaration is naught: The Action ought to be brought by the Gilda Mercatoria, how is the City prejudiced? Anciently the King's Grant to have Gildam Mercatoriam, made the whole Town to have a Corporation. But Non constat to us whether the Guild here be the whole Town, or part of the Town, or what part of the Town, nor by what Right there is any Gilda Mercatoria in this Place. Powell, Powys and Gould concurring, Judgment was given quod nil capiat, &c. for this Fault in the Declaration.

Difference as to this Custom between London and other Cities.

The Action ought to be brought by the Guild.

# DAMAGES. *Vide* Costs.

## Cone *versus* Bowles. Mich. 2 W. & M. B. R.

REPLEVIN against three Defendants, one of whom was an Infant, and all appeared and avowed by Attorney. Judgment being given against the Plaintiff, he brought a Writ of Error, and assigned the Infancy of one of the Defendants for Error: And because he might have pleaded this in Abatement to the Avowry, it was held well enough, and Judgment was affirmed; but the Court held the Avowants should have no Costs; for all Statutes that give Costs are to be taken strictly, as being a kind of Penalty, and the Statute 3 H. 7. c. 10. mentions only Writs of Error brought by any Defendant or Tenant.

(1) Statutes that give Costs are to be taken strictly.

## Lawson *versus* Storie. Hill. 5 W. & M. B. R.

BY the Statute 2 W. & M. Seff. 1. c. 5. treble Damages and Costs are given against the Rescousor of a Distress for Rent: In an Action upon the Case for a Rescous upon this Statute the Plaintiff shall recover treble Costs as well as treble Damages; for the Damages are not given by the Statute, but increased, an Action upon the Case lying for a Rescous at Common Law.

(2) By 2 W. & M. Seff. 1. c. 5. the Plaintiff shall recover treble Costs as well as treble Damages.

## Herbert *versus* Waters. Mich. 7 Will. III. B. R.

IN Replevin the Defendant avow'd as Overseer of the Poor for a Distress for a Rate upon the 43 El. c. 2. and at the Trial the Plaintiff was nonsuit, and no Damages being found, Winnington moved for a Writ of Enquiry of Damages to supply this omission, and it was granted, because if the Jury had enquired, they had enquired as an Inquest of Office, on which no Attaint would have lain. Vide 1 Cro. 146. 1 Ro. 272. 2 Ro. 112. 1 Sid. 380. And they distinguished this from the Case 1 Sid. 380. of an Avowry for a Rent-charge according to the 17 Car. 2. c. 7. There a Writ of Enquiry was rightly denied, for by that Statute

(3) Upon a Nonsuit in Replevin for Distress for a Poor's Rate, if the Jury omit to inquire of Damages, that may be supplied by Writ afterwards.

tute the same Jury are to enquire of the Rent-arrear, and the Value of the Cattel; but the Statute of the 43 Eliz. does not tie it up only to the same Jury. And Holt C. J. said, That 17 Car. 2. inter Burton and Robinson, Detinue was brought, and upon Trial of the Issue the Jury found the Damages, but not the Value of the Distress, and the Court granted a Writ of Enquiry, which he said was contrary to Cheyney's Case, and as he thought contrary to Law.

## Shore *versus* Madisten. Trin. 9 Will. III. B. R.

(4) Where the Statute gives a certain Penalty to the Party grieved, he shall recover Costs; otherwise of Informer.

THE Plaintiff brought Debt in C. B. upon the Statute 5 Eliz. c. 9. for not appearing upon a Subpœna ad testificand. and recovered Judgment, with Costs of Suit; and upon this Judgment, Error was brought in B. R. and the Court held that where a Statute gives a Sum certain to the Party grieved, he shall in Consequence have Costs, because he had a Right of Action antecedent to the bringing of the Action. But where a Sum certain is given to a Stranger, as where it is to him that shall prosecute, he shall not have his Costs; for till he commenced his Action he had no Right of Action in him: And the Judgment was affirmed. Vide 1 Brownl. 66. Hutt. 22. 1 Lut. 201. No Costs shall be in a popular Action, be the Penalty certain or uncertain, but where the Party grieved shall have a Penalty certain, he shall have Costs.

## Browne *versus* Gibbons. Hill. 1 Ann. B. R.

(5) In case for Words, with special Damage, the Plaintiff shall recover full Costs, tho' the Damages are under 40 s.

THE Plaintiff brought an Action on the Case for slanderous Words spoken of his Wife; viz. That she was a Whore, per quod he lost such and such Customers: Upon Not guilty the Jury found for the Plaintiff, and gave Damages under 40 s. And the Question was, Whether the Plaintiff could have full Costs notwithstanding the 21 Jac. 1. c. 16? Et per Cur. The Plaintiff shall have his full Costs, for it is not the Words, but the special Damage which is the Cause of Action in this Case; and upon Evidence it is not sufficient to prove the Words, but he must prove the special Damage also; and this is the Reason why the Action lies by the Husband alone without the joining of his Wife: And the Court held, That if a Man bring Trespass for beating his Servant per quod servitium amisit, it is not an Action of Assault and Battery within 22 & 23 Car. 2. c. 9. but this is

an Action founded upon the special Damage. So in the principal Case the Action is for the Damage and not for the Words, for they alone are not actionable; and the Court agreed the Case 1 Cro. 140. That in an Action for slandering his Title, the Plaintiff shall have his full Costs. Nota, Mich. 5 Car. 1. C. B It was said by Richardson to be the Resolution of all the Justices of B. R. and C. B. That in an Action upon the Case for Slander, tho' the Court are bound by 21 Jac. 1. c. 16. and cannot increase the Costs where the Damages are under 40s. yet the Jury are not bound by that Statute, and therefore they may give 10 l. Costs where they give but 10 d. Damages.

Court are bound by the Clause of 21 Jac. 1. c. 16. Jury not.

## Jenkins & Ux. *versus* Plume. Hill. 2 Ann. B. R.

(6) Husband and Wife declare upon an Indebitat. Assumpsit to them as Executors. Upon a Nonsuit they shall pay Costs.

INDEBITATUS ASSUMPSIT by Husband and Wife Executors, who declared quod cum the Defendant was indebted to them in 20 l. as Executors of the last Will and Testament of J. S. for Money had and received to their Use as Executors, he promised to pay, &c. To this Non Assumpsit was pleaded, and the Plaintiffs were nonsuited at the Trial. And now the Question was, Whether they should pay Costs upon the Statute 23 H. 8? Et per Cur. The Plaintiff shall pay Costs, for the Receipt being since the Death of the Testator, if it was by the Consent of the Executor, it is the Receipt of the Executor. On the other side, if it was without his Consent, yet now the bringing this Action is a Consent. As to the naming themselves Executors, it is only to deduce their Right, and set it forth ab origine; yet nevertheless the Cause of Action arises intirely in his Time and since the Death of the Testator. It is only by Construction, that an Executor is out of the Statute of 23 H. 8. and the Reason is, because he is not privy to the original Cause of Action, but in this case he is. If the Defendant received this Money by the Consent or Appointment of the Plaintiff, it was Assets in his Hands immediately; if without his Consent, yet the bringing of the Action is such a Consent, that upon Judgment obtained, it shall be Assets immediately without Execution; and yet if an Executor brings an Action and recovers Judgment, the Money recovered is not Assets till levied by Execution: But in the principal Case it is Assets immediately; and the Reason is, because it is recovered against a Person that never was indebted to the Testator, and the original Debtor is discharged; but here the Matter is at large again by the Nonsuit, and the Executor may sue either the first or second Debtor. In this Case was cited, the Case of Elwes versus Mocatoe. Pas. 2 Ann. in this Court. Executor brought an Action, and declared on an insimul computasset with himself, and was nonsuit, and the Defendant could have no Costs,

Debtor pays Testator's Debt to A. with Executor's Consent, 'tis Assets. Without his Consent, 'tis not Assets; Unless he bring an Action and recover, and then 'tis Assets before Execution.

Post Tit. Executor.

Account with Executor begets not a new Cause of Action, but ascertains the old.

Costs, which the Court now agreed, because the Promise upon the Insimul computasset begat not a new Cause of Action, but ascertained the old Cause of Action, which remained still the Debt of the Testator.

Holt C. J. said, That if the Goods of the Testator be taken and converted before they come to the Hands of the Executor, he shall not pay Costs upon a Nonsuit in an Action brought for these, for they were never Assets.

## Venn *versus* Phillips. Pas. 2 Ann. B. R.

(7) In Trespass for taking, driving, and wounding his Sheep, the Plaintiff shall have full Costs.

TRESPASS for chasing, driving, and wounding his Sheep, per quod some died, and others were damnified, and also for taking and carrying away one Hog of the Plaintiff; upon Not guilty the Jury found the Defendant guilty of all, but the taking and carrying away the Hog, of which they found him Not guilty, and gave 2 d. Damages; and the Question was, Whether the Plaintiff could have more Costs than Damages? And the Court upon opening the Matter, held the Plaintiff should have his full Costs, for this is out of the Statute 22 & 23 Car. 2. c. 9. and the Reason is, because the Statute enacts, That in all Actions of Trespass, Assault and Battery, and other personal Actions wherein the Judge shall not certify an Assault and Battery sufficiently proved, or that the Title of the Land came in question, there shall be no more Costs than Damages, where the Damages found are under 40 s. So that tho' the first Words are general, yet by the last words Actions is restrain'd to such wherein there can be such certifying of the Battery, or the like: Therefore if it be an Action wherein there can be no such certifying, as Debt, Assumpsit, Trover, Trespass for taking his Goods, Trespass for spoiling his Goods, Trespass for beating his Servant per quod servitium amisit, it is out of the Statute; but Trespass quare clausum fregit, or Trespass for riding over his Ground, are within the Statute, Vide 3 Keb. 184. 3, 8, 9. Raymond 487. 2 Jones 232. Trespass for breaking his Stall in Mercatu posita. And altho' Trespass quare clausum fregit, is within the Statute, yet if it go on for cutting and carrying away his Corn, it is out of the Statute, unless the Defendant be acquitted thereof. Vide 3 Keb. 21. 247.

Construction of the Stat. 22 & 23 Car. 2. c. 9.

## Fanshaw *versus* Morrison. Trin. 3 Ann. B. R.

(8) Upon a Recognizance of Bail no Damages can be given, occasione dilationis executionis.

UPON a Scire Facias on a Recognizance in C. B. against Bail, the Plaintiff had Judgment for Execution upon the Recognizance, & quod recuperet dampna sua occasione dilationis Exe-

Executionis, upon a Writ of Error in B. R. this was reversed, for the Bail are only liable to Costs of Suit by the Statute, and Damages by reason of the delay of Execution are not Costs, nor Costs of Suit, but Damage sustained by being so long out of his Money, which uses to be assessed by allowing the Party what lawful Interest would have come to him in the mean Time; so that Costs and Damages are different in this Case, given for different ends, and assessed by different Measures.

# DEBT.

## Bellasis *versus* Burbrick. Mich. 8 Will. III. C. B.

IN Debt for Rent upon a Lease at Will the Plaintiff must shew an Occupation; for the Rent is only due in respect thereof, and therefore it must appear to the Court when the Lessee entered, and how long he occupied. But in Debt for Rent upon a Lease for Years the Plaintiff need not set forth any Entry or Occupation, for tho' the Defendant neither enters nor occupies, he must pay the Rent, it being due by the Lease or Contract and not by the Occupation.

(1) In Debt for Rent on a Lease at Will, occupation must be shewn.

## Jayson *versus* Rash. Mich. 4 Ann. B. R.

THE Sheriff brought Debt for his Fees of executing an Elegit; and Holt held that it lies, for it is all the Execution the Plaintiff in the original Action can have on this Judgment, and he may enter on the Land extended, if he can without Force. Vide 1 Cro. 286.

(2) Debt lies for Sheriff's Fees of executing Elegit.

## Anonymus. Trin. 11 Ann. B. R.

PER Curiam, Debt lies in the Marshalsea, or any other Court upon Judgments in C. B. or B. R. and upon Nul tiel Record the Issue shall be tried by Certiorari and Mittimus out of Chancery.

(3) Debt on Judgment in B. R. lies in the Marshalsea.

# DECEIT.

## Zouch *versus* Thompson. Mich. 9 Will. III. C. B.

(1) Deceit for a Fine levied of ancient Demesne, lies against the Heirs of Conusor and Conusee after five Years, because it was merely void.

A Fine being levied of ancient Demesne Lands, the Lord brought his Writ of Deceit against the Tertenant, the Heir of the Conusee, and the Heir of the Conusor seven Years after the Fine levied, and declared generally, That he was Lord of the Manor at the Time of the Fine levied, without shewing how or what Estate he had: And it was resolved, 1st, That Deceit lies against the Conusee himself, as well as against the Conusor, because he is equally a Party to the Fine, and it is the Fine that works a Prejudice to the Lord. 2dly, That such a Writ of Deceit lies against the Heir of the Conusee or Conusor; for this is a real Deceit, and not like a personal Wrong, quod moritur cum persona; for by this Wrong the Lord is disinherited and debarred of the Perquisites arising from his Court, which is a permanent Injury in the Realty, that by no means dies with the Person of him that did it. 3dly, The Lord need not shew his Estate, if he was Dominus pro tempore it is enough; and if his Estate is since determined, it must be shewed on the other side. 4thly, The five Years Nonclaim is nothing in this Case; for a Fine may establish the Right of another, but cannot establish it self. 5thly, The Court held the Fine to be coram non judice, and merely void. 2 Leon. 290. Br. Fines 47. Br. Discent. 14. 21 E. 3. 20. Hern's Plead. 93. 7 Hen. 4. 28. Vide Lut. 713.

## Medina *versus* Stoughton. Trin. 12 Will. III. B. R.

(2) Where Seller has the Possession of Chattels, the bare affirming them to be his makes a Warranty; otherwise if out of Possession.

CASE, for that the Defendant being possessed of a certain Lottery-Ticket sold it to the Plaintiff, affirming it to be his own, whereas in Truth it was not his but another's; Defendant pleaded he bought it bona fide, and so sold it. Et petit judicium de Narr. & quod Narr. prædict. cassetur: The Plaintiff demurred. And per Holt C. J.

1st, Where one having the Possession of any personal Chattel sells it, the bare affirming it to be his amounts to a Warranty, and an Action lies on the Affirmation; for his having Possession is a Colour of Title, and perhaps no other Title can be made out;

out; aliter where the Seller is out of Possession, for there may be room to question the Seller's Title, and Caveat Emptor in such Case to have either an express Warranty or a good Title: So it is in the Case of Lands whether the Seller be in or out of Possession, for the Seller cannot have them without a Title, and the Buyer is at his Peril to see it. 3 Mod. 261.

Such affirmance makes no Warranty of Lands in any case.

2dly, The Court took this Plea in the Conclusion of it to be in Bar, but because it was safest for the Plaintiff, gave Judgment to answer over; saying that could not be assigned for Error by the Defendant, because it was for his Advantage. 3 Mod. 261.

Judgment to answer over, tho' the Plea pray'd Jud. de Narr.

## Risney *versus* Selby. Mich. 3 Ann. B. R.

(3) Deceit lies for affirming to a Purchasor, that the Rent is more than in fact it is.

CASE, for that the Plaintiff being in Treaty with the Defendant about the Purchase of such a House, the Defendant did fraudulently affirm the Rent to be 30 l. per Annum, whereas it was but 20 l. whereby he was induced to give so much more than the House was worth: Upon Not guilty pleaded, and Verdict for the Plaintiff, 'twas moved in Arrest of Judgment, that this was an improper Inquiry in the Plaintiff, and he was over-credulous in taking the Defendant's Word for it; but the Plaintiff had his Judgment, for the Value of the Rent is Matter that lies in the private Knowledge of the Landlord and Tenant, and if they affirm the Rent to be more than it is, the Purchasor is cheated, and ought to have a Remedy for it.

## Butterfeild *versus* Burroughs. Trin. 5 Ann. B. R.

(4) Warranty of a Horse to be found. Want of an Eye is a Breach.

THE Plaintiff declared that the Defendant sold him a Horse such a Day and Place, & adtunc & ibidem warrantizavit Equum prædict. to be sound, Wind and Limb, whereupon he paid his Money, and avers the Horse had but one Eye, &c. The Defendant pleaded non warrantizavit, upon which there was a Verdict for the Plaintiff; and now in Arrest of Judgment it was objected, 1st, That the Want of an Eye is a visible Thing, whereas the Warranty extends only to secret Infirmities; but to this it was answered and resolved by the Court, that this might be so, and must be intended to be so, since the Jury have found the Defendant did warrant. 2d. Obj. As the Warranty is here set forth it might be at a Time after the Sale, whereas it ought to be part of the very Contract, and therefore it is always alledged warrantizando vendidit. Sed non allocatur, for the Payment was afterwards, and it was that compleated the Bargain, which was imperfect without it.

# DECLARATION.

## Haſtrop *verſus* Haſtings. Paſ. 4 W. & M. B. R.

(1) Miſtakes in a Declaration cannot be taken Advantage of upon a Plea in Abatement.

IN an Action upon the Caſe for Beer and Wages the Defendant pleaded in Abatement, Et pet. judicium de billa & quod billa prædict. caſſetur for Incertainty in the Declaration: Upon Demurrer the Defendant's Counſel inſiſted upon many Faults in the Declaration; Et per Cur. The Defendant ſhall not take Advantage of Miſtakes in the Declaration upon a Plea in Abatement, but if he would do that, he muſt demur to the Declaration, per quod a Reſpondeas ouſter was awarded.

## Bennet *verſus* Talbot. Hill. 8 Will. III. B. R.

(2) Declaration concluding contra form. Statuti is well enough, tho' ſome of the Matters are not within the Stat.

TRESPASS for entring his Cloſe, and treading down his Graſs and Corn, and hunting there, the Defendant being an inferiour Tradeſman, viz. a Clothier, contra pacem Domini Regis & contra formam Statuti inde proviſ. After Verdict pro quer. 'twas objected in Arreſt of Judgment, That contra formam Statuti goes to the whole Declaration, wherein ſeveral of the Treſpaſſes contained are not contrary to any Statute; for the Statute 4 & 5 W. & M. does only increaſe Coſts. Holt C. J. If an Act of Parliament increaſes a Penalty, or deprives a Man of a Benefit he had before at Common Law, in ſuch Caſe, if one declares upon the Statute, and does not bring himſelf within the Statute, and concludes contra formam Statuti prædict. it is naught: This was Penhallow's Caſe, 3 Cro. 231. But if there be no Act of Parliament at all, and the Plaintiff concludes contra formam Statuti prædict. 'tis only Surpluſage. This was Ward's Caſe, 1 Ven. 103. Here an Act gives an Increaſe of Coſts, and in that only reſtores the Common Law, which was taken away by the Stat. 22 & 23 Car. 2. The Queſtion is now, How the Plaintiff ſhall declare in this Caſe? In this Count ſeveral Treſpaſſes are alledged, the laſt whereof is only within the Statute, and the Concluſion of the Count is contra formam Statuti, which, tho' in grammatical Conſtruction it goes to the whole Count, yet in Law it only goes to the Hunting, and therefore why may we not apply it only to the latter part, and reject it as to the reſt for Surpluſage, as was done in an Indictment in

in Harwood's Case All. 43. Accordingly the Court held that contra formam Statuti should only be applied to the latter part which was really against the Statute, and that, seeing the Hunting and Breaking could not be separated, the Plaintiff should have his Costs according to the new Statute: Judgment for the Plaintiff.

## West *versus* Troles. Mich. 9 Will. III. B. R.

(3) Two Counts in Narr. for Things of the same kind not averr'd to be different; well after Verdict.

The Plaintiff declared, That whereas the Defendant 6 Maii 1695, for 120 Weeks Dyet then past, had promised to pay him 7 s. per Week, and that the Plaintiff, Postea, sc. 6 Maii 1695, having found the Defendant Dyet 120 Weeks then past, the Defendant promised to pay the Worth, and that it was worth 7 s. per Week: Upon Non Assumpsit and Verdict pro quer. it was now moved in Arrest of Judgment, that the Weeks in the quantum meruit are not said to be aliæ than those laid in the special Promise, so that the Defendant is twice charged for the same Thing. Sed non allocatur, for they do not appear necessarily to be the same, and without Necessity the Court will not intend them so.

## Nevill *versus* Soper. Trin. 10 Will. III. B. R.

(4) Repugnancy in Count.

In Covenant against an Apprentice the Plaintiff assign'd for Breach, that the Apprentice before the Time of his Apprenticeship expired, & durante tempore quo servivit, departed from his Master's Service: The Defendant demurred and had Judgment because the Declaration was repugnant, for it should have been durante tempore quo servire debuit. The Case of Lawley versus Arnold, Hill. 8 W. 3. B. R. was not unlike this: That was Trespass for taking and carrying away his Timber and Brick, super terram suam jacent. erga Confectionem Domus de novo ædificat. And the Court held this insensible, for they could not be Materials towards the Building of a House already built.

## Tilsden *versus* Palfriman. Mich. 3 Ann. B. R.

(5) Diversity between charging a Prisoner in Custody in Term and Vacation.

If one be in Custod. Mar. Maresch. the Way to charge him with an Action or an Execution is thus: If it be in Term-time you must file a Bill against him, and deliver a Declaration to the Turnkey: Upon this he shall lie two Terms before he be discharged, even on common Bail: But if it be in Vacation, the Plaintiff must go to the Marshal's Book in the Office, and make an

an Entry quod remaneat in Custod. ad sect. J. S. But then he must be in actual Custody, and not at Liberty; because then he may be arrested. Per Curiam.

See the Case of Crowder versus Oldfeild, Title Jeofails.

# Deeds and Charters.

## Nurse *versus* Frampton. Pas. 6 Will. III. B. R.

(1) Where Deed runs in the first Person, signing and sealing makes H. a Party, tho' not named therein.

DEBT for 25 l. and declares that by Deed between him and the Defendant 'twas agreed, That the grey Nag of the Defendant, between the Day of the Date thereof and the last of August, a Day's Notice being given to the Plaintiff, should ride from Hyde-Park Corner to the first House in Reading in three Hours, for 50 l. Bet on each Side, on the Forfeiture of 25 l. and avers, That the Defendant gave not a Day's Notice, and that the Horse did not ride; the Defendant craves Oyer of the Deed, which was, It is agreed that a grey Nag, &c. In witness whereof we have hereunto set our Hands and Seals. Et nota, They were not otherwise named in the Deed. Hereupon the Defendant pleaded that the Plaintiff absconded for Felony from such a Day till after the first of August, so that he could not give Notice: To this there was a Replication and Rejoinder both impertinent, and a Demurrer, whereupon it was objected, That bare setting Names and Seals would not make them Parties, so as to have an Action. Vide 2 Inst. 673. 3 Cro. 56. 2 Ro. 22. But the Court held, 1st, That the Cases were not alike, and that an Action would lie by the bare Signing and Sealing. 2dly, The Court held, That the Defendant was not bound to seek the Plaintiff to give Notice, because the Plaintiff by his own Act in absconding had prevented it, and a personal Notice was necessary, which could not be given. Vide 2 Cro. 46. Yelv. 37. Lat. 158. 1 Inst. 211.

Notice dispensed where it becomes impossible.

3dly, The Court held, That tho' Notice was dispensed with by the Plaintiff's absconding, yet the Defendant should have rid the Horse within the Time limited, and for default thereof must pay the Forfeiture. Judgment for the Plaintiff.

1 Filch

## Fitch *versus* Wells. Hill. 4 Ann. B. R.

UPON a Trial in Ejectment the Plaintiff made his Title under several Deeds, and after a long Trial the Jury found against them, and upon Motion the Court ordered them to be kept in the Officer's Hands in order to a Prosecution for Forgery; but upon Application to the Court of Chancery, from whence the Issue was directed, a new Trial being granted, the Plaintiff moved to have the Deeds out of Court. Holt C. J. held they must be delivered out as this Case was, because the Deeds were not in Issue directly upon the Pleadings in the Cause; otherwise if the Issue had been non est factum; and he remembred the Case of Sir John Hughley, who was sued as Executor to J. S. upon a Bond of 10000 l. set up by an old Woman that looked after J. S an old Miser, as his Nurse; and upon non est factum pleaded it was found upon a Trial at Bar not to be the Deed of J. S. and upon the Authority of Wymark's Case in 5 Co. it was made a Question, Whether the Bond should not be cancelled? and it was held it should not be cancelled, because the Judgment might be reversed by Writ of Error, but the Bond should be kept in Court.

(2) Upon Non est factum found against the Deed, it may be kept in Court; otherwise upon a collateral Issue.

## Hill *versus* Aland. Pas. 5 Ann. B. R.

ACTION was brought upon a special Agreement contained in a Note, and a Rule was made to shew Cause why the Plaintiff should not give the Defendant a Copy; but upon Cause shewed the Rule was discharged, because the Contract upon which the Action was founded, was a Parol Contract, of which the Note was only Evidence, and therefore the Defendant ought not to have a Copy.

(3) Where the Writing is only Evidence, and the Action not founded on it, the Defendant cannot have Copy.

# DEFAULT.

## Staple *versus* Hayden. Trin. 2 Ann. B. R.

Where Defendant makes Default at Nisi prius, no Judgment can be given for him, nor Repleader awarded.

TRESPASS; the Defendant justified for a Way, &c. and Issue being joined, the Cause came down to be tried at Nisi prius. But the Defendant made Default, and so the Inquest was taken by Default; and now the Issue being immaterial, the Court was moved for a Repleader. Et per Holt C. J. The Defendant is out of Court by the Default, and that to all purposes but this, viz. That Judgment may be given against him; therefore being out of Court there cannot be a Repleader, unless the Default could be waived, or the Party could be brought into Court again.

In personal Actions the first Default before, and the second after Issue joined, is peremptory.

He said in personal Actions before Issue joined every Default was peremptory, but after Issue joined the first Default is not peremptory, but the second is, and this is by the Statute of Westminster, c. 17. and Marlbr. Postquam aliquis se in Inquisitionem posuerit, non habebit nisi unicam defaltam; and this unica defalta is always upon the Return of the Venire, and not upon the Distringas, for the Unica defalta must be ad proximum diem, which is the Day upon the Venire. And tho' the Defendant never appears now upon the Return of the Venire, yet heretofore the Defendant was then demanded solemnly, and if he made Default, there went out a Distringas against the Jury with a Clause in it to distrain the Defendant, and if after this he made Default again, it was peremptory, because there was no Process left to fetch him in.

Where upon Default after Issue joined the Inquest shall be taken by Default, and where Judgment may be given.

Generally, if after Issue joined the Defendant makes Default, the Plaintiff may proceed to Trial, and have the Inquest taken by Default; but he shall not have Judgment by Default, unless in some special Cases. In Debt upon a Bond, if the Defendant pleads a Release, and Issue is thereupon joined, and at the Trial the Defendant makes Default, the Plaintiff may pray Judgment by Default, and the Inquest need not be taken by Default, for by this Plea the Duty is confessed, and the Plea is not made good; aliter upon non est factum, for thereby the Duty is denied, therefore in that Case the Inquest must be taken by Default: But in Trespass, if the Defendant plead a Release and

 make

make Default, the Plaintiff cannot pray Judgment by Default, but must pray the Inquest by Default; for the Debt was certain, but the Damages are uncertain. Long 5 Ed. 4.

In an Appeal of Rape after Issue joined the Defendant makes Default, there shall be neither Judgment by Default nor Inquest by Default, but an Alias, Pluries, Capias & Exigent shall be awarded. Vide Jenk. 68. 18 Ass. 13. 34 H. 6. 24.

The Plaintiff cannot waive the Default here, as the Demandant may in a Real Action: If the Tenant make Default in a Real Action, a Grand Cape is awarded, and upon the Return of it, if the Demandant insists upon the Default, he must have Judgment final; but the Demandant may waive the Default, and take an Appearance upon the Grand Cape; and that is regular, because the Tenant comes in by Process: And so it is of a Default on a Petit Cape, but in a personal Action there is no Process to bring the Party into Court again: Also the Day of the Nisi prius not being the same with the Day in Bank, a Default at Nisi prius cannot be waived at the Day in Bank.

Default may be waived in real Actions, not in personal.

And the Bar was cautioned never to make Defaults at Nisi prius, because no Judgment could be given for the Defendant afterwards.

# DEFENCE.

## Ferrer *versus* Miller. Pas. 4 W. & M. B. R.

EJECTMENT; The Defendant venit & dicit that the Land is ancient Demesne, without making any Defence: To this there was a special Demurrer. Et per Holt C. J. The Plaintiff might have refused the Plea for Want of a Defence; but if he receives the Plea, he admits a Defence. If one plead Outlawry, he ought to plead it sub pede sigilli, and if he does not so plead it, the Plaintiff may refuse it: But if he accept the Plea, he shall not demur for that Cause; for it is well enough if he allow it.

Plea without Defence may be refused, but is made good by Acceptance.

# DEMURRER.

## Benbridge *versus* Day. Hill. 3 W. & M. B. R.

(1) Demurrer to Declaration in Trover de duobus fulcris.

TROVER for several Things, and among the rest de duobus fulcris: The Defendant demurred, and Holt C. J. refused to give Judgment quod nil capiat, saying, The Plaintiff may take several Damages, and release as to this, and then take Judgment as to the rest, and all would be well.

## Carter *versus* Davies. Paf. 3 W. & M. B. R.

(2) Demurrer in bar to a Plea in Abatement, makes a Difcontinuance.

INDEBITATUS ASSUMPSIT and quantum meruit for Wares; as to the first Count the Defendant pleaded non Affumpfit, and as to the second Pet. judicium de billa, and pleads in Abatement; the Plaintiff took Iffue on the Non Affumpfit, and demurr'd on the Plea in Abatement quod placitum prædict. minus fufficien. in lege exiftit ad ipfum ab actione fua prædict. habend. præcludend. Et per Cur. The Plaintiff having demurred in Bar, where the Plea is only in Abatement, the Suit is thereby difcontinued; but Iffue being joined on the other Promife, the Court ftay'd Proceedings on the Demurrer, faying, The Difcontinuance would be helped by the Verdict.

Aided by Verdict.

## Combe *versus* Talbot. Mich 5 W. & M. B. R.

(3) One Defendant cannot plead two Pleas that go to the whole.

IN Debt for two Years Rent due upon a Demife of a Meffuage and feveral Parcels of Land, rendering 9 l. per Annum, the Plaintiff demanded 18 l. Defendant as to 9 l. parcell. inde, being the firft Year's Rent, pleaded nil debet, and concluded to the Country, but there was no Joinder in Iffue thereupon; and as to the 9 l. Refidue, he confeffed the Demife as laid in the Declaration reddendo annuatim 9 l. viz. 40 s. for fuch a Parcel, and 7 l. for other Parcels; and as to the 40 s. Parcel thereof, he pleaded Nil debet, and as to the reft Nil habuit in tenementis; the Plaintiff demurred generally quia placitum prædict. &c. Et per Holt C. J. and Eyre (who were only in Court). 1ft, One Defendant cannot plead two fuch Pleas as go to the whole; thus one Defendant

dant cannot plead Nil debet and Nil habuit in Tenementis. 2dly, If Placitum be nomen collectivum, which was doubted, (Vide 1 Saund. 338. Dyer 325. b. 15 H. 7. 10. b. 3 Cro. 139. 1 Leon. 125. 1 Sid. 39.) then the Demurrer goes to all; and then no Judgment can be given for the Plaintiff, because the Plea of Nil debet is a good Plea. Leave was had to amend on both Sides.

Placitum est nomen collectivum. Q.

## Campbell *versus* St. John. Trin. 6 W. & M. B. R. Rot. 551.

IN Trover for a Box and 290 Peciis Argenti, the Defendant demurr'd to the Declaration, and the Plaintiff demurr'd to the Defendant's Demurrer, and concluded & hoc paratus est verificare; the Defendant maintained his Demurrer, and put the Matter upon the Court. And first, The Court held that Trover would lie for Plate generally. Vide Style 224, 264. 2dly, That all is discontinued by the Plaintiff's not joining in Demurrer, but demurring upon the Defendant's Demurrer, for there is no difference between pleading over when Issue is offered, and not joining in Demurrer, but pleading over; both are alike and make a Discontinuance.

(4) Demurrer to a Demurrer makes a Discontinuance.

## Lamplough *versus* Shortridge. Pas. 13 Will. III. B. R.

IN Demurrer for Duplicity, it is not sufficient to demur, quia duplex est, or duplicem habet materiam; but the Party must shew wherein; for the Statute by requiring to shew Cause intended to oblige the Party to lay his Finger upon the very Point. Per Holt C. J.

(5) Demurrer for Duplicity must shew wherein.

## Anonymus. Mich. 13 Will. III. B. R.

IF there be a Demurrer to part and an Issue upon other part, and Judgment be given for the Plaintiff upon the Demurrer, he may enter a Non Pros. as to the Issue, and proceed to a Writ of Inquiry on the Demurrer, but without a Non Pros. he cannot have a Writ of Inquiry, because on the Trial of the Issue the same Jury will ascertain the Damages for that part to which the Demurrer was. Per Cur.

(6) Demurrer to part, and Issue to other Part.

Docminique *versus* Davenant. Trin. 3 Ann. B. R.

(7) No Demurrer in Abatement.

PER Cur. If a Defendant demur in Abatement, the Court will notwithstanding give a final Judgment, because there cannot be a Demurrer in Abatement; for if the Matter of Abatement be extrinsick, the Defendant must plead it; if intrinsick, the Court will take Notice of it themselves.

# DEODAND.

## *Case of the Lord of the Manor of* Hampstead.

Where several Things move ad mortem, they are all Deodands.

A Cart met a Waggon loaded upon the Road, and the Cart endeavouring to pass by the Waggon was driven upon a high Bank, and overturn'd, and threw the Person that was in the Cart just before the Wheels of the Waggon, and the Waggon run over the Man and kill'd him. In the Home Circuit this was referred to Pollexfen C. J. and Gregory, and they gave their Opinions, That the Cart, Waggon, Loading, and all the Horses are Deodands, because they all moved ad mortem: Pollexfen at first doubted concerning the Forfeiture of the Cart, but looking into his Common-Place-Book he grounded his Opinion upon this Case: One riding upon a Horse in a River, the Horse threw him, and the Stream carried him to a Mill, and the Wheel of the Mill killed him, and it was adjudged, That the Horse and the Wheel were forfeited. If a Man is thrown from his Horse by the Violence of the Water, then the Horse is not forfeited, 2 Cro. 483. Lord Chandois's Case; where the Inquest found him killed per cursum Aquæ. It is said in the Books, That if a Tree fall upon the Branch of another Tree, and both fall to the Ground, and the Branch kills a Man, the Tree and Branch are both forfeited.

# DEPARTURE.

## Gargrave *versus* Smith. Hill. 2 W. & M. C. B. Rot. 1639.

TRESPASS for breaking his House, and taking and carrying away his Goods; the Defendant justified the taking and carrying away nomine districtionis for Damage-feasant; Plaintiff replied quod post districtionem præd. viz. eodem die, &c. he converted them to his own Use. On Demurrer it was urged, That the Replication was a Departure, for it does not make good the Plaintiff's Declaration in Trespass, but shews rather that the Plaintiff should have brought Trover and Conversion: Sed non allocatur, He that abuses a Distress, is a Trespasser ab initio, and therefore if in Trespass the Defendant justifies nomine districtionis, the Plaintiff may shew an Abuse, and it is no departure, but makes good his Declaration; and so it does in this Case, for the converting is a Trespass, or Trover at Election, and the Matter disclosed in the Replication makes good his Election, for it proves it a Trespass as well as a Trover.

(1) To a Justification by Distress, the Plaintiff may reply an Abuse, and it is no Departure. Yelv. 96, 97. 1 Ro. Ab. 633, 562, 879.

## *Countess of* Arran *versus* Crispe. Trin. 5 W. & M. B. R.

IN Debt upon a Bond the Defendant craved Oyer of the Condition, which was to perform Covenants in an Indenture of Lease, wherein one Covenant was to pay so much clear of all Taxes, and then set forth the Indenture of Lease and pleaded Performance: The Plaintiff replied Non-payment of so much for half a Year's Rent; the Defendant rejoined so much paid in Money and so much in Taxes, upon the Act of Parliament for laying 4 s. per Pound on Land, which being allowed amounted to the full. The Plaintiff demurred. Holt C. J. held the Covenant did not extend to parliamentary Taxes for Want of the word Parliamentary; Cæteri contra, All Taxes includes Parliamentary: Yet per Holt, Judgment ought to be for the Plaintiff, tho' the Point of Law were against him; because the Matter of this Rejoinder being by way of Excuse ought to have been set forth in the Bar; but

(2) Where performance is pleaded and Matter of Excuse is afterwards set forth in the Rejoinder, 'tis a Departure.

but as it is here, 'tis a Departure; for whereas he said at first that he had performed the Covenants, now he says he is not obliged to perform them. Judgment pro Quer.

## Primer *versus* Phillips. Pas. 6 W. & M. B. R.

(3) Varying from that which is not materially alledg'd, is no Departure.

TRESPASS for taking his Cattle in alta via Regia at such a Place; the Defendant justified the taking for Damage-feasant; the Plaintiff replied, That Time out of Mind there had been quædam via tam equestris quam pedestris pro omnibus inter such a Place, &c. and that the Defendant drove his Cattle over the Way, and that en passant the Cattle eat, &c. The Defendant rejoin'd, That the Cattle were commorant in via prædict. and Issue was joined hereupon, which was found for the Plaintiff. Darnel moved for a Repleader, the Trespass now tried being another Trespass than that complained of. 34 H. 6. 19, 20. Holt C. J. The Trespass is a transitory Trespass, and the mention of it in the Declaration as done in alta via was nothing to the Purpose: It was idle and out of Time, and mere Surplusage; and therefore the Plaintiff in his Replication, by following the Defendant to another Way, does not depart, because it was not materially alledged in the Declaration, and a Departure must be from something that is material: And when the Issue is taken upon the Commorancy, it admits the Plaintiff had a Way, but that he continued longer in it than he should. Judgment pro Quer.

## Webley *versus* Palmer. Mich. 7 Will. III. B. R.

(4) In Trespass, if the Defendant justifies upon the Day in Narr. the Plaintiff may alledge another Day in his Repl.

IN Trover the Defendant pleaded a Release, &c. and it was held per Holt C. J. That in Trespass, if the Defendant plead a Release before the Time, he must also go on with an absque hoc, That he is guilty ad aliquod tempus postea: But if he does not vary the Time, there needs no Traverse; for suppose you alledge the Trespass to be such a Day, and the Defendant justifies as to that Day, the Plaintiff may shew another Day, and it is no Departure; for the Defendant has occasioned this: And there is great difference between a Bond and a Trespass; if the Declaration lays the Bond to be dated on one Day, the Replication cannot say it was dated on another; but in Trespass the Plaintiff may depart according to occasion. Sed adjournatur.

Howard *versus* Jennison. Pas. 8 Will. III. B. R.

An Action on the Case for Work done was brought by a Taylor and six several Promises laid all upon the 16th of October; the Defendant pleaded infra ætatem to all generally, the Plaintiff replied as to two Promises, præcludi non, &c. quia the Defendant was at that Time of full Age, and as to the rest, that they were pro necessario vestitu; hereupon the Defendant demurred, alledging that this was repugnant; that the Defendant could not at the same Time be of full Age and not of full Age: But the Court held, That Time was but a Circumstance in no wise material nor part of the Issue; that a Man is not tied to a precise Day in his Declaration, and if the Defendant force him to vary, 'tis no Departure. Judgment pro Quer.

(5) So in Assumpsit.

# DETINUE.

Roberts *versus* Wetherall. Pas. 8 Will. III. B. R.

By the Act of Navigation 12 Car. 2. c. 18. certain Goods are prohibited to be imported here under pain of Forfeiting them, one part to the King, another to him or them that will inform, seize, or sue for the same; and it was adjudg'd in this Case, That the Subject may bring Detinue for such Goods, as the Lord may Replevin for the Goods of his Villein distrained; for the bringing the Action vests a Property in the Plaintiff.

Detinue brought for Goods forfeited.

# DEVISE.

## Loddington *versus* Kime. Mich. 6 W. & M. C. B. Intr. Trin. 5 W. & M. Rot. 1551.

(1) Devise to A. for Life, and if he have Issue male, then to such Issue male and his Heirs; and if he die without Issue male, to B. and his Heirs. A. has but an Estate for Life, and both Remainders are contingent.

IN Replevin a special Verdict was found, viz. That Sir Michael Armin being seised in Fee, devised a Rent-charge, and then devises the Land to A. for Life, without Impeachment of Waste: And in case he have any Issue male, then to such Issue male and his Heirs for ever; and if he die without Issue male, then to B. and his Heirs for ever. A. entered and suffered a Common Recovery, and died without Issue.

1st Question was, Whether A. was Tenant in Tail by this Devise? Powell held the express Estate for Life not destroyed by the Implication, that arose on the later Words following, so that A. was only Tenant for Life, and the rather, because these words, viz. Impeachment of Waste, and for Life, must in that case be rejected, quod Treby C. J. concessit. 2dly, The Court held, That Issue was to be taken here as nomen singulare, because the Inheritance was annexed and limited to the word Issue; so that the Inheritance was in the Issue, and not in A. the Father. 3dly, That this Limitation to the Issue was not an executory Devise, being after a Freehold, but a contingent Remainder, so that a posthumous Son could never take. 4thly, That the Remainder limited to the Issue of A. was a contingent Remainder in Fee, and that the Remainder to B. was a Fee also: But those Fees are not like one Fee mounted on another, nor contrary to one another, but two concurrent Contingencies, of which either is to start according as it happens; so that these are Remainders contemporary and not expectant one after another. 5thly, The Court held that the Remainder in Fee to B. was not vested, because the precedent Limitation to the Issue of A. was a contingent Fee, and they took this difference, viz. Where the mesne Estates limited are for Life or in Tail, the last Remainder may, if it be to a Person in Esse, vest, but no Remainder limited after a Limitation in Fee, can be vested. 6thly, That the Recovery suffered by A. had barr'd the Estate limited to his Issue, that being contingent, and likewise the Remainder limited to B. and his Heirs, because that was contingent, not vested, and now never could vest; and

I that

that A. had gained a tortious Fee, which would be good against B. and his Heirs, and likewise against all Persons but the right Heirs of the Devisor.

Nota, In the Report of this Case in 3 Lev. 431. it is said, That the Court were agreed to give Judgment for the Avowant upon the Point, That A. only took an Estate for Life, when Powell J. started the other Point, Whether the Devise over to B. was only a contingent Remainder or an executory Devise? Upon which it was afterwards twice argued; but that before any Judgment given the Parties agreed and divided the Estate.

## Milford *versus* Smith. Mich. 5 W. & M. B. R.

UPON a Special Verdict in Ejectment the Case was, A. being seised in Fee by Indenture, &c. in Consideration of Marriage, covenanted to levy a Fine to certain Uses, and no Fine was levied. A reciting this Deed by his Will devises and confirms all Estates given and granted to his Son in Marriage according to the Deed. And it was resolved per Cur. That the Will had reference to the Deed, and passed such Lands and such Estates as were intended to be conveyed by the Deed and Fine; for the word Grant in a Will, is not to be taken strictly, but largely for any Agreement. Vide Cro. El. 68. 2 Cro. 148.

(2) Granted, in a Will construed as if it had been, Agreed to be granted.

## Lamb *versus* Archer. 5 W. & M. B. R.

IN Ejectment a Special Verdict was found, and the Case, as shortly put by the Court, was this; H. possessed of a Term for Years devises his Land to A. and to the Heirs of his Body, and if A. die without Issue, living B. then to B. Northey, who argued the Case, said, That the Judges would allow a Limitation in Remainder not only to a Person in esse, but to the first Son of the Person in esse. Vide 1 Sid. 451. 1 Cro. 230. 1 Ro. 612. And the Court held this was a good Limitation to B. the Contingency arising within the Compass of a Life; and they denied Child and Bayly's Case, 2 Cro. 45. Mr. Gould, in arguing the Case said, if one make a Feoffment to the right Heirs of B. that this was a good springing Use: Sed tot. Cur. contra eum in hoc, because 'tis by way of present Limitation, aliter where it is future, as to the right Heirs of B. after his Death.

(3) Limitation of a Term to A. and the Heirs of his Body, and if he die without Issue, living B. then to B. is good.

Carthew 261

## Goodright *versus* Cornish. Hill. 5 W. & M. B. R.

(4) Devise to A. for 50 Years, if he so long live, Remainder to the Heirs males of A. Remainder to B. the last Remainder takes effect presently.

No Implication to be receiv'd against express Words.

Limitation per verba de præsenti will not make an executory Devise.

IN Ejectment a Special Verdict was found, viz. Knowling had Issue two Sons, John and Richard, and devised Lands to John for 50 Years, if he should so long live, and as for my Inheritance after the said Term, I devise the same to the Heirs males of the Body of John, and for default of such Issue, then to Richard. The Court resolved; 1st, That John had not an Estate Tail by Implication upon the Words without Issue; because the Devisor had given him an Estate for Years by express Words, and the Court cannot make such a Construction against express Words, when thereby they would also drown the Estate for Years, and make an Estate of Inheritance. 2dly, The Court held this Devise to the Heirs males of the Body of John to be void in its Creation; for, for want of an Estate of Freehold to support it, it was void as a Remainder, and they seemed not to think it an executory Devise, because it was limited as a Remainder, and because it is limited per verba de præsenti. If one devise his Estate to the Heir of J. S. and J. S. is living, the Devise shall not be construed an executory Devise, and such a Devise is therefore void; but if it were to the Heir of J. S. after the Death of J. S. that is good, as an executory Devise; so note the Diversity inter verba de præsenti & verba de futuro. 3dly, The Court held the Limitation to the Heirs males of John was become void by Event, whatever it was in its Creation; because John is now dead without Issue. 4thly, The Court held, That if the Remainder to the Heirs males of John was void in Point of Limitation, then the next Remainder limited to Richard took effect presently. 4 Mod. 255. S. C.

## Blisset *versus* Cranwell & al. Pas. 6 W. & M. C. B.

(5) Devise to A. and B. and their Heirs, and the longer Liver of them, equally to be divided between them and their Heirs, makes a Tenancy in Common.

IN Ejectment upon Trial at Kent Assizes a Case was made for the Opinion of the Court, viz. A. being seised of the Lands in question devised in these Words, I give and devise to my two Sons and their Heirs, and the longer Liver of them, equally to be divided between them and their Heirs, after the Death of my Wife, all that my Messuage, &c. The Devisor dies, his Wife dies, one of the Sons entered and made his Will, and devised his part to the Lessor of the Plaintiff, and died, and the Defendant was the surviving Devisee of A. and therefore it was agreed, That if the two Sons were Jointenants, then this Devise was void quoad the Survivor; but, if by the first Will the two Sons were Tenants in Common, then this Devise to the

Lessor was good. And after Argument, the Chief Justice, Nevill and Rokeby were of Opinion, that they were Tenants in Common, and that the Devise was good, and their Reason was upon the Construction of Wills, that it ought to be according to the Intent of the Devisor; his Intent appearing by the Words to be not only to provide for his two Sons, but for their Posterity, that not only his two Sons, but their Heirs should have an equal part: For the Words are, Equally to be divided between them and their Heirs, and tho' by the first Words 'tis given to them and the Survivor of them, yet the last Words explain what he intended by the word Survivor, and that the Survivor should have an equal Division with the Heirs of him that should die first; and tho' the Testator has not aptly expressed himself, yet upon all the Words taken together, his Meaning seems to be so. That the Cases in Sty. 211. and 2 Ro. 90. differ from this Case as the C. J. said, for there the Inheritance is fixed and settled in the Survivor, which shews plainly his Intent that they should be Jointenants: But here the Inheritance is appointed to be equally divided betwixt them and their Heirs. And here the Words equally to be divided, do immediately follow the word Survivor, which shews he intended a Division in case of Survivorship; but in the other Case 'tis otherwise: The Cases upon which they grounded themselves were. 3 Cro. 443. 2 And. 17. Sty. 434. Powell J. contra, That the Exposition of a Will may be enlarged to so great an Uncertainty, that 'tis fit to put a Stop to it, and that 'tis the Words of the Will only, that are to explain the Testator's Intent. That the word Survivor makes a Jointenancy by express Words; but the words equally or equally to be divided were taken at first only to import a future Division to be made; but afterwards it was agreed, that these Words also made a Tenancy in Common; but this was only an Exposition collected out of the Words where there was no Jointenancy given by express Words. No Construction of an Intent shall be received against such express Words; for this would be to confound the Text; and he relied upon the Case in 2 Ro. 90. Sty. 211. and concluded for the Defendant, that the two Sons were Jointenants; but by the Opinion of the three other Justices it was adjudg'd, that they were Tenants in Common. Judgment pro Quer.

No Construction to be receiv'd against express Words.

## Reeve *versus* Long. Pas. 6 W. & M. B. R.

(6) 3 Lev. 408. 4 Mod. 282. S. C.

ERROR of a Judgment in C. B. in Ejectment, wherein a Special Verdict was found, and the Case was, John Long being seised in Fee devised the Lands to his Nephew Henry Long for Life, Remainder to the first Son in Tail male, and so on to the second, third, &c. and for default of such Issue, Remainder to his Nephew Richard Long, Lessor of the Plaintiff, for Life, Remainder

mainder to the first Son in Tail, and so on to the second, third, &c. with divers Remainders over. The Devisor died, Henry married and died without Issue, leaving his Wife enseint with a Son; Richard entered as in his Remainder, and afterwards the posthumous Son (the Defendant) was born, and his Guardian entered upon the Lessor, whereupon he brought this Ejectment; and Judgment was given for the Plaintiff in C. B. by the whole Court; and now that Judgment was affirm'd by this Court, and resolv'd, 1st, That the Remainder to the first Son of A. is a contingent Remainder, and must take effect during the particular Estate of A. or eo instante that it determines; that by Consequence this Remainder to the Son became void by the Death of the Tenant for Life before A. had a first Son. 2dly, That this was such a Default of Issue or a dying without Issue, that instantly the Remainder limited over to B. vested in him, and he became seised in Possession, and this cannot be defeated nor the Estate fetched back again, tho' A. has a Son born afterwards.

Contingent Remainder must vest during the particular Estate or eo instante that it determines.

But Note, This Judgment was afterwards reversed in the House of Lords against the Opinion of all the Judges, who were much dissatisfied with the Reversal. Vide Stat. 10 & 11 Will. 3. cap. 16.

## South *versus* Alleine. Trin. 7 W. & M. B. R.

(7) Devise of the Rents and Profits to A. to be paid by the Executors, is a Devise of the Lands to A.

IN Ejectment upon a Special Verdict the Case was, That J. S. being seised of Lands in Fee 29 Car. 2. devised all the Rents and Profits of such Lands to Sarah Birch, Wife of William Birch, during her natural Life, to be paid by his Executors into her own Hands, without the intermeddling of her Husband, and after her Decease, he devised them unto and amongst J. B. M. B. and R. B. &c. The Question was, Whether by this Devise S. B. had the Lands themselves? And Mr. Northey argued she had; for by the words, Rents and Profits, the Land it self would pass, which the Court granted; then the Question was, Whether these last Words, to be paid by his Executors, &c. did not alter and restrain the first Words? And he argued, they did not, for which he cited Yelv. 73. Carpenter and Collins, 3 Cro. 674, 734. Pigott versus Garnish. 1 Cro. 368. Spirt versus Bence. 2 Leon. 221. pl. 280. and 3 Leon. 78. But per Holt C. J. I am not satisfied with it: And he seemed strongly to incline that the Executors were Trustees for the Wife, but the Defendant had Judgment by the Opinion of Rokeby and Eyre against Holt C. J.

## Scatterwood *versus* Edge. Trin. 9 Will. III. C. B. Rot. 1424.

(8) Devise to the first Son of A. (A. having none at that Time) is void.

IN Ejectment a Special Verdict was found, viz. Robert Edge devised to Trustees for eleven Years, and then to the first Son of A. and the Heirs males of his Body, and so on to the second, third, &c. Sons in Tail male, Provided they the said Sons shall take on them my Surname, and in case they or their Heirs refuse to take my Surname, or die without Issue, then I devise my Land to the first Son of B. in Tail male, provided he take my Surname, and if he refuse or die without Issue, then to the right Heirs of the Devisor. A. had no Son at the Time of the Devise, and died without Issue, and B. had a Son who was living at the Time of the Devise, who took the Surname of the Devisor. The whole Court agreed, 1st, That the Devise to the first Son of A. was not a contingent Remainder, but by way of executory Devise, because the precedent Estate is for Years, which cannot support a Remainder; for a contingent Remainder can never depend on a Term of Years because of the Abeyance of the Freehold; nor can it be limited after a Fee, because after such a Disposal, nothing remains in the Owner to limit. Et per Powell, A Devise to the first Son of A. having none at that Time, is void, because 'tis by way of a present Devise, and the Devisee is not in esse; but a Devise to the first Son of A. when he shall have one, is good, for that is only a future Devise and no Inconvenience, for the Inheritance descends in the mean Time. 2dly, They held that an executory Estate to rise within the Compass of a reasonable Time is good; that 20 nay 30 Years has been thought a reasonable Time. So is the Compass of a Life or Lives; for let the Lives be never so many, there must be a Survivor, and so it is but the Length of that Life; but they were not for going one step farther; because these Limitations make Estates unalienable, every executory Devise being a Perpetuity as far as it goes, that is to say, an Estate unalienable, tho' all Mankind join in the Conveyance. And as to the principal Case, Blencow J. held the Devise to the first Son of A. to be future, for he supposed the Testator knew A. had no Son, and that the rather, because he does not name him. Powell J. There are three sorts of executory Estates, one where the Devisor parts with his whole Fee-simple, but upon some Contingency qualifies that Disposition, and limits another Fee upon that Contingency, which is altogether new in Law, as appears by 1 Inst. 18. a Fee cannot be limited upon a Fee. Vide 1 Ro. 825, 826. 2 Cro. Pells and Brown. The second Sort is where he gives a future Estate to arise upon a Contingency, and does not part with the Fee at present, but retains it; these are not against Law;

Within what Time an executory Estate ought to arise.

Three kinds of executory Estates.

Law, for by Common Law one might devise that his Executor should sell his Land, and in such Case the Vendee is in by the Will, and the Fee descends to the Heir in the mean Time; for this sort, Vide 2 Leon. 11. 3 Leon. 67. Cro. Eliz. 833. Mo. 644. 2 Ro. 793. Raym. 82. A third sort of executory Devises is of Terms which are well settled in Matth. Manning's Case: 'Tis dangerous to extend the Boundary of these executory Devises, which at present is a Life or Lives. A Devise to an Infant in ventre sa Mere, by the better Opinions, tho' various, is not good. Vide 11 H. 6. 13. Bro. Devise. 32. 1 Ro. 609, 610. Dy. 303, 304, 342. Mo. 127, 177, 634. 2 Bul. 272. 1 Ro. Rep. 110. Litt. 255. but I am of Opinion 'tis good; for he taking Notice that the Devise is in ventre must intend a future Devise; but a Devise to A.'s first Son, does not import Notice in the Devisor that A. has no Son: It may as well be said a Devise to the Heirs of J. S. a Person living, is good, because the Testator knew he was alive, and therefore meant a future Devise. The Question here is, Whether the precedent Term for eleven Years makes a Difference? I hold not, because 'tis an original Devise per verba de præsenti, and so differs from 1 Ray. 82. 2 Mod. 292. But had it been to the first Son to be begotten, it had been otherwise. Lastly, he held that the Devise to the first Son of B. who was born and in esse at the Time, was good, and as to the Objection, that the Devise to the first Son of A. was a Condition precedent, and so that failing (all fails,) Vide 1 Inst. 218. he held 'twas not a precedent Condition, but part of the Limitation. Treby C. J. If the Devise to the first Son of A. be good, then the Devise to the first Son of B. is not good; but if that to the first Son of A. be bad, then this to the first Son of B. is good: Had the first Son of A. been before the Court, the Judgment must have been against him, because as a Remainder 'twas void, and as an executory Devise 'twas void; for these are either present or future: If present, the Party must be in esse & capax at the Time, or all is void, like a Devise to the right Heirs of J. S. who is living: This is a present Devise, and therefore not like the Case of an Infant in ventre sa Mere: Where future, they must arise within the Compass of a Life; no longer Time has yet been allowed: And he was not for prolonging Time in favour of these inconvenient Estates. 2dly, He held the Devise to the first Son of A. was not a precedent Condition, but a precedent Estate attended with these Limitations. Judgment was given for the Defendant, and afterwards affirmed in B. R.

Devise to Infant in ventre sa Mere, good.

## Eyres *versus* Faulkland. Hill. 9 Will. III. C. B.

H. Possessed of a Term for ninety-nine Years devised his Term to A. for Life, and so on to B. and five others successively for Life; all seven being now dead, the Question was who should have the Residue of the Term? Et per Treby and Powell. Anciently, if one having a Term devised it to A. for Life, Remainder to B. such Remainder was void; 1st, Because an Estate for Life is a greater Estate; and, 2dly, Because the Term included the whole Interest, so that when he devised his Term, nothing remained to limit over. Afterwards the Law altered; for a Devise of the Term to B. after the Death of A. was held good; and by the same Reason to A. for Life, Remainder to B. for 'twas but disposing of the Interest in the mean Time; but a Devise to A. in Tail, Remainder over, is too remote; so if it be to A. and if he die without Issue, Remainder over: As to the principal Case, they held that all the Remainders were good; and that the first Devisee and so every Devisee in his Turn had the whole Term vested in him; during which the next Man in Remainder, and so every other after him had not an actual Remainder, but a Possibility of Remainder, and the Executor of the Devisor a Possibility of Reverter; for there may be a Possibility of Reverter, even where no Remainder can be limited, as in the Case of a Gift to A. and his Heirs while such a Tree stands: No Remainder can be limited over, and yet clearly the Donor has a Possibility of Reverter, tho' no actual Reversion; a Fortiori, there shall be a Possibility of Reverter, where a Remainder may be limited over; for the Testator gave but a limited Estate, and what he has not given away, must remain in him; and the Words for Life can be no more rejected in the last Limitation than in the first.

(9) Devise of a Term of Years to several successively for Life. After all are dead Executor of Devisor shall have the Residue.

There may be possibility of Reverter, where no Remainder can be limited.

## Bertie *versus* Falkland. Hill. 9 Will. III. In Canc.

CARY by Will dated the 10th of September 1685. devised to Trustees and their Heirs upon Trust, to take the Profits for three Years, and if within the three Years there happened a Marriage between the Lord Guilford and Mrs. W. who was then ten Years of Age and his Heir at Law, then to Mrs. W. for Life, Remainder to her first Son, &c. And if the Marriage did not happen, then the Remainder to Lord Falkland in Tail; they differ'd about the Terms, so the Lord Guilford took another Lady, and Mrs. W. was married to C. who brought a Bill to have the Estate, as being a Person equivalent, that is to say, equal in Estate, Family and Person (as they urged) to the Lord Guil-

(10) Where a Condition is precedent to the taking of an Estate, Chancery cannot relieve in Case of Non-performance; otherwise in Case of Forfeiture.

Guilford; and the Lady an Infant, and in no Fault, she having done what she could, and therefore she ought not to forfeit for the Fault of another, and they produced Evidence from Papers, Letters, and Sayings of the Testator to prove his Intent in this Will was not that it should be in Lord Guilford's Power to make her forfeit. Et per Cur. These collateral Papers, &c. cannot be taken notice of to influenee the Construction of this Will, for that would be to let them in, and to make them part of the Will it self; and by the Statute of Frauds and Perjuries, every part of a Will must be in Writing: But before that Statute, where a Will was in Writing, no collateral Proofs by Papers or Words could be admitted; because a Will was a compleat and consummate Act of itself: That therefore they must construe it by it self. That Chancery could not relieve in this Case, tho' the Condition was answered to what the Lady was capable of doing, for that the Condition was precedent; and tho' Chancery relieves Non-performance, 'tis only upon a Forfeiture, for which Equity can have a Valuation made, and give a Compensation. Decreed for the Lord Falkland, but reversed on Appeal to the House of Lords.

## Badger *versus* Lloyd. Trin. 9 W. 3. B. R. Rot'lo. 373.

(11) IN Ejectment a Special Verdict was found, viz. John Lloyd the Elder conveyed Lands by Lease and Release to the use of himself for ninety-nine Years, if he lived so long, Remainder to his Son John for ninety-nine Years, if he lived so long, Remainder to Eliz. the Son's Wife for Life, Remainder to Trustees to support contingent Remainders, Remainder to the first, second, third, &c. Sons of John the Son in Tail male, Remainder to John the Father in Tail, Remainder to him and his Heirs: John the Elder had Issue the said John, Thomas, Paul and Peter, and after makes his Will, whereby, reciting this Settlement, he devises these very Lands after John the Son's Death without Issue male, to Thomas, and after the Death of Thomas without Issue male, then to Paul, and if Paul die without Issue male, none of his other Brothers being living, then to Peter and his Heirs for ever. John the Elder died, and John the Son suffered a Common Recovery, and the Lessor of the Plaintiff, who claimed by the Devise and the Recovery also, was the only Son of Peter, and the Defendant was a Purchaser under a Fine from Thomas. The Title depended upon these three Points; 1st, Whether the Remainder devised to Peter was contingent? 2dly, Whether it was an immediate Estate vested, or executory? 3dly, Whether the Intails there devised were not vain and fruitless, such as never could take effect, and therefore void?

The first Question arose from these words, And none of his Brothers living: And the Court held that those words did not alter the Case, because they say nothing but what was implied and understood before: The Sense had been the same if they had been omitted, and then this had been like all other Limitations of Remainders; and 'tis plain, the Limitation to Peter can never take effect till all are dead. To construe it otherwise would be to destroy all the express Estates before devised. Vide 1 Cro. 185. 2 Cro. 415.

Expressio eorum quæ tacite insunt nihil operatur.

The second Question arose from this Objection, That John the Father having an Estate tail in Remainder, with a Reversion in Fee expectant, this Devise of his cannot take effect till the old Estate tail be spent: So this Devise, if ever it take effect, is to commence after a dying without Issue, which is a void executory Devise: The Court agreed, That if a Man seised in Fee does devise his Lands to A. and his Heirs, if J. S. a Stranger die without Issue, this is an executory Devise; because there is no precedent particular Estate: Aliter if J. S. had been Tenant in Tail of the Lands, the Reversion to the Devisor, as in this Case; for here is an immediate Devise of a present Reversion, and the words, after or from and after, are only to denote when they are to take effect in Possession. 10 Co. 107. 3 Cro. 323. 1 Saund. 151.

Devise to A, B. a Stranger dying without Issue, is executory; otherwise if B. were Tenant in Tail, Remainder to the Devisor.

To the third Point Holt C. J. agreed, That the Estates tail devised to John, Thomas, and Paul, could never take effect; because the Estate tail, which was in the Devisor, must descend to them, and would always interpose and keep back the Estate tail devised, which being no larger, must spend æquis passibus with the old Intail, and therefore it can never have effect; upon which reason he agreed, That such a Devise of a Remainder would be void, but he held it otherwise of a Reversion, which is also in this Case; because there is a Seigniory and a Tenancy created; for Tenant in Tail must hold of him in Reversion, and he of the supream Lord, so that this Devise has a real Effect as to the Tenure, which is altered hereby. Vide 2 Co. 51. and so there is a sound Diversity.

A. having Remainder in Tail with Reversion in Fee, devises to one Son in Tail, Remainder to the other in Fee; good, because it alters the Tenure.

## Nottingham *versus* Jennings. Trin. 12 Will. III. B. R.

In Ejectment a Case was made upon Trial, which was, H. had three Sons, A. B. and C. and devised his Lands to B. his second Son after the Death of his Wife, to hold to him and his Heirs for ever; and for want of such Heirs, then to his own right Heirs. H. died, and B. entered and died without Issue, living the eldest Son. Et per Cur. The second Son had only an Estate Tail, and the eldest shall take by Discent, and not by the Will, and so the Devise over is void in Point of Limitation;

(12) Devise by Father to Son and his Heirs for ever, and for want of such Heirs, then to the right Heirs of the Father, is Tail.

tion; for his Intent was, That the Land should descend from himself, and not from his Son B. If the Devise over had been to a Stranger, it had been void, and B. had taken a Fee; but here is only an Estate Tail, and the word Heirs can import nothing more than Issue, for B. could not die without Heirs, living Heirs of the Father.

## Cole *versus* Rawlinson. Hill. 1 Ann. B. R.

(13) I give all my Estate, Right, Title and Interest in, &c. And also the House call'd, &c. carries a Fee in the House.

IN Ejectment, a Special Verdict was found, viz. That Billingsley being seised in Fee of the Bell-Tavern, made a Settlement to the use of himself for Life, Remainder to his Wife for Life, Remainder to his Son in Tail, Remainder to his Wife in Fee; or to the like Effect. The Husband died, and the Wife being so seised of the said Bell-Tavern, and possessed of other Lease-hold Estates, made her Will, and thereby devised in this manner, I give, ratify and confirm all my Estate, Right, Title and Interest, which I now have, and all the Term and Terms of Years which I now have or may have in my Power to dispose of after my Death, in whatever I hold by Lease from Sir John Freeman, And also the House called the Bell-Tavern, to John Billingsley. This John Billingsley was the Son and Heir of him that made the Settlement, and also had the Remainder in Tail in the Bell-Tavern, but was not the Heir of the Wife: The Question was, What Estate the said John Billingsley took in the Bell-Tavern by this Devise? Powell, Powys and Gould Justices held, that he took an Estate in Fee. 1st, Because 'tis but one Sentence coupled by the words and also, and governed by one Verb, whereby the Preposition in is carried unto the Bell-Tavern, so that 'tis a Devise of all her Estate and Interest in her Leasehold Estate, and also in the Bell-Tavern. Vide Dy. 19. 2 Saund. 165. And the Words ought to have this Construction since they are capable of it, because this was certainly the Intent of the Testator, who could not design so vain and useless an Estate to the Devisee, as an Estate for Life after an Estate Tail; and for this purpose was urged the Case in Moor 873. Hob. 2. Mo. 52. 1 Ro. 844. 2dly, Because the words of the Will are rather a Description of the Testator's Estate than of his Lands, and the Preposition in subintelligitur, and put it into Latin, and 'tis acetiam Domo vocat. &c. and suppose a Transposition of the Words, which is allowable to serve the Intent of a Will, and then the Matter is plain, for then 'tis, I give my Term of Years and all the Estate, Right and Title I have in my Term, and also in the Bell-Tavern; and Powys said it was an honest Construction, and brought back the Fee of the Reversion to the right Heir of the Husband, who created the Reversion. Holt C. J. contra, For the Intent of a

Testator will not do, unless there be sufficient words in the Will to manifest that Intent; neither is his Intent to be collected from the Circumstances of his Estate and other Matters collateral and foreign to the Will, but from the Words and Tenor of the Will it self: And if we once travel into the Affairs of the Testator and leave the Will, we shall not know the Mind of the Testator by his Words, but by his Circumstances; so that if you go to a Lawyer he shall not know how to expound it. Upon the Will 'tis so, but with the Matter found in a Special Verdict 'tis otherwise; and what if more accidental Circumstances be discovered, and be made the Matter of another Verdict? Mens Rights will be very precarious upon such Construction. And as for the Honesty of the Construction, What if the Woman paid a good Portion, and was a Purchaser of this Reversion, is it not as honest then to construe it in Favour of her Heir, as to expound it in favour of the right Heir of the Husband? But we must not depart from the Will to find the meaning of it in Things out of it. 'Tis then a certain Rule, That to devise Lands to H. without farther Words, will pass but an Estate for Life, unless there be other Words to shew his Intent, as for ever, or unless he devise for some special purpose which cannot be accomplished without a larger Estate: And as this is a sure Rule, so it holds good as well where the Devise is of a Reversion, as where 'tis of Lands in Possession, unless he devise it as a Reversion, or take Notice of a particular Estate; for then his Intent may appear upon the Face of the Will it self; but if the Words be general and without regard to the Nature of the Thing, it is otherwise; for it shall not be construed from the Nature of the Thing, which is extrinsical, but from the Words of the Will. Ask a Lawyer what passes, he says an Estate for Life, for he knew not that it was a Reversion; and tho' it be a fruitless Estate and will signify nothing, yet that does not appear till it be found, and therefore when found 'tis not to be regarded. The Case in Mo. and Hob. differs, for there the Testator takes Notice of a precedent Term, and the Words are, His Lands of Inheritance, so that the special Intent of the Testator is apparent from the Words of the Will. If I give Black Acre to A. and his Heirs, and also White Acre, the Fee-simple of White Acre shall pass, as well as the Fee of Black Acre; because it follows the Limitation, and comprizes it by the words, and also; but if I give all my Right, Title and Interest in my Term, and also my House called the Bell; in the grammatical Construction 'tis no more than, and also I give my House called the Bell, for the subject Matter of his Right, Title and Interest is the Term, and the Preposition in terminates and rests there. So is the Case at bar; but, say they, turn it into Latin, and then 'tis, I give jus titulum & statum in termino ac etiam domo vocat. the Bell-Tavern. I answer the Preposition in

Intent of Testator to be collected from the Words of the Will, not extrinsic Circumstances.

Rule, What Words give only an Estate for Life, and what a Fee without Heirs.

Matter that cannot appear till found, when found is not to be regarded in the Exposition of Wills.

in may be necessarily understood in Latin, but not in English, and the Conjunction is not so far a Copulative as to take in the Preposition in, tho' it takes in the Verb. My Brother Powell would transpose the Words, so it shall be all the Right, Title and Interest in the Bell-Tavern, and also all the Term I have and hold of Sir John Freeman. But I do not know how we can transpose words that are good Sense. If the Will was Nonsense, then we may transpose to make it bear a meaning; but to displace the Words of the Will when they are intelligible, is to alter the Will and the Sense of it; For these Reasons, and also because the Heir at Law was to be favoured, he concluded for the Plaintiff. He cited 3 Cro. 330. Hob. 2. 1 Cro.. Wilkinson versus Merrilan.

Words in a Will that are good Sense, are not to be transposed.

## Popham *contra* Banfeild. Hill. 2 Ann. In Canc.

(14) Where a particular Estate is expresly devised, a contrary Intent is not to be implied by subsequent Words.

DEVISE to A. for Life, Remainder to the first Son of A. in Tail male, and so on to the 10th Son in Tail male, and if the said A. die without Issue male of his Body, the Remainder over: Also by a Codicil annexed he recited, whereas he had given an Estate Tail to A. &c. And it was objected, That by the Codicil the Intent of the Devisor appeared, and that by the Will A. had an Estate Tail; for he might have posthumous Children and more than ten Sons: Sed non allocatur; For where a particular Estate is expresly devised, we will not by any subsequent Clause, collect a contrary Intent inconsistent with the first by Implication; and therefore they construed dying without Issue male, a dying without such Issue male. And they said there was a mighty Difference between a Devise to A. and if he die without Issue, then to B. and a Devise to A. for Life, and if he die without Issue, then to B. Adjudg'd per Wright Lord Keeper, Holt C. J. and Trevor C. J.

## *Countess of* Bridgwater *versus the Duke of* Bolton. Hill. 2 Ann. B. R.

(15) The Words, All my Estate, in a Will pass both the Thing and all the Testator's Interest therein.

A Special Verdict was found upon a feigned Issue, directed out of Chancery to try whether the late Duke of Bolton did by his Will devise certain Fee-farm Rents to John Earl of Bridgwater in Fee. The Devise was in these Words, viz. I give certain Lands to A. and I give to John Earl of B. my Son in Law 5000 l. and all my Mines; all which I give to my said Son in Law, his Executors and Assigns, together with all my Plate and Jewels, and *all other my Estate real and personal,* not otherwise disposed of by this my Will, for to be given by him to his Children as he shall think convenient, I solely trusting to

 his

his Honour and Discretion, that he will give them such Provision as will be necessary. And another Clause was, Whereas I have contracted for the Sale of my Fee-farm Rents, my Will is, that if my Debts shall not be satisfied out of my other Estate, my Executors (whereof the Earl was one) shall and may sell some part or all of them for Payment of them, notwithstanding the Rents are not devised by this my last Will. And the Question Whether his Fee-farm Rents should pass to the Earl of B. and for what Estate? Et per Holt C. J. who delivered the Resolution of the Court: The Rents pass by these Words, All my real and personal Estate: For the word Estate is genus generalissimum, and includes all Things real and personal, and the Fee of the Rents pass, at least the whole Estate of the Devisor; for All his Estate is a Description of his Fee. In pleading a Fee-simple you say no more than, seisitus in Dominico suo ut de feodo; and in a Formedon or other Action, if a Fee-simple be alledged, you say cujus statum the Demandant has now: In a Will the Testator is not tied up to form, 'tis enough that he expresses and signifies his Meaning by any Words. Before the Statute H. 8. if one had devised his Land by vertue of a Custom, the Common Law accepted his Intent without requiring particular words of Limitation, as in Cases of Conveyances at Common Law; and as it was so in Devises before the Statute, there is the same Reason why it should be so in Devises since the Statute: And he held, that devising all his Estate, and all his Estate in such a House, was the same, and that all his Estate in the Thing passed in either Case.

## Bunter *versus* Coke. Mich. 6 Ann. B. R.

(16) By Devise of all the Lands I shall have at my Decease, Lands purchased after the Devise pass not.

H. Devised to his Wife all such Sums of Money, Lands, Tenements and Estate whatsoever, whereof at the Time of his Decease he should be possessed. After the making of the Will H. purchased Lands of the Custom Gavelkind. And the Question was, Whether these Lands passed by the Devise? It was urged, That if a Disseisee devises, and after re-enters, the Devise is good: Et hoc fuit concessum, because by the Entry he was seized ab initio, so as he might bring Trespass: So if one have a Remainder in Fee expectant on an Estate for Life, and devise it, and Tenant for Life dies, the Estate in Possession passes; and this was granted, because the Devisor was seised at the Time of the Will, and his Intent was to pass all. Sed per Cur.

1st, A Devise of Things personal is good, tho' the Testator hath them not at the Time of his Will, because they go to the Executors, and the Legacy passes not by the Will, but by the Assent

Assent of the Executors to whom the Will is only directory; so that the Legatee is in by the Executors; but the Court doubted somewhat of a Chattel real, as a Lease for Years. Vide Gouldsb. 93. That it does not pass.

2dly, A Devise of Lands is not good if the Testator had nothing in them at the Time of the making his Will; for a Man cannot give that which he has not, and that which was void in its Original can never become good. If an Infant make a Will, it is void, tho' he come of full Age before he die; so of a Feme Covert: And in these Cases there was only a personal Disability, viz. Infancy and Coverture; so here there is a real Disability by wanting the Thing: And the constant form of pleading is, that the Testator was seized, and being so seized, made his Will. Co. Ent. 364. Ras. 274. And there is no difference between a Devise of Lands, Socage and Gavelkind by Custom 34 H. 6. F. N. Br. 199. Upon which Place note, That they must be sua at the Time of the Devise.

3dly, Had there been a Republication, it was admitted these Lands would have passed; for a Republication is as making a new Will, and the Intent is manifest.

4thly, It was admitted that if one devise to two and their Heirs, and one dies in vita Testatoris, the Survivor has all: And that if one has a Manor and devises it, and after a Tenancy escheat, that shall pass by the Devise as being part of the Manor.

## Aumble *versus* Jones. Hill. 7 Ann. C. B.

(17) Remainder to the right Heirs of J. S. void, the particular Estate determining in the Life of J. S.

Legal Sense of the Words to be taken, if the contrary not plainly implied.

UPON a Special Verdict in Ejectment the Case was, That Anthony Gull was seized in Fee, and devised to his Daughter for Life; after that to A. the eldest Son of his Daughter and his Heirs, and for want of such Heirs, Remainder to the right Heirs of J. S. And it was agreed, That J. S. being alive when the Remainder after limited was to commence, that that Remainder was therefore utterly void by this Event, whatever it was in its Creation. Secondly, That the common and legal Construction of Words shall be taken, where it does not appear from a necessary or plain Implication that the Intent of the Devisor was otherwise, and therefore that the Limitation to A. and his Heirs was a Fee-simple and not an Estate Tail; for he might mean for want of Heirs general, and there is nothing that plainly shews he meant otherwise, and that by Consequence the Remainder to the right Heirs of J. S. was void in its Creation. Vide Cro. Car. 57. Cro. Ja. 416.

## Hopewell *versus* Ackland. Hill. 8 Ann. C. B.

(18) Whatever else I have not before disposed of will carry a Fee in a Will.

IN Ejectment a Special Verdict was found, viz. John Ackland being seised in Fee of the Lands in Question, devised an Annuity to H. in Fee. Item, I devise my Manor of Bucknall to A. and his Heirs. Item, I devise all my Lands, Tenements and Hereditaments to the said A. Item, I devise all my Goods and Chattels, Money and Debts, and whatever else I have not before disposed of, to the said A. he paying my Debts and Legacies, and makes him Executor. And now the Question being, What Estate A. had in the Lands, Tenements and Hereditaments? It was urged that the Item conjoined the Sentences, and carried on the Testator's Intent, and imported a Meaning to give the like Estate, as was before expressed in the precedent Sentence, like Moor 52. Also the word Hereditament imports an Inheritance. Vide 2 Lev. 169. The Statute 12 Car. 2. gave the Crown the Lands, Tenements and Hereditaments of the Regicides; and it was held that the Inheritance in Tail of one of them passed by those Words. Et per Trevor C. J. Item is an usual Word in a Will to introduce new distinct Matter; therefore a Clause thus introduced, is not influenced by, nor to influence a precedent or subsequent Sentence, unless it be of its self imperfect and insensible without reference; therefore not here, where both Clauses are perfect and sensible; and the word Hereditament cannot be taken to denote the Measure or Quantity of Estate; because it has a proper Meaning and extends to Annuities, Advowsons in gross, &c. which are not comprized by the words Lands and Tenements: And the Reason of the Case in 2 Lev. 196. was not from any such Import of the word Hereditament, but because a Forfeiture of their Lands was reasonably construed the Forfeiture of the Lands and their Estate therein forfeitable for such Crime: But by the concluding Clause whatever else he had not before disposed of, he held an Estate in Fee passed, relying upon Aleyn 28. Wheeler's Case, and 2 Vent. Willow's Case; for it could not have any Effect on the personal Estate, because that was given away as fully as possible by the Words precedent, therefore it must extend to Remainders, &c. and this he held to be inforced by the latter Clause, paying, &c. and the Annuity in Fee.

Exposition of the word Item.

(19) Devise to A. for Life, and then to be at her disposal to any of her Children, gives an Estate for Life with a Power to dispose of the Fee.

## Thomlinson *versus* Dighton. Pas. 10 Ann. B. R.

ERROR on a Judgment in C. B. in Ejectment, wherein a Special Verdict was found to this effect. H. seised in Fee, devises to his Wife for her Life, and then to be at her disposal to any of her Children who shall be then living. H. dies, leaving a Son

Son and a Daughter, and his Wife, who then enters and marries a second Husband, and the second Husband and she by Lease and Release convey the Lands to A. and his Heirs to the Use of the Wife for Life, without Impeachment of Waste, Remainder to her Daughter and the Heirs of her Body, Remainder to the Son and his Heirs, with a Power to revoke and limit new Uses: The first Question was, Whether the Wife had an Estate in Fee, or only an Estate for Life, with a Power to dispose of the Inheritance? And the Court held this to be only an Estate for Life, with a Power to dispose of the Inheritance. Et per Parker C. J. The Difference is where a Power is given with a particular Limitation and Description of the Estate, and where generally, as to Executors to sell or to give; for he, that can give or sell an Estate in Fee, must have an Estate in Fee. 2dly, The Question was, Whether this Power could be construed as a Power appendant to the Estate for Life, so as by the destroying of that it might be destroyed or extinguished, or a collateral one? And Powell J. said, This was not a Power appendant or appurtenant, nor was it in the Nature of an Emolument to the Estate, like a Lease for Life, with a Power to make a Lease for twenty-one Years; for that affects the Estate for Life, and is concurrent with it, and has its Being and Continuance, at least for some Part, out of it; but this Power arises after the Estate and has its effect upon another Interest; so that the Estate for Life is perfect without it, and no ways altered nor affected by the Execution of it. Et adjournatur. And afterwards at another Day, Parker C. J. delivered the Opinion of the Court, That this was only an Estate for Life, and that the disposing Power was a distinct Gift; because the Estate given is express and certain, and the Power comes in by way of Addition: And that this differs from the other Cases, which are general and indefinite, viz. A Devise to J. S. and that he shall sell, or a Devise to J. S. to sell, &c. In these Cases, because the Party is impowered to convey a Fee, he is construed to have one; he having no express Estate divided from the Power; but here the Power is a separate Gift distinguish'd from the Estate, and the Estate given is a certain and express Estate. Vide 10 H. 8. 9. 1 Inst. 9. Mo. 57. 3 Lev. 71. 1 Jones 137. Lat. 9. 34. 2 Lev. 104. 1 Mod. 189.

Difference between a Power appendant to the Estate, and collateral.

# DISCENT.

## *The Lessee of* Carter *versus* Tash. Hill. 6 W. & M. *At* Nisi Prius, coram Holt, *C. J.*

(1)

IN Ejectment these Points were held for Law by Holt C. J. 1st, If Lessee for Years be made Tenant to the Præcipe by Lease of a Freehold to suffer a Common Recovery, that by this the Term is not merged, but preserved and revived by the saving of former Rights in the Statute 27 H. 8. of Uses. 2dly, If a Termor levy a Fine come ceo, &c. this shall not bar him in the Reversion, for he may avoid it by Plea of Partes finis nihil habuerunt. 3dly, A Discent which tolls Entry ought to be an immediate Discent; and therefore if a Feme disseisoress take Husband and hath Issue and dies, and after the Husband dies, the Discent to the Issue does not take away Entry, because the Interposition of Tenant by the Curtesy does impede it. 4thly, Coverture to avoid a Discent, ought to be continual from the Time of the Disseisin to the Discent; for if a Feme be sole at the Time of the Disseisin or of the Discent, or any Time intermediate, her Entry is not preserved, because she had an opportunity to enter and prevent the Discent. As if a Feme Covert is a Disseisee, and after her Husband dies she takes a second Husband, and then the Discent happens, this Discent shall take away the Entry of the Feme, and upon this last Point the Plaintiff was nonsuited. 1 Inst. 338, 246, 353.

Discent que toll Entry must be immediate.

Coverture to avoid such Discent must be continual.

## Clerk *versus* Smith. Hill. 10 & 11 Will. III. C. B. Rot. 1257.

(2)

IN Ejectment on a Special Verdict the Case was, J. S. devised Lands to his Daughter's Son [who was also his Heir] and to his Heirs, upon Condition that he should pay 200l. to such a Person out of the said Lands, as the Wife of the Devisor should appoint by her Deed. The Grandson enter'd and the Wife made no Appointment, then the Grandson died seised, leaving an Heir à parte materna, under whom the Plaintiff claimed, and an Heir à parte paterna, under whom the Defendant claimed: The Question was, Whether the Grandson was in by Discent, or in by Pur-

Where the same Estate is devised to H. which he would have taken by Discent, he is in by Discent, notwithstanding the Possibility of a Charge.

Purchase under the Will? And it was adjudged, That he was in by Discent and not by Purchase, for the Devise gives him the same Estate the Law would have given him under a Possibility of being charged, which never happened; by Consequence, as the Grandson took it as Heir à parte materna, he shall transmit it in the same manner to his Heirs à parte materna: And Treby C. J. and Powell J. denied Gilpin's Case, Cro. Car. 161. Vide 2 Mod. 286. Dy. 124. 3 Leon. 64, 70. Cro. El. 833, 919. Mo. 644. Vau. 271. Dy. 371. Hard. 204.

## Reading *versus* Royston. Hill. 1 Ann. B. R.

(3.) H. having two Daughters, one has a Son and dies, and H. devises to the Son, he takes the whole by Devise.

H. had Issue two Daughters, one of them had Issue a Son and died, H. devised the Land to the Son and his Heirs for ever. And the Question was, Whether the Son should take all by the Devise, or the one Moiety by Discent, and one Moiety by Devise? For then as to that Moiety he takes by Discent, his Aunt will be Co-parcener with him. Mr. Cowper argued, That where two Titles concur, the elder shall be preferred; and that as to one Moiety, which the Grandson has by the Devise, he has the same Estate in it, and no other by the Devise, than he would have without it; and therefore since the Devise works no Alteration in Point of Estate as to that, the Grandson shall take it in potiori jure, which is by Discent; as if the Father having some Lands Borough-English, and some Frank-fee, should devise all his Lands to his eldest Son and his Heirs. But it was resolved by the Court, That the eldest Son should take all by the Devise, and could not take a Moiety by the Discent as Heir, and a Moiety by the Devise; for there can be no such Discent as the Discent of a Moiety to one Co-parcener as Heir; one cannot plead a Discent uni filiæ & Cohæredi, but it is a Discent to all: And the Court agreed the Rule, viz. Where a Devise to an Heir gives the same Estate which would discend, the Devise is unnecessary & nihil operatur; it has no effect, and therefore it is void: But here is not a Devise to an Heir, both Co-parceners make the Heir, and the one is not an Heir without the other; and supposing the Devise void as to one Moiety, the other Moiety must discend to both: But the Grandson must take by the Devise in this Case, because nothing can discend to him ut uni cohæredi. Afterwards a Point was stirr'd in this Case upon the Statute of Limitations, for which see Title Limitations.

There cannot be a Discent of a Moiety to one Co-parcener as Heir.

## Clements *versus* Scudamore. Hill. 2 Ann. B. R.

(4)
Borough-English Lands discend to the Representative of the youngest Son.

IN Ejectment a Special Verdict was found, viz. A. had five Sons, and the youngest Son died in the Life of the Father, leaving Issue a Daughter, after which the Father purchased Copyhold-Lands of the Nature of Borough-English, which by Custom were discendible to the youngest Son and his Heirs. The Father died seised, and the fourth Son entered; and now the Question was, Whether the fourth Son, or the Daughter of the fifth Son should inherit these Lands? And Holt C. J. delivered the Resolution of the Court, viz. The Daughter shall inherit jure repræsentationis, for by this Custom the youngest Son is put in the Place of the Eldest at Common Law, and as at Common Law the Issue of the Eldest is preferred jure repræsentationis, so by this Custom shall the Issue of the Youngest. If a Man seised of Lands of the Custom of Gavelkind have Issue three Sons, and one of the three dies, leaving Issue a Daughter, in the Life of his Father, this Daughter shall inherit the part of her Father, and yet she is not within the Words of the Custom, which vide Rast. 143. a. §. Gavelkind, terra inter hæredes masculos partibilis & partita, for she is no male, but the Daughter of a Male, and Heir by Representation. In the Year 1660, there was a Case between Fane and Barr; it is entered Hill. 1659. Rot. 779. The Custom was, That the Copyhold-Land of every Tenant dying seised discended to the youngest Son. A Surrender was made to the use of A. and his Heirs; A. died before Admittance, and it was agreed his youngest Son should inherit if A. had been admitted; but in this Case A. being not admitted, it was adjudged the eldest Son should inherit, and that is by reason of the strictness of the Custom, which required a Seisin and a dying seised; but by the Report I have of that Case, the Court said it had been otherwise if this Land had been found to be of the Custom of Borough-English or Gavelkind; for the Law takes Notice of these Customs, but not of such special Customs which must be pleaded by him that would take Advantage of them, and must be taken by the Court to be as they are set forth by the Pleading, and no otherwise. In the Case at bar, the Custom is expresly found to be discendible to the youngest Son and his Heirs, tho' the words his Heirs are needless, for the Law would imply all necessary Incidents and Consequences in the Course of Discents. If the Father be disseised and die, the Right of Entry shall discend to the youngest Son; if the youngest Son die that same Right of Entry shall discend to his Daughter; and the youngest Son being Heir by Custom, shall have his Age as if he were Heir at Common Law. And the Court denied the Case

Difference between general Customs, whereof the Law takes Notice, and special.

Where Custom makes an Heir, the Law implies all Incidents in Course of Discents.

of 1 Leon. 109, 208. and inclined against the Opinion of Croke in 1 Cro. 410. Reeves versus Malster, and said if a Lease be made to H. and his Heirs, for three Lives, of Lands of the Nature of Borough-English, this discendible Freehold shall go to the youngest Son, tho' it is a new created Estate, for the Custom is inherent in the Land; and so it is of a Rent, for it issues out of the Land, and the introducing the same Rules of Discent in all Cases relating to the same Lands, tends to Quietness and Certainty.

# Discontinuance of Estate.

## Hunt *versus* Burn. Hill. 1 Ann. B. R.

A. Tenant in Tail levies a Fine to B. for B.'s Life, with Warranty, and after levies a Fine to the use of A. and his Heirs, with Warranty.

A. Tenant in Tail levies a Fine to the Use of J. S. for the Life of J. S. with Warranty, and after that levies a Fine to the Use of himself and his Heirs with Warranty, and after that bargains and sells to another and his Heirs. Et per Holt C. J. and Powell, 'twas held:

Discontinuance remains no longer than the wrongful Estate that causes it.

1st, That the first Fine made a Discontinuance, but it was only a Discontinuance for the Life of J. S. because the wrongful Estate that causes the Discontinuance, was only an Estate for his Life, and the Discontinuance could remain no longer than that Estate.

2dly, The second Fine could not enlarge the Discontinuance; because the Estate raised by the Fine returned back to the Conusor, and consequently the Warranty which was annexed to it was extinguished; and it would be a vain Thing to make a Discontinuance for the sake of that Warranty which was destroyed in its Creation.

3dly, Suppose the second Fine had been levied to R. S. a Stranger, yet during the Life of the first Conusee this second Fine makes no Discontinuance, because the Estate was turned to a Right by the first Fine, and the second Fine could not turn it more to a Right; so as it is not a present or an immediate Dis-

continuance; but if the first Conusee die in the Life of Tenant in Tail, then it becomes a Discontinuance; for the new Reversion which Tenant in Tail gained, and to which the Warranty was annexed, is executed in Possession in R. S. and there was no Right of Entry or Action in any Body when the Estate was executed, for the Tenant in Tail could not enter, and the Issue had no Right; and they compared it to Litt. Sect. 620, 622.

And Powell J. said it was thought anciently that no Advantage could be taken of a Warranty but by Pleading: If the Issue could enter they thought the Warranty was lost, and therefore created Discontinuances in Safeguard of the Warranty: But it is otherwise now. vide 10 Co. 97. b.

Also he held there might be a Discontinuance, which turns the Estate to a Right, and yet does not take away the Right of Entry, and that a Warranty might bar where the Reversion was only displaced and turned to a Right, tho' the Right of Entry was not taken away. As if Tenant in Tail makes a Lease for the Life of Lessee, and after grants his Reversion to J. S. and his Heirs with Warranty, this Warranty is annexed to an Estate in Fee, and yet here is no immediate Discontinuance, so as to toll the Right of Entry; nevertheless, if this Warranty discend upon the Issue, and there is Assets, this will be a Bar, which shews a Warranty may bar without a Discontinuance.

There may be Discontinuance which turns the Estate to a Right, and not take away Entry.

Lut. 770, 782. Jones 209. Br. Discent 3. 1 Inst. 333. 21 H. 8. 22. 2. 23.

# Disseisin, Seisin.

(1) Mortgagee Covenants that Mortgagor shall quietly enjoy till default of Payment, and assigns. After Assignment Mortgagor is only Tenant at Sufferance, but his continuing in Possession does not turn the Term to a Right. 3 Lev. 387. S. C.

## Smartle *versus* Williams. Pas. 6 W. & M. B. R.

ON a Trial at Bar the Case upon Evidence was; A Man made a Mortgage for Years to A. who without the Mortgagor's joining, assigned it to B. who assigned to C. under whom the Plaintiff in Ejectment claimed; and it was objected by Levinz, That tho' he admitted the first Mortgagee might well assign without making any Entry or joining the Mortgagor, who is but Tenant at Will to the Mortgagee, and his Possession as such is but the Possession of his

his Mortgagee; Yet the Assignment of the first Mortgagee determined the Lease at Will, and the Mortgagor thereby became Tenant at Sufferance, and his Continuance in Possession devested the Term and turned it to a Right, so that it could not be assignable without B.'s Entry on the Mortgagor's Joining; that it was at least a devesting of the Term at the Election of the Assignee according to Blunder and Daw's Case, 1 Cro. 305. And B. the Assignee had made his Election and brought an Ejectment against the Mortgagor, which admitted his being out of Possession, and they shewed the Record it self, wherein the Assignee was Lessor of the Plaintiff. Sed per Holt C. J. Upon executing the Deed of Mortgage the Mortgagor, by the Covenant to enjoy till Default of Payment, is Tenant at Will, and the Assignments of the Mortgagees could only make the Mortgagor Tenant at Sufferance, but his continuing in Possession could never make a Disseisin, nor Devesting of the Term: Otherwise if the Mortgagor had died and his Heir had entered; for the Heir was never Tenant at Will, but his first Entry was tortious; or if the Mortgagee had entered upon the Mortgagor, and the Mortgagor had re-entered; for the Mortgagee's Entry had been a Determination of the Will, and the Re-entry of the Mortgagor had been merely tortious. And as to the bringing an Ejectment it was said, that could not admit an actual devesting, so as to turn the Term to a Right, for that was not brought to recover the Mortgage Term, but the actual Possession only, for the Recovery of which the Assignee of the first Mortgage had no other Way but this, or to make a Forcible Entry, which the Law forbids; nor does the Assignee appear a Party to the Record, but only a Lessor of the Plaintiff, so that this Record can be no Evidence or Estoppel against him, and the Court will take Notice that an Ejectment is only a fictitious Proceeding for recovering the Possession which cannot well otherwise be obtained; and the Entry laid in the Declaration or confessed by the Defendant, is not an Entry that is real; for it shall neither avoid a Fine, nor be sufficient Evidence to support Trespass for the mean Profits.

## Anonymus. Trin. 3 Ann. B. R.

(2) Effect of a bare Entry.

PER Holt C. J. A bare Entry on another without an Expulsion makes such a Seisin only that the Law will adjudge him in Possession that has the Right, and so are the words intravit & fuit inde seisit. prout lex postulat to be understood in Special Verdicts; but it will not work a Disseisin or Abatement without actual Expulsion.

# DISTRESS.

## Walter *versus* Rumball. Trin. 7 Will. III. B. R.

(1) Distress in two Hundreds, viz. A. and B in different Counties. Oath upon Sale administred by the Constable of A. in B. well.

TROVER for six Hogs; Special Verdict was found, viz. That the Lands demised lying in two Counties, viz. Part in the Hundred of A. in Wilts, and part in the Hundred of B. in Southampton, the Lessor for Rent-arrear distrained in both Hundreds, and the Distress being not replevied in five Days, Notice was given to the Owner of the Goods, and then he sent for the Constable of A. who in the Presence of the Constable of B. sold them in the Hundred of B. Et per Cur. 1st, Personal Notice is sufficient, for Notice is the Thing required. 2dly, Notice to the Owner is sufficient against him in Trover; but if the Tenant had brought Replevin, that would not have served as to him, but he must have had Notice also.

3dly, Tho' the Act requires the Oath should be administred by the Constable of the Hundred where the Goods are, and here the Constable of A. administred the Oath in the Hundred of B. where he had no Authority; yet this was held good, because the Defendant could not sever the Distress, it being intire as the Cause was, and the Hundreds contiguous, so that the Driving was lawful, and a Continuance of the first Taking. Sed per Cur. A Distress in Middlesex ought not to be driven into a distant County, as Hampshire.

## Cotsworth *versus* Bettison. Mich. 8 Will. III. C. B.

(2) Where Distress is made without Cause, the Owner may rescue before impounding, but not afterwards.

IN a Parco fracto 'tis no objection, That the Plaintiff shews no Title to distrain, therefore the Defendant cannot justify breaking the Pound and taking them out, tho' the Distress was without Cause, because they are now in actual Custody of Law; yet Note, Before impounding he might have rescued.

Vasper

## Vasper *versus* Eddows. Pas. 12 Will. III. B. R. Rot. 316.

(3) Where Distress escapes, Distrainer cannot bring Trespass, unless it be shewn to be wholly without his Default; otherwise if it had died.

TRESPASS for breaking the Plaintiff's Close, &c. and treading down his Grass with Hogs, &c. The Defendant as to all but one Hog pleaded Non cul. and as to that pleaded, That the Plaintiff distrained it Damage-feasant for the same Trespass, and impounded it in the common Pound; the Plaintiff replied, that the Hog escaped without his Assent, and that he neither then nor yet is satisfied for the Damage. Upon Demurrer it was said for the Plaintiff, That the Hog was only as a Pledge, and that he could not tie it in the Pound, and where a Distress dies, the Distrainer may distrain again. 3 Cro. 162. 2 Leon. 174. pl. 211. 13 H. 4. 17. 2 Inst. 107. Cro. Car. 148. and that where one pleads Levy by Distress, &c. he must conclude, & sic nil debet, or quod adhuc detinet. 28 H. 6. 6. 35 H. 6. 10. Rast. 175. Co. Ent. 496. Of this Opinion was Gould J. contra Holt C. J. Turton and Powys, who held that there was a Time when the Plaintiff could not have any Action for this Trespass, viz. while the Hog was in the Pound, and 'twas the Plaintiff's Fault to put him in a Pound which could not hold him; also it is the Distrainer's Pound. F. N. B. 100. He might have put him in any other Place, even into a Pound covert; and he does not say it escaped absque defectu suo; but absque assensu suo. If a Distress dies in the Pound, the Action revives, for the Distress failed by the Act of God, otherwise where it escapes, especially unless it be made to appear that the Plaintiff was in no default, which is not done in this Case; for his own Default ought not to entitle him to another Action, nor subject the Defendant to a double Punishment for the same Cause, viz. The Loss of his Pig, and the Damages and Costs of this Action.

## Vinkestone *versus* Ebden. Mich. 10 Will. III. B. R.

(4) Anchor and Sails of a Ship distrainable for Port-Duties.

TROVER for his Anchor and Sails; upon Not guilty pleaded a Special Verdict was found, viz. That the Mayor and Burgesses of Newcastle, by Custom Time out of Mind, had used and ought to repair the Port there, and had in Consideration thereof a Toll of 5 s. per Chaldron of all Coals exported, to be paid by the Exporter; and for that, by the same Custom, had used to distrain any Thing distrainable; and that the Defendant being Master of a Vessel loaded with Coals intended to be carried out of the said Port refused, and for this they distrained the said Anchor and Sails, being part of the Tackle belonging to the said Ship, and if this was distrainable they found

for the Defendant, otherwise for the Plaintiff: And Mr. Northey urged, That the Conclusion of the Special Verdict being upon a Special Point, the Court could doubt of nothing but what was thereby referred to them. Vide 5 Co. 97. 1 Cro. 21. Mo. 261. pl. 420. However the Court heard and over-ruled all the other Objections, and held, 1st, That it was not necessary the Town should shew that they actually did keep the Port in repair, for their keeping the Port in repair is not the Consideration, but their being bound by Custom to do it. 2dly. That, tho' the Master is not strictly the Exporter, yet as to Port-Duties, the Master is always looked upon as such, and is the Person answerable; for to put them to seek the Merchant to answer Duties, is impracticable, and it is but reasonable the Master should pay a Duty for the Benefit of the Port, and that the Town should have the Duty who are to maintain the Port.

Special Verdict found upon a single Point.

As to the Distress, it was argued, That the Instruments of Trade are not distrainable, viz. A Millstone is not; Averia carucæ are not; a Horse in a Smith's Shop cannot be distrained; that the Goods subject to the Toll only can be taken, and this was part of the Ship and going from Market. Vide 3 Cro. 227. pl. 14. Dy. 199. 1 Leon. 231, 105. 3 Cro. 550, 569. Noy 68. 1 Inst. 47. 1 Sid. 348. Dy. 312.

On the other Side it was said, Averia Carucæ are not privileged where there is no other Distress. Vide Stat. 51 H. 3. 2 Inst. 122, 133, 565. So it is of Instruments of Trade, as if there be two Millstones, or averia otiosa. Mo. 214. Dy. 302. Godb. 67. Ow. 139. A Boat is distrainable, ergo a Ship, and ergo a Sail of a Ship. Dy. 117. pl. 73.

Sed per Holt C. J. The Duty arises from the Goods loaden on Board the Ship, with which the Master is chargeable; therefore the Ship and every Thing there of the Master's, is chargeable as well as the Goods. And the Defendant had Judgment.

## Gisbourn *versus* Hurst. Hill. 8 Ann. B. C.

IN Trover upon a Special Verdict the Case was, The Goods in the Declaration were the Plaintiff's, and by him delivered in London to one Richardson to carry down to Birmingham. This Richardson was not a common Carrier, but for some small Time last past, brought Cheese to London, and in his Return took such Goods as he could get to carry back in his Waggon into the Country for a reasonable Price: When he returned home, he put his Waggon with the Cheese into the Barn, where it continued two Nights and a Day, and then the Landlord came and distrained the Cheese for Rent due for the House, which was not an Inn but a private House; And it was agreed, per Cur. That Goods

(5) H. undertaking to carry Goods of all Persons indifferently for hire, is a common Carrier, and the Goods are privileged.

Goods delivered to any Person exercising a publick Trade or Imployment to be carried, wrought or managed in the Way of his Trade or Imploy, are for that Time under a legal Protection, and privileged from Distress for Rent, but this being a private Undertaking required a farther Consideration; and it was resolved, That any Man undertaking for Hire to carry the Goods of all Persons indifferently, as in this Case, is, as to this Privilege, a Common Carrier; for the Law has given the Privilege in respect of the Trader, and not in respect of the Carrier, and the Case in Cro. El. 596. is stronger. Two Tradesmen brought their Wool to a Neighbour's Barn, which he kept for his private Use, and it was held that could not be distrained.

Domina Regina versus Speed. Mich. 1 Ann. B. R. Vide Title Information.

# DISTRIBUTION.

## Pett *versus* Pett. Trin. 12 Will. III. B. R.

(1) Brother's Grandchildren cannot share with Brother's Children.

Ray 496. 3 Mod. 58. 1 Vent. 307, 316, 325.

MR. Lechmere moved for a Mandamus to the Ordinary to make Distribution on the 22 & 23 Car. 2. c. 10. And the Question was, Whether the Brother's Grandson should have a Share with the Daughter of the Sister of the Intestate? The Words of the Act are, Provided no Representation be admitted amongst Collaterals, after Brothers and Sisters Children: And it was urged that this Act was a remedial Law to prevent the Mischief of Administrators sweeping away the whole personal Estate of the Intestate, and therefore to be taken largely; sed non allocatur per Cur. For Brother's Children are the Children of the Intestate's Brother; for the Intestate is the Subject of the Act; it is his Estate, his Wife, his Children, and by the same Reason his Brother's Children; for he is equally the Correlative to all. Vide 1 Ventr. Tracy's Case, in which Holt C. J. said a Consultation was at last awarded.

## Blackborough *versus* Davies. Paſ. 13 Will. III. B. R.

ADMINISTRATION being granted to the Grandmother, the Aunt moved for a Mandamus to have it granted to her, which was denied, (quod vide Title Adminiſtrator, pl. 6.) and now ſhe moved for a Mandamus to have a Diſtribution, being in equal Degree; and Dr. Lane urged ſhe was not intitled to it, being not ſo near as the Grandmother; for the Grandmother ſtands in the Place of the Mother, and is in the ſecond Degree to the Inteſtate: The Aunts are the Daughters of the Mother, and the Daughters cannot be in equal Degree with their Mother. Before the Stat. 1 Jac. 2. c. 17. If one died without Wife or Child, his Mother had all, and his Siſters and Brothers nothing. The Father ſurviving has all at this Day; and the Reaſon of making that Act was, becauſe the Mother might marry and carry all away to another Huſband. Et per Holt C. J. at another Day, No Mandamus ought to be in this Caſe. By the Common Law before and at the Conqueſt, the Children both male and female inherited alike, and the Eſtate whether real or perſonal, diſcended to all equally, Seld. Eadm. 184. Lamb. Sax. Laws 36. fo. 167. In the Reign of H. 1. Females began to be excluded as to the real Eſtate, and the Males inherited equally the Socage-Land. Glanv. l. 7. c. 3. At that Time the Land diſcended to the Father, if the Son died without Iſſue. Lamb. 202, 203. LL. H. 1. c. 70. And yet about this Time, or in the Time of H. 2. the Father and Mother began to be excluded as to the real Eſtate, but not as to the perſonal. And as by Common Law, Father and Mother were nearer than Brother and Siſter, Grandfather and Grandmother are nearer than Uncle and Aunt. And the Grandmother in this Caſe is the Root of the Kindred; whereas the Aunt is only a Branch.

(2) Aunt not intitled to Diſtribution with Grandmother, the latter being nearer a Kin.

Old Law of Diſtribution and Inheritance.

## *Archbiſhop of* Canterbury *verſus* Willis. Hill. 6 Ann. B. R.

PER Cur. Any Perſon that is intitled to Diſtribution within the Stat. 22 Car. 2. c. 10. is by Conſequence intitled to ſue the Adminiſtrator in the Eccleſiaſtical Court to make good his Accompt by Proofs, and Examination upon Oath, as a Legatee was againſt an Executor before that Statute. Vide the Report of this Caſe at large, Title Executors.

(3) Adminiſtrator's Accompt.

# DOWER.

## Mordant *versus* Thorold *Bar.* Trin. 2 W. & M. B. R. Intr. Hill. Ult. Rot. 340.

(1) Tenant in Dower dies before Writ of Inquiry executed, Administrator cannot bring Sci. Fac. for the Damages and mesne Profits.

THE Plaintiff brought a Scire Facias as Administrator of the Lady Thorold, upon a Judgment in Dower obtained by her against the Defendant, to have the Value of the Damages, Costs, mesne Profits and Waste, from the Time of the Death of the Husband, qui quidem valor attingit ad 670 l. which Judgment was removed by Writ of Error out of C. B. into B. R. and there affirmed; after which, and before the Writ of Inquiry executed, the Lady died, and Administration was committed to the Plaintiff, who brought this Writ. The Defendant pleaded that no Damages were adjudged to the Feme in her Life-time, &c. And the Plaintiff demurred, and the Court resolved that this was a good Plea, for if Damages had been ascertained upon the Writ of Inquiry, and Judgment thereupon, they had then vested in the Intestate as a Debt, and the Administrator should have had them; but she dying before the final Judgment, and when the Damages were due to her only by Way of Satisfaction for an Injury, which is in Nature of a Trespass, and the Writ of Inquiry being in Nature of a personal Action for them, it dies with the Person, and a Scire Facias lies not for the Executor or Administrator. Judgment for the Defendant. Noy 126. 3 Lev. 275. Shower 97. S.C.

## Burdon *versus* Burdon. Pas. 3 W. & M. B. R. Rot. 292.

(2) Detainer of Charters is no Plea after Imparlance.

ERROR on a Judgment in Durham in a Writ of Dower; the Defendant after Imparlance had pleaded Detainer of Charters, and upon Demurrer Judgment was given by the Court for the Demandant, which was now affirm'd; for per Cur. He that pleads this Plea must plead that from the Time of the Death of his Ancestor, paratus fuit & adhuc paratus existit to assign her Dower, if she would deliver the Charters.

## The Lord Gerard versus the Lady Gerard. Hill. 7 W. 3. B. R. Intr. in C. B. Trin. 5 W. & M. Rot. 445.

(3) Feme shall be endowed of the capital Messuage. Vide the Record at large in Lev. Entries 76.

ERROR of a Judgment in C. B. given in a Writ of Dower, where the Tenant as to part confessed the Action, and Judgment was given in C. B. and a misericordia entered against the Tenant, and as to the rest the Tenant pleaded, That the Messuage in demand had Time out of Mind been call'd as well Gerard's Bromley as Bromley-Hall, That Sir Tho. Gerard was seised thereof in his Demesne as of Fee; and being so seised, King James I. by Letters Patent under the Great Seal of England, created the said Sir Tho. Gerard, Baron of Gerard's Bromley, and that he was commorant with his Family in the said Capital Messuage, and so the Messuage in demand became, and had ever since continued caput Baroniæ, and brings down the Discent both of the Barony and Messuage to himself, and demands Judgment if of the third Part thereof the Demandant ought to be endowed; the Demandant demurred, and Judgment was given in C. B. for the Demandant, and another Misericordia entered against the Tenant who now brought Error and assigned for Error:

1st, That the Demandant ought not to be endowed of Caput Baroniæ, because it is for the Honour of the Kingdom to have the Chief Seat kept intire, and for Authorities were cited 1 Inst. 31. b. F. Abr. Dower 180. Bract. lib. 2. 170. b. P. 4 H. 3. Rot. 7.

2dly, That there ought not to be two Misericordia's; for 'tis repugnant to this Maxim in Law, Quod nemo bis punietur pro uno delicto, and so is Specot's Case, 5 Rep. 57. and Peytoe's Case. As to the first Point, Serjeant Wright and Mr. Northey for the Defendant in Error argued, that the Authorities cited of the other Side, were of feudal Baronies, of which there were not any remaining at this Time except Arundel, of which Opinion were the whole Court; Et per Rokeby J. That was the Ground we went upon in C. B. Et per Holt C. J. Feudal Baronies were when the King in the Creation of the Baronies gave Lands and Rents to hold of him for the Defence of the Realm. But the King could not make this a Barony which was in the Seisin of the Gerards before. As to the second Point the Counsel argued, That here were two Delays which are two several Offences, and two several Judgments, and therefore there should be two several Amerciaments. 2 Leon. pl. 231. 1 Ro. Abr. 213, 218. Barry's Case, Fitz. Abr. Judgment 32. Rast. Ent. 19. Co. Entr. 169. b. and that Specott's Case was not against this, because the second Judgment there was erroneous, there being no Delay in the Defendant. Br. Amerciament 16, 17, 56. insinuates, that where there is a final Judgment given, there must be a Misericordia,

Feudal Barony quid. none at this Day, except Arundel.

and

and then if there is a new Delay, there must be a new Misericordia, and Peytoe's Case is only a saying of the Counsel. And Judgment was affirmed by the whole Court upon both Points. Vide ante 54. pl. 1.

Bates's *Case*. Hill. 9 Will. III. C. B.

(4) A. Tenant for Life, Remainder for Years, Remainder to A. in Tail; A.'s Wife shall be endow'd; aliter if the mesne Remainder had been for Life.

TENANT for Life, Remainder to Trustees for ninety-nine Years, Remainder to Tenant for Life in Tail; Tenant for Life dies, his Wife shall be endowed notwithstanding the intervening Estate; for that being for Years only, is not to be regarded: At Common Law the Freeholder might destroy it by a feigned Recovery; if the Remainder in Tail had been in a Stranger, it would not have obstructed an Action of Waste, and as the Case is, the Party died seised of an Estate tail; otherwise it would have been if the mean intervening Estate had been for Life; for that had obstructed Dower as well as Waste.

# EJECTMENT.

Knight *versus* Syms. Pas. 4 W. & M. B. R.

(1) Declaration must shew the Quantum of each sort of Land.

EJECTMENT of five Closes of Arable and Pasture called —— containing twenty Acres in D. upon Not guilty pleaded, Verdict was for the Plaintiff, but Judgment was arrested, because Ejectment lies not of twenty Acres arable and pasture, without shewing how much of the one and how much of the other; and Clausum does not help the Matter: Furlinga is a known Measure; so is bovata, hida, caruca, but Clausum is not so certain in Law, and the adding a Name to the Close is nothing, and Holt C. J. affirmed Savill's Case for Law. Vide 2 Cro. 435. contra.

Whit-

## Whittingham *versus* Andrews. Mich. 4 W. & M. B. R.

ERROR of a Judgment in Ejectment in the Court of Durham, and the Declaration was De mineris carbonum, without shewing the Number of Mines. It was not questioned but an Ejectment lies of a Coal-Mine. 2 Cro. 150. But the Incertainty in not expressing the Number was doubted: For the Plaintiff it was urged, That the Course was so in Durham, and that the Declaration was according to the Plaintiff's Lease; and as this was the constant Course in Durham, so it was well enough understood in those Parts, comparing it to the Ejectment for so many Acres of Mountain, in which Case this Court would not reverse the Judgment, but writ to the Justices in Ireland to certify whether the Practice there could warrant such Ejectments, and being certified this Court did not reverse the Judgment. And here the Court were satisfied such Ejectments were usual in Durham, and affirmed the Judgment.

(2) Ejectment de mineris Carbonum, without shewing the Number, well in Durham. Show. 364. S. C.

## Smartly *versus* Henden. Hill. 8 Will. III. B. R.

IN Ejectment for empty Houses, a Lease was sealed upon the Land, and a Declaration delivered to the casual Ejector, and Judgment and Execution had, yet because they had not moved for a peremptory Rule to plead, the Judgment was set aside, and in such Case there must be Affidavit of the Sealing of the Lease, Entry, &c.

(3) Ejectment for empty Houses.

## Anonymus. Hill. 10 Will. III. B. R.

H. Brought an Ejectment in C. B. and at the Assizes was nonsuited, and Costs were taxed upon the Nonsuit; the Plaintiff brought a new Ejectment in C. B. and a Rule was made to stay all Proceedings till the Costs of the Nonsuit were paid. Then he brought an Ejectment in B. R. and upon producing the Rule of the Court of C. B. the same Rule was made here.

(4) Nonsuit in C. B. new Ejectment brought in B. R. and staid till Costs paid.

## Anonymus. Hill. 10 Will. III. B. R.

A Motion was made for a Rule to plead in Ejectment; and the Affidavit was, That the Declaration was delivered to the Servant of the Tenant in Possession, and also that since that the Tenant in Possession had wrote a Letter to him, which he verily believed to be his Hand, desiring him being Attorney for the Plain-

(5) Service upon the Servant, and acknowledgment of the Tenant that he receiv'd it; sufficient.

Plaintiff to intercede with the Lessor (who was a Mortgagee) for Forbearance, and the Rule was granted.

## Underhill *versus* Durham. Trin. 11 Will. III. B. R.

(6) Landlord may be join'd a Defendant if he request it; but is not compellable.

THE Plaintiff moved that the Landlord might be joined a Defendant with the Tenant in Possession, but it was denied; for the Court cannot compel him without his Consent; otherwise if he request it himself. In another Cause a Motion was made on the Behalf of the Landlord that he might be made a Defendant, and the Plaintiff opposed it, because he was a Parliament-Man. Et per Holt C. J. He must be joined, and we cannot compel him to waive his Privilege. Et per Darnell, A Person privileged cannot be joined to be a Plaintiff, but he may be made a Defendant, for every one ought to be allowed to defend his own Right. Quære.

## Hollingsworth *versus* Brewster. Hill. 11 Will. III. C. B.

(7) Church demandable by the Name of a Messuage. A special Rule to defend quoad a Right of Entry to perform Divine Service.

KING JAMES I. by his Letters Patent granted the Impropriation of Aldgate to B. and his Heirs, reserving the Right of Patronage, &c. and a Covenant on the Grantee's Part to pay the Chaplain 10 l. per Annum, there being no Vicaridge endowed out of this Impropriation. K. Charles II. made Dr. Hollingsworth Chaplain or Curate by Grant under the Great Seal, under which he enjoyed it many Years. Brewster the Assignee of the Patentee brought an Ejectment, and delivered a Declaration to the Defendant, and had Judgment by Default and Possession delivered him upon an Habere facias Possessionem; and Mr. Attorney-General Trevor moved, That the Doctor having no Right to the Possession, but only a Power to enter in order to preach, which the Defendant kept him out of by Colour of this Judgment in Ejectment and Execution, might be restored; and Serj. Darnell on the same Side insisted, that the Judgment was irregular, because no Declaration was delivered to the Tenant in Possession, and that the Church was not within the Demise of a Messuage and Lands. Sed per Cur. If the Doctor has no Right to the Possession, he is not concerned, and therefore cannot complain of the Irregularity of the Proceeding: And as to his Preaching there, he should have come in and moved for a Special Rule to defend only quoad a Special Right of Entry to perform Divine Service. No Body can complain of irregularity in an Ejectment, but the Tenant in Possession or the Landlord. And sure a Church is a Messuage, and may be recovered by that name in a Præcipe: But we will hear you again as to that.

## Anonymus. Pas. 12 Will. III. B. R.

THE Plaintiff had Judgment in Ejectment, but was hung up by Injunction, so that the Term expired. Mr. Williams moved to enlarge the Term, the Injunction being now dissolved. Sed per Holt C. J. We cannot alter Records. I have no Mind to build a new Clock-house. Note, The same Motion was made Pas. 3 Ann. B. R. by Mr. Wilkinson, and denied for the same Reason; and said, That it could not be done without Consent, and that in Sir John Roll's Case (which was cited) the Term was inlarged; but it was by Consent.

(8) The Term cannot be enlarged without Consent.

## Anonymus. Trin. 12 Will. III. B. R.

IN an Ejectment for Lands in Middlesex, the Declaration was delivered after the Essoin-day of Michaelmas Term; the Plaintiff let that Term pass without doing any Thing, and also till the last Day of Hillary Term in like Manner, when he moved for a Rule to plead, and for want of a Plea signed the Judgment: And the Court held this to be a Surprise upon the Defendant, for when he let all Hillary Term slip without doing any Thing, within which Time he might have had a Trial, he ought to have given fresh Notice: As in Case a Man lets an Assizes pass in a Country-Cause without proceeding; wherefore the Judgment was set aside.

(9) After a whole Term elapsed the Plaintiff must give a new Notice.

## Fenwick's *Case*. Mich. 1 Ann. B. R.

A Motion was made to make the Lessor of the Plaintiff's Wife a Defendant in Ejectment, the Plaintiff's Title being by a pretended intermarriage, which was controverted. Et per Holt C. J. To make the Landlord a Defendant in Ejectment is of Right; for otherwise he might lose his Possession by Combination between the Plaintiff and Tenant in Possession, and the Court inclined to grant the Motion, because there could be no Inconvenience, and it would make the Verdict more considerable; but in regard the Wife lived in Cheshire, and must have fourteen Days Notice of Trial, and the Defendant would not waive that, the Court perceived it a Trick to put off the Trial, so nothing was done.

(10) Wife may be made Defendant in Ejectment, where the Husband is Lessor of the Plaintiff.

## Withers *versus* Harris. Mich. 1 Ann. B. R.

(11) In Ejectment Execution cannot be sued after the Year and Day without Sci. Fa.

AN Habere facias Possessionem was sued out upon a Judgment in Ejectment, after a Year and Day past after the Judgment obtained, without suing out a Scire Facias. And Mountague argued that there ought to be a Scire Facias, and cited 1 Sid. 361. 2 Keb. 307. Williams contra agreed there must be a Scire Facias for the Damages, but not as to the Term; for till the Reign of King Charles II. it was doubted whether a Scire Facias would lie on a Judgment in Ejectment, as appeared by 2 Keb. 55. 1 Sid. 317. and before that Time no Scire Facias had been brought, and the Plaintiff here, as in the Case of a real Action, may execute a Judgment in Ejectment by Entry without a Writ of Execution. 2 Sid. 156. 1 Ro. Re. 215. Noy 11. Palm. 263. Holt C. J. said, That as to the Possession of the Land, an Ejectment was real, and was the only Remedy for a Termor for Years, and a Recovery in Ejectment binds the Right and Interest of him that has the Inheritance, and makes a Title in the Plaintiff, and therefore a Scire Facias is as necessary in this as in any real Action, and in a Scire Facias on a Judgment in Ejectment, he that hath the Inheritance cannot falsify, nor can his Heir in Fee-simple, nor any one that claims under him, except the Issue in Tail, and he cannot falsify such a Recovery in the Point tried, but only in the Case of a Judgment by Default, or else by shewing that the Defendant's Ancestor made but a feint Defence, and did not shew such and such pieces of Evidence as he ought to have done; and therefore there is no reason why this Case should differ from the general Rule of Law; so it was ordered that a Scire Facias should go against the Tertenants as well as the Defendant: And Powell J. observed, That in Annuity a Scire Facias lay upon a Judgment.

Who may falsify Recovery in Ejectment.

## Fenwick *versus* Grosvenor. Pas. 2 Ann. B. R.

(12) If there be Judgment for the Plaintiff and Defendant brings a Writ of Error, he ought not to bring a new Ejectment.

MR. Fenwick obtained Judgment on a Verdict in Ejectment on his Demise against my Lady Grosvenor; upon this the Lady brought a Writ of Error, and pending the Writ of Error delivered a Declaration in Ejectment to the Tenants in Possession, upon her own Demise; and now the Plaintiff moved for the common Rule, and it was denied; for per Holt C. J. No new Ejectment shall be brought by the Defendant after Recovery against him, till he has quitted the Possession, or the Tenants have attorned to the Plaintiff, so as he be in Possession and the Defendant out; for if the Plaintiff gets Judgment in this last Ejectment, and the first Judgment is affirmed, then he renders

it needless and ineffectual by this riding Judgment, upon which he takes out Execution to recover his Possession. The Rule for Judgment against the casual Ejector is in the Power of the Court upon what Terms the Court thinks fit. My Lady must shew us a different Title, or we will not grant the Rule.

The same Thing was done in another Cause. Hill. 2 Ann. B. R. Where the Defendant in Ejectment pending a Writ of Error, delivered a new Declaration in Ejectment, and the Court was moved that the Costs might be first paid. The Court thought the Payment of Costs suspended by the Writ of Error; but stayed all Things for the Reasons before given.

## Little *versus* Heaton. March 26, 1702. Ad Assisas coram Holt *C. J.*

(13) In Ejectment on a Condition of Re-entry, proof of actual Entry and Ouster, is not necessary.

EJECTMENT was brought by the Lessor against the Lessee on a Condition of Re-entry for Non-payment of Rent, and upon a Trial before Holt C. J. Broderick urged, That an actual Entry and Ouster was necessary. Holt C. J. answered, That true it was the Law had been held so, and accordingly it was practised till the Case of Withers versus Gibson 25 Car. 2. Vide 3 Keb. 218. In which case Hale C. J. ruled the Law to be otherwise upon a Trial before him at the Assizes in Bucks, and held that the Confession of Lease, Entry and Ouster, was sufficient: That upon this Opinion of his a Case was made and moved in Court, where all the Judges concurred with him: That accordingly it was held by Scroggs C. J. in the Case of Sir Robert Pye versus Billing. 1 Ven. 332. But that notwithstanding this it became a Question again after the Revolution, and that he himself doubting about it, it was moved again in Court, and that his Brothers were all of Opinion with Hale, and that accordingly he had ever since held it, and so it was ruled in this Case. 3 Keb. 282.

## Turner *versus* Barnaby. Trin. 2 Ann. B. R.

(14) Proceeding against the Defendant, if he don't confess Lease, Entry and Ouster.

IN Ejectment, if at the Trial the Defendant will not appear and confess Lease, Entry and Ouster, the Course is to call the Defendant and his Attorney, if he be within the Rule; and then to call the Plaintiff himself and nonsuit him; and then upon the Retorn of the Postea, Judgment will be given against the casual Ejector. Also the Master will tax Costs upon the Rule for confessing Lease, Entry and Ouster, and, if these be demanded of the Defendant, and not paid, the Court upon Affidavit will grant an Attachment.

### Anonymus. Paſ. 4 Ann. B. R.

(15) Releaſe of Plaintiff is a Contempt.

THE Plaintiff in Ejectment is a mere nominal Perſon, and Truſtee for the Leſſor, and if he releaſe the Action, or if an Action be brought in his Name for the mean Profits, and he releaſe it, he has been committed for contempt per Holt C. J.

# Entry Forcible.

### *The King verſus* Harris. Paſ. 11 Will. III. B. R.

(1) Inquiſition remov'd into B. R. no Reſtitution can be if Defendant traverſe or plead three Years Poſſeſſion.

IF an Inquiſition of Forcible Entry comes into this Court by Certiorari, there can be no Reſtitution, if either the Defendant traverſes the Force, or pleads three Years quiet Poſſeſſion before the Force; for theſe muſt be tried firſt: And Holt C. J. remembred the Caſe of Sir Robert Atkins and the Lord Brounker concerning St. Catherine's Hoſpital; there an Indictment of Forcible Entry was brought into B. R. per Certiorari, and my Lord Brounker pleaded that the late Maſter (Mountague) and Brethren of the Hoſpital were ſeiſed in Fee in Right of the Hoſpital, and ſo continues it to himſelf, and that he, &c. had been in quiet Poſſeſſion for three Years next before the Force; to which Plea it was never replied. Per Holt C. J. upon the Motion of Sir Will. Williams.

### *The King verſus* Dorny. Mich. 12 Will. III. B. R.

(2) Tenant at Will is not within the Statute. Expulſion muſt be expreſly alledged

AN Inquiſition of a Forcible Entry was, That the Defendant & al. in Meſſuagium exiſtens a School-houſe adtunc exiſten. tenement. J. S. intraverunt & eum diſſeiſit. expulſ. & eject. extratenuerunt. Mr. Thompſon objected, That it does not appear what Eſtate J. S. had, ſo that he might be but Tenant at Will, which is not within any of the Statutes. Mr. Lechmere contra:

 Diſſeiſit.

disseisit. imports that he had a Freehold. Vide 3 Leon. 102. Palm. 277. All. 49. Sed per Holt C. J. Here is an Entry upon J. S. but no Expulsion expresly alledged; and the Disseisin ought to be positively charged; the Words being expelled and disseised they held him out, are a Conclusion without Premisses. Vide 1 Sid. 102. Possessionat. is ill. 1 Ven. 306. Disseisivit is ill; cited by Mr. Thompson. The Inquisition was quashed per Cur.

# ERROR.

## Howard *versus* Pitt. Trin. 4 W. & M. B. R.

TRESPASS against four Defendants; the Plaintiff recover'd in B. R. Error was afterwards brought in Cam. Scacc. where it pended a Year, and then abated by the Death of one of the Plaintiffs in Error; then another Writ was brought, which pended half a Year, and abated by the Death of another Plaintiff. The Plaintiff in the original Action seeing no new Writ of Error brought a third Time, and thinking himself at Liberty, sued out Execution by Ca. Sa. against the Survivors. Serjeant Levinz moved for a Supersedeas to this Ca. Sa. Et per Cur. it was agreed, 1st, That there was no need of a Scire Facias to revive the Judgment against the Survivors, but that was sufficiently revived by the several Writs of Error. 2dly, Where a Writ of Error determines in the Exchequer-Chamber by Abatement or Discontinuance, the Judgment is not again in B. R. till there be a Remittitur entered; for without such Remittitur it cannot appear to the Court of King's Bench, but that the Writ of Error is still pending in Cam. Scacc. 3dly, That the Execution was erroneous for this Cause, but not void, and 4 Leon. 197. was denied.

(1) Where Writ of Error abates in Cam. Scacc. the Judgment is not in B. R. without a Remittitur.

Cro. 364. Yelv. 7. Ro. 899.

Parker

## Parker *versus* Harris. Mich. 4 W. & M. B. R. Intr. Trin. 3. Rot. 27.

( 2 ) Where the Plaintiff brings Error, and the Court reverse, they give a new Judgment; otherwise if the Defendant brings Error.

DEBT for Rent in C.B. upon two several Demises, one of which was, Reddendum after the Rate of 18 l. per Annum. After Judgment for the Plaintiff, the Defendant brought a Writ of Error in B.R. The Court held that Reddendum after the Rate, &c. was void for the Incertainty, and for this it was held the Judgment should be reversed: Then it was a Question what Judgment the Court should give, Whether as the Court below should have given, viz. Judgment for Part, and a Nil Capiat for the rest, or a bare Reversal? Et per Cur. Where Judgment is given for the Plaintiff, and the Defendant brings Error, there shall only be Judgment to reverse the former Judgment, for the Suit is only to be eased and discharged of that Judgment: But where the Plaintiff brings Error, the Judgment shall not only be a Reversal, 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 recovered by the first Suit, wherein erroneous Judgment was given.

## Lampton *versus* Collingwood. Trin. 6 W. & M. B. R. Rot. 419.

( 3 ) Matter contrary to the Surmise of the Sci. Fac. and pleadable thereto not assignable for Error.

JUDGMENT was given against A. and B. and a Scire Facias taken out against R. Administrator of B. and two Nihils returned, and thereupon Execution awarded; and the Scire Facias suggested the Recovery to be against A. and B. and that A. died and B. survived, and afterwards B. died Intestate, and that R. is his Administrator: Now R. brought a Writ of Error coram nobis for Error in the Execution, and assigned for Error, that A. survived, and hereupon Issue was joined and found for the Plaintiff; but the Court notwithstanding quashed the Writ of Error, holding this Matter not a Matter assignable for Error, because it is contrary to the Surmise of the Writ of Scire Facias, and if a Scire Feci had been returned, he might have pleaded it, and since it was not, he must bring his Audita querela.

Har-

## Hartop *versus* Holt. Mich. 8 Will. III. B. R.

In Debt brought in B. R. the Plaintiff had Judgment. The Defendant brought a Writ of Error in the Exchequer-Chamber, and the Judgment was affirmed. The Plaintiff sued out a Scire Facias in B. R. and had an award of Execution. Hereupon the Defendant brought Error in the Exchequer-Chamber tam in redditione Judicii quam in adjudicatione executionis. Notwithstanding all this, the Plaintiff in the original Action went on and sued out Execution, and now a Motion was made to set it aside, because it was sued out when there was a Writ of Error depending. Et per Holt C. J.

(4) Writ of Error lies not in Cam. Scacc. on 27 Eliz. on an Award of Execution after the original Judgment affirmed there.

1st, The Intent of the Statute of 27 Eliz. was only to relieve upon the very Merits of the Cause, as it stood upon the first Judgment, which the Justices and Barons may either affirm or reverse; but there can be no new Writ of Error after they have affirmed or reversed. If this Scire Facias had been sued out, and there had been no Writ of Error, then upon the Award of Execution a Writ of Error would have lain in Cam. Scacc. for then the Merits of the first Judgment had remained yet to be examined: But in the principal Case the Merits of the first Judgment were examined before the Scire Facias, and thereby the Exchequer-Chamber have executed their Power and Authority. If a Plaintiff in Error be nonsuit, he shall not have a Writ of Error again. In the Case of Exeter-College, the Lords reversed the Judgment of this Court, and sent their Judgment down to be entered here; but this Court refused it, because the Authority of the Judges here determined with the first Judgment, and they had no more to do with it.

2dly, They held ex consequenti that the Writ of Error could be no Supersedeas to the Execution, and that what the Plaintiff did was well, and no contempt.

## Groenvelt *versus* Burwell. Trin. 10 Will. III. B. R. Vide *this Case*, *Title* Courts and Jurisdictions.

It was held in this Case per Holt C. J. That where-ever a new Jurisdiction is erected by Act of Parliament, and the Court or Judge, that exercises this Jurisdiction, acts as a Court or Judge of Record according to the Course of the Common Law, a Writ of Error lies on their Judgments; but where they act in a summary Method, or in a new Course different from the Common Law, there a Writ of Error lies not, but a Certiorari.

(5) Error lies to a new-created Jurisdiction of Record acting by the Course of Common Law.

Wicket

## Wicket & al. *versus* Creamer. Paf. 11 Will. III. B. R.

(6) Writ of Error abates not by the Death of Defendant in Error.

MR. Northey and Mr. Eyre moved to set aside an Execution, and the Case was, That a Writ of Error was brought on a Judgment recovered in this Court by A. and B. and the Writ of Error was allowed, but no Transcript made. B. died, the other Defendant in Error sued a Scire Facias quare executionem non, and upon two Nihils returned had an Award of Execution, and thereupon took the Plaintiff in Error upon a Ca. Sa.

1st, It was agreed and admitted, That tho' there be but one Defendant in Error, yet the Writ of Error does not abate by his Death; but there must go a Scire Facias ad audiend. Error. against his Executors. But that the Defendant in Error was irregular in this Case, because the Record was not transcribed, and that, as it happened here, by his own Fault. Sir Bartho. Shower on the other Side said as to the first Point, That the Plaintiff in Error should have shewed the Death of one of the Defendants by Pleading to the Scire Facias, but had slipp'd his Time, and ought not to have Advantage of this Matter without Audita querela. Upon which it was held per Holt C. J.

After Award of Execution on a Scire Feci, Defendant cannot have Advantage of Matter pleadable to that; otherwise after two Nihils.

That where the Defendant had Matter which he might have pleaded to the Scire Facias, and has lost the Benefit of that by an Award of Execution upon a Scire Facias returned, he is estopped for ever, and can never have an opportunity or means to let himself in to take Advantage of that Matter. But where it is an Award on two Nihils returned, he may relieve himself by Audita querela, and the Court will save him that trouble, and relieve him upon Motion, unless the Ground of his Audita querela be a Release, or some such Matter of Fact, as may be proper to be tried; and the Execution was set aside.

Audita Querela.

## Anonymus. Paf. 11 Will. III. B. R.

(7) Writ of Error against the King.

PER Holt C. J. A Writ of Error may be against the King without Petition, tho' anciently that was used, and was a Decency; but since 1640, Writs of Error have been made out ex Officio.

## Giggeer's *Cafe*. Paf. 1 Ann. B. R.

(8) Error abates by Motion; Court must be mov'd for Execution; otherwise if for Variance.

ACTION was brought by the Name of Giggeer, and now a Writ of Error was brought as in an Action between Giggure and the Defendant, whereas his Surname was Giggeer; and it was moved that the Defendant notwithstanding the Writ

 of

of Error might take out Execution; and the Court held this was a fatal Variance, and that the Record was not removed by the Writ of Error, but would not meddle as to the Execution. Et per Holt C. J. Where a Writ of Error abates by Motion, the Defendant in Error must move for Leave to take out Execution; but where by reason of Variance the Record is not removed, he need not move the Court for Execution; but at last the Record was amended.

## Andrews versus Lynton. Pas. 2 Ann. B. R.

(9) Original return'd by one not Sheriff, is not assignable for Error.

ERROR of a Judgment by Default in an Action of Trespass in C. B. the Error assign'd was, That the Person who returned the Original, was not Sheriff, and Mr. Raymond urged, That the returning was but a ministerial Act, and that an Averment lies against what the Sheriff does as an Officer, but not as a Judge. Vide Yelv. 34. 2 Cro. 12. 7 H. 7. 4. 8 H. 4. 15. 1 Cro. 421. 1 Ro. 758, 760. 2 Lev. 184, 242. 2 Jo. 134. Et per Holt C. J. 1st, If the Sheriff did not return the Writ, it was irregular, and you should have complained, but that should have been in Time: When a Writ comes in, the Defendant has all the Term to complain of Irregularity, and in that Time the Sheriff might have had leave in C. B. to disavow the Return; but after the Term is slipp'd, and the Writ is filed and becomes a Record, 'tis then too late, and every one is estopped to say the Sheriff did not return it. But, 2dly, The Defendant in the principal Case admitted the Original by appearing and not challenging the Original, as if a Venire be returned by one that is not Sheriff, this is not assignable for Error; because he might have challenged the Array for it at Nisi prius.

Irregularity in the Return must be complain'd of the same Term.

## Gibbons versus Roberts. Mich. 2 Ann. B. R.

(10) Court may be held per legem mercator. and not a Court of Staple.

ERROR of a Judgment in Bristol in an Action of Debt upon a Bond, 1st, 'Twas objected, That the Style of the Court is laid to be secundum legem mercatoriam, which cannot be but in a Court of Staple, and Debt upon a Bond is not infra legem mercatoriam. Sed per Cur. We will intend this to be another sort of Customary Court under that Name, as where a Court of Pie-Powder was said to be held by Prescription, which could not be; this Court held it to be a Customary Court under that Denomination. 2dly, It was objected that here was a Dies datus partibus prædict. and it was not alledged to be per Curiam datus. Sed per Holt C. J. Where an Award of Process or Judgment is alledged, it must be said per Cur. but a dies datus need not; for tho' it may be prece partium, yet it must be given by the Court.

Mm 3dly,

3dly, 'Twas objected, That the Certiorari was awarded to the Sheriff of the County of Bristol, and the Return is by the Sheriff of Bristol. Sed non allocatur, For we take Notice of all Counties, being to award Process to them every Day, and the Sheriff is our Officer. 4thly, It was objected, That the Retorn was by a succeeding Sheriff, and not by him to whom the Writ was directed; sed non allocatur, for the Writ is to the Sheriff as Sheriff, and not to him by this or that Name, and therefore different from a Writ of Error to the Chief Justice of the Common Pleas.

## Hale *versus* Clare. Paſ. 3 Ann. B. R.

(11) Variance between Plaint and Declaration in inferiour Court is Error.

No Diminution can be alledged of Records out of inferiour Courts.

IN a Borough-Court a Plaint was entered as the Plaint of A. B. and the Declaration was by A. B. Executor of J. S. and on a Writ of Error in B. R. this Variance was assigned for Error: And the Court held, 1st, That want of a Plaint in an inferiour Court is the same as want of Original in the Court of Common Pleas; and that this could not be a Plaint in this Action: And tho' a Verdict will cure want of Original, yet there is no Verdict in this Case. 2dly, If such Variance had been in a Record of the Common Pleas, Diminution might have been alledged, and a good Writ certified; but in Records out of inferiour Courts, no Diminution can be alledged, and the Court must take them as they find them. Vide 1 Ven. 6. 2 Cro. 108, 109. Jo. 304. 1 Cro. 282. Hob. 130, 134, 264, 282.

## Regina *versus* Foxby. Trin. 3 Ann. B. R.

(12) Writ of Error not proper to remove Indictments.

THE Defendant was convicted at the Sessions for a Scold, and adjudged to be duck'd: She brought a Writ of Error (by Leave of the Attorney-General) and the Chief Justice said, the Court was well enough possessed of the Cause by Writ of Error, but the best Way was by Certiorari to remove it into the Crown-Office, and then bring a Writ of Error coram nobis residen. and upon that the Course is to give a Rule to assign Errors, and then to move for a peremptory Rule, and in default thereof to have a Non Prof. and then an Award of Execution.

## Burnaby *versus* Saunderson. Trin. 3 Ann. B. R.

(13) Defendant in Error may sue out a second Certiorari after a variant Original return'd on the first.

ERROR was brought on a Judgment in C. B. and want of an Original assigned for Error: The Defendant in Error came in gratis, and alledged Diminution, and prayed a Certiorari, and thereupon a variant Original was certified: Upon this he came again at the Day given, and suggested another Original of such a Term,

and prayed another Certiorari. This appearing on the Master's Report the Question was, Whether it was regular? Et per Holt C. J. If a Record below be of Easter-Term, and want of Original be assigned for Error, the Defendant may alledge Diminution, and then a Certiorari goes to the Custos brevium only, to certify an Original of Easter-Term, that being the Term of which the Placita is: If then the Custos brevium certifies a wrong Original, or that there is no Original, then the Defendant may come and suggest, before in nullo est erratum pleaded, that there is an Original of another Term, viz. Hillary or Michaelmas, and then there must go a Certiorari to the Custos brevium to certify that, and another to the Chief Justice of the Common Pleas to certify the Continuances. Also if the Custos brevium certify a wrong Original of the same Term the Placita is of, it has been held the Defendant may suggest there is a right Original even of that very Term, and when both are before the Court, the Court will apply the Record to that which is a good Original. 2 Cro. 279.

## Smith *versus* Stoneard.

(14) Where Want of Original is assigned, the Plaintiff in Error must sue a Certiorari, unless the Defendant confesses it.

In a Writ of Error of a Judgment in C. B. after Verdict the Plaintiff in Error assigned for Error the Want of an Original, but did not take out a Certiorari, as the Course is; the Defendant in Error pleaded in nullo est erratum, and when the Cause came on in the Paper, it was objected that there ought to have been a Certiorari taken out, and a Return of the Want of an Original upon that; for there might be an ill Original, which is not aided by Verdict, tho' Want of Original is. Et per Holt C. J. If Want of an Original be assigned for Error, and the Plaintiff in Error does not sue out a Certiorari, the Course is for the Defendant in Error to go to the Master of the Office and get a Rule for the Plaintiff in Error to return his Certiorari; and in Case he does not get it done accordingly, the Assignment of Errors signifies nothing; but if the Defendant in Error will come gratis and confess the Error, there need be no Certiorari returned; and as to the Objection, That there may be a bad Original in this Case, that is another kind of Error; for when Want of Original is assigned for Error, the Court will never intend a bad Original: The Judgment was affirmed.

## Carlton *versus* Mortagh. Trin. 3 Ann. B. R.

(15) Want of Original assigned and a Release mispleaded. The Court may award a Certiorari ad inform. Conscientiam.

A Writ of Error was brought upon a Judgment in Debt in C. B. and Want of Original was assigned for Error: The Defendant before a Certiorari returned came in gratis, and pleaded a Release in Bar; the Plaintiff in Error demurred, and the Defendant joined therein. It was agreed per tot. Curiam, That the Release was mispleaded for Want of a Venue; and upon this the Question was, Whether the Court ex Officio, should award a Certiorari, that it might appear to them whether there were an Original, or not? Holt C. J. was of Opinion that the Court could not award a Certiorari; because the Question was not, Whether Error or not? but whether barred or not by the Release? and that Want of Original was certainly Error in this Case, which the Defendant had confessed by coming in gratis and pleading his Release; for that by coming in gratis he had prevented the Plaintiff, and hindered him from compleating his Error by taking out a Certiorari, and therefore the Court must take it to be as the Plaintiff had admitted: Also that the Court is not at liberty to depart from the Point referred to their Judgment: At that rate they strike out the Plea in Bar and the Demurrer, and give Judgment on the Certiorari: That the Court is no more at Liberty in this Case, than if, instead of a Demurrer, Issue had been joined upon this Plea, and found for the Plaintiff, and if that had been the Case, the Court might as well have granted a Certiorari to see whether the Trial was to any Purpose: But he allowed a Diversity between a particular Error, as in this Case, and the general Errors assigned; for if the Defendant had pleaded a Release, and that had been found against him; yet the Court could not reverse the Judgment, unless Error had appeared in the Record. Cæteri Justiciarii contra; Powys and Gould held, That the Act of the Parties might foreclose themselves, but not the Court, and that they are to give Judgment upon the whole Record according to Conscience and Right, and can not be concluded by any Admittance of the Parties: And Powell took this Difference, If Error be assigned in a Defect which will appear by the Record it self, and the Defendant pleads a Release, the Court ought not to reverse the Judgment tho' the Release be mispleaded; because it is an Error in Law, which appears upon the Face of the Record, and the Release was to bar the Writ of Error. Aliter if the Error does not appear upon the Record, for in such Case the Court must go on to determine the Writ, and whether there be Error in the Record, or not; and he held that Error in Fact might be confessed; but Error in Law could not; by Errors in Fact he meant such Errors as could

Court cannot depart from the Point put in Judgment.

Error in fact may be confessed, but not Error in Law.

could not appear on the Face of the Record; and therefore if a Matter in Pais be assigned for Error, and the Defendant plead a Release, but misplead it; or if Issue be taken and found against him, the Court in such Case must reverse the Judgment without more ado. Vide 21 E. 3. 54. 1 Cro. 415. Jo. 373, 374. 1 Ro. 764, 765. 2 Cro. 60. Lat. 152. 1 Jo. 139, 140. 5 Co. 37. After in nullo est erratum pleaded, the Plaintiff cannot have a Certiorari ex debito justitiæ, but it may be granted ad informand. conscientiam Cur. 28 H. 6. 10. 9 E. 4. 32. The Court will award it in order to affirm, but never to reverse a Judgment or make Error. Palm. 52. Jo. 138. 21 E. 4. 38, 39, 44. 2 Cro. 6. 141, 445. 3 Cro. 836, 837.

## Tyson *versus* Hilliard. Hill. 3 Ann. B. R.

IN Error of a Judgment in C. B. the Declaration was Trin. primo Annæ, and Want of an Original assigned for Error, and a Certiorari was awarded, and the Original returned with the Continuances, by which it appeared the Declaration was Hill. 13 W. 3. with Imparlances till Trin. 1 Ann. and the Original of that Term; so that it appeared to be a Suit pending in the Common Pleas before any Original, which was the Objection. Vide 1 Lev. 69. 1 Keb. 177, 197, 238, 377. Yelv. 108. Sed non allocatur, For per Holt C. J. The Certiorari as to the Continuances was impertinent, and so is the Matter returned; and as to the rest the Return is impossible and contrary to the Record, and therefore the Imparlances shall be taken to be in another Cause. Vide Style 293. Judgment affirmed.

(16) Continuances cannot be return'd upon the same Certiorari with the Original.

## Redham *versus* Waters. Hill. 4 Ann. B. R.

UPON a Writ of Error of a Judgment in the Court of Berwick, the Proceedings were returned in English. Et per Cur. it was held, That on a Writ of Error the Court of King's Bench is to take Notice of the particular Laws and Customs of the Place where the Judgment was given, and the Law of that Place need not be returned, but the Court must inform themselves of it; also that if by Law the Proceedings below be in English, they may be so entered here; and a Difference was taken between a Writ of Error and a Habeas Corpus, for upon a Habeas Corpus the inferiour Jurisdiction must in their Return set forth the particular Law or Custom of the Place whereby they justify their Commitment, otherwise the Court is not to take Notice of it.

(17) Upon a Writ of Error the Court takes Notice of the Law or Custom of the inferiour Jurisdiction; otherwise on a Habeas Corpus.

Meredith

## Meredith *versus* Davies. Pas. 10 Ann. B. R.

(18) Court may award Certiorari ex Officio to supply a Defect in the Body of the Record, after In nullo est erratum pleaded.

ERROR of a Judgment for the Plaintiff in Ejectment in the Grand Sessions of Wales after Verdict; the general Errors were assigned, and In Nullo est erratum pleaded: Upon arguing of the Case it appeared that the Declaration set forth a Demise for a Term of Years to the Plaintiff, but did not shew that the Plaintiff entered or was possessed; and the Truth was, That this Line was omitted in the Transcript, and the Court held this defect to be fatal. Hereupon the Plaintiff prayed the Court would ad informand. conscientiam award a Certiorari to the Grand Sessions. Mr. Brydges argued it could not be done, for that the Party had estopped himself by pleading In nullo est erratum; and tho' the Court might do it in order to be certified of the out-branches of the Record, as in the original Writ or Warrant of Attorney, which are not returned with the Body of the Record upon a Writ of Error, and which indeed are contained in another Roll; yet the Court never do it to be certified of any Thing in the Body of the Record: They must suppose it to be return'd as it ought to be, and must take it as it is, and are concluded by the Admission of the Parties from taking it to be otherwise. Vide 1 Ro. 264. 2 Cro. 6. 9 E. 4. 32.

By pleading In nullo est erratum, the Defendant admits the Record to be perfect, and cannot afterwards alledge Diminution.

On the other Side it was argued, That by In Nullo est erratum, the Defendant admitted the Record perfect; for the Effect of his Plea is that this Record, as it is, is without Error; therefore he cannot come and alledge Diminution afresh, and say that there is Error by reason of such a Defect, for that is against his former Supposal, and by the same Reason he may be let in to alledge a Diminution more than once, and he may alledge it in infinitum; that the Party was therefore bound and foreclosed by this Admission, and that equally as to all Parts of the Record; but the Court were not foreclosed, for the Writ of Error is a Commission to them to examine the Errors, viz. Quod inspectis record. & processu fieri faciat quod de jure fuerit faciend. therefore no Admission of the Parties can nor ought to restrain the Court from looking into the Record before them: That in the Case of Carlton and Mortagh (ante pla. 15.) the Plaintiff assigned for Error Want of Original, and the Defendant pleaded a Release, but mispleaded it, and tho' this was a full Confession of the Party that there was no Original, yet the Court awarded a Certiorari, and affirmed the Judgment; but that had been otherwise if he had assigned for Error Infancy; because this could not appear by inspecting that Record: And that where-ever by inspecting the Record the Court may affirm the Judgment, they ought to award a Certiorari. And as the Party by pleading in nullo est erratum

is estopped to pray a Certiorari as to every part of the Record, so the Court is foreclosed as to no part; and the Case of Gwin was cited. 1 Keb. 557. In a quod ei deforceat Judgment was given, quod petens teneat prædict. tenementa instead of recuperet: Upon this a Writ of Error was brought, and after In nullo est erratum pleaded, the Court being informed the Judgment was right sent a Certiorari. In the Case of Fanshaw and Morrison. Trin. 3 Ann. B. R. In a Scire Facias on a Recognizance against Bail, Judgment was for the Plaintiff, & quod recuperet damna occasione dilationis executionis, which was naught, being not warranted by the Statute, which gives only Costs of Suit; In nullo est erratum was pleaded, and the Defendant got this amended in the Common Pleas, and the Court suffered it to be amended here. Et per Cur. A Rule was made for a Certiorari upon these Reasons, together with an Affidavit that the Record was right below.

Ante 208.

# ESCAPE.

## Scott *versus* Peacock. Mich. 4 W. & M. B. R.

TO a Scire Facias quare executionem non upon a Judgment, the Defendant pleaded that he was formerly taken in Execution by Ca. Sa. upon the same Judgment, and the Sheriff suffered him to escape, to which Escape the Plaintiff then and there consented: Sed non allocatur, for the Assent subsequent will not make it an Escape with the Consent of the Plaintiff, and therefore he has either his Remedy against the Sheriff, or may retake the Party.

(1) Precedent assent of the Plaintiff will excuse Escape, but not subsequent.

## Dominus Rex *versus* Fell. Hill. 10 Will. III. B. R.

(2) Indictment against Gaoler for negligent Escape of H. committed to Prison, and charged with High Treason, ill.

FELL was indicted by two several Indictments, viz. One, for that he being Keeper of Newgate, one Birkenhead was committed to the Prison of Newgate sub custod. Vicecom. Midd. and the said Birkenhead being in Custody of Fell oneratus alta proditione, the Defendant negligently suffered him to escape. And it was objected in Arrest of Judgment, that the Warrant of Commitment ought to have been set forth, which was not done, and it was argued by Mr. Northey, That even in Debt for Escape, the Commitment must be set out, 3 Cro. 894. 2 Inst. 590. and he might be charged with High Treason, and not committed for it, and at the Time of the Escape he does not appear to have continued charged, nor is it said that the Defendant let him escape sine Warranto or pardonatione. Et per Holt C. J. 1st, 'Tis not enough to say that he was charged, but he must also be said to be committed for High Treason; for if H. be in Custody for Trespass, and another should go before a Justice and swear High Treason against him, H. is in Custody and also charged with High Treason; yet the Gaoler in that Case is not liable, as he would have been in Case H. had been committed for Treason: The Precedents are, cujus causa commissus fuit; and the Warrant of Commitment was set out in Lord Grey's Case, and if there be Error in the Warrant, the Gaoler shall take no Advantage.

2dly, The Prisoner is in Custody both of the Gaoler and of the Sheriff, and if he be committed to the Sheriff, and the Gaoler suffer him to escape, the Gaoler is punishable; for the Sheriff shall answer civilly for the Faults of his Gaoler, but not criminally. Vide 14 E. 3. c. 10. 19 H. 7. c. 10. And a Commitment to a Prison is frequent, viz. Committitur Prisonæ; committitur Turri London.

3dly, The Court will not intend a Pardon: If any were, it should be shewn on the other Side; and if there were a Pardon, the Sheriff or Officer cannot take Notice of it till it be allowed in B.R. and before such Allowance had 'tis criminal in him to suffer such Escape, but the Judgment was arrested.

## Watson *versus* Sutton. Mich. 13 Will. III. B. R.

(3) Marshal not chargeable in Escape, till Notice of the Commitment.

IN Debt for an Escape against the Marshal of the King's Bench, and Nil debet pleaded, the Evidence was, That the Prisoner being out on Bail came and surrendered himself, by entring a Reddidit se in Discharge of his Bail in the Judge's Book; That the

3

the Plaintiff's Attorney accepted him in Execution, and filed a Committitur with Mr. Bromfield the proper Officer. Upon this Evidence the Jury found for the Plaintiff, and now the Marshal moved for a new Trial, because he had no Notice, for 'twas not sufficient to enter a Committitur in the Office, without serving him with a Rule, or entring a Committitur also in the Marshal's Book kept in the Office for that purpose, without which the Marshal is not chargeable in Escape. Et per Cur. A Reddidit se in the Judge's Book is an immediate Discharge of the Bail; but he is not in Custody till the Plaintiff makes his Election by entring a Committitur; nor then is he in Custody, so as to charge the Marshal, till there be a Notice by Rule or Entry as aforesaid: But this Matter should have been shewed and insisted on at the Trial; 'tis now too late, so the Motion was denied.

New Trial not granted for Matter omitted to be insisted on at former Trial.

## Shirley *versus* Wright. Trin. 1 Ann. B. R

(4) Escape upon erroneous Process.

THE Sheriff had the Defendant in Custody on a Ca. Sa. which issued post diem & annum, without a Scire Facias, and let him escape; and it was held that he was liable, and should not take Advantage of the Error; but otherwise had it been on a Capias ad respondend. bearing Teste in Trinity-Term, and returnable in Hillary, because such Process must be returnable from Term to Term, otherwise 'tis out of Court.

## Anonymus. Mich. 4 Ann. B. R.

(5) Discharge by Court not having Jurisdiction, is void.

DEBT for 200 l. upon a Bond, conditioned to pay 100 l. for Want of Bail the Defendant was committed to the Marshall, and he applied to the Justices of Peace of Surrey, and procured a Discharge on the late Act, for the Relief of insolvent Debtors. The Plaintiff obtained an Escape-Warrant, upon which he was taken up; and upon a Motion to be discharged the Court held this was an Escape, for being a Prisoner both indebted and also charged in above 100 l. Debt and Damages, the Justices had no Authority for what they did, and therefore their Discharge was illegal and void.

## Jackson *versus* Humphreys. Trin. 5 Ann. B. R.

(6) A. Levies a Plaint in the Sheriff's Court of London against B. being in Custody on a former Plaint by C. B. escapes. A. may bring Escape.

IN Escape against the Sheriffs of London, the Plaintiff declared that he levied a Plaint in the Sheriff's Court against J. S. being then in the Counter in Custody on a former Plaint levied against him by J. N. and that the Defendant being so in Custody was suffered to escape: The Defendant demurred, and in-

 sisted

sisted, that there ought to have been a Precept sued out on the latter Plaint, on which the Sheriff might have return'd a Cepi; as if H. is arrested by the Sheriff ad sectam A. and afterwards another Writ is delivered ad sectam B. he is now in Custody for B. and the very Delivery of the Writ to the Sheriff was an Arrest in Law, and in Debt for Escape B. must declare that H. was arrested on this Writ; for the Declaration must be according to the Operation of Law, and not according to Fact. Vide 5 Co. 89. But after two Terms debate, Holt C. J. having looked on Mackally's Case said, That upon entring a Plaint in the Counter, there never is any Precept awarded; but the Serjeant of the Mace arrests the Party by his general Authority, and therefore there is nothing more to be set forth than is set forth in this Case; for by entring the Plaint and charging the Defendant in the Counter, he is in actual Custody of the Sheriff: So if the Sheriff of Northumberland have a Man in Custody in Northumberland, and the Sheriff is himself here in Town, and a Writ is delivered to him against that Person, he is in his Custody immediately upon that Writ; otherwise if the Man was out of the County at the Delivery of the Writ, as in case the Sheriff was bringing him to Westminster on a Habeas Corpus.

# ESCROW.

## Watts *versus* Rosewell. Mich. 1 Ann. B. R.

Plea, delivered as an Escrow, ought to conclude to the Country.

IN Debt upon a Bond, the Defendant pleaded it was delivered as an Escrow, to be his Deed upon the Plaintiff's Sealing and Delivering a general Release, which was not done, Et sic non est factum, & hoc paratus est verificare, &c. The Plaintiff demurred, and shewed for Cause that the Plea should have concluded to the Country; and the Reason insisted upon in Argument was, That it is a special Negative of the Affirmative in the Declaration, and the general Conclusion in the Negative had waiv'd the special Matter precedent; and 1 Ven. 210. was quoted as an Authority in Point. Tho' it was admitted, That

That if the Plaintiff had pleaded over, and taken Issue upon the special Matter, it had been well. On the other Side was cited 1 Keb. 30, 242. but Note, No Judgment is entred in that Case. But in the principal Case Judgment was given for the Plaintiff, because the Precedents are accordingly.

# ESTOPPEL.

## Gilman *versus* Hore. Mich. 4 W. & M. B. R.

(1) Lease for Years may operate as to part by Estoppel, and as to the Residue by passing an Interest.

DEBT for Rent on an Indenture of Lease for forty Years: The Defendant pleaded that a Year before the Plaintiff made a Lease for forty Years to A. virtute cujus A. entered and was possessed; and that tho' the Defendant did afterwards enter, yet he was accountable to the said A. On Demurrer Carthew argued, That the second Lease was void for the first thirty-nine Years, and so was the Reservation; and that here was no Estoppel, because the last of the forty Years passed by the Lease. Vide Plow. 433, 422. 1 Inst. 47. Where Tenant per auter vie made a Lease for Years by Indenture, and afterwards purchased the Reversion; and it was held that the Lease ended by the Death of cestui que vie; so is 3 Cro. 707. Et per Holt C. J. The Reason of the Case in 1 Inst. is, because Tenant for Life has a Freehold, which is a greater Estate, and the Lease will need no Estoppel, if the Life endure: But in the principal Case the Lease must necessarily be void for thirty-nine Years, unless made good by Estoppel, and that a Lease for Years may operate and take effect as to part by Estoppel, and as to the Residue by passing a real Interest, is very plain from the common Case of concurrent Leases, which are all of them as to part good by Estoppel, and a Rent reserved thereon.

(2) Rock versus Leighton. Mich. 12 W. 3. B. R. Vide post Title Executors.

Trevivan *versus* Lawrence, & al'. Mich. 3 Ann. B.R.

(3) Scire Facias against Tertenants reciting the Judgment of a wrong Term, and upon Nul tiel Record Judgment for the Plaintiff; and after Elegit, Ejectment brought; the Defendant is estopp'd to take Advantage of the Variance.

IN Ejectment upon the Demise of R. V. a Special Verdict was found, viz. That S. R. was seised in Fee of the Lands in Question, and that being so seised H. M. recovered Judgment against him in Debt for 127 l. in B. R. in Michaelmas-Term 1656. which they find in hæc verba. That in Hillary 13 W. 3. the Lessor of the Plaintiff as Administrator of the said H. M. sued a Scire Facias, reciting the Judgment as of Trinity-Term, against the Tertenants of the Lands which the said S. R. had on the Day of the Judgment recovered, or at any Time afterwards. That the Tertenants (of which the Defendant was one) appear'd and pleaded Nul tiel Record, and Issue join'd thereupon, and a Day was given to bring in the Record, at which Day the Record of the Judgment of Michaelmas-Term 1656, was produc'd, and Judgment given quod habetur tale recordum, and Execution awarded; that thereupon the Plaintiff sued out an Elegit, upon which an Inquisition was taken, and the Lands in question extended; and for the Variance between the Judgment recited in the Scire Facias, and that given in Evidence, the Jury doubted: After Argument, and Consideration from Easter-Term to Michaelmas, the Court held, That the Defendants were estopped by this Judgment in the Scire Facias, to say that there was no Judgment in Trinity-Term, because that Matter had been tried against them, and the Defendants were concluded to falsify the Judgment in the Point tried: Thus, If a Scire Facias be brought against the Issue in Tail upon a Judgment in Debt against the Ancestor, and he being warn'd makes Default, he shall not come afterwards and say that he is Tenant in Tail; so if he plead any other Matter, and it is found against him: Also they held the Judgment upon the Scire Facias is sufficient Title in the Ejectment, and the first Judgment need not be given in Evidence.

2dly, The Court held not only that the Parties, but all claiming under them, or this Recovery, would be bound by this Estoppel: As if a Man make a Lease by Indenture of D. in which he hath nothing, and after purchases D. in Fee, and after bargains and sells it to A. and his Heirs, A. shall be bound by this Estoppel, and that where an Estoppel works on the Interest of the Lands, it runs with the Land into whose Hands soever the Land comes, and an Ejectment is maintainable upon the mere Estoppel.

Where Estoppel works on the Interest of the Land, it runs with it and is a Title.

3dly, The Court held, That not only the Parties and all claiming under them, but the Court and Jury were bound by this Estoppel, and that the Jury can not find against this Estoppel; and the Court took this difference that where the Plaintiff's Title

Jury is bound by Estoppel unless the Party leaves the Fact at large by Pleading.

Title is by Estoppel, and the Defendant pleads the general Issue, the Jury are bound by the Estoppel; for here is a Title in the Plaintiff, that is a good Title in Law, and a good Title if the Matter had been disclosed and relied on in pleading; but if the Defendant pleads the special Matter, and the Plaintiff will not rely on the Estoppel when he may, but take Issue on the Fact, the Jury shall not be bound by the Estoppel, for then they are to find the Truth of the Fact which is against him. Thus in Debt for Rent on an Indenture of Lease, if the Defendant plead Nil debet, he cannot give in Evidence, That the Plaintiff had nothing in the Tenements; because, if he had pleaded that Specially, the Plaintiff might have replied the Indenture and estopped him; but if the Defendant plead Nihil habuit, &c. and the Plaintiff will not rely on the Estoppel, but reply habuit, &c. He waives the Estoppel and leaves it at large, and the Jury shall find the Truth notwithstanding his Indenture.

(4) Smith versus Villars. Trin. 1 Ann. B. R. Vide Title Abatement, pl. 7.

## Kemp *versus* Goodal. Pas. 4 Ann. B. R.

(5) Where the Estoppel appears on the Record, the other Side may demur.

In Debt for Rent upon an Indenture, if the Defendant pleads Nihil habuit in tenementis, the Plaintiff need not reply that Estoppel, but may demur, because the Declaration is on the Indenture, and the Estoppel appears on the Record; otherwise if he had declared quod cum dimisisset. So is Speak's Case, Hob. 206. The Plaintiff declares on the Levy, and therefore no Estoppel, because there no Estoppel is pleaded, and relied upon: But if he had declared upon the Return prout patet per recordum, the Defendant could not have pleaded Payment; if he had, the Plaintiff might have demurred without pleading the Estoppel.

EVI-

# EVIDENCE.

## Anonymus. Coram Holt, *C. J.* *At* Nisi Prius *at* Hertford, 1690.

(1) IT was adjudg'd per Holt C. J. That in Debt for Rent, upon Nil debet pleaded, the Statute of Limitations may be given in Evidence, for the Statute has made it no Debt at the Time of the Plea pleaded, the Words of which are in the present Tense; but in Case on Non Assumpsit, the Statute of Limitation hath been given in Evidence, for it speaks of a Time past, and relates to the Time of making the Promise.

## Dominus Rex *versus* Dominum Preston. Mich. 3 W. & M. B. R.

(2) Refusing to give Evidence to the Grand Jury, is a Contempt fineable.

LORD PRESTON was committed by the Court of Quarter-Sessions for refusing to be sworn to give Evidence to the Grand Jury on an Indictment of High Treason. He was brought by Habeas Corpus in B. R. and Holt C. J. said it was a great Contempt, and that had he been there, he would have fined him, and committed him till he paid the Fine; but being otherwise, he was bailed.

## Howard *versus* Tremaine. Mich. 4 W. & M. B. R.

(3) Depositions taken in Chancery De bene esse, are good Evidence at Law, where the Witnesses die before Answer.

UPON a Bill exhibited in Chancery to perpetuate Testimony, the Defendant (who was Heir at Law) stood in Contempt, and would not answer, and thereupon the Plaintiff had a Commission, and examined Witnesses to the Matter of his Bill De bene esse, and the Defendant join'd in Commission, and cross-examin'd some of the Witnesses produc'd for the Plaintiff, and before the Answer came in the Witnesses died: And upon a Trial in Ejectment, in which the Plaintiff made Title under this Will, the Question was, Whether these Depositions could be given in Evidence? And a Verdict was taken for the Plaintiff, but the Postea stayed till the Opinion of the Court was had on this Point, and it was not questioned, but if the Defendant had answered, and these Depositions had been taken after Answer, they had

been good Evidence against the same Parties, and those that claim under them. Et per Eyre J. It might be very inconvenient if this should not be allowed as Evidence: How otherwise can a Devisee examine Witnesses in perpetuam rei memoriam? For the Heir at Law will not answer to the Plaintiff's Bill; and on the other Side he will not call in question the Title of the Devisee, as long as he has Witnesses alive to prove the Will; but as soon as they are dead, then will commence his Suit. Vide Shower 363. S. C.

Vide Godb. 326. Hob. 112. 2 Ro. 679. Hard. 232. 1 Cro. 352.

## Darby *versus* Boucher. Pas. 5 W. & M. C. B.

(4) In Indeb. Assumpsit Infancy may be given in Evidence on Non Assumpsit.

IN an Assumpsit for Money lent, and likewise for Money laid out to the use of the Defendant's Wife dum sola. Upon Non Assumpsit pleaded, upon Trial before Treby C. J. the Defendant offered to give in Evidence the Infancy of the Feme at the Time of the Promise, which the Chief Justice doubting of, it was referred by Consent to him as a Case, who consulted with the rest of the Judges, and there being ten of the Judges then present, they all agreed that upon the general Issue such Evidence hath been of late admitted; and the Chief Justice in giving his Opinion said 'twas true, that in the Books such Resolutions are not to be found, for that Actions on the Case have not been so common till of late; and that as to the Objection, That the Plaintiff may at this Rate be surprised, who may be supposed to come prepared to prove nothing but his Debt; The same Objection might be made against allowing Payment to be given in Evidence in case of an Assumpsit in Law, admitting there was a Difference betwixt an express Assumpsit and an Assumpsit in Law, and that upon an express special Assumpsit Infancy cannot be given in Evidence upon the general Issue: Yet he said, Supposing that in this Case there had been an express Assumpsit to pay the Money, or the Money laid out, this had been void, it being no more than the Law implied upon the lending and laying out; and the Chief Justice said, that the Promise of an Infant is absolutely void; but a Bond takes Effect by Sealing and Delivery, and consequently is a more deliberate Act, and therefore is only voidable: And in this Case there was another Question made, which was, One lends an Infant Money, who imploys it in paying for Necessaries, Whether in that Case the Infant be liable? And it was held clearly by the Chief Justice, that the Infant is not liable; for it is upon the lending that the Contract must arise, and after that Time there could be no Contract raised to bind the Infant, because after that he might waste the Money, and the Infant's applying it afterwards for Necessaries, will not by Matter ex post facto intitle the Plaintiff to an Action.

One lends an Infant Money and he lays it out in Necessaries, yet the Infant is not liable.

Ano-

## Anonymus. Paſ. 5 W. & M. C. B.

(5) Parol Promiſe to be perform'd on a Contingency is not within the Statute of Frauds, tho' that happen not within a Year.

NOTA, Treby C. J. related a Caſe upon the Clauſe of the Statute of Frauds, which ſays, That no Action ſhall be brought upon any Agreement that is not to be performed within the Space of one Year from the making thereof, unleſs it be in Writing. The Caſe was, That a parol Promiſe was made to pay ſo much Money upon the Return of ſuch a Ship, which Ship happened not to return within two Year's Time after the Promiſe made, and whether this parol Promiſe was void by the Statute of Frauds, was made a Queſtion before all the Judges: And they were of Opinion that this was a good Promiſe, and not within that Clauſe of the Statute, for that by Poſſibility the Ship might have returned within a Year; and tho' by Accident it happens not to return ſo ſoon, yet, they ſaid, that Clauſe of the Statute extends only to ſuch Promiſes, where by the expreſs Appointment of the Party the Thing is not to be performed within a Year.

## Brook *verſus* Smith. Paſ. 5 W. & M. Coram Holt, *C. J. At* Niſi Prius, Middleſex.

(6) Where upon Non Aſſumpſit, Condemnation in foreign Attachment may be given in Evidence, and where it muſt be pleaded, and how.

IN Aſſumpſit Evidence was given, That the Debt was attached by the Cuſtom of London before the Action brought, and Condemnation had there before Plea pleaded, and it was urged that this ſhould relate to defeat the Action. But per Cur. it was ruled, That if an Attachment and Condemnation be before the Writ purchaſed, it may be given in Evidence on the general Iſſue, becauſe that is an Alteration of the Property before the Action brought; but if the Attachment only be before the Writ purchaſed, it ought to be pleaded in Abatement of the Writ; and if the Condemnation be after the Action commenced and before the Plea pleaded, then it may be pleaded in Bar, but ſhall not be given in Evidence on Non Aſſumpſit, for that the Property is not altered until Condemnation; and the Plaintiff had a Verdict.

## Smartle ex dimiſſ. Newport *verſus* Williams. Paſ. 6 W. & M. B. R.

(7) Indenture of Bargain and Sale inrolled, may be given in Evidence without proving the Execution.

UPON the Trial at Bar in this Caſe (Vide ante Title Diſſeiſin, pl. 1.) a Deed of Bargain and Sale acknowledged by the Bargainee and inrolled, by which a Term for Years was aſſigned, was given in Evidence without any Proof made of the Bargainor's Sealing and Delivery thereof; and after

4 Debate

Debate it was allowed per Holt C. J. and Eyre J. & tot. Cur. for the Acknowledgment of the Party in a Court of Record, or before a Master extraordinary in the Country (as this was) is good Evidence of its being sealed and delivered; and such an Acknowledgment estops a Man from Pleading Non est factum. Also Inrollments of Deeds on the Statute are admitted every Day in Evidence without Witnesses of the Sealing and Delivery, and it is the Acknowledgment which gives it Credit, and not its Operation or Contents. Also they held a sworn Copy of a Deed inrolled good Evidence.

### Dominus Rex *versus* Paine. Hill. 7 Will. III. B. R.

(8) Depositions before a Justice, Evidence only in Felony.

IN an Information for a Libel against the Government, Not guilty being pleaded, upon Trial the Attorney-General offered in Evidence Depositions taken before a Justice of Peace relating to the Fact, the Deponent being since dead. Et per Cur. upon Advice with the Justices of the Common Pleas, In Cases of Felony such Depositions before a Justice, if the Deponent die, may be used in Evidence by the Statute 1 & 2 Ph. & Mar. c. 13. But this cannot be extended farther than the particular Case of Felony, and therefore not to this Case.

### Stainer *versus* *Burgesses of* Droitwich. Mich. 7 Will. III. B. R.

(9) A general History is Evidence to prove a Matter relating to the Kingdom in general; otherwise of a particular Right.

AN Issue was directed out of Chancery, wherein the Question was, Whether by the Custom of Droitwich Salt-Pits could be sunk in any Part of the Town, or in a certain Place only? And upon the Trial at Bar Cambden's Britannia was offered in Evidence, but refus'd; for the Court held, That a general History might be given in Evidence to prove a Matter relating to the Kingdom in general, because the Nature of the Thing requires it; but not to prove a particular Right or Custom: So in the Case of St. Katherine's Hospital, Hale C. J. allowed a Chronicle to be Evidence of a particular Point of History in Edward III's Time: So a Year-Book may be Evidence to prove the Course of the Court; yet in this Case it was admitted, That Heralds Books are good Evidence as to Pedigrees, and Parish Registers as to Births and Marriages, upon the Nature of the Thing; and it was said that in the Exchequer the Question being, Whether the Abbey de fentibus was an inferiour Abbey, or not? Dugdale's Monasticon Anglicanum was refused for Evidence, because the original Records might be had in the Augmentation-Office.

Heralds Books.

## Anonymus. Paſ. 8 Will. III. B. R.

(10) Payment of Money due to the Wife as Executrix, is not Evidence to maintain Action for Money received to Husband's Uſe.

IN an Action on the Caſe for Money had and received to the Plaintiff's Uſe, upon the Evidence it appeared, That the Plaintiff's Wife was Executrix, and that the Money was paid to the Defendant as due to her, and the Plaintiff was nonſuited, becauſe the Action ought to have been brought by Husband and Wife as Executrix, for it being paid without any Authority from the Husband, it remains as a Debt due to the Executrix, and if the Husband dies, the Wife may bring an Action for it; but if the Money had been received by Authority from the Husband, then it had been as his Receipt, and as his Money, and the Action might well have been brought in his Name, and the Money would have been Aſſets in her Hands.

## Middleton *verſus* Fowler & al. Mich. 10 Will. III. Coram Holt, *C. J.* *At* Niſi Prius.

(11) Maſter of a Stage-Coach not chargeable for Goods loſt by the Driver, unleſs the Maſter takes a Price for the Carriage of Goods.

AN Action upon the Caſe upon the Cuſtom of the Realm was brought againſt the Defendants being Maſters of a Stage Coach, and the Plaintiff ſet forth that he took a Place in the Coach for ſuch a Town, and that in the Journey the Defendants by their Negligence loſt a Trunk of the Plaintiff's: Upon Not guilty pleaded, upon the Evidence it appeared, That this Trunk was delivered to the Perſon that drove the Coach, and he promiſed to take care of it, and that the Trunk was loſt out of the Coachman's Poſſeſſion; and if the Maſter was chargeable with this Action was the Queſtion. Holt C. J. was of Opinion that this Action did not lie againſt the Maſter, and that a Stage-Coachman was not within the Cuſtom as a Carrier is, unleſs ſuch as take a diſtinct Price for Carriage of Goods as well as Perſons, as Waggons with Coaches; and tho' Money be given to the Driver, yet that is a Gratuity, and cannot bring the Maſter within the Cuſtom: For no Maſter is chargeable with the Acts of his Servant, but when he acts in execution of the Authority given by his Maſter, and then the Act of the Servant is the Act of the Maſter; and the Plaintiff was nonſuited.

## Dominus Rex *versus* Whiting. Mich. 10 Will. III. Coram Holt, *C. J. At* Nisi Prius, *at* Guildhall.

(12) On Indictment for a Cheat in procuring a Note from H. H. cannot be a Witness.

IN an Information against the Defendant for a Cheat, upon Trial the Fact appeared to be, That he had a Promise of a Note for 5l. from his Mother-in-law, and by some slight got her Hand to a Note of 100l. Et per Holt C. J. The Mother cannot be a Witness being concerned in the Consequence of the Suit, which is a Means to discharge her of the 100l. For tho' the Verdict upon this Information cannot be given in Evidence in an Action upon the Note for the 100l. yet we are sure to hear of it to influence the Jury; and he said he could not distinguish this from the Cases of Perjury or Forgery, where the Party, whose Interest is defeated or prejudiced by the Deed, &c. is no Evidence to prove the Perjury or Forgery.

## Anonymus. Mich. 10 Will. III. Coram Treby *C. J. At* Nisi Prius, *at* Guildhall.

(13) Heir at Law may be Witness of the Title, Remainder-Man not.

TREBY C. J. An Heir apparent may be Witness concerning the Title of the Land, but a Remainder-Man cannot, for he hath a present Estate in the Land; but the Heirship of the Heir is a mere Contingency.

Tenant in Tail, Remainder in Tail, he in Remainder cannot be a Witness concerning the Title of these Lands; for he hath an Estate such as it is.

## Ford *versus* Hopkins. Hill. 12 Will. III. Coram Holt, *C. J. At* Nisi Prius, *at* Guildhall.

(14) Goldsmith has Lottery-Tickets of A. and B. and delivers A.'s Tickets to B. for his own, A. may maintain Trover against B.

TROVER for Million-Lottery-Tickets; upon Evidence it appeared, That the Plaintiff had given the Tickets in question to a Goldsmith to receive the Money due on them; That some Payments were due, and some were not; that this Goldsmith had received Tickets of the Defendant, and given a Note to pay him so many Million-Lottery-Tickets; That the Plaintiff's Tickets were delivered to the Defendant by the Goldsmith upon this Note. It was insisted on, That this Note under the Goldsmith's Hands, could be no Evidence against the Plaintiff, but it was read. And Holt C. J. said, That the way and manner of Trading is to be taken Notice of, and the best Proof, that the Nature of the Thing will afford, is only required: When Goldsmiths give their Notes no Witnesses are by; and their Notes to pay Money or Tickets are Evidence of the Receipt of Money.

Goldsmith's Note to pay is Evidence of his receiving Money.

If Money is stoln and paid to another, the Owner of the Money can have no Remedy against him that received it; But if Bank-Notes, Exchequer-Notes, or Million-Tickets, or the like, are stoln or lost, the Owner has such an Interest or Property in them, as to bring an Action into whatsoever Hands they are come: Money or Cash is not to be distinguished, but these Notes or Bills are distinguishable, and cannot be reckoned as Cash, and they have distinct Marks and Numbers on them. He agreed in this Case, that if the Exchequer or any private Person had paid to the Goldsmith the Money or the Tickets, it would have been a good Payment against the Owner; but whether it would be so where Tickets not due are bought for a valuable Consideration, he doubted; but as the Case was, the Goldsmith having Tickets of the Plaintiff and of the Defendant, the Delivery of the Plaintiff's Tickets to the Defendant was no Change of the Property, or any Consideration; for tho' the Owner gave the Goldsmith Power to receive Money for the Tickets, he did not give him Power to change them for other Tickets, and accordingly a Verdict was given for the Plaintiff.

## Gallaway *versus* Susach. Trin. 12 Will. III. B. R.

(15) Levy per Distress, Et sic non debet. Payment or Release is good Evidence; otherwise of Rasure.

IN Debt for Rent, if the Defendant plead Levy per Distress & sic non debet, a Release or Payment is good Evidence; for it proves there is no Debt, and that is the Issue. Vide Cro. El. 140. which agrees; but if the Defendant plead Rasure, & sic non est factum, nothing else is Evidence but Rasure. Per Holt C. J.

## Thurston *versus* Slatford. Mich. 12 Will. III. B. R.

(16) Record of Sessions given in Evidence to prove the Plaintiff had not taken the Oaths, and so his Office void.

CASE in C. B. upon an Indebitatus Assumpsit for 5 l. received to the Plaintiff's Use, being Fees of the Office of Clerk of the Peace of Oxfordshire: Upon Non Assumpsit 'twas insisted on that the Plaintiff had forfeited his Office by not qualifying himself according to Law: They shewed he was admitted in April, and produced the Record to prove he had not taken the Oaths: The Plaintiff offered a Bill of Exceptions to this Evidence, which was brought into B. R. with the Record by Writ of Error. And Holt C. J. said, That if a Judge admits that for Evidence, which is not, the other Side cannot demur for that Cause; but must tender a Bill of Exceptions; but he held that this Record was Evidence: That indeed if there be a Mis-entry, it might be supplied and corrected by other Evidence; for he should not be concluded by the Mistake or Negligence of the Officer, but still it is a Record, and some Proof, tho' not a compleat Proof, and

 might

might be left to the Jury. He remembered a Case where the University of Oxford entitled themselves to a Presentation by a Conviction of the Earl of Shrewsbury for Recusancy, and upon giving some Evidence that the Record was lost, the University was permitted to prove the Effect of it by other Evidence: Judgment afterwards was given on another Point.

The Matter of a Record lost may be proved.

## Blainfield *versus* March. Mich. 1 Ann. Coram Holt *C. J. At* Nisi Prius *at* Guildhall.

(17) Trover by Administrator on the Intestate's Possession; Defendant cannot give in Evidence a Will on the general Issue; otherwise if on Administrator's own Possession.

THE Plaintiff brought Trover as Administrator, and declared upon the Possession of the Intestate; and upon Not guilty pleaded, at the Trial the Counsel for the Defendant offered to give in Evidence, that the pretended Intestate made a Will and an Executor; but Holt C. J. over-ruled it, and took this Diversity, That where an Administrator brings Trover upon his own Possession, the Defendant may give in Evidence a Will, and an Executor upon Not guilty; otherwise if it be on the Possession of the Intestate (as in the principal Case) for there the Defendant ought to plead it in Abatement, and if he does not, he shall not give it in Evidence.

## Price *versus the Earl of* Torrington. Trin. 2 Ann. Coram Holt *C. J. At* Nisi Prius *at* Guildhall.

(18) Evidence of Beer delivered.

THE Plaintiff being a Brewer, brought an Action against the Earl of Torrington for Beer sold and delivered, and the Evidence given to charge the Defendant was, That the usual Way of the Plaintiff's Dealing was, that the Draymen came every Night to the Clerk of the Brew-house, and gave him an Account of the Beer they had delivered out, which he set down in a Book kept for that purpose, to which the Draymen set their Hands, and that the Drayman was dead, but that this was his Hand set to the Book, and this was held good Evidence of a Delivery; otherwise of the Shop-Book it self singly, without more.

## Ford *versus* Grey. Hill. 2 Ann. B. R.

(19) What Possession or Entry will prevent the Statute of Limitations.

IN Ejectment on a Trial at Bar, the Statute of Limitations was insisted on, and these Points were ruled. Per Cur.

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

2dly, That a Claim or Entry to prevent the Statute of Limitations must be upon the Land, unless there be some special Reason to the contrary.

3dly,

3dly, If one makes an Answer in Chancery which is prejudicial to his Estate, it may be given in Evidence against him, but not against his Alienee.

Recital of Lease and Release is Evidence, and against whom.

4thly, That a Recital of a Lease in a Deed of Release is good Evidence of such Lease against the Releasor and those that claim under him; but as to others it is not, without proving there was such a Deed, and it was lost and destroyed.

Fine severs Jointenancy.

5thly, If one Jointenant levies a Fine, it severs the Jointure, but does not amount to an Ouster of his Companion.

## Domina Regina *versus* Mackartney &c al. Mich. 2 Ann. B. R.

(20) H. being cheated, may be a Witness to prove the Fact on the Indictment.

INDICTMENT for a Cheat done to J. S. by imposing upon him a Quantity of Beer mix'd with Vinegar and Grounds of Coffee for Port Wine; one of the Defendants pretending to be a Broker, and the other a Portugueze Merchant, for the better carrying on of the Cheat. Et per Holt C. J. J. S. was allowed to be a Witness to prove the Fact upon the Trial, for in such private Transactions no Body else can be a Witness of the Circumstances of the Fact, but he that suffers.

## Tilley's *Case*. Mich. 2 Ann. C. B.

(21) Depositions in perpetuam rei memoriam, are not Evidence in any Case as long as the Witnesses live.

ON a Trial at Bar in C. B. this Point arose, viz. Depositions had been taken in Chancery in perpetuam rei memoriam, and it happened afterwards that the Inheritance of the same Land descended to the Person, who was sworn as a Witness, and he was now a Party to the Suit in Ejectment; and the Question was, Whether these Depositions could be read in the Cause? Trevor C. J. held, That they ought; for that he was disabled to give Evidence by the Act of God; so that 'twas in effect the same Thing as if he were dead. Tracy and Blencow contra. Hereupon Tracy came into B. R. to ask the Opinion of the Court, and the Court agreed they ought not to be read; for per Holt C. J. The only Intent of such Depositions was to perpetuate Testimony, in Case the Witnesses died, and they cannot be read in any Case between other Parties till after the Death of the Witness, who is to appear and give his Evidence viva voce, so long as he lives: Much less can they be read in this Case where the Witness himself is Party. To which Trevor C. J. agreed.

## Martyn *versus* Hendrickson. Hill. 2 Ann. Coram Holt *C. J. At* Nisi Prius, *at* Guildhall.

IN an Action on the Case for managing the Defendant's Ship so negligently, that it ran over the Plaintiff's Barge, the Declaration set forth that he was possessed of the said Barge, laden with divers Goods and Merchandizes; and, 1st, Holt C. J. would not suffer the Pilot to be a Witness; because he was answerable, if faulty in Steering, to the Master. 2dly, He would not suffer any Damages to be recovered for the Goods, because not set forth particularly, saying, they ought to be set forth specially, as where an Action is brought for burning his House: So in Case for Words, per quod she lost her Marriage with J. S. & aliis Personis, He said he would not suffer them to give in Evidence a Loss of Marriage with any Body but J. S.

(22) Evidence in an Action for running over the Plaintiff's Barge with his Ship.

## Anonymus. Mich. 3 Ann. B. R.

PER Holt C. J. In a Case in my Lord Hale's Time, between Combe and Mayo, a Counterpart of an ancient Deed was admitted as Evidence of the Deed, and the Special Verdict was drawn up as finding the Deed with a prout patet by the Counterpart, which he said was done to preserve the Precedents; and now by all the Court, The Counterpart of a Deed, without other Circumstances, is not sufficient Evidence, unless in Case of a Fine, in which case a Counterpart is good Evidence of it self.

(23) Counterpart is not Evidence of Indenture, unless old, or in case of a Fine.

## Watson *versus* Sparks. Mich. 5 Ann. B. R.

IN Trespass quare clausum fregit Not guilty was pleaded, and on Trial the Defendant gave Evidence, That it was in a Highway. Et per Cur. 'Tis a special Justification and ought not to be allowed to be given in Evidence on the general Issue. Holt C. J. said, In Case for disturbing the Plaintiff of his Common, upon Not guilty pleaded, he had known the Defendant permitted to give in Evidence, that he had a Right to Common there, but he never thought it right, and never allowed it.

(24) In Trespass on Not guilty, the Defendant cannot give Evidence that the Place was a Highway.

Char-

## Charnock's *Case*.

( 25 ) On Indictment, Evidence may be of the Fact done at any Time, not after the Indictment, and at any Place in that County.

CHARNOCK was indicted for that he the 10th of February, 9 W. 3. & diversis aliis diebus & vicibus tam antea quam postea, in the Parish of St. Clement Danes, did traiterously conspire to kill the King. Et per Holt C. J. Evidence may be given of a treasonable Conspiracy, &c. at any Time before or after the Time alledged in the Indictment:

1st, Because 'tis only a Circumstance and of Form: Some Day must be alledged, but it is not material.

2dly, The Indictment lays it to be at divers Days and Times, as well before as after, and thereby comprehends what was done last Year, as well as this, and as the Evidence may be of Matters before that Time, so it may be of Matters also at any Time after the Time specified in the Indictment, provided it be not after the Time the Indictment was found; neither is the Evidence tied up to the Place; for it may be of any Place, provided it be not out of the County; and so it is of all criminal Cases. Vide Charnock's Trial, fo. 19, &c.

## Wright *versus* Sharp. Pas. 7 Ann. B. R.

( 26 ) Bill of Exceptions must be tendered at the Trial.

A Corporation-Book was offered in Evidence at the Assizes to prove a Member of the Corporation not in Possession, and refused. No Bill of Exception was then tendered, nor were the Exceptions reduced to writing; so the Trial proceeded, and a Verdict was given for the Plaintiff. Next Term the Court was moved for a Bill of Exceptions, and it was stirred and debated in Court. It was urged that the Law requires quod proponat exceptionem suam, and no Time is appointed for the reducing it into writing, and the Party is not grieved till a Verdict be given against him, and the same Memory, that serves the Judges for a new Trial, will serve for Bills of Exceptions. Vide 2 Inst. 437. N. B. 21. 540. b. Vet. Intr. 96, 136. Raymond 405. Brownl. Red. 433. 2 Lev. 236. Stat. West. 2. c. 31. On the other Side 'twas said, That this Practice would prove a great Difficulty to Judges, and Delay of Justice; that the Precedents and Entries suppose the Exception to be written down upon its being disallowed, and the Statute ought to be construed so as to prevent Inconvenience; besides the Words of the Act are in the present Tense, and so is the Writ formed on the Act. Holt C. J. If this Practice should prevail, the Judge would be in a strange Condition: He forgets the Exception, and refuses to sign the Bill, so an Action must be brought: You should have insisted on your Exception at the

Trial: You waive it if you acquiesce, and shall not resort back to your Exception after a Verdict against you, when perhaps, if you had stood upon your Exception, the Party had other Evidence and need not have put the Cause on this Point: The Statute indeed appoints no Time, but the Nature and Reason of the Thing requires the Exception should be reduced to writing when taken and disallowed, like a Special Verdict, or a Demurrer to Evidence; not that they need be drawn up in form; but the Substance must be reduced to writing while the Thing is transacting, because it is to become a Record: So the Motion was denied.

## Hern *versus* Nicholls. Coram Holt *C. J. At* Nisi Prius.

( 27 ) Deceit of the Factor beyond Sea, Evidence to charge the Merchant in an Action of Deceit.

IN an Action on the Case for a Deceit, the Plaintiff set forth That he bought several Parcels of Silk for .... Silk, whereas it was another kind of Silk; and that the Defendant well knowing this Deceit sold it him for —— Silk: On Trial, upon Not guilty, it appeared that there was no actual Deceit in the Defendant who was the Merchant, but that it was in his Factor beyond Sea, and the Doubt was, If this Deceit could charge the Merchant? And Holt C. J. was of Opinion, That the Merchant was answerable for the Deceit of his Factor, tho' not criminaliter, yet civiliter; for seeing some Body must be a Loser by this Deceit, it is more reason that he that imploys and puts a Trust and Confidence in the Deceiver, should be a Loser than a Stranger, and upon this Opinion the Plaintiff had a Verdict.

## Anonymus. Coram Holt, *C. J. At* Nisi Prius.

( 28 ) Son took the Father's Money and gave it to H. and the Son's Evidence admitted in Trover against H.

IN Trover for Money the Case was upon Evidence, That the Plaintiff's Son had a general Authority from his Father to receive and pay out his Father's Money. The Son took a Bill for Money due to his Father, and received it without a particular Authority for that purpose, and this Receipt was with an Intent to imbezil and spend it; but he gave a Receipt as for Money had to his Father's Use, and this Money was given to the Defendant. The Questions were, 1st, If the Son could be a Witness in this Case to prove the Delivery? And, 2dly, Whether the Father could maintain an Action of Trover? Holt C. J. was of Opinion, That the Son might be admitted as a good Witness, his Testimony being corroborated by other Circumstances; and that the Action was maintainable for the Father, for that the general Authority that the Son had to take his Father's Money, made the Receipt of the Money to be to his Father's Use, and a good Discharge of the Debt, so as that the Father could not avoid

the Payment, and charge the Person that paid the Money with an Action; and then, if the Payment was a good Discharge, it is reason it should be his Money, and the Possession of the Son is the Possession of the Father, the Son being to this purpose as his Father's Servant; and according to this Opinion the Plaintiff had a Verdict, but he said he was willing to have a Case made of it; but the Defendant acquiesced in his Opinion.

## Brown *versus* Hedges. Trin. 7 Ann. B. R.

(29) Declaration of a Trover in Middlesex, and proof of one in Ireland, good.

IN Trover, upon Not guilty pleaded it appeared in Evidence, That the Defendant was Tenant by the Curtesy of Lands in Ireland, and had cut down and sold the Trees off the Estate, and that the Reversion belonged to the Plaintiff and two others in Coparcenary: Upon a Case made for the Opinion of the Court, it was resolved. 1. That in local Actions, as in Trespass quare clausum fregit, the Plaintiff cannot prove a Trespass but where he lays it, nor lay it in any other Place than where it is; but it is otherwise in Actions transitory, as Trover: Ergo, here he may lay the Conversion here, and prove it in Ireland. Vide Style 331. 2dly, One Jointenant or Tenant in Common, or Parcener cannot bring Trover against another; if he does, it is good Evidence upon Not guilty: But if one Jointenant brings Trover against a Stranger, in that Case the Defendant may plead it in Abatement, but cannot take Advantage of it in Evidence. 2 Lev. 113. Cro. El. 554.

One Jointenant, &c. cannot bring Trover against his Companion, but may against a Stranger, and it is only pleadable in Abatement.

## Blackham's *Case*. Hill. 7 Ann. Coram Holt *C. J. At* Nisi Prius *in* Middlesex.

(30) Sentence of the Spiritual Court in a Cause within their Jurisdiction, is conclusive Evidence in the Point tried; otherwise of a collateral Matter.

IN Trover upon Evidence at a Trial before Holt C. J. at the Sittings in Middlesex, the Case was, The Plaintiff proved the Goods to be in his Possession, and to be taken away by the Defendant: The Defendant shewed that these were the Goods of Jane Blackham in her Life-time, and that the Defendant had taken out Letters of Administration to her, and so was intitled to the Goods: Upon this the Plaintiff proved that some few Days before her Death, she was actually married to him; and in answer to that it was insisted that the Spiritual Court had determined the Right to be in the Defendant; for they could not have granted Administration to the Defendant, but upon supposing there was no such Marriage, and that this Sentence being of a Matter within their Jurisdiction was conclusive, and could not be gain-said in Evidence. Et per Holt C. J. A Matter, which has been directly determined by their Sentence, cannot be gain-said: Their Sentence is conclusive in such Cases, and no

Evidence shall be admitted to prove the contrary; but that is to be intended only in the Point directly tried; otherwise it is if a collateral Matter be collected or inferred from their Sentence, as in this Case, because the Administration is granted to the Defendant, therefore they infer that the Plaintiff was not the Intestate's Husband, as he could not have been taken to be, if the Point there tried had been married or unmarried, and their Sentence had been, Not married.

## *Lady Dowager* Lindsey *versus Lord* Lindsey. Mich. 8 Ann. B. R.

(31) Ejectment. Title, Recovery in Dower; Defendant offer'd to prove a Term of Years prior to the Title of Dower, and disallowed.

IN Ejectment the Plaintiff made Title by a Recovery in Dower, and produced in Evidence the Record of the Judgment, the Habere facias seisinam, &c. The Defendant offered to prove a Term of ninety-nine Years subsisting, and that prior to this Title, but it was disallowed; for if he had pleaded this in Bar of the Writ of Dower, yet the Plaintiff must have recovered with a Cesset executio, and the Defendant had a proper Time to have pleaded it then, and has slipp'd his Opportunity: Also a Chattel-Interest was at Common Law bound by a Recovery in a real Action, so that the Demandant had an immediate Execution, without Regard to the subsisting Term: And tho' by the Statute H. 8. a Termor may falsify; yet it must be the Termor himself, and not another for him.

## Savage's *Case.* Coram Trevor *C. J. At* Nisi Prius.

(32) Condemnation after Original, in foreign Attachment brought before Original, is a Discharge on Non Assumpsit. Vide ante contra.

IN Assumpsit upon a Note for 10 l. 15 s. given by the Defendant to the Plaintiff, and Non Assumpsit pleaded, upon Trial the Plaintiff produced and proved the Note. The Defendant in discharge of himself produced the Record of a foreign Attachment, wherein the said Debt was attached by the City-Process for the Satisfaction of a Debt demanded there of the Plaintiff, and was there condemned: And it was ruled by Trevor C. J. That this was a good Discharge; but that if the Plaintiff in this Action could have shewed the Original, wherein he declared to be precedent to that Attachment, so that it had appeared that this Court was possessed of an Action for the Demand of this Debt before it was attached, then should the Plaintiff have recovered his Debt notwithstanding such Evidence; but the Declaration in the Record here was betwixt the Time of the Attachment and of the Condemnation.

[illegible] *versus* Layfield, & al'. Coram Holt *C. J.* *At* Nisi Prius.

(33) Where the Plaintiff goes upon the Credit of both Partners, the Act of one is Evidence against the other, unless he shews a Disclaimer.

IN an Action on the Case for Money had and received to the Plaintiff's Use, it appeared upon Evidence, that Layfield and the other Defendants were Bankers and Partners, and that the Plaintiff had given Layfield 20s. for which he received a Ticket in the Double-Exchange Lottery, and Layfield undertook to pay what Benefit should happen thereupon: That the Ticket came up a 40 l. Benefit, and for that Money the Action was brought; and it was objected for the Defendants, That the Action was brought against Layfield and his Partners, and it did not appear that any had undertaken to be Trustees in the Lottery but Layfield, and therefore he only ought to be charged, and not his Partners; to which Holt C. J. answered, That it appeared they were Partners in their Trade, and Goldsmiths, and the Adventurers put their Money in upon the Credit of the several Goldsmiths, that had undertaken to pay the Benefits, and it should be presumed the Act of Layfield was the Act of the other, and should bind him, unless he could shew a Disclaimer, and a Refusal to be concerned in it; and accordingly the Plaintiff had a Verdict for forty Pounds.

# Excommunicato Capiendo.

## King *versus* Fowler. Mich. 12 Will. III. B. R.

(1) Excommunicato capiendo pro quibusdam causis subtraction. decimarum sive al. Jur. Eccleſiaſt. quaſh'd for Incertainty.

ON a Habeas Corpus the Return was, That Fowler was taken and in Cuſtody by a Writ of Excommunicato capiendo, and the Excommunication was in the Writ recited to be pro quibuſdam cauſis ſubtractionis decimarum ſive aliorum Jurium Eccleſiaſticorum, and becauſe this Return was incertain, the Court was moved that he might be diſcharged; and the Queſtion was, Whether this Return was incertain, and whether that Incertainty would viciate the Writ, &c? And the Court reſolved,

1ſt, That the Return was uncertain; for that the alia Jura might be ſuch Matters as were out of their Juriſdiction, and they ought to ſhew the Matter was within their Juriſdiction; for of that the King's Courts are to be Judges, and not they themſelves.

Cauſe muſt be expreſs'd in the Writ ſince the Stat. 5 Eliz.

2dly, The Cauſe of Excommunication muſt be ſet forth in the Writ. At Common Law the Writ De Excommunicato capiendo was always general pro contumacia not containing a ſpecial Cauſe: And the Writ was returnable in Chancery, and founded on a Significavit or Certificate of the Biſhop, which Certificate ſet forth the Cauſe before, and the Party could not be diſcharged but by Superſedeas in Chancery, if the Cauſe were inſufficient: But now the Cauſe muſt be ſet forth in the Writ De Excommunicato capiendo it ſelf, becauſe by the Stat. 5 El. the Writ is made returnable in this Court, which would be to no purpoſe, if the Cauſe were not to be ſet forth in the Writ, and this Court Judge of that Cauſe.

3dly, The Court held they might diſcharge the Party upon the Inſufficiency of the Return: Before the 5th Eliz. there were no Diſcharges in this Court on Excommunicato capiendo's, but where a Man was excommunicate pending a Prohibition: Now the Caſe is altered, for this Court may quaſh the Writ of Excommunicato capiendo or award a Superſedeas, becauſe this Court are Judges of the Cauſe and have it before them, and the Party cannot go into Chancery for a Superſedeas now, becauſe the Writ is returnable here.

Sc-

Accordingly the Writ was quashed and this Special Entry made on the Habeas Corpus, viz. That the Party was discharged, because the Writ De Excommunicato capiendo was quashed.

## Domina Regina *versus* Hill. Pas. 13 Will. III. B. R.

(2) IN a Writ of Excommunicato capiendo the Recital of the Significavit was, That he was excommunicated for not paying the Costs in quodam negotio puerorum educationis sive instructionis sine aliqua licentia in ea parte prius obtenta, and the Writ was quashed for Incertainty, because it might be a Teaching to fence or dance, and not Letters.

## Domina Regina *versus the Bishop of St.* Davids. Mich. 1 Ann. B. R.

(3) H. Taken on Excommunicato capiendo cannot come into B.R. but by Habeas Corpus, and that not before the Return of the Process.

THE Defendant was taken upon a Writ of Excommunicato capiendo, and being in Custody in Newgate prayed a Habeas Corpus, and was brought into Court thereupon, and it appeared by the Return, that the Writ of Excommunicato capiendo was not yet returnable: And the Court held, 1st, That one taken on a Writ of Excommunicato capiendo cannot come into this Court but by Habeas Corpus, and if he be brought in before the Writ is returnable, he shall not be allowed to plead or move to quash the Writ.

2dly, The Writ of Excommunicato capiendo recites the Significavit, which is in Chancery, but the Writ is brought into this Court, and is inrolled here before it goes to the Sheriff, which Inrollment is to inform the Court, that at the Return of the Excommunicato capiendo, they may award farther Process, as the Case requires.

3dly, If by the Recital of the Significavit it appears that there was no Cause for the Writ, the Court of King's Bench may quash it, and the Court of Chancery cannot, tho' the Significavit be there.

## Domina Regina *versus* Sangway. Mich. 1 Ann. B. R.

(4) THE Defendant was excommunicated pro quadam causa jactitationis maritagii, and taken upon a Capias with Penalty, and brought up by Habeas Corpus; and Mr. Cheshire took two Exceptions to the Writ; 1st, That this not being one of the nine Causes mentioned in 5 Eliz. c. 23. no Penalty ought to have been in the Writ. 2dly, That no Addition was given the De-

Defendant: And the Court held, That for any of the nine Causes mentioned in the Statute there ought to go a Capias with a Penalty, and be an Addition in the Writ; but in other Cases no Addition was necessary, and tho' there was a Penalty, yet the Court would not discharge the Party of the Process, but discharge the Penalty only; tho' the Law was taken to be otherwise heretofore: But that for the Want of Addition in cases where that was necessary, the Party should be discharged upon Motion.

# EXECUTORS.

## King *versus* Ayloff. Trin. 1 W. & M. B. R.

(1) Executor may bring Error to reverse the Attainder of Testator.

EXECUTOR brought a Writ of Error to reverse an Attainder of High Treason of his Testator, and Holt C. J. doubted whether it lay for the Executor? For by Reversal the Blood and the Land is restored, which is of no Advantage to him, and the Goods were forfeited by the Conviction of the Testator, and not by the Attainder: But the other three Justices against him; for he is privy to the Judgment and may have Loss thereby. Vide 3 Cro. 237, 275, 558.

## Whitehall *versus* Squire. Pas. 2 W. & M. B. R.

(2) Administrator cannot bring Trover for a Chattel after his Consent to the Defendants, having it before Administration granted. Q.

IN an Action of Trover by the Plaintiff as Administrator of J. M. for a Gelding, on Not guilty pleaded the Jury found a Special Verdict, viz. That J. M. was possessed of the Gelding and put him to the Defendant to pasture, and died Intestate: That before Administration granted the Plaintiff desired the Defendant to bury J. M. decently, who accordingly buried him, and laid out 23 l. therein, whereupon the Plaintiff agreed, That the Defendant should have the Horse in part of Satisfaction of funeral Charges, and for 13 l. Residue thereof gave him his Note; afterwards the Plaintiff took out Administration, and now brought Trover for the Horse; and Holt C. J. was of Opinion that the Action

Action well lay; for that the Defendant was a tort Executor, and the Plaintiff's Consent, when he had nothing to do, would not alter the Case; for if he had then released, yet he might have taken Administration, and brought an Action afterwards; but Dolben and Eyre Justices contra, and the Defendant had Judgment.

## Shelley's *Case.* Trin. 5 W. & M. B. R.

(3) Evidence upon Plene Administravit.

IN an Action upon the Case against an Executor, upon Plene administravit pleaded, three Points were declared per Holt C. J. 1st, That the Plaintiff must prove his Debt, otherwise he shall recover but a 1 d. Damages tho' there be Assets, for the Plea only admits the Debt, but not the Quantity. 2dly, That all separate Debts mentioned in the Inventory shall be counted Assets in the Executor's Hands; for that is as much as to say that they may be had for demanding, unless the Demand or Refusal be proved. 3dly, That for strictness no Funeral Expences are allowable against a Creditor, except for the Coffin, Ringing the Bell, Parson, Clerk and Bearers Fees, but not for Pall or Ornaments.

## Harding *versus* Salkill. Mich. 5 W. & M. B. R.

(4) Debt against Executor, That he is Administrator, is not in Bar but Abatement.

IN Debt against the Defendant as Executor, the Defendant pleaded in Bar, That he was Administrator relying upon Dy. 305. pl. 61. But the Court held it no Plea in Bar; for if an Action be brought against an Administrator by the Name of Executor, and Judgment had therein, this Judgment may be pleaded in Bar to another Action brought against him as Administrator.

## Newton *versus* Richards. Pas. 6 W. & M. B. R. Rot. 67.

(5) Scire Facias on a Judgment against the Testator. Plene Administravit without shewing how, is ill on special Demurrer.

SCIRE FACIAS upon a Judgment against the Testator was now sued against his Executor, who pleaded Plene Administravit & nulla bona die impetrationis primi brevis de Scire Facias nec unquam postea. The Plaintiff demurred specially, and shewed for Cause that the Defendant did not shew how he had administred, and had Judgment; for against a Judgment he ought to shew how he administred, but it had been good upon general Demurrer. Vide Mo. 158. All. 48. 3 Keb. 258. 2 Keb. 736. 3 Cro. 575.

## Billinghurst *versus* Speerman. Pas. 7 Will. III. B. R.

(6) In Debt for Rent, Executor may plead no Assets, and that the Premisses are of less Value than the Rent.

If an Executor has a Term, and the Premisses are of less Value than the Rent reserved thereon, in an Action brought against him in the Debet and Detinet, he may plead the special Matter, viz. That he has no Assets, and that the Land is of less Value than the Rent, and demand Judgment if he ought not to be charged in the Detinet tantum. This Holt C. J. said was his Opinion, and that Hale was of the same Opinion, and it was but reasonable, because an Executor could not waive for the Term only; for he must renounce the Executorship in toto or not at all.

(7) Williams versus Crey. Pas. 7 W. 3. B. R. Vide this Case in Title Action sur le Case. Pl. 2. Pag. 12.

## Fooler *versus* Cooke. Mich. 7 Will. III. B. R.

(8) Action against Executor, Plea that he is Administrator, need not traverse that he intermeddled before Administration granted.

PLAINTIFF brought Assumpsit against the Defendant as Executor; Defendant Petit judicium si ipse ad billam præd. respondere debeat quia dicit, That Administration was granted to him, in which Case he ought to be sued as Administrator and not as Executor, and concludes Petit judicium si ad billam prædict. respondere compelli debeat, &c. The Plaintiff demurred, and it was objected, first, That he had not traversed absque hoc, that he administred as Executor. 2 Brownl. 184. Sed non allocatur: For it is better without a Traverse, and the Plaintiff's Declaration is well confessed and avoided; for an intermeddling with the Goods intitles the Plaintiff to an Action against the Defendant, and now he has shewed the Cause of his intermeddling, and upon what Account, which, if true, he ought to be charged accordingly; 'tis true, if he intermeddled before Administration, he may be charged as Executor of his own Wrong, but that shall not be intended; for all Acts are intended to be rightful till the contrary appears; and if the Case were so, the Plaintiff ought to reply it: A Traverse would be impertinent, for tho' the Declaration supposes an intermeddling, yet it does not suppose how nor in what manner, and to deny an intermeddling as Executor de son tort, is to traverse that which is not alledged. Et per Holt C. J. The Difference is between suing one as Executor, as in this Case, for then there needs no Traverse, and suing one as Administrator to J. S. for then, if the Defendant pleads he is an Executor, he must go on and traverse absque hoc that the said J. S. died intestate; and the Reason is, because, unless there was

Plea that he is an Executor, must traverse the dying Intestate.

a dying Intestate, no Action can be brought against one as Administrator, and to say he was made Executor, is by Implication only an Answer to the dying Intestate. 2dly, 'Twas objected, That the Bill could not be abated upon the Conclusion of this Plea, which was to the Jurisdiction of the Court and not to the Bill; and the Court inclined that every Plea ought to have its apt Conclusion, and that they ought not to abate the Plaintiff's Writ or Bill in this Case, because the Defendant had not prayed it.

Proper Conclusion in Abatement.

## Powers *versus* Clerk. Trin. 9 Will. III. B. R.

(9) Debt against Executor of J. S. Plea that J. S. died Intestate, and he is Administrator, he need not traverse that he intermeddled before Administration granted.

THE Plaintiff brought Debt upon an Obligation against the Defendant as Executrix of J. S. The Defendant pleaded that J. S. died Intestate, and that Administration was committed to her & pet. judicium si ipsa ad billam prædict. respondere debeat, &c. Upon this the Plaintiff demurred, and insisted that the Defendant should have traversed, absque hoc that she intermeddled before Administration committed to her; for if she did, she made her self liable as a tort Executrix, and cited 3 Cro. 566. 810, 102. 3 Leon. 197. Yelv. 115. Brownl. 97. Holt C. J. & Cur. Such a Traverse had been ill; for such intermeddling is not alledged, and the Defendant ought not to traverse that which the Plaintiff doth not alledge in his Declaration.

## Aston *versus* Sherman. Mich. 9 Will. III. B. R.

(10) Pleading of six Judgments is a Confession of Assets for above five, and if the Replication takes Issue upon the Riens ultra a certain Sum, it is ill.

DEBT upon a Bond against an Executor; the Defendant pleaded six several Judgments for 100 l. each, and that he had not Assets ultra 10 l. which was bound by them; the Plaintiff replied severally as to five of the Judgments, that they were kept on Foot by Fraud, and prayed Judgment for his Debt and Damages in the Conclusion of each Plea; and as to the sixth he pleaded that the Defendant had Assets, ultra the 10 l. sufficient, &c. Et hoc petit quod inquiratur per patriam. Et per Holt C. J. it was adjudged, first, That the Plaintiff may reply severally as to each, and that it is at his Election to reply to all, or some, or any one of the Judgments set up by the Executor. But, 2dly, That the Plaintiff's Replication is wrong in this, that he pleaded as to five Judgments per fraudem, and as to the last, that he has Assets ultra, concluding to the Country; for when a Man pleads six Judgments, he confesses Assets for above five, so that it is an Allegation of what is already confessed, and driving him to an unnecessary Issue thereupon; but because there are Precedents this Way, as 1 Saund. 336. the Plaintiff had leave to discontinue.

## Dominus Rex *versus* Sir Richard Raynes. Mich. 10 Will. III. B. R.

(11) Ordinary cannot refuse Probate to an Executor, because incapax.

A Mandamus issued to grant Probate of the Will; the Ordinary returned, That the Executor was an absconding Person, incapax, &c. And this Return was held insufficient; for that there is a Will is admitted, and since the Testator has thought the Executor a proper Person to be intrusted with his Affairs, the Ordinary cannot adjudge him otherwise upon a Disability by the Canon Law, for that is not admitted here, but as far as it has been received from Time immemorial; Per Holt C. J. and a peremptory Mandamus was granted.

Neither can the Ordinary insist upon Security from the Executor; for the Testator has thought him able and qualified, and he has a temporal Right which he cannot sue for before Probate; and there have been no Precedents nor Practice of this Nature.

## Wankford *versus* Wankford. Intr: in C. B. Mich: 11 Will. III. Rot. 311, 312. & Intr. in B. R. Hill. 1 Ann. Rot. 484.

(12) Obligor is made Executor to Obligee and administers some of the Goods, but does not prove the Will, and dies. The Debt is extinguished, and the Administrator cum testamento annexo can have no Action for it.

IN an Action of Debt upon two Bonds, one for 240 l. dated 1 Nov. 24 Car. 2. and the other for 800 l. dated the 10th of January the same Year, by Elizabeth Wankford, Widow, Administratrix with the Will annexed of Thomas Shelley, against Robert Wankford, Son and Heir of Robert Wankford the Obligor, by which Bonds the Obligor bound himself and his Heirs, &c. The Defendant prayed Oyer of the Letters of Administration, and therein appeared the Will of Thomas Shelley, in which was this Clause: And I do hereby ordain and make the said Robert Wankford my Son in Law (who was the Obligor) full and sole Executor of this my last Will, to pay my Debts and Legacies; and after the Oyer of the Letters of Administration pleaded in Bar, That Thomas Shelley the Obligee, the 13th of July, 30th Car. 2. made his Will, and Robert Wankford the Obligor in the said Bonds, his Executor, and afterwards, viz. the 20th of July the same Year died, after whose Death Robert the Obligor took upon him the Burthen of the Execution of the said Will, and administred divers Goods and Chattels which were the Testator's at the Time of his Death, and afterwards, the 17th of August 1686. Robert the Father made his Will, and made the Plaintiff his Executrix, and afterwards the same Day died, after whose Death the Plaintiff took upon her the Burthen of the Execution of the last mentioned Will, and proved

it long before the Grant of Administration above set forth; the Plaintiff replied Proteſtando, That the Defendant's Plea is insufficient for Want of alledging that Robert the Obligor proved Shelley's Will, or that Elizabeth the Plaintiff proved it, and that it does not traverse or deny Niſi argumentative, that Shelley died inteſtate; pro placito ſhe ſays that Robert the Obligor never proved the Will of Shelley, but died soon after him without proving the Will; and that it is true, That the Plaintiff was made Executor of the Will of Robert the Obligor, and after his Death proved it, and took upon her the Execution thereof; and farther says, That before the proving of the Will of Robert the Obligor by her, as aforeſaid, or the Administration of the Goods of Shelley to her committed, viz. The 31ſt of July 1689, ſhe refuſed before the Ordinary to prove Shelley's Will, or to administer as Executrix to him, whereby Shelley died inteſtate, and Administration of his Goods and Chattels was committed to the Plaintiff, and that Tho. Shelley left no Goods and Chattels sufficient ad ſatisfaciend. ejus debita & ſeparales denar. ſummas per ipſum diverſis perſonis debit. & ſolubiles & adhuc inſolut. exiſten. præter debitum prædict. ſuperius petit. ac ei debit. per & ſuper ſcripta Obligatoria prædict. To this Replication the Defendant demurred generally, and the Plaintiff joined in Demurrer, and Judgment was given in C. B. for the Defendant, and the Plaintiff brought a Writ of Error upon that Judgment in B. R. and aſſigned the general Errors, and after the Cauſe had been ſeveral Times argued, the Court delivered their Opinions ſeriatim, that the Judgment ought to be affirmed: Gould. J. ſaid, That the Caſe was in ſhort, Shelley the Obligee makes his Will, and makes Robert Wankford the Obligor his Executor, who dies without proving his Will, and makes his Wife the Daughter of Shelley his Executrix, who proves the Will, and alſo takes Administration to Shelley her Father with his Will annexed, and whether this be a Releaſe of the Bond, was the Queſtion: He ſaid that if R. W. had proved the Will, then that had been clearly a Releaſe, for it was agreed, That if the Obligee makes the Obligor his Executor, and the Obligor proves the Will, it is a Releaſe; but the Queſtion is, Whether the Obligor's not proving the Will will alter the Caſe, and he ſaid that he thought it did not: He put the Caſes of 20 E. 4. 17. a. Br. Exec. 114. 21 E. 4. 3. 81. Plowd. 184. That if ſeveral Obligors are bound jointly and ſeverally, and the Obligee makes one of them his Executor, it is a Releaſe of the Debt, and the Executor cannot ſue the other Obligor: So if the Obligee makes the Obligor and J. S. his Executors, altho' the Obligee never adminiſters, yet the Action is gone for ever; and altho' the Obligor dies and makes an Executor, the other Co-executor of the firſt Teſtator who ſurvives, ſhall not have an Action againſt the Executor of the Obligor; he ſaid that this

Where ſeveral are jointly and ſeverally bound, if the Obligee makes one of the Obligors his Executor, either ſole or jointly with a Stranger, the Debt is releaſed, tho' the Obligor never adminiſters.

4

this Case was stronger; that it appeared here that tho' the Executor had not proved the Will, yet he had administred, and by that Means had put it out of his Power to refuse the Executorship, and that the proving the Will was only to signify to the Spiritual Court that there was a Will, because, in Case there was none, then there was a dying Intestate, and the Commission of Administration belongs to them. He said, That an Executor is a compleat Executor to all purposes but bringing of Actions, before Probate; that before Probate he may release an Action, may be sued, may alien, or give away the Goods or otherwise intermeddle with them, and for this he cited Plow. 280. 5 Co. 28. a. 1 Mod. 213. and he said that this would be the Diversity, That if the Executor refused the Executorship, then he refused to accept the appointing him Executor as a Release, and by Consequence the making him Executor will have no Operation; but if he does not refuse the Executorship but administers the Goods, then that will be a Release; and he cited also the Case of Abram versus Cunningham. 2 Lev. 182. 1 Ven. 303. where it was resolved, That Administration committed where there was a Will and an Executor, tho' the Will was concealed, was void, and that it was all one, tho' the Executor of the Will, when it did appear, refused to intermeddle. He said, That if there were several Executors, and all died before Notice of the Will; yet this making the Obligor Executor would amount to a Release. That there was no Case express in Point, viz. That it is a Release where the Executor never proves the Will, but that it is cited, being put generally without mentioning whether the Will was proved or not, and that upon such a general putting and agreeing it to be a Release, it is to be concluded that there is no Diversity. That where the Executor does administer, which he appears to have done in this Case, and by that has put it out of his Power to renounce, it will be a Release, like the Case in 3 Co. 26. b. A. makes an Obligation to B. and delivers to C. to the use of B. 'tis the Deed of A. immediately, but B. may refuse it, and by that the Bond will lose its Force; so of a Gift of Goods and Chattels, if a Deed be delivered to the Use of the Donee, the Goods and Chattels are in the Donee immediately before Notice or Agreement; but the Donee may refuse, and by that the Property and Interest shall be devested.

Executor is compleat Executor before Probate for all purposes but bringing Actions.

Obligation delivered by A. to C. to use of B. is a Deed till B. refuses.

Powys J. said, That an Executor is a compleat Executor as to every Intent but bringing of Actions before Probate, so that he may release a Debt due to the Testator, assent to a Legacy, intermeddle with the Goods of the Testator; and he cited, besides the Books already cited, 36 H. 6. 7. Dy. 367. and argued from the Form of the Probate of the Will; but an Administrator cannot act before Letters of Administration granted to him: He said, the Executor by acting would become liable to the Suits of all the Creditors of the

the Testator before Probate, which R. W. the Executor in the present Case had made himself liable to by administring the Goods of the Testator, and therefore according to the known Maxim of the Law, Qui sentit onus sentire debet & commodum, that this would amount to a Release of the Debt without Probate; he cited the Case of Abram versus Cunningham, and the Opinion of Twisden (which is remembred in the Report of that Case in 1 Ven. 303.) which Opinion was also cited by Gould J. in his Argument, That tho' the Executor Debtor refuses, yet the Action is gone, and the Administrator cannot sue him, but he seemed not to rely upon it, but said it differed much from this Case: That here H. should have a Burthen, such as an Executor is put upon whether he would or no: He said, That the Diversity would be where the Executor did actually refuse before the Ordinary, and where he did not actually refuse, but only did not intermeddle with the Administration; in the first Case it would be no Release, but it cannot be otherwise in the second, and more clearly so, where the Executor did intermeddle with the Administration as he did in the present Case.

Powell J. said, That the Case was, the Obligee makes the Obligor his Executor who dies before he proves the Will; and the Question is, Whether the Debt be extinct or the Administrator of the Obligee may sue the Heir? He cited the Case 21 E. 4. 4. If the Debtee makes the Debtor and another his Executors, altho' the Debtor never administers, yet the Action is lost for ever, and said it was agreed on all Hands, That if the Executor had proved the Will, the Action had been gone, and that the Case 21 E. 4. had been confirmed since by many Authorities, and that none of those Authorities take any Notice of the Probate of the Will, and if there were any such Diversity, it could not but have been taken Notice of in some of them; but the Reason that they go upon is that a personal Action once suspended by the Act of the Party, is gone for ever, and tho' in some Cases it may be suspended and revive again, yet never where that Suspension is from the Act of the Party. He said, That some Books say the Action is gone, some say the Debt is gone, and some say the Debt remains; but they will all be reconciled by this, That the Debt will be Assets; he said he could not see how the Probate of the Will altered the Case; for the Executor has assented to the Executorship by intermeddling with the Goods, and the Act of the Ordinary has no Effect; because the Ordinary has no Right in any Case where there is an Executor, and all the Executor's Right is under the Will, and all that Right that he hath, he has by the Will. He is in Possession of all the Testator's Goods before Probate, and may bring Trover or Detinue; so he may avow for Rent where a Reversion for Years comes to him from his Testator: But tho' he may commence an Action before Probate, yet he cannot indeed go

Executor may commence an Action before Probate, but not declare. 9 E. 4. 47.

3 on

on with the Action; for when he comes to declare, he must produce in Court the Letters testamentary; but now if Probate were necessary to make him an Executor, he could not bring the Action without Probate, as is evident in the Case of an Administrator, in which Case there is no Right till Administration committed; for till then the Administrator cannot bring an Action; but in the Case of an Executor, the not proving the Will is only an Impediment to the Action; but the Right of Action is the same before Probate as after; and the Reason why an Executor cannot go on before Probate is for the inforcing of Probates, as is said in Hutton 31. because upon Probates there are Inventories exhibited and other acts done by the Executor, which are for the Benefit of the Creditors of the Testator. He said, That if Administration of the Goods, &c. of the Obligee was committed to the Obligor, that was but a Suspension of the Action and no Extinguishment of the Debt, but the Reason of that is, because the Commission of Administration is not the Act of the Obligee, and so is 8 Co. 136. Sir John Needham's Case; he said, That unless the Executor proved the Will, he could not continue the Executorship, and so is Dy. 372. That in such Case, Administration de bonis non must be committed; but that Case was the first Case of it, and it appears by the Case in 1 Leon. 271. (where Debt was brought against one as Executor in such a Case, and the Defendant pleaded in Abatement of the Writ, That he was an Executor of an Executor, and therefore ought to have been so sued, and not as an immediate Executor; and the Plaintiff replied that the first Executor died before Probate, and the Writ was awarded to be good) that there was no Notice taken amongst the Lawyers of that Opinion, and indeed the Opinion seemed to have proceeded rather from a Compliance with the Usage of the Spiritual Court, than from any Ground in the Reason and Nature of the Thing; for the Power the Executor has of making an Executor to the first Testator is by the Will of the first Testator, and not at all from the Act of the Ordinary, and it is by an implied Power given to the first Executor by the Will of his Testator, and so is Plowd. 290. a. All the Interest of the Administrator is from the Ordinary, but all an Executor's Interest is from the Testator. He said, That this Extinguishment was not wrought by Way of actual Release, because then the Debt could not be Assets; but by Way of Legacy or Gift of the Debt by the Will, and where that Debt, or any Part of it is expresly devised by the Will to pay a Legacy, it will be Assets to pay such Legacy, because the Testator did not intend to extinguish the whole Debt, and so is the Case in Yelv. 160. but where there is no such special Devise, the Debt shall be extinguished notwithstanding any other Legacies. In 1 Ro. 920, 921. it is given as the Reason why the Debt remains Assets in the Hands of the Exe-

Where Administration is committed to Debtor, the Action is only suspended.

Where Debtor is made Executor, the Debt is extinguished, not by Way of Release, but Legacy; and it is Assets.

Executor, that it is extinct only by the Will. A Man cannot in strictness make a Release by Will, but the Debt will be extinguished in such Case with the Diversity before taken: He said, That there would be a great Diversity where the Obligee made the Obligor Executor, and where the Obligor made the Obligee his Executor, for in the last Case the Debt is not extinct, but only upon supposal that the Executor has Assets, which he may retain to pay himself; for tho' the Obligee may give the Obligor the Debt, yet that will not hold vice versa, but in Case of Failure of Assets the Executor may sue the Heir: Indeed where the Executor has Assets, the Debt is gone, but that is because he may retain and pay himself, and so is 12 H. 4. 21. Plow. 185. b. But if he has no Assets, the Action is never so much as suspended, for the Executor may sue the Heir at the very Day, and so it is not within the Rule of a personal Action once suspended, &c. He said, That there had been an Objection made from the Form of the Letters of Administration in this Case; That the Court does indeed take Notice of the Forms used in the Spiritual Court, and where there is no Probate of the Will (as in this Case) they grant an immediate Administration, and not an Administration de bonis non administratis, which is done where the Executor has actually administred the Goods of the Testator; but this Form has not been constant, and Administrations de bonis non administratis by the Executor have been granted in the former Case, and so it was done in the Case of Heydon and Wolfe. Palm. 153. 2 Cro. 614. Hutt. 30. He said, That if the making the Obligor Executor did extinguish the Debt by Way of Release, then it would work Nolens volens: But if it took effect as a Legacy, then the Obligor refusing the Executorship does also lose the Benefit of what he would have had by being Executor, and consequently the Debt will not be extinguished: But he said that he would not determine that Point, because it appeared upon the Pleading, That the Executor administred Goods of the Testator, which is an Agreement to the Executorship, and so strong an one that he could not afterwards refuse it; and so the want of Probate would not alter the Case.

If Obligee is made Executor to Obligor, and there is not Assets, he may sue the Heir.

Where Executor dies, not having proved the Will, Ecclesiastical Court grants an immediate Administration, and not de bonis non, &c.

Holt C. J. The Pleadings in this Case are perplexed; but upon the whole Matter the Case is but this, viz. R. W. is bound to S. S. who makes R. W. his Executor, and dies; R. W. administers several Goods, but dies before Probate; the Plaintiff takes Administration to S. S. and brings an Action on the Bond against the Heir of R. W. and the Question is, The Obligee having made the Obligor Executor, and he having administred some of the Goods, tho' not proved the Will, Whether that will amount to a Release? And I agree it is a good Release as this Case stands.

There have three Objections occurred, which render this Point considerable:

1st, That when a Will is made, and H. Executor thereof, if the Executor does administer, but dies before probate of the Will, an immediate Administration is committed; whereas, if the Will had been proved, the Administration must be de bonis non Administrat' by the Executor.

2dly, That the constant Course of the Spiritual Court is, where the Executor dies before probate, to make the Ground and Foundation of their granting Administration to be, because the Executor died ante onus executionis testamenti super se susceptum.

3dly, That tho' the Executor does administer, yet if he dies before probate, his Executor cannot be Executor to the first Testator. But notwithstanding these Objections, I hold that the Obligee's making the Obligor his Executor is a Release in that Case, and that for these Reasons:

1st, Because by being made Executor he is the Person, that is entitled to receive the Money due upon the Bond before probate, and as he is the Person that is entitled to receive it, he is also the Person that is to pay it, and the same Hand being to receive and pay, that amounts to an extinguishment: The Rule does not indeed always hold, but is liable to these Limitations:

Where the same Hand is to receive and ought to pay, it is an Extinguishment.

1st, If the Obligor makes the Obligee, or the Executor of the Obligee, his Executor, this alone is no Extinguishment tho' there be the same Hand to receive and pay; but if the Executor has Assets of the Obligor, it is an Extinguishment, because then it is within the Rule, That the Person who is to receive the Money, is the Person who ought to pay it; but if he has no Assets, then he is not the Person that ought to pay, tho' he is the Person that is to receive it; and to that purpose is the Case of 11 H. 4. 83, and the Case of Dorchester versus Webb, 1 Cro. 372. 1 Jo. 345. Where the Obligee makes the Executor of one of the Obligors his Executor, who has no Assets, this is no Discharge of the Debt; because, tho' this Executor, as Executor of the Obligee, is the Person to receive; yet having no Assets of the Obligor, he is not the Person who ought to pay: But if the Executor of the Obligee is made Executor to one of the Obligors, and has Assets of the Obligor, the Debt is extinct, and the Executor cannot sue the other Obligor, for the having Assets amounts to Payment. And the same Point was again resolved, Hill. 24 & 25 Car. 2. B. R. In the Case of Lock and Crosse, where the Obligee was made Executor to one of the Obligors, and in an Action by him against the other, where the Matter was pleaded, the Plea was held to be

Executor of one of the Obligor's having no Assets, made Executor to Obligee, it is no Extinguishment.

naught, because he did not shew to what Value the Assets were that he administred; but if the Defendant had shewn that he administred Goods to the Value of the Debt in demand, it had been a good Plea.

Administration committed to Obligor.

2dly, Suppose the Obligor takes Administration to the Obligee, in that Case the same Person has a Right to receive the Money, and is to pay it, and yet that will be no Extinguishment, and so is 8 Co. 136. Sir John Needham's Case; but the Reason of the Diversity is, because the Administration is made such by Act of Law, but the Executor by the Act of the Testator, and for that Reason it is no Extinguishment; but if the Administrator having no Assets pays a Debt of the Intestate to the Value of the Bond, out of his own Money, that will be a Release; tho' I do not know that it has ever been adjudged so.

Obligee taking Obligor to Husband is an Extinguishment; otherwise of Executrix of the Obligee.

3dly, If the Executrix of the Obligee takes the Obligor to Husband, That is no Extinguishment of the Debt, and so is the Case of Crosman and Read. Co. Litt. 264. 1 Leon. 320. Moor 236. But if the Obligee herself takes the Obligor to Husband, that is an Extinguishment of the Debt, because it would be a vain Thing for the Husband to pay the Wife Money in her own Right; but he may pay Money to her as Executrix, because, if she lays the Money so paid to her by it self, the Administrator de bonis non of her Testator (if she dies Intestate) shall have that Money as well as any other Goods that were her Testator's, for if the Goods of the Testator remain in Specie, they shall go to his Administrator de bonis non, because in that case it is notorious which were the Goods of the Testator, and they are distinguishable; and there is the same Reason where Money is kept by it self, and the Husband permits it so to be, but if the Husband seizes it, it will be his, and will be a Devastavit. In case of a Feme Covert made Executor, the Husband has a great Power: He may administer and bind her tho' she refuses, and may release the Debts of the Testator, so is 33 H. 6. 31. But the Wife cannot do any Thing to the Prejudice of the Husband without his Consent.

Feme Executrix. If the Husband converts Goods or Money, they become his, and it is a Devastavit.

My second Reason is, That when the Obligee makes the Obligor his Executor, tho' it is a Discharge of the Action, yet the Debt is Assets, and the making him Executor does not amount to a Legacy, but to Payment and a Release. If H. be bound to J. S. in a Bond of 100 l. and then J. S. makes H. his Executor; H. has actually received so much Money and is answerable for it, and if he does not administer so much, it is a Devastavit.

Debtor made Executor, the Debt is Assets.

3dly, By administring the Executor has accepted of and taken upon him the whole Administration, and is a compleat Executor. He is before Probate intitled to receive all Debts due to the Testator, and all Payments made to him are good, and shall not be

What Executor may do before Probate.

defeated, tho' he dies and never proves the Will. All the Testator's Goods are actually in his Possession, tho' at what Distance soever, and he may maintain Trover for them; and as he may maintain a possessory Action, so he may avow for Rent where a Reversion of a Term comes to him; and for such Rent as has accrued after the Death of the Testator he may avow before Probate, because the Reversion is vested in him by the Will; but for such Arrears as accrued due in the Testator's Life-time, he cannot avow without Probate: He may bring an Action of Debt for a Debt due to the Testator before Probate, so that tho' the Teste of the Original appears to be before the Probate, yet it is well; so is 1 Ro. 917. Now the Executor having all these Advantages before Probate and the Law taking Notice of him, and he having actually administred, which is such an Acceptance of the Executorship that he cannot refuse it afterwards, this is a Release. Indeed if he had not administred, but had refused in the Ecclesiastical Court to be Executor, that making him Executor had not been a Release, for you shall no more force a Man to accept of a Release against his Will, then of a Deed of Grant and the subsequent Refusal makes the Deed void ab initio; as if a Deed of Release were delivered to B. to the Use of the Obligor, if the Obligor refuses to accept it, it is not the Deed of the Obligee, and he may plead non est factum to it. 5 Co. 119. b. And besides, if the Obligee were never Executor, then was he never the Person intitled to receive the Money, and consequently not within the Reason of the Rule of Extinguishment. It is said that H. who is made Executor, is Executor till actual Refusal, and that was the Resolution of the Case of Abram versus Cunningham; and if so, then his administring in this Case having put it out of his Power to refuse, he has by administring accepted the Executorship, which is that which makes the Release; if H. makes his Debtor and J. S. his Executors, if J. S. administers, tho' the Debtor never does, this is a Release, so is 20 E. 4. 17. 21 E. 4. 3. And where H. makes his Will and several Executors, if one of them refuses and the rest administer, that makes his Refusal void, and the refusing Executor may notwithstanding Release any Debt. 5 Co. 28. a. And in Actions brought by them the refusing Executor must be named 9 Co. 37. And if the refusing Executor survives, he may take the Executorship upon him. The Case indeed in Dy. 160. is contrary, and holds that the refusing Executor must come in and act during the Life of the acting Executor; but the 21 E. 4. 23. is contrary to Dyer, and according to the preceding Position, and in Hard. 111. Pawlett versus Freke, it is resolved, That where the refusing Executor survives, Administration committed during his Life is void. In my Lord Petre's Case, which was before a Commission of Delegates at Serjeants-Inn, where the Case was, That several Executors were named in the

Where several Executors are, and one only refuses, the Refusal is void.

Post pl. 15.

the Will, and one refused and the others acted, and those that acted died, and Administration was committed before any Refusal by the surviving Executor to J. S. the Administration was held to be void, because the refusing Executor surviving, might, notwithstanding his former Refusal, have taken upon him the Executorship; and afterwards on another Refusal of the surviving Executor before the Ordinary, Administration was committed to the Lord Petre, and was held to be good; and upon that Title he maintained in this Court an Action of Trover for a Jewel.

Obligor made Co-executor refuses, and dies before the others, who administred, the Debt is extinguished.

If H. makes the Obligor and others his Executors, and the Obligor refuses, but the others administer, and the Obligor dies first, yet the Debt is released; and the only Reason of that must be, That the Refusal was void, and the Obligor might have come in and administred notwithstanding; for the Probate by the other Executors is for his Benefit.

Objections.

Now I come to answer the Objections; and as to the First, That tho' an Executor has administred, yet an immediate Administration is committed, if he die before Probate, and not an Administration de bonis non. I answer, That the Reason of that is, because the Administring is an Act in Pais, of which the Spiritual Court cannot take Notice, and they must commit Administration according as it appears to them judicially, and not according to the Fact, and yet the Acts done by the Executor are good.

As to the Second, That the Administration in this Case is grounded upon this, That the Executor died ante onus Executionis testamenti super se susceptum: I answer, That those Words are to be understood in a limited Sense, viz. That the Executor died ante onus, &c. super se susceptum in the Ecclesiastical Court.

3dly, And which is the most considerable Objection, That the Executor dying in this Case before Probate, his Executor is not Executor to the first Testator, but Administration must be granted cum testamento annex', tho' he did administer. To this I answer,

Where Executor administers and after refuses, Administration cannot be committed during his Life.

That the Executor by administring has taken upon him the Executorship, and has put it out of his Power to refuse 9 Co. 33. b. Hensloe's Case; and where an Executor administers, tho' he refuses afterwards before the Ordinary, yet Administration cannot be committed during his Life, and if Administration be granted, it is void, and so is 1 Mod. 213. Parten's Case. Now tho' the Executorship ceases by the Death of the administring Executor in this Case; yet he being Executor by his administring, that has by Consequence had its Operation of a Release already. But then it may be said what is the Reason why, the Executor dying before Probate, tho' after administring, his Executor shall not be Executor to the first Testator? Why? It is because his Executor

None can prove a Will, but who is named Executor therein.

cannot prove the Will of the first Testator, and consequently is incapable of recovering his Debts, and consequently of being his Executor: The administring Executor may prove his Testator's

Will, because he is the Person named in the Will; and if he does so, his Executor shall be Executor to the first Testator, because there needs no new Probate; but where the Executor dies after administring and before Probate, his Executor cannot prove the Will of the first Testator, because he is not named Executor to him in the Will, and no one can prove the Will but who is named Executor in the Will; the Executor of an Executor may renounce being Executor to the first Testator, but if he does not renounce, he is Executor of Course. 2 Cro. 614. And so it was held in the Case of Abram and Cunningham: The Executor's not proving the Will, does upon his Death determine the Executorship, but not avoid it. If an Executor Obligor proves the Will and afterwards dies Intestate (which is a parallel Case to the present Case) his Administrator is not Executor of the Will of the first Testator. But yet the Debt having been extinguished by his being compleatly Executor and proving the Will, tho' his Administrator cannot continue the Executorship, that will not revive the Debt; so here, the administring Executor not proving the Will, and so his Executor not being Executor to the first Testator (if he were justly Executor by administring to extinguish the Debt) this Inability of continuing the Executorship will not alter the Case.

Palm. 156.

The Judgment of C. B. was affirmed.

## Tilny *versus* Norris. Pas. 12 Will. III. B. R.

THE Plaintiff brought Covenant against an Administrator, and declared upon a Lease for Years to the Intestate, wherein was a Covenant for him, his Executors and Assigns, to repair, and shews quod Status de & in præmissis devenit to the Defendant, and that he entered, and after that the Premisses fell into Decay, and he had not repaired: The Question was, Whether an Administrator was liable in jure proprio, as an Assignee? And Mr. Williams argued that this Covenant runs with the Land, and binds the Assignee, and for that Reason an Executor may be charged as a Tertenant; as in case an Executor enters and does Waste. 1 And. 52. And he prayed Judgment de bonis propriis, and insisted, That where he answers as Assignee, the Judgment against him is de bonis propriis; but where as Executor, tho' the Breach be in his Time, 'tis de bonis Testatoris. Judgment Nisi for the Plaintiff, no Counsel attending on the other Side.

(13) Where Executor or Administrator is charged as Assignee, the Judgment is De bonis propriis.

Rock

## Rock *versus* Leighton, Vic. Salop. Mich. 12 Will. III. B. R.

(14) Judgment against Executor by Confession or Default, is an Admission of Assets, and he is estopped to say the contrary on a Devastavit return'd; and so is a Jury.

AN Action was brought for a false Return of a Fieri Facias against an Administrator de bonis Intestati, and on Non cul. pleaded, a Verdict was for the Plaintiff, and a Case was made for the Opinion of the Court, viz. The Plaintiff being an Administrator, was sued by A. and, pending that Suit, let Judgment be obtained against him by B. and did not plead this Judgment in Bar of the said Action, but sold the Goods of the Intestate to pay B. A. recovered and sued a Fi. Fa. on which the Sheriff levied Part, and as to the rest returned a Devastavit, and it was said for the Plaintiff in Maintenance of the Action, that the suffering Judgment by Default was no Confession of Assets, and also that the Sheriff ought not to have return'd a Devastavit on the Fi. Fa. but a Nulla bona, and upon that there ought to have been a Scire Fieri Inquiry. Et per Cur.

Devastavit may be return'd on Fi. Fa. without Inquiry.

1st, The Sheriff may return a Devastavit on the first Fi. Fa. if he will: It is at his Peril if false, and the Inquiry is only for his Safety.

2dly, If an Executor confesses or suffers Judgment by Default, he admits Assets in his Hands, and is estopped to say the contrary.

3dly, That he might have pleaded the first Judgment obtained by B. against the Action of A. & riens ultra, but having not done it, he has confessed he has Assets to answer the Judgment in this as well as the first Action; and if a Sci. Fi. inq. had been awarded on the said Judgment, and a Devastavit return'd, and Non Devastavit pleaded, the Administrator could not have given in Evidence the first Judgment; because he had not pleaded it when he might; so there was no Occasion for an Inquiry, nor is he injured by this Return of a Devastavit on the Fi. Fa. since it could not have been avoided if there had been an Inquiry.

Estoppel.

4thly, The Administrator's not pleading the first Judgment and nihil ultra when he might, is an Admission of Assets as to the second Judgment, so that he has slipp'd his Time, and is estopped; so the Jury are estopped as well as the Plaintiff, and their Verdict is void, and that the Sheriff shall take Advantage of all Estoppels between the Parties; as if an Action be brought against a Feme Sole, and she marries, and Judgment is against her, and then Execution, and the Sheriff take her by that Name, she shall be estopped to say the contrary. Judgment pro Def. Vide Dy. 57. 2 Sid. 70.

## House and Downs *versus the Lord* Petre, 19 Dec. 1700. *At the Court of* Delegates *in* Serjeants-Inn Hall.

ROBERT Lord Petre died in the Year 1638, and made William Petre Esq; his Brother, his Executor; William Petre died, and left Lucy his Wife and one Henry Todd his Executors: Lucy only proved the Will; she died and left House and Downs her Executors: Afterwards Henry Todd renounced the Executorship of the Will of William Petre, and Administration was granted to the Lord Petre now Defendant, of the Goods and Chattels of Robert Lord Petre. House and Downs, being Executors of Lucy, insisted that this Administration belonged to them, and it was agreed by the whole Court, as well Civilians as Common Lawyers, That Henry Todd being a joint Executor with Lucy, and surviving her, the sole Right of Executorship to William Petre did accrue to him by Survivorship, tho' he never concurred in proving the Will, nor acted as Executor, and this Right was not divested out of him till he receded from it by an actual Renunciation; by which both William Petre, and Robert Lord Petre, as from that Time died intestate, so as to entitle the Ordinary to grant Administration of the remaining personal Estate; but not so as by Relation to render effectual the Will of Lucy, and transmit those Executorships to the Plaintiffs: But in another Matter the Common Lawyers and the Civilians disagreed; and the Common Lawyers held, That where there are several Executors, and one renounces before the Ordinary, and the rest prove the Will, by the Common Law he who renounced may at any Time afterwards come in and administer, and tho' he never act during the Life of his Companions, may come in and take on him the Execution of the Will after their Death, and shall be preferred before any Executor of his Companions. Vide 21 E. 4. 23. Office of Executors 6. Hard. 111. contra, 9 Co. Hensloe's Case, Dy. 160. But the Civilians held, that by the Civil Law a Renunciation is peremptory.

(15) Where there are two Executors, and one proves the Will and dies, the Executorship survives to the other, but if he then renounces, the Testator is dead intestate.

## Parker *versus* Atfeild. Trin. 13 Will. III. B. R.

IN Debt upon a Bond against an Administrator, he pleaded several Judgments & riens ultra 5 s. which was found: The Plaintiff as to one Judgment replied there was but so much due, which the Debtee was willing and ready to accept in full, and that the Defendant by Fraud deferred the Payment of that Money, and the Judgment was kept in Force to defraud the Creditors; and replied the same Matter as to another Judgment, and de-

(16) Executor in pleading Judgments with Penalties should shew how much is really due.

demurred as to the rest: The Defendant rejoined that as to one Judgment, was, it was not kept on Foot by Fraud, &c. and as to the other, no Assets ultra so much, which was liable to the Judgment, and so to the third, and as to the rest joined in Demurrer. Et per Cur. 1st, The best Way for an Administrator to plead, is to plead truly and honestly, and tho' there is a Judgment for a Penalty, he ought to plead the Judgment, and shew how much is due. 2dly, If he pleads several Judgments, and any one Judgment be ill pleaded or found fraudulent, the Plaintiff shall have Judgment. 3dly, If an Administrator plead twenty Judgments, 'tis a Confession of Assets to satisfy twenty Judgments, and the riens ultra 5 s. is but Form, not material nor traversable. 4thly, If a Judgment being pleaded, and per fraudem replied, Issue is taken thereupon, and by Evidence it appears the Debtee was willing to take less than is recovered, 'tis Evidence of Fraud; but if it be shewn that the Administrator had not Assets to pay that Sum, it is no Fraud. 5thly, If an Administrator pleads two or more Judgments, and the Plaintiff confesses the Plea to be true, and prays Judgment of Assets in futuro; if afterwards Assets came to his Hands, he may satisfy the Judgments pleaded; for the Judgment of Assets de futuro is only to be paid off after the other Judgments are satisfied, and therefore there is no Inconvenience in making the Pleading of fraudulent Judgments a Confession of Assets. 6thly, The Conclusion of the Replication with hoc paratus est verificare to every Judgment, is well; but a general Conclusion to the whole had been better. Vide 2 Saund. 338.

Pleading of Judgments is a Confession of Assets to satisfy them, and the riens ultra a certain Sum is not material.

## Rouse *versus* Etherington. Pas. 1 Ann. B.R.

(17) If one Executor appears upon the Capias, and another makes default, Judgment shall be against both de bonis Testatoris, and if Error be brought, both must join.

IN an Action in C. B. against two Executors a Capias issued against both, which as to one was returned Non est inventus, but the other appeared, and Judgment was given against both; whereupon he that appeared brought a Writ of Error, and concluded ad dampnum ipsius. Et per Holt C. J. By the Statute 9 E. 3. If Debt be brought against several Executors, and one appear and the other make Default upon the Grand Distress, the Court may proceed against him that appears; and if the Plaintiff recover, Judgment shall be against all the Executors for the Goods of the Testator; and the 25 E. 3. c. 17. which gives a Capias in Debt, has been always construed within the Equity of the 9 E. 3. So that if there be several Executors Defendants, and a Cepi is returned as to one, and a Non est inventus as to the rest, the Plaintiff shall proceed against him that appears, and shall have Judgment against all; for the Default upon the Capias is the same as upon the Grand Distress.

Thus the Judgment being against all, one only ought not to bring the Writ of Error, for the Judgment is ad grave dampnum of them all, and the Costs, which are only adjudged against him that appeared, are but an accessary to the principal Judgment, which cannot be reversed quoad them only.

Brookes versus Stroud. Pas. 1 Ann. B. R. Vide this Case, Title Abatement, pl. 6. pag. 3. (18)

## Anonymus. Trin. 1 Ann. B. R.

(19) H. is a tort Executor by taking the Intestate's Goods before Administration, not after.

PER Holt, C. J. If H. gets Goods of an Intestate into his Hands after Administration is actually granted, it does not make him Executor of his own Wrong; but if he gets the Goods into his Hands before, tho' Administration be granted afterwards, yet he remains chargeable as a wrongful Executor, unless he delivers the Goods over to the Administrator before the Action brought, and then he may plead Plene administravit. Vide 4 Co. 33. b. F. N. Br. 44.

## Shardelow *versus* Naylor. Hill. 1 Ann. B. R.

(20) Will made by a Wife in pursuance of a Power reserved before Marriage, is not properly a Will, nor proveable by the Ordinary.

A Woman by Deed settled her Estate in Trust, reserving a Power to her self to give by her last Will and Testament, as she should think fit, so much of her Estate in Legacies; and this was done before Marriage, with the Consent and Privity of the intended Husband, who refused nevertheless to be a Witness or a Party to the Deed: The Marriage took effect; the Wife made a Will and died, and the Executor proved the Will. Et per Holt C. J. This is not a Will, neither ought the Ordinary to prove it, if he does, a Prohibition lies. Where a Woman is an Executor and marries, there she may make a Will with Consent of her Husband, and cannot without. 1 Jon. 157. So if a Woman having Debts due to her marries, she may make a Will quoad these, and the Ordinary may prove it. In other Cases she cannot, for 'tis only a Writing in Form of a Will: However in the principal Case it appearing, That the Ordinary had only granted Administration, quoad the Goods in this Will, 'twas allowed as reasonable. Cro. Car. 219.

## Eaves *versus* Mocato. Pas. 2 Ann. B. R.

(21) Assumpsit by Executor for Testator's Money received to the Plaintiff's Use. Executor shall not pay Costs of Nonsuit.

EXECUTOR brought Assumpsit for Money of his Testator had and received by the Defendant to the Use of the Plaintiff as Executor, and was nonsuit: And now the Court was mov'd for a Direction to the Master to tax Costs. Et per Curiam, He shall not pay Costs, for he could not sue but as Executor, and it is not material whether the Money was received by the Defendant since the Death of the Testator, or before; for suppose it since, it is not Assets in the Hands of the Executor, till it is recovered. But in Trover and Conversion by an Executor, upon a Trover and Conversion in the Time of the Executor, the Executor if nonsuit shall pay Costs; for he need not name himself Executor, and the Goods are Assets in the Executor's Hands, tho' he never recover them. 1 Ven. 109. So, if an Executor will not go on to Trial according to his Notice, he shall pay Costs for that.

Cro. Car. 219.

## Berwick *versus* Andrews. Mich. 2 Ann. B. R.

(22) Executor may bring Debt, suggesting a Devastavit in his Testator's Life-time, upon a Judgment obtained by his Testator against the Executor of J. S.

JUDGMENT was obtained against J. S. as Executor, and now the Executor of him that obtained the Judgment brought an Action of Debt upon that Judgment against the said J. S. suggesting a Devastavit in the Life-time of his Testator, and had Judgment by Nihil dicit in C. B. and now Error being brought, it was objected that the Plaintiff was not privy to the Judgment, and therefore ought first to have brought his Scire Facias, and then have suggested a Devastavit according to the Case of Wheatly and Lamb. 1 Saund. 216. and that this was carrying Devastavits a Step farther than they had yet gone. Sed per Cur. It lies for the Executor of him to whom the Wrong was done, tho' it lies not against the Executor of him that did the Wrong. Here the Defendant is the Person against whom the Recovery was, and he has admitted Assets; and the Executor may as well maintain this Action, as he may an Action of Debt for an Escape where his Testator might. So an Executor of a Parson shall maintain Debt for Tithes, as the Testator might; for in this Case the Tort was to the Property of the Testator, and vested an Interest in him, and is within the Equity of the Statute De bonis asportatis, and the same Reason holds for an Action of Debt, as for a Scire Facias. Vide 2 Sid. 102.

## Smith *versus* Harmon. Paſ. 3 Ann. B. R.

(23) To a Sci. Fa. upon an interlocutory Judgment againſt an Executor, the Defendant cannot plead a Judgment in Bar.

THE Plaintiff as Adminiſtrator to J. S. ſued a Scire Facias againſt the Defendant, ſetting forth that his Inteſtate ſued the Defendant as Executor in ſuch an Action, & taliter proceſſum fuit that Judgment was given againſt the Defendant by Nihil dicit, and a Writ of Enquiry of Damages awarded, which abated by the Death of the Inteſtate before the Return of the Writ; and that Adminiſtration was granted to the Plaintiff; and commanded the Sheriff to ſummon the Defendant to ſhew Cauſe, why the Plaintiff ſhould not have Judgment: The Defendant pleaded, that the Plaintiff ought not to recover, becauſe his Teſtator was indebted to A. in 100 l. by Bond, on which A. ſued him and recovered Judgment, and that he had no Aſſets ultra, &c. To this the Plaintiff demurred, and had Judgment; for that the Statute never intended that the Executor ſhould ſtand in any other Circumſtances to make another Defence than the Party to the Contract himſelf might have made againſt the Inquiry, and he could have pleaded nothing but a Releaſe or other Matter in Bar ariſing puis darrein Continuance. He is by the Words of the Statute to ſhew Cauſe, why Damages in ſuch Caſe ſhall not be aſſeſſed and recovered, and if he ſhall appear at the Return and not ſhew any Matter ſufficient to arreſt the final Judgment, then a Writ of Inquiry ſhall be awarded, &c. And arreſting Judgment is by Matter apparent in the Record, and not extrinſick; and heretofore they pleaded in Arreſt of Judgment as now we move. 5 H. 7. 23. 2 Ro. 716. 12 H. 4. 24. Co. Ent. Error 95. Yelv. 152. 2 Cro. 220. And the Executor cannot be hurt by this, for the Judgment is only de bonis Teſtatoris, as if recovered againſt the Teſtator himſelf.

## *Archbiſhop of* Canterbury *verſus* Willis. Hill. 6 Ann. B. R.

(24) Since the Stat. 22 Car. 2. Adminiſtrator is bound to accompt without Citation.

IN Debt upon a Bond entred into by an Adminiſtrator to the Ordinary upon taking Letters of Adminiſtration, the Queſtion was, Whether an Adminiſtrator by vertue of this Obligation was bound to go, and give in his Accompt in the Spiritual Court, without being cited? Et per Holt C. J. who delivered the Opinion of the Court, it was ſaid, 1ſt, That it appears by the Statute of Edward the Third, That an Executor was compellable to accompt before the Ordinary, and ſo was an Adminiſtrator: But then the Ordinary was to take the Accompt as given in, and could not oblige them to prove the Items of it, nor ſwear the Truth of them. Vide Noy 78. 2 Inſt. 6.

2 Inst. 6. So it was if a Creditor sued in the Ecclesiastical Court, for he had a proper Remedy at Common Law: But if a Legatee had sued for an Accompt in the Ecclesiastical Court, the Defendant before the Statute was compellable to prove the whole Accompt, for the Legatee had no other Remedy, and the Ecclesiastical Court which had a Jurisdiction of Legacies could not otherwise do Right: Yet in such a Case, if the Executor would pay him, he could not sue farther, for he had Right done him, and the Executor was not liable, but of Necessity that Right might be done. Raym. 407.

H. entitled to Distribution by 22 Car. 2. may sue Administrator to prove his Accompt.

2dly, A Person intitled to Distribution on the 22 Car. 2. is in Consequence intitled to sue for an Account as a Legatee was; for the next of Kin is a Legatee by the Statute, and as a Statute-Legatee shall have the same Remedy as the other Legatee might before the Statute. The Condition of an Administration-Bond was to accompt when required: So it appears by Co. Ent. 128. Ergo he was not to accompt before he was legally cited, which could not be ex Officio, and therefore the Statute Jac. 2. whereby the Ordinary is prohibited from citing him in ex Officio, had really no Effect at all, for the Law was so before: But since the Statute of Car. 2. the Condition of Administration-Bonds being, that he accompt at a Day certain, he must accompt accordingly at Peril, and that without Citation or Suit, and this Accompt must be in Court; and if he comes at the Day and no Court is held, he shall be excused; for he may plead he was there ready, and no Court, &c. But then this Accompt is not examinable, unless a Party interested comes in and controverts it: And whereas by the Words of the Condition he is to administer well and truely, that shall be construed in bringing in his Accompt, and not in paying the Debts of the Intestate; and therefore a Creditor shall not take an Assignment of the Bond and sue it, and assign for Breach the Non-payment of a Debt to him, or a Devastavit committed by the Administrator, for that would be needless and infinite.

But Debtor cannot sue the Administration-Bond for Non-payment of a Debt, for it does not extend to that.

## Buckley *versus* Pirk. Trin. 9 Ann. B. R. Rot. 28.

(25) Where a Defendant is charged as Executor, Judgment shall be De bonis testatoris, tho' he might have been charg'd as Assignee.

COVENANT by the Plaintiff against the Defendant as Executrix of Jonathan Pirk, wherein she declared quod cum per Indentur' made between the said Prudence Buckley, Executrix of Thomas Buckley, and the Defendant's Testator Jonathan Pirk, reciting, That one Sarah Champernoon did demise the Premisses to the said Thomas Buckley for twenty-one Years, reddend. 24 l. per Annum; That Thomas made Prudence his Executrix, and died; testatum existit, That Prudence assigned to Jonathan Pirk pro toto residuo dicti termini, who covenanted to repair; That Jona-

than

than entered and was possessed and died; and that Mary as his Executrix entered and was possessed, and suffered the Premisses to be out of Repair, &c. The Defendant pleaded a Judgment obtained against her, and no Assets ultra, and the Plaintiff demurr'd: And Serjeant Pengelly argued that the Plea was good, for that the Defendant was only charged as Executrix and not as Assignee, and therefore was liable only to answer de bonis Testatoris; and that there was no Privity of Estate between the Plaintiff and the Defendant, (as where the Lessee or his Executor hath the Term and the Lessor the Reversion,) but only a Privity of Contract. If a Man assigns his Term, or makes a Feoffment, reserving Rent, this is only a Charge by the Contract, and tho' such Contracts may be real, yet they cannot create a Privity of Estate; therefore he concluded the Plaintiff could not charge the Defendant as Assignee.

If Lessee for Years assign, there is no Privity of Estate between him and Assignee, but of Contract.

Parker C. J. 1st, A Covenant to repair is a Covenant that must run with the Land, for it affects the Estate of the Term, and the Reversion in the Hands of any Person that has it. If the Covenant to repair be on the Part of the Lessor, the Rent is the greater; if the Lessee be to repair, he pays the less Rent; and as an Assignee has the Benefit, 'tis but reasonable an Assignee should be subject to the Charge. 2dly, He held, That if the Executor of a Lessee enters, the Lessor may charge him as an Assignee, for the Rent incurred after his Entry, in the Debet and Detinet, and if the Rent be of less Value than the Lands, as the Law prima facie supposes, so much of the Profits as suffices to make up the Rent, is appropriated to the Lessor, and cannot be applied to any Thing else: And therefore in such Case the Defendant cannot plead plene administravit, for that confesses a Misapplication, since no other Payment out of the Profits can be justified till the Rent be answered: On the other Hand, if the Rent be more worth than the Land, the Defendant may disclose that by Special Pleading, and pray Judgment, whether he shall be charged otherwise than in the Detinet only: Quod Powell concessit. 3dly, 'Twas held, That the Defendant was charged as Executrix in this Case, and that so plainly, that there was indeed no better Way to charge her as such. That the Plaintiff had her Election of charging the Defendant as Executrix or Assignee; that having charged her as Executrix, she can only have Judgment against her as such: Sed adjournatur.

Covenant to repair runs with the Land, and why.

Executor chargeable in the Debet & Detinet for Rent incurr'd after his Entry; but if the Rent be more worth than the Land, he may plead it.

Ante pl. 6.

Churchill

Churchill *contra* Hopson. Mich. 12 Ann. in Canc.

(26) Two Executors join in an Acquittance, but one only receives the Money; both are chargeable for it to Creditors, but the actual Receiver only to Legatees.

SIR Charles Hopson made Churchill and Goodwin his Executors, Men of good Credit: Goodwin being a Banker received all the Money, but Churchill joined with him in the Receipts, taking his Note to shew that he received not the Money: Et per Harcourt Lord Chancellor, If two Trustees join in a Receipt, and one receives the Money, he only that receives shall be liable. If there be two Executors, and they join in a Receipt, and one only receives the Money, as to Creditors who are to have the utmost Benefit of Law, each is liable for the whole; tho' one Executor alone might give a Discharge, and the joining of the other was unnecessary; But as to Legatees and those claiming Distribution, who have no Remedy but in Equity, the Receipt of one Executor shall not charge the other; for the joining in the Receipt is only Matter of Form; the substantial Part is the actual receiving, and this only is regarded in Conscience.

# EXECUTION.

Oviat *versus* Vyner. Paſ. 1 W. & M. B. R.

(1) Where it is necessary to return a Fieri Fac. and where not.

IF on a Fieri Facias all the Money is not levied, the Writ must be returned before a second Execution can be taken out, for that must be grounded upon the first Writ, and recite that all the Money was not levied upon the first; but if upon the first all the Money had been levied, the Writ need not have been returned, for no farther Process was necessary.

Wolf

## Wolf *versus* Davison. Pas. 8 Will. III. B. R.

IN Debt for Escape of H. in Custody by a Capias Utlegatum after Judgment, and Nil debet pleaded, the Jury found a Special Verdict, viz. That the Plaintiff had outlawed one J. S. after Judgment upon a Capias ad satisfaciend. sued out within the Year, and that two Years after the Outlawry he was taken up upon a Capias Utlegatum, and the Sheriff suffered him to escape: Upon Argument it was admitted, That if a Capias Utlegatum had been sued out within the Year, no Prayer had been necessary, because the Plaintiff might have had a Ca. Sa. without a Scire Facias; but this being after the Year, the Question was, Whether he could be said to be in Execution for the Plaintiff in the original Action without Prayer? And the Court held, That he was, tho' no Prayer was entered, because he would have been so if he had been taken within the Year, and here is no Difference; for the Plaintiff was at the End of his Process at the Exigent, and no Continuance nor Scire Facias lies after Capias Utlegatum, and the very Capias Utlegatum which is sued at his Charge imports an Election of the Body. Vide 3 Cro. 918, 850. 1 Ro. 810. 1 Sid. 280. 5 E. 3. c. 12. 5 Co. 89. 5 Mod. 200, &c.

(2) Defendant taken on a Capias Utl. after Judgment, after the Year, is in Execution at the Party's Suit without Prayer.

## Pennoir *versus* Brace. Trin. 9 Will. III. B. R.

TRESPASS against four Defendants, and Judgment against them in C. B. Whereupon they brought Error in B. R. for Error in Fact: After the Record certified, one of the Plaintiffs in Error died, whereupon the Plaintiff in the original Action took out Execution by Ca. Sa. against all four. Et per Cur. 'Twas admitted, 1st, That the Writ of Error was abated. 2dly, That if the Execution taken out had been against three only, omitting the fourth, it had been erroneous, because not warranted by the Judgment. 3dly, That if the Execution had not been so long delayed by the Writ of Error, so that it might have born Teste as of the same Term with the Judgment, then the Death of the one Plaintiff had not been material, because subsequent to t... Teste. 4thly, The Court ruled this Execution erroneous, and therefore superseded it; because the Death of the Party did not appear to them by any Matter of Record, and till they were so apprized of it, they were bound up by the Writ of Error. 5thly, Supposing that were suggested upon Record, 'twas then doubted whether the Plaintiff could have Execution in this Case without a Scire Facias; wherein this Difference was taken, viz. Where any new Person is either to be

(3) Judgment in Trespass against four, who bring Error, and afterwards one dies. The Plaintiff cannot sue Execution without suggesting the Death upon Record, but need not sue Sci. Fac.

Where upon the Death of any Party Sci. Fac. is necessary.

be better or worse by the Execution, there must be a Scire Fac. because he is a Stranger, to make him Party to the Judgment, as in case of Executor and Administrator; otherwise where the Execution is neither to charge or benefit any new Party, as in this Case where there is a Survivorship, for there is no Reason why Death should make the Condition of the Survivors better than before. Vide 21 H. 7. 16. Mo. 367. Noy 150. Carter 112, 193. (not resolved.) Holt C. J. held, That a Capias or Fi. Fa. being in the Personalty might survive, and might be sued against the Survivors without a Scire Facias, otherwise of an Elegit, for there the Heir is to be contributory.

## Smallcomb *versus* Buckingham. Mich. 9 Will. III. B. R.

(4) Two Fi. Fa. delivered the same Day to the Sheriff, who executes the last first; the Execution is good, but he is liable to the Plaintiff in the first.

A and B. had each a several Judgment against C. A. sues out a Fi. Fa. and delivers it to the Sheriff about nine in the Morning to be executed. Afterwards, about ten a Clock, B. sues out a Fi. Fa. and brings it to the Sheriff forthwith, and desires it may be executed; accordingly the Sheriff executes the last Fi. Fa. and after that executes the first Fi. Fa. and takes the same Goods again that were taken upon B.'s Execution. And upon this the first Vendee brought Trover against the second Vendee, and the Sheriff: And it was held per Cur. That, as the Goods were bound from the Day of the Teste of the Writ at Common Law, so now by 29 Car. 2. c. 3. they are bound from the Day of the Delivery: But at Common Law, if two Writs had been of the same Teste, the Sheriff was bound to execute that first, that was first delivered. By the same Reason, if two Writs of Fieri Facias come to the Sheriff in one Day, he ought to execute that Writ first which came to Hand first; for he has no Election: In consequence the Sheriff makes himself liable for executing the Writ first, that came last, and must answer it to the Party that brought the first Writ, who may bring an Action against him; but the Execution shall stand good: Judgment for the Plaintiff: Otherwise it would have been had he delivered his Writ, but bad the Sheriff stay Execution till another Day.

## Mosely *versus* Warburton. Mich. 9 Will. III. B. R.

(5) Bishop's Power to compel a Sequestration.

ON a Fieri Facias against Warburton, a Fellow of Winchester College, the Sheriff returned Clericus beneficiatus nullum habens laicum feodum. Hereupon a Fieri Facias De bonis Ecclesiasticis issued to the Bishop, who sent his Mandate to the Warden and Fellows of the College to sequester his Salary, and they re-

refused. The Bishop now moved to know, whether he might not compel them by Ecclesiastical Censures. The Court asked, whether this were an Ecclesiastical Constitution? The Universities they said were not, for they have no Cure; but are only Societies ad Studendum & Orandum; but a Prebend is an Ecclesiastical Benefice: And in such Case, if the Prebend have a sole distinct Corpse, it may be sequestred; but where he is only a Member of the Body aggregate, and the Inheritance is in the Dean and Chapter, there cannot be a Sequestration: Per Cur. Let the Bishop do as he ought by Law.

## Coot *versus* Lynch. Mich. 10 Will. III. B. R.

(6) Judgment of B. R. in Ireland affirmed here. Costs must be levied by Writ out of B. R. in Ireland.

JUDGMENT was given in Ireland, and on a Writ of Error affirmed in B. R. here, and Costs taxed, and a Capias sued out of the King's Bench here directed to the Sheriff of the same County in Ireland, to take the Defendant for these Costs: But upon Motion the Execution was set aside, because there can be no such Writ. The Method is to have a Writ, reciting all the Proceedings here in England, directed to the Judges of the King's Bench in Ireland, requiring them to issue Process of Execution; and by this mandatory Writ, the Cause is restored to that Court.

## Kingsdale *versus* Mann. Trin. 2 Ann. B. R.

(7) What is Disturbance of Execution of Hab. fac. Poss.

THE Sheriff delivered Possession by vertue of an Habere facias Possessionem in the Morning: Some Hours after the Sheriff was gone, and the Party in Possession, the Defendant came and turned him out again. Et per Cur. If the Plaintiff had been turned out immediately after he was put into Possession, or while the Sheriff and his Officers were there, an Attachment might have been granted; for this had been a Disturbance to the Execution, and a Contempt; but being several Hours after, Curia dubitavit. 2dly, It was agreed, That the Court might grant a new Habere facias Possessionem, if the first was not returned.

## Perkins *versus* Woolaston. Pas. 3 Ann. B. R.

(8) Writ of Error is a Supersedeas to Execution (not begun to be executed) as soon as allowed, without Notice.

A Writ of Error is a Supersedeas from the Time of the Allowance, and that is Notice of it self; but if the Defendant have Notice before Allowance, 'tis from the Time of that Notice a Supersedeas: But if a Writ of Execution be executed

 before

before a Writ of Error allowed, or Notice, it may be returned afterwards. The utmost length of Time the Law allows for executing a Writ, is the Day whereon the Writ is returnable; and it is not executable any longer that Day than the Court sits. So long as it is executable, but not executed, the Allowance of a Writ of Error is a Superfedeas, but not afterwards.

## Booth *versus* Booth. Mich. 3 Ann. B. R.

(9) Where Execution is stay'd by Injunction till after the Year, Plaintiff must sue a Scire Fac.

By Injunction out of Chancery the Defendant stayed the Plaintiff's Execution a Year and upwards; the Injunction being dissolved, the Plaintiff took out Execution without a Scire Facias, and this was referred by the Court for Irregularity. The Plaintiff insisted, That he was stopped by the Act of the Defendant, and that if the Defendant had suspended it by Writ of Error so long, he had been at Liberty to take Execution without a Scire Facias. Sed per Curiam, We cannot take Notice of the Chancery Injunction, and you might have taken out a Writ of Execution, and continued it by Vicecomes non misit breve. A Superfedeas quia improvide was awarded to the Execution.

## Clerk *versus* Withers. Mich. 3 Ann. B. R.

(10) ADMINISTRATOR recovered Judgment and sued out a Fieri Facias, and delivered it to the Sheriff the First of August; the Sheriff seized the Defendant's Goods, and afterwards, viz. the Ninth of September, the Administrator died; the Sheriff returned, That he had seized Goods to the Value, Sed quod remanent in manibus pro defectu emptorum: And afterwards, viz. the 29th of September, the said Sheriff was removed, and a new Sheriff sworn in. And now the Defendant sued a Scire Facias against the old Sheriff, to have his Goods again; and Judgment being against him in C. B. Error was brought here, and objected for the Plaintiff in Error, That the Execution was abated and no Body could perfect it; not the Executor of the Administrator, because he came in in auter droit; and the Administrator de bonis non could not, for he was Paramount; and that this was not within the 17 Car. 2. c. 13. for that only regarded Cases after Verdict. But per Cur. This Scire Facias is not maintainable, and these Points were resolved:

Fieri Facias abates not by the Plaintiff's Death.

1st, That the Plaintiff's Death did not abate the Execution, and that the Sheriff, notwithstanding that, might proceed in it; because the Sheriff has nothing more to do with the Plaintiff, for the Writ commands him to levy and bring the Money into Court, which the Plaintiff's Death does no way hinder: Be-

sides an Execution is an intire Thing, and cannot be superseded after 'tis begun.

Sheriff that began Execution shall end it, tho' Office expires.

2dly, That the old Sheriff has not only Authority, but is bound and compellable to proceed in this Execution; for the same Person that begins an Execution, shall end it, and a Distringas nuper vicecomitem lies. Of these there be two Sorts, one is to distrain the old Sheriff to sell and bring in the Money; the other to sell and deliver the Money to the new Sheriff to bring into Court: Which plainly shews his Authority continues by vertue of the first Writ. Vide Rast. 164. Thes. Brev. 90. 34 H. 6. 36.

Seizure divests Defendant's Property.

3dly, That when the Sheriff had seized, he was compellable to return his Writ, and made himself liable at all Events (Acts of God excepted) to answer the Value of the Goods according to his Return. 3 Cro. 390. 1 Cro. 459. and by the Seizure the Property was divested out of the Defendant, and in Abeyance.

And he is discharged.

4thly, They held, That the Defendant was discharged; because the Plaintiff having made his Election, and the Defendant's Goods being taken, no farther Remedy could be had against the Defendant, but against the Sheriff only. He may be compelled to return his Writ: If it be a false Return, an Action lies; if he returns a Seizure and Sale, he has the Money; if he has seized and not sold, that does not discharge but excuse the Sheriff, and therefore the Plaintiff may have a Venditioni exponas to the Sheriff, if he continues in Office; if out of Office, a Distringas nuper vicecomitem, and then he must sell.

Stat. 17 Car. 2. c. 13.

5thly, That since by the 17 Car. 2. c. 13. an Administrator de bonis non may commence an Execution on a Judgment obtained by an Executor or Administrator, it is but reasonable, and within the Equity of that Act, that an Administrator de bonis non should be permitted to perfect an Execution thus began; for the Right now comes to him. Judgment affirm'd.

# Exposition of Words.

## Rex versus —— Hill. 10 Will. III. B. R.

(1) Difference between Tenor and Effectus.

INDICTMENT for making, writing, composing and collecting divers Libels in uno quorum continetur inter alia juxta tenorem & ad effectum sequent': Upon Not guilty a Verdict was for the King, and upon a Motion in Arrest of Judgment it was held, That this was a sufficient setting forth the Words of the Libel: But, had it been only, continetur ad effectum sequent', that would not have done; for that would not import a Sameness in Words, but in Sense and Construction only.

But juxta tenorem imports the same Words, for Tenor is a Transcript or true Copy, which it cannot be if it differs from the Libel. Co. Ent. 116. Reg. 169. a. Saltashe's Case, Hill. 33 & 34 Car. 2. B. R. Rot. 1154.

## Wyat versus Aland. Trin. 2 Ann. B. R.

(2) Where Words are capable of different Expositions, that shall be taken which supports the Declaration or Agreement, and not that which defeats it.

AN Action Qui tam was brought by an Informer against one Aland for taking more than Statute-Interest; and he declared, That the Defendant Aland had lent to one Nicholson 200 l. for so long, and that at the Day of Payment it was corruptly agreed between them the said Aland and Nicholson, That the said Nicholson should give the said Aland 40 l. pro deferendo & dando ulteriorem diem solutionis, viz. tiel jour prædicto Aland; whereas Aland was not the Person to pay, for it was he that lent the Money; and it was objected, That this was nonsensical and impossible, and that the Statute of Jeofails would not aid a penal Information: The Counsel of the other Side urged, That the Nonsense should be rejected, and then the Declaration would be sufficient; and cited 1 Mod. 42. 2 Saund. 96. 2 Cro. 549. Hall and Bonithon. Holt C. J. Where a Matter set forth is grammatically Right, but absurd in the Sense and unintelligible, we cannot reject some Words to make Sense of the rest, but must take them as they are; for there is nothing so absurd or nonsensical, but what by rejecting and omitting may be made Sense;

but where a Matter is Nonsense by being contradictory and repugnant to somewhat precedent, there the precedent Matter which is Sense shall not be defeated by the Repugnancy which follows, but that which is contradictory shall be rejected; as in Ejectment where the Declaration is of a Demise the second of January, and that the Defendant Postea, scil. the first of January, ejected him: Here the Scilicet may be rejected as being expresly contrary to the Postea and the precedent Matter. 2dly, He seemed to hold, That an Information upon a Penal Statute by a common Informer, was not within the Statutes of Jeofails, otherwise of an Information by a Party grieved. 3dly, He held, That the Word Dando was applicable to Nicholson, and Solutionis to Aland; so that it bore this Meaning, viz. For giving a farther Day to Nicholson of Payment to Aland, since he was to receive, and the Money was to be paid to him; and where a Matter is capable of different Meanings, that shall be taken which will support the Declaration or Agreement, and not the other, which would defeat it. Powell J. differed as to the first Point, and was of Opinion, That Words unnecessary might in Construction be omitted or rejected, tho' they are not repugnant or contradictory, but in cæteris omnibus agreed with the Chief Justice. Adjournatur.

Where Nonsense shall be rejected.

# EXTINGUISHMENT.

## Gage *or* Gray *versus* Acton. Hill. 11 Will. III. B. R.

1 : L : Carth : 511. 2 Kay: 515.

DEBT against the Administratrix of her Husband for 60l. for Rent incurred in the Life of the Intestate, on a Demise by Deed to the Intestate; the Defendant pleaded, That the Intestate dum ipsa præfat' defendens sola fuit concessit se teneri by Bond to her in 2000l. with this Condition indorsed, viz. That in case the Obligor and she intermarried, and the Wife survived, and the Obligor left her 1000l. then to be void; and farther pleads, That they intermarried; she survived; that he did not leave her 1000l. that she took Letters of Administration; that 250l. came to her Hands, which she

Bond to pay Money after Marriage between Obligor and Obligee, the Debt is only suspended by the Intermarriage.

she retains in part of Satisfaction; and that she hath not Assets ultra. The Plaintiff demurred. Et per Cur'.

Administrator may retain a Bond-Debt against Rent, but cannot plead a Bond to another.

1st, An Administrator may retain a Bond-Debt due to himself, notwithstanding that Rent is due from the Intestate; for whether the Demise be by Parol or by Deed, the Rents are of equal Nature, and neither is superiour to a Debt by Specialty. On the other Hand, a Debt by Specialty is equal, but not superiour to them, therefore an Executor may plead Payment of one against another, or a Recovery of one against another; but in Debt for Rent he cannot plead there is a Bond-Debt due, nor vice versa, which is all that can be collected from 2 Ven. 184. the Case objected.

And Holt C. J. held, That the Bond-Debt was extinguished by the Intermarriage, because it was a present Debt, and the Condition made no Alteration; for the Condition is not precedent, nor does the Debt arise on the Event of that: If it were, then in Debt upon a Bond, the Plaintiff must always shew the Condition broken; whereas if the Defendant craves Oyer and demurs, the Plaintiff must have Judgment; for the Condition is subsequent, and the Obligor may, if he will, pay the Money due on the Bond without regard to the Condition.

If this be a present Duty, then he held the Intermarriage extinguished it ex consequenti, for the Husband and Wife are one Person; the Husband was the Person intitled to receive the Money, and that in his own Right; therefore he could not at the same Time be the Person bound to pay; and no Intention of the Parties can alter the Law.

Feme Executrix of Obligee marries Obligor, no Extinguishment.

The Chief Justice admitted, That if a Feme Executrix of an Obligee marries the Obligor, that will work no Extinguishment, because the Husband is to receive it in auter droit; it would be a Devastavit by Construction of Law, which being a Wrong cannot be; so if a Man hath a Term in Right of his Wife, or as Executor, and purchases the Reversion, this is no Extinguishment; because he hath the Term in one Right, and the Reversion in another. In that Case the Difference of the Rights hinders an Extinguishment, because a third Person is concerned and may be prejudiced, which cannot be by Act in Law.

Also he admitted, if one promises a Feme Sole, in Consideration that she will marry him, he will leave her so much in case she survive, or covenants in the same Manner, that is good; because, tho' the Covenantor and Covenantee be present, yet they raise no present Duty, but only a future Debt upon Contingency, which cannot happen during the Coverture; and this is precedent to the Duty, and must be specially declared upon.

Husband may release Duty which by Possibility may accrue to the Wife during the Coverture; otherwise not

Also he said, That where the Wife hath any Right or Duty, which by Possibility may happen or accrew during the Coverture, the Husband may by Release discharge it; but where the Wife

 hath

hath a Right or Duty, which by no Possibility can accrew to her during Coverture, the Husband cannot release it.

But Gould and Turton, Justices, were against the Chief Justice, because it would subvert the Marriage-Agreement, and they held the Debt was only suspended, the rather because it was not payable during the Coverture, but was a Debt on Contingency; so that if the Feme dum sola had released all Demands, the Debt had not been extinguished. 2 Cro. 170. 1 Sid. 58. 5 Co. 70. b. Moore 855. Litt. R. 32. Hetl. 12. Noy 26. Hutt. 17. Hob. 216. 2 Cro. 571. 26 H. 8. 7. b. 1 Cro. 373. 8 Co. 136. 1 Inst. 264. b. 343. b. 11 H. 7. 4. b. Dyer 140. Hutt. 171. 1 Roll's 935. Yelv. 156. Palm. 99. 2 Cro. 222.

# Fairs, Markets, and Tolls.

## Burdett's *Case*. Trin. 8 Ann. B. R.

Q. Whether the Clerk of the Market can distrain ex Officio, for using unlawful Measures?

IN Trespass the Defendant justified as Clerk of the Market within the District of White Chapel, for a Distress of 3 s. 4 d. for not using Measures marked according to the Standard of the Exchequer. Upon Demurrer, Sir Peter King pro Def. urged, this was an Authority given by 14 E. 3. c. 12. Sect. 2. And Holt C. J. held,

That the Clerk of the Market could not have a Power to estreat Fines and Amerciaments, otherwise than as a Franchise; and it is more reasonable the Clerk should bring the Standard with him, than that the People should follow him, or attend at a Place out of the Market.

False

# Falfe Latin.

## Bennet *verfus* Prefton. Mich. 4 W. & M. B. R.

(1) Falfe Latin abates not an Appeal. Quidem for quidam.

IN an Appeal of Murder the Declaration was, That at Clapham in Com. Surr. Venerunt prædicti Johannes & quidem Daniel Stokely modo defunct'. And upon Demurrer the Court held, That this, viz. Quidem, being admitted to be falfe Latin, would not abate the Bill or Declaration, for it did not at Common Law, and relied upon Long's Cafe. 5 Co. 121. 10 Co. 133. 1 Leon. 73.

## Redwood *verfus* Coward. Hill. 8 Will. III. B. R. Intr. Trin. 8 Will. III. Rot. 645.

(2) Affident damna well in a Verdict.

A Verdict was entred affident damna for affidunt, and on a Writ of Error this was affigned for Error, and infifted was future. Sed non allocatur; For it may be the prefent Tenfe of the Word Affideo; however, in Verdicts the fame Exactnefs of Expreffion is not required as in Pleading, for they are the Words of a Lay Jury, and tho' it may not be proper Latin, yet it is fo common, that it is now made good by Prefcription. Vide Plo. 347. 3 Cro. 647. 4 Co. 7. And the Court faid, it was not like Conceffum inftead of Confideratum eft in a Judgment, for that thofe Words were of different import, and the Law requires that judicial Acts fhould appear to be done upon Confideration.

## Dillon *verfus* Harper. Trin. 2 Ann. B. R.

(3) Two Negatives in pleading cannot be taken as a Negative.

IN an Action againft an Attorney, he pleaded that he was an Attorney of the Court of Common Pleas, Et quod nullus hujufmodi Attornatus non debet implacitari, &c. Et per Cur. Two Negatives may be conftrued as a Negative in Grants, but not in Pleas, for they are to be in Latin, and muft be conftrued as Latin ought to be, and in that refpect this Plea is rather a Difclaimer than a Claim of Privilege.

# Failer of Record.

## Knight's *Case*. Hill. 2 Ann. B. R.

CASE against Besaliel Knight by a wrong Name: The Defendant pleaded in Abatement; upon this the Plaintiff, without proceeding farther, brought a new Action against him by his right Name, to which he pleaded another Action pending. Et per Holt C. J. The Plaintiff should first have discontinued the first Action; it will be too late to do it now, for the Discontinuance will relate only to the Time of its being entered on Record; so that upon Nul tiel Record it will be against him; for it was pending at the Time of the Plea pleaded: And this differs from a Reversal of an Outlawry or Judgment by Writ of Error; for if Nul tiel Record be pleaded, and after that, but before the Day given to bring in the Record, the Judgment is reversed on a Writ of Error, that Reversal avoids the Record ab initio, and it is a Defecit de Recordo.

Upon auter Action pendant pleaded, Discontinuance, after Nul tiel Record replied, will not avoid it; otherwise of Reversal by Error.

# FEES.

## Stockhold *versus* Collington. Mich. 3 W. & M. B. R.

(1) Quantum meruit lies for serving as a Commissioner on a Commission to examine Witnesses.

THE Plaintiff brought an Action upon a Quantum meruit against the Defendant, for that he at his Request had served him as a Commissioner in a certain Commission out of the Exchequer, directed to him and others for Examination of Witnesses: After Verdict on Non Assumpsit, Tremaine moved in Arrest of Judgment, That the Plaintiff acted by Command of Court, and could not therefore take a Promise of Reward for the Service, no more than a Sheriff or Bailiff; Sed non allocatur; For he is appointed at the Nomination of the Party, who ought to pay him if he employs him.

## Gosslin *versus* Ellison. Hill. 5 W. & M. B. R.

(2) Prohibition granted to a Suit for Fees for swearing Church-wardens.

PROHIBITION was prayed and granted to stay a Suit in the Archdeacon of Litchfield's Court against Church-wardens, for a Fee for swearing them and taking their Presentments; and Sir James Mountague came afterwards to discharge the Rule, but was over-ruled: Mr. Acherly on the other Side insisted, that no Fees could be due but by Custom or for Work done, in which Case a Quantum meruit lay.

## Hescott's *Case.* Mich. 6 W. & M. B. R.

(3) Under-Sheriff cannot refuse to execute Process till he has his Fees.

AN Under-Sheriff refused to execute a Capias ad satisfaciendum till he had his Fees. And upon Motion against him, the Court said, That the Plaintiff might bring an Action against him for not doing his Duty, or might pay him his Fees, and then indict him for Extortion. Noy 75.

## Brockwell *versus* Lock. Paſ. 7 Will. III. B. R.

(4) Executions out of inferiour Courts not within the Statute 29 El. c. 4.

DEBT was brought by the Bailiff of the Liberty-Court of the Biſhop of Rocheſter on the 28 El. c. 4. for 6 l. 10 s. Fees, for an Execution ſued out of that Court on a Judgment there, and a Verdict was for the Plaintiff; and in Arreſt of Judgment it was objected, 1ſt, That Debt would not lie upon this Statute for Fees, ſed non allocatur. 2dly, That the Act was miſrecited to be of 28 Eliz. whereas it was made the 29th, ſed non allocatur; for the printed Book is falſe, and by the Parliament-Roll it appears to be the 28th. But then it was conſidered, whether the Statute extended to Executions out of Corporation Courts, &c. And it was held by the Court, That the Statute extends to all Judgments in Weſtminſter, and that whether the Sheriff executes them in a County or a Franchiſe, he ſhall have his Fees within this Statute, viz. 1 s. per Pound for the firſt Hundred, and 6 d. per Pound for every other Hundred: And ſo it is of the Bailiff of a Liberty when he executes any Execution on a Judgment given in the Courts at Weſtminſter within his Liberty; but if the Bailiff or other Officer executes Proceſs on a Judgment given in a Court of a Corporation or Liberty, he is not entitled to Fees within this Statute.

Jones 307. Noy 75. Latch 16. 1 Cro. 286. Noy 27. Latch 18.

## Anonymus. Hill. 7 Will. III. B. R.

(5)

MR. Carthew moved, That an Under-Sheriff might attend for refuſing to execute a Fieri Facias till his Shilling-pence was paid: The Court would not grant the Rule, but ſaid it was Extortion, for which he might be indicted.

## Peacock *verſus* Harris. Paſ. 8 Will. III. C. B.

(6) To what Execution the Statute 29 El. c. 4. extends, and to what not.

IT was reſolved, 1ſt, That the Statute 29 Eliz. c. 4. does not extend to real Executions, but only to Executions in perſonal Actions; therefore it does not extend to an Habere facias ſeiſinam or poſſeſſionem. 2dly, That upon a Capias ad ſatisfac. the Sheriff ſhall have his Fees for the whole Debt. 3dly, Powell junior J. ſaid, That it was the Opinion of Holt C. J. That the Sheriff ſhould have Fees for executing an Elegit, but he ſaid he doubted of that; becauſe it would be unreaſonable when the whole Debt is 500 l. and perhaps the Land extended but 20 l. per Annum, that the Sheriff ſhould have Fees for 500 l. Treby C. J. ſaid, That he ſhould have Fees according to the Sum levied, and

Poſt. pl. 12.

not according to the Debt recovered, as upon a Fieri Facias. To which Powell answered, That that could not be, because the Party might detain the Land till he was satisfied the entire Debt, and the Plaintiff is, by having made his Election, barr'd of all other Executions. 4thly, That the Statute does not extend to Executions upon Statutes-Merchant, Recognizances, &c. for the Act is to be understood of Cases where the Judgment Redditur in invitum, and not by the voluntary Confession of the Party.

## Earle *versus* Plummer. Pas. 9 Will. III. B. R.

(7) Fees due on erroneous Writ.

If an erroneous Writ be delivered to the Sheriff, and he executes it, he shall have his Fees, tho' the Writ be erroneous.

## Springate *versus* Springate. Pas. 9 Will. III. B. R.

(8) Attorney's Bill.

No Rule ought to be made for referring an Attorney's Bill delivered to his Client, unless there be an Action pending thereupon.

## Burdeaux *versus* *Dr.* Lancaster, & al. Hill. 9 W. 3. B. R.

(9) No Fees due for Christening or Burying, unless by Custom, and then he must do the Duty.

Post pl. 13.

Burdeaux, a French Protestant, had his Child baptized at the French Church in the Savoy, and Dr. Lancaster, Vicar of St. Martin's, in which Parish it is, together with the Clerk, libelled against him for a Fee of 2 s. 6 d. due to him, and 1 s. for the Clerk. A Prohibition was moved for, and Levinz urged this was an Ecclesiastical Fee due by the Canon. Holt C. J. Nothing can be due of common Right, and how can a Canon take Money out of Laymens Pockets? Linwood says, 'Tis Simony to take any Thing for christening or burying, unless it be a Fee due by Custom; but then, a Custom for any Person to take a Fee for christening a Child, when he does not christen him, is not good; like the Case in Hobart where one dies in one Parish and is buried in another, the Parish where he died shall not have a burying Fee. If you have a Right to christen, you should Libel for that Right; but you ought not to have Money for christening when you do not.

## Ballard *versus* Gerrard. Mich. 13 Will. III. B. R.

THE Register in an Ecclesiastical Court libelled there for 4s. 6d. for his Fees, and proceeded to Excommunication; The Defendant came and suggested, that the Office of Register was Temporal Office and a Freehold, and moved for a Prohibition, which was granted; for the Court have no Power to compel the Party to pay Fees to their Officers, but they must bring their Quantum meruit; or if the Office be a Freehold, they may bring an Assise; for the Denial of just Fees is a Disseisin. At another Day Mr. Broderick moved to set aside the Rule: He admitted it was otherwise for Proctors Fees, because there is a Remedy at Common Law upon the Retainer; but said this was upon a different Reason, because the Party is a mere Officer of the Court; and that the Court might appoint a reasonable Fee to Officers that attend them, and that it is not Extortion any more than Box-Money; but the Rule stood. Vide 2 Keb. 615. 3 Keb. 441, 516, and 303.

(10) Register of Spiritual Court cannot sue there for Fees.

Denial of just Fees is a Disseisin.

## Gifford's *Case*. Mich. 1 Ann. B. R.

GIFFORD was libelled against in the Ecclesiastical Court for Fees, and upon Motion a Prohibition was granted, for no Court has a Power to establish Fees; the Judge of a Court may think them reasonable, but that is not binding: But if on a Quantum meruit, a Jury think them reasonable, then they become established Fees. Vide Hard. 351.

(11) Suit for Fees in the Ecclesiastical Court prohibited.

## Tyson *versus* Paske. Mich. 4 Ann. B. R.

THE Sheriff having executed an Elegit, brought an Action of Debt for his Fees: And it was objected, That this was not within the Statute, that the Execution is not compleat, and the Plaintiff cannot enter, but must bring his Ejectment. Holt C. J. said, There was the same Reason for Fees for executing an Elegit as an Extent. Upon an Elegit the Sheriff returns, that he has taken an Inquisition, extended the Lands, and delivered them to the Plaintiff; and there is a Liberate in the Body of the Writ of Elegit, and the Plaintiff on this Return may enter, for by the Return he becomes Tenant by Elegit, and may maintain an Ejectment, and assign his Interest upon the Land; but the Defendant's continuing in Possession after the Return of the Writ, turns the Plaintiff's Estate to a Right, and therefore he must enter to assign. The Execution is compleat and perfect; and his being

(12) For Fees of executing an Elegit, Debt lies.

Vide Ante pl. 6.

being put to an Ejectment is no Reason; for in case of an Extent upon a Statute where the Liberate is distinct, he cannot enter by Force; 'tis true, he may without Force; and so he may here: And Powell said, That Extent generally is the Word of the Statute of Eliz. and that an Extent upon an Elegit was an Extent within the Statute, as well as an Extent upon a Statute.

*Dean and Chapter of* Exeter's *Case.* Hill. 5 Ann. B. R.

(13) No Fees due for Burials, unless by Custom.

Ante pl. 9.

SERJEANT Hooper shewed Cause against a Rule for a Prohibition to the Spiritual Court, to stay a Suit there for a customary Fee of 10 l. due to the Dean and Chapter of Exeter, for burying in the Cathedral Church, sed non allocatur. For no Fee is due for burial of Common Right: But where a Licence is necessary, the Person giving it may stand upon his own Price; and if there be such a Custom, 'tis triable at Common Law. Vide 3 Keb. 527, 523. If the Custom be not denied, the Spiritual Court shall proceed; for there is no other Remedy: But if the Custom be denied, a Prohibition shall go; not propter defect. jurisdictionis, but triationis; and that Burials at Common Law ought to be in the Church-yard, and without Fee. 2 Keb. 778. contra.

# FELONY.

Domina Regina *versus* Wallis. Oct. 14. 1703. Coram Holt *C. J.* & al. Justic. apud le Old Baily.

If several make a Riot, and a Man is killed, they are all Principals in the Murder.

INDICTMENT against A. for the Murder of John Cooper, and also against B. C. D. and E. as Persons present assisting, aiding and abetting A. therein: E. being arraigned upon this Indictment pleaded Not guilty, and upon Evidence it appeared, That the Person slain was a Constable, and in the Execution of his Office with divers other Constables in May-Fair. That E. the Prisoner first drew his Sword, and with divers others, to the Number of forty Persons, fell upon the Constables:

4

bies: That this Affray continued an Hour after, till in the End one of the Constables, viz. the said John Cooper, was slain; but by whose Hand it did not appear. It also appeared that A. had been tried on this Indictment and acquitted. Et per Holt C. J. 1st, Tho' the Indictment be against the Prisoner for aiding, assisting and abetting A. who was acquitted; yet the Indictment and Trial of this Prisoner is well enough, for who actually did the Murder is not material; the Matter is, That a Murder was committed, and the other is but a Circumstance, and all are Principals in this Case; therefore if a Murder be proved, 'tis well enough.

2dly, If a Man begins a Riot, as in this Case, and the same Riot continue, and an Officer is killed, he that began the Riot, as the Prisoner here did, is a principal Murderer, tho' he did not do the Fact.

# Fences, Inclosures.

## Starr *versus* Rookesby. Mich. 9 Ann. B. R.

ERROR was brought on a Judgment by Default in C. B. in an Action on the Case, wherein the Plaintiff declared, that he was possessed of a Close adjoining to the Defendant's, and that the Tenants and Occupiers of that Close had Time out of Mind made and repaired the Fence between the Plaintiff's and Defendant's Close, and that for want of Repair the Defendant's Cattle came into the Plaintiff's Close, &c. Et per Cur',

Case for suffering a Fence between the Plaintiff's and Defendant's Close to be out of repair, per quod Defendant's Cattle entred Plaintiff's Close, &c. lies.

1st, Either Trespass or Case lies; Trespass, because it was the Plaintiff's Ground and not the Defendant's; and Case, because the first Wrong was a Nonfeazance and Neglect to repair, and that Omission is the Gist of the Action; and the Trespass is only consequential Damage.

Where a Charge against common Right is laid on Owner of the Soil, Plaintiff must make Title; and a Prescription is sufficient.

2dly, This is a Charge upon the Defendant against common Right; for the Law bounds every Man's Property, and is his Fence, and this is obliging another to make a Fence for him.

3dly,

3dly, That where a Charge is imposed on another, and that against common Right, and the Charge is laid on him as Owner of the Soil, or Tertenant, the Plaintiff in his Declaration must make himself a good Title; but where he declares against the Defendant as a Wrong Doer only, and not as Tertenant, 'tis sufficient that the Plaintiff declares on his Possession.

4thly, That the Plaintiff has made himself a sufficient Title in this Declaration, by shewing the Defendant bound to this Charge by Prescription; which Prescription is sufficiently alledged; for by Tenentes is meant the Owners of the Fee-simple, and by Occupatores, those that come in under them. That Tenentes is so taken, appears by the Writ de Curia Claudenda; which is a Writ of Right, and lies only for a Tenant in Fee; and as this is a Charge upon the Land, which runs with it, there is good Reason why every Occupier should be bound. And it is sufficient for the Plaintiff to charge the Tenentes and Occupatores; because it is impossible that he who is a Stranger, should be able to know and set forth their particular Estates, Titles and Interests; but the Prescription is annexed to the Tenentes, i. e. Tenants of the Fee: Yet on a Traverse of the Prescription it would be good Evidence that the Tenants for Years have from Time to Time fenced and repaired, for perhaps the Estate has not since Time of Memory been in the actual Occupation of the very Owner of the Fee. The Judgment was affirmed.

Prescription in Tenentes & Occupatores is well.

Vide Hern. 72. Raft. 621, 622. 21 H. 6. 5. Raym 192. 2 Cro. 665. 29 E. 3. 32. 3 Cro. 445. 2 Rolls R. 285. Dy. 75.

# FINES.

## Price *versus* Langford. Paſ. 2 W. & M. B. R. Intr. Hill. 2 & 3 Jac. 2. Rot. 1059.

H. Was ſeized in Fee as Heir of the part of the Mother; he and his Wife levied a Fine to A. and B. with Warranty; A. and B. by the ſame Fine did grant and render the Lands to the Husband and Wife in Tail, Remainder to the Heirs of the Husband: The Husband and Wife died without Iſſue, and the Queſtion was, Whether the Heir a parte Paterna or a parte Materna ſhould take theſe Lands? It was argued on the one Side, that the Seiſin of the Conuſee is fictitious, for if the Conuſee were Tenant for Years, the Term would not be thereby extinguiſhed; and he is like to the Surrenderee of a Copyhold, nothing but a mere Inſtrument: Therefore nothing is altered by the Fine, but the Uſe and Eſtate remains as before. On the other Side it was ſaid, That the Conuſee could not render if he had not the Eſtate in him, and that it is a Re-infeoffment; and of this Opinion was the Court, who held, That the Eſtate was once in the Conuſee, and the Fine and Render is a Conveyance at Common Law, and the Render makes the Conuſor a new Purchaſor as much as a Feoffment and Re-infeoffment at Common Law.

(1) Fine ove Grant & Render is tantamount to a Feoffment and Re-feoffment, and creates a new Eſtate.

## Winchurch *verſus* Belwood. Paſ. 4 W. & M. B. R.

ERROR being brought in B. R. of a Fine in C. B. the Fine was affirmed; and now a Writ of Error, coram vobis reſident. was brought here, and Exception was taken, That the Writ ought to abate, for that no ſuch Writ lies in this Caſe, becauſe only a Tranſcript of the Fine is removed into this Court. And it was likened to the Caſes of Error in the Exchequer-Chamber, where only a Tranſcript goes up, and if the Writ abates, no Writ of Error coram vobis lies.

(2) Error coram vobis lies upon an Affirmance of a Fine in B. R.

Sed per Cur. The Reaſon of that is not becauſe they in the Exchequer-Chamber have only a Tranſcript; but becauſe they have only a particular Authority to affirm or to reverſe. It was

 ad-

admitted, that a Transcript of the Record of a Fine is only removed, because upon Judgment of Reversal a Certiorari goes for the very Foot of the Fine, and it is cancelled. But notwithstanding that the Court held, That Error coram vobis residen. lay.

## Symonds *versus* Cudmore. Hill. 5 W. & M. Rot. 743.

(3) A. Tenant in Tail, Remainder to A. in Fee, makes a Lease and dies before Commencement, and the Issue levies a Fine, the Lease is good against Conusee.

IN Ejectment a Special Verdict was found, upon which the Case was, Tenant in Tail in Reversion after a Lease for Years, Remainder to Tenant in Tail in Fee, made a Lease to commence at a Day to come, and died before the Day, having Issue; after the Death of Tenant in Tail, but before the Day, the Issue levied a Fine: In this Case the whole Court agreed, That the Remainder in Fee stood chargeable with this Lease, and it should have been served out of the Remainder in Fee, had Tenant in Tail died without Issue. 2dly, It was held, That the Estate Tail was extinct by the Fine, as much as if Tenant in Tail were dead without Issue. 1st, Because two Fees immediately expectant one upon another, cannot subsist in the same Person. 2dly, Because by the 32 H. 8. c. 36. the Fine is declared to be a Bar and a Discharge of the Estate Tail. 3dly, Because the Statute of Westm. 2. having made Estates Tail a kind of particular Estate, they are (the Protection of the Statute being gone by the Fine) like all other particular Estates, subject to Merger and Extinguishment when united with the absolute Fee.

Estate Tail extinct by Fine.

Tenant in Tail, Remainder to the King; Tenant in Tail makes a Lease for Years, and is attainted, the King shall avoid the Lease, for the Estate Tail is as much gone by Merger, as if Tenant in Tail was dead without Issue.

If there be Tenant for Life, Reversion to A. in Fee, and A. makes a Lease for Years, and then Tenant for Life and he in Reversion join in a Fine, the Lease shall take effect presently; not but that the Estates passed severally according to Bredon's Case; but they are now consolidated; or else, if the Conusee should die during the Life of the Conusor, there would be an Occupant.

Eyre, Gregory and Dolben denied 1 Inst. 46. b. and held the Issue in Tail had Election to avoid or affirm the Lease, and that by Westm. 2. but that the Conusee had not; for the Power and Privilege is personal, and cannot be transferred.

In this, Holt C. J. differed; he held the Lease actually void quoad the Issue, as if Tenant in Tail make a Lease to commence after his Death; and that as by Law no Act is necessary to be done to avoid the Lease, so the Fine does not prevent its being void.

## Anonymus. Hill. 6 Will. III. B. R.

(4) On Error to reverse a Fine Scire Facias must go against Tertenants.

PER Curiam, The Court will not reverse a Fine without a Scire Facias returned against the Tertenants; for the Conusees are but nominal Persons: And tho' it was otherwise in the Precedent in Co. Ent. and Hern's Plead. 375. and the Law perhaps does not strictly require it, yet the Course of the Court does.

## Hunt *versus* Bourne. Hill. 1 Ann. B. R.

(5)

IN Ejectment in C. B. the Jury found a Special Verdict; That the Lands in Question were holden of the Manor of Wormelow, which is de antiquo dominico Coronæ Domini Regis & Anteceſſorum ſuorum, impleadable in the Court of the Manor per parvum breve de recto clauſo coram Seneſchallo ſectatoribus & Domeſmen' ejuſdem Manerii ſive eorum locum tenen. & Attornat', and that upon Writs of Right close Fines have been Time out of Mind levied and leviable in the same Court: That Thomas Guillym was seised in Tail of the said Lands, and being so seised 25 Maii, 22 Car. 1. a Fine was levied in the said Court ſecundum conſuetud. prædict. before A. B. locum tenen. Willielmi Kyrle Seneſchalli & R. Attornat. J. S. & W. Attornat. J. N. adtunc Sectator. & Domeſmen. ejuſdem Cur'; by which Fine the said Thomas Guillym conceſſit tenementa prædict. to one Nurſe for Life, rendering Rent, &c. Then the Fine was set forth in hæc verba, and it appeared to be levied before the Attorneys of the Suitors, in placito conventionis ſecundum conſuetudinem Manerii come ceo que il ad de ſon done, with Warranty. Then they found that the said Lands were not accustomably letten, and that this was not the ancient Rent; That Nurſe entred, and afterwards, 24 Car. 1. the said Thomas Guillym and his Wife levied a Fine with Warranty, to the use of the Husband and his Heirs; That afterwards, the same Year, the said Thomas Guillym bargained and sold the said Lands to Paine and his Heirs, under whom the Defendant claimed; That afterwards he released to Paine, and that Paine died in 1661. That Guillym died in 1663; That thirty Years afterwards, viz. 1693. Nurſe died: And whether the Entry of Richard Guillym, Grandson and Heir in Tail of Thomas the Conusor of both Fines be lawful upon the Purchasor, was the Question, which in C. B. was determined in the Affirmative, and Richard had Judgment; and now upon a Writ of Error in B. R. that Judgment was affirmed per totam Curiam ſeriatim after many Arguments at Bar. And these Points were resolved,

1st, That Tenant in Tail of ancient Demesne Lands may levy a Fine of those Lands in the Court of Ancient Demesne, although it be no Court of Record, because it is but agreeable to the Power of that Court, in like Instances; for they may proceed to try the Mise joined in a Writ of Right close, which is of a higher Nature than a Fine. Dy. 111. pl. 47. Whereas in all other inferiour Courts on the Mise joined, the Cause must be removed into C. B. by Recordari. F. N. B. 12. And the 18 E. 1. is but Declarative of the Common Law, and was made to rectify a Mistake, viz. That Fines were leviable in inferiour Courts upon Bills or Plaints, which now cannot be either by Grant or Custom, by reason of the negative Words of that Statute, but this does not extend to Ancient Demesne Courts, for then this Statute would make Fines of those Lands leviable in the Court of Common Pleas, whereas they are not, but reversible by Writ of Disceit, so that they would be under a double Disadvantage, that a Fine would not be leviable of the Land any where if not in this Court of Ancient Demesne; whereas that which is their Privilege could never be intended to be to their Disadvantage.

Mise join'd in a Writ of Right may be tried in that Court.

2dly, That a Fine may be levied on a Writ of Right close, or in any real Action, but not on an Original in a personal Action; and that the common Writ of Covenant on which a Fine is levied, is not a personal but a real Action; for tho' it is to have Damages for a Breach of Covenant, as in personal Actions, yet it is to have an Execution and Performance of the Covenants. Vide 5 Co. 59. F. N. Br. 146. f. 2 Inst. 514. 1 And. 71. Kel. 90. b. 4 Inst. 207.

Fine may be levied in any real Action, and the Writ of Covenant on which a Fine is levied, is such.

3dly, That a Fine levied in the Court of Ancient Demesne may work a Discontinuance, tho' the Court is not a Court of Record; for the Discontinuance is, because the Freehold is recovered in the Action; for every Recoverer recovereth a Fee-simple, and a Recovery of a Fee-simple must work a Discontinuance; and if this be allowed to be a Fine, in consequence it ought to have the Effect of Fines. But nota, Tho' such Fine be a Discontinuance, it is not a Bar to the Intail; for it is by the 4th of Hen. 7. that a Fine with Proclamations shall bar an Estate Tail, and no Fine but a Fine with Proclamations is within that Statute, nor can bar an Estate Tail. And the Court denied a Fine to be a Feoffment of Record, and said it was improperly so called, but that the meaning was, That it had the Effects of a Feoffment to some purposes, if he that levied the Fine was seised of the Freehold at the Time of the Fine levied.

Fine in ancient Demesne works Discontinuance, but no Bar.

Why Fine call'd a Feoffment of Record.

4thly, That a Fine sur conusans de droit come ceo que il ad de son done generally implies a Fee-simple; but it is only by Implication, and therefore there is no Repugnancy to limit an Estate for Life to the Conusee; for the precedent Donation or Feoffment which is supposed might be for Life only, or in Tail, and

Fine sur conusans, &c. come ceo, &c. implies a Fee-simple, but that may be qualified to a particular Estate.

and the general Intendment of the Conusans may be qualified by an express Limitation. Vide 41 E. 3. 14. Co. Lit. 9. b.

5thly, That the Suitors, who are Judges, might act by Attorney, because it is a part of their Service, ratione tenuræ, and they are Judges quatenus Tenants. Quilibet liber homo qui sectam debet libere possit facere Attornatum suum ad sectam suam pro se faciend. Stat. Merton c. 10. And this is part of his Suit. Vide 2 Inst. 225. F.N.B. 25. 156.

There was another Point in this Case, viz. Whether it appeared by the Verdict that the Issue in Tail was barred of his Formedon by 21 Jac. 1. and if so, Whether he had lost his Right of Entry also. But for the Resolution of that, vide this Case, Title Limitations.

## Fazacharly *versus* Baldo. Trin. 3 Ann. B. R.

(6) Writ of Error of Fine removes only a Transcript.

PER Holt, C. J. If a Writ of Error be brought in B. R. to reverse a Fine levied in C. B. the very Record of the Fine it self is never removed hither, but only a Transcript of it: But if this Court adjudge it erroneous, then a Certiorari goes to the Chirographer to certify the very Fine, and when it comes up it is actually cancelled.

## Lloyd *versus* *Viscount* Say *and* Seal. Mich. 10 Ann. B. R.

(7) Fine is of the Term the Concord was made.

A Fine was thus; Hæc est finalis Concordia facta in Cur. Regis apud Westm. a die Sancti Michaelis in tres septima' Anno decimo Willielmi tertii coram Thom. Trevor, &c. & Postea in Crast. Sanctæ Trinitat. 1 Annæ concess. & recordat. coram ejusdem Justiciar'; so that the Concord of the Fine was of one Term, and the Recordat. of another Term following; and therefore the Question was, Of which Term this should be said to be a compleat Fine? Per Cur. 'Tis a Fine that Term when the Concord was made, and of which the Writ of Covenant was returnable, for the Concordia facta in Curia, is the compleat Fine; the Concesset recordat', is the Leave of the Court to inrol it. 6 Co. 68. Hob. 330. 2 Ven. 47.

FOR-

# FORGERY.

## Dominus Rex *versus* Stocker. Mich. 7 Will. III. B. R.

(1) Fabricavit seu fabricari causavat, ill in Indictment.

AN Indictment, for that the Defendant fabricavit seu fabricari causavit a Bill of Loading, was held naught upon Demurrer, for an Indictment ought to be certain and positive. Co. Ent. 477. 1 Sid. 134. 2 Cro. 345. 2 Ro. 272. cont. 2 Ro. 82.

## Domina Regina *versus* King. Hill. 1 Ann. B. R.

(2) For forging a Deed of J. S.

INDICTMENT for forging quoddam scriptum Obligatorium of J. S. Objection, It should be Scriptum, purporting a Writing obligatory of J. S. sed non allocatur. For the 5th of Eliz. c. 14. mentions false Deeds as well as false Writings.

## Domina Regina *versus* Smith. Pas. 2 Ann. B. R.

(3) Indictment for forging a Deed with the Mark of J. S. Mark need not be set forth.

INDICTMENT for forging a Deed of Assignment of a Lease, signed with the Mark of one Goddard, cujus tenor. sequitur, but set not down the Mark as in the Assignment; and this was objected, for that without that it could not be a Forgery; sed non allocatur.

# Franchises, Liberties, &c.

Domina Regina *versus* Taylor. Trin. 1 Ann. B. R.

MR. Lovell moved against the Keeper of the Prison of the Gatehouse, for not returning a Habeas Corpus for bringing up Prisoners in order to be sent to Newgate, the County Gaol: Upon this Occasion, Holt C. J. laid it down, That none can claim a Prison as a Franchise, unless they have also a Gaol-Delivery of Felony, which the Dean and Chapter of Westminster hath not, and therefore ought to send a Calendar of them to Newgate, or return the Habeas Corpus to this Court, with a Claim of their Franchise.

(1) Where there is a Franchise of a Prison, there must be a Gaol-Delivery.

Rush *versus the Chancellor and Scholars of* Oxford. Trin. 1 Ann. B. R.

MR. Cowper moved for a Prohibition to a Suit in the Vice-Chancellor's Court against certain Brewers, for selling ill Beer and false Measure, and the particular Excess of Jurisdiction alledged was, the exacting juratory Caution; and he also insisted, that tho' they have the Assize of Bread and Beer by Charter, yet a Power to punish by Fine, and proceed according to the Civil Law, cannot be by Charter. Holt C. J. Before the 14 H. 8. the University had the Jurisdiction of a Leet, and exercised it in the Vice-Chancellor's Court; but the Charter of the 14 H. 8. grants them Power of Trespasses, and that over all Persons whatsoever, if a Scholar be Party. Adjournatur.

(2) Franchise of the University of Oxford.

# GAMING.

## Pope *versus* St. Leger. Mich. 5 W. & M. Rot. 337.

(1.) Wager concerning the right Manner of Playing, not within the Statute.

At Play at Backgammon, one of the Players stirred one of his Men, but did not move it from the Point; and the Question was, Whether he was bound to play it? On this, a Wager of 100 l. was laid, and the Determination referred to the Groom-Porter; and now in an Action, the Question was on the Statute against Gaming, Whether this was within the Statute? And 'twas held this Wager was not prohibited by the Statute, for 'twas not on the Chance of the Play, but on the Right of the Play, which is a collateral Matter.

## Hussey *versus* Jacob. Mich. 8 Will. III. B. R.

(2) Winner shall not recover on a Bill for Money won at Play against an Acceptor; otherwise of an Indorsee.

The Lord Chandois lost Money at Play to Hussey, and gave him a Bill for it on Jacob, who accepted it, and afterwards refused to pay; and now an Assumpsit was brought against Jacob, and he pleaded the 16 Car. 2. c. 7. To which it was demurred, and 1st, It was objected, That this amounted to the general Issue: Sed Curia contra; for where the Matter of the Plea confesses the Cause of Action, but avoids it, the Defendant may plead specially, tho' he might have given it in Evidence; otherwise where the Matter of the Plea does not avoid but deny. 3 Cro. 871. Second Objection; This is out of the Statute, because the Nature of the Duty is altered, and a new Contract created by the Acceptance, which is the Ground of this Action, sed non allocatur; for tho' this is a kind of new Contract, yet all is founded on the illegal and tortious Winning, and only secures the Payment of that Money, and therefore it is within the Statute, the Plaintiff being privy to the first Wrong; but if Hussey the Plaintiff had assigned this to a Stranger bona fide upon good Consideration, he had not been within the Statute, for he was not privy to the Tort, but an honest Creditor.

Where Matter amounting to the general Issue may be pleaded specially.

Ano-

Anonymus. Mich. 12 Will. III. B. R.

At Play H. may lose 100 l. to one, and 100 l. to another, upon Tick, because it is a several Contract; otherwise if it were a joint Contract. It was held in the Case of Danvers and Thistleworth, That if H. loses 2000 l. in ready Money, and afterwards loses 100 l. more, for which he gives his Note, the Note is good, but all beyond it is void, Per Holt C. J.

(3) Several Contracts.

Dickson *versus* Pawlett. Mich. 13 Will. III. B. R.

The Plaintiff brought Assumpsit for 40 l. Defendant pleaded it was for Money won at Play, and that at the same Time and Sitting he lost also 66 l. to J. S. Plaintiff demurred and had Judgment, for 'twas the Opinion of the Court, That losing 106 l. to several Persons at one Sitting, is not within the Statute, unless they go Shares fraudulently, and join in the Stakes: For then, as to the Chance of the Game, they are as one Person.

(4) Assumpsit for 40 l. Plea, won at play, and at the same Sitting he lost 66 l. to J. S. ill.

# GAOL.

Tilsden *versus* Palfriman. Mich. 3 Ann. B. R.

If one be in Custod. Marr. the Way to charge him with an Action is thus, viz. In Term-time the Plaintiff must file a Bill against him, and deliver a Declaration to the Turnkey, and then he shall lie two Terms before he shall be discharged, even on Common Bail; but if it be in Vacation, then the Plaintiff must go to the Marshal's Book in the Office and make an Entry quod remanet in Custodia ad sectam, &c. and this is sufficient to charge him, provided he be then in actual Custody; for if he be out of Gaol, then he may be arrested. Per Cur'.

Course of charging a Prisoner in Custody with an Action.

# GRANTS.

## Germain & Ux. *versus* Orchard. Mich. 3 W. & M. B. R.

Lessee for Years grants the Land Habendum for the Residue after his Death; Term vests presently and Habendum is void.

IN Trespass quoad Non cul. was pleaded, and the Vi & Armis and Issue was thereon, and as to the other Part of the Trespass to such a Time, the Statute of Limitations, upon which there was a Demurrer; and as to the Residue a Justification and Issue on it, and a Venire to try that, and enquire of the Damages on the Demurrer: Accordingly there was an Enquiry of Damages as to the Issue, but not upon the Demurrer; and as to that the Plaintiff entered a Non Prof. and took Judgment for the other. The Case, upon the Justification, was found by Special Verdict to be this, viz. Lessee for 1000 Years by Deed, reciting the original Lease of the Lands, grants the said Lands, together with the said recited Lease to the Grantee, his Executors, Administrators and Assigns, and all Writings relating to the Premisses, Habendum to the Grantee, his Executors, &c. after the Death of the Grantor and his Wife for the Residue of the Term of 1000 Years.

Termor, Grants or Devises generally. Grantee is Tenant at Will, Devisee has the Term.

Per Holt C. J. If a Termor grants the Land, the Grantee is but Tenant at Will; for it does not appear that the Grantor meant to pass his whole Interest, and this is enough to satisfy the Grant; But if a Termor devises the Land, all his Term passes; for the Devisee cannot be Tenant at Will, because the Devisor must die before the Devise can take Effect, and one cannot be Tenant at Will to a dead Man: Also he agreed the Word Lease would pass the Term, but here 'tis the recited Lease, which can signify nothing but the Deed, therefore he held the Habendum void; aliter had it been a Grant of the Term, habendum after his and his Wife's Decease, for there the Habendum should be rejected as repugnant, and that being rejected, there would be enough in the Premisses to pass the Estate; but here was nothing in the Premisses that could pass the Term. And as to the Issue on the Vi & Armis, on which nothing was found, he held that was only Form, and that not finding Damages on the Demurrer, was helped by the Non Prof. entered as to them. And Judgment was given for the Plaintiff, and upon that Judgment a Writ of Error brought in the Exchequer-Chamber, where it was reversed; and the Court there held, That by the Grant of the

the Lands in the Premisses to the Grantee, his Executors, Administrators and Assigns, the whole Term of 1000 Years was transferred; and since by the Premisses the whole Term passed presently, but by the Habendum not till after the Death of the Grantor and his Wife, ex consequenti the Habendum was repugnant to the Premisses, and void. And in Trinity-Term, 6 W. & M. the Judgment of the Exchequer-Chamber was affirmed in the House of Peers.

# Habeas Corpus.

## Dominus Rex *versus* Kendal *and* Roe. Trin. 7 Will. III. B. R.

UPON a Habeas Corpus to the Keeper of Newgate, it was return'd, That the Defendants were committed by Mr. Secretary Trumball for High Treason in aiding Sir James Montgomery to escape, who was committed to the Custody of a Messenger for Suspicion of High Treason. And upon Exceptions taken to the Return, the Court held, 1st, That Secretaries of State might commit as Conservators of the Peace did at Common Law, and that it was incident to the Office, as it is to the Office of Justices of Peace, who are not authorized by any express Words in their Commission to that purpose, but do it ratione Officii. Vide 1 And. 297. 2 Leon. 275. 2dly, That the Commitment of Sir James Montgomery to a Messenger, was good, and a lawful Custody, for they would intend it only in order to carry him to Gaol. And Holt C. J. said it had been held by Hale C. J. That if a Justice of Peace direct a Warrant to any particular private Person, he might execute it; and supposing the Commitment ought to have been to the County-Gaol, yet the Want of that would not make the Warrant void. 3dly, That Sir James Montgomery's Treason ought to have been inserted in the Warrant, with an Allegation, That Sir James did the Fact; because the Defendants, by breaking the Prison, are guilty of the same specifick Treason and Offence, and for this Cause they were bailed.

(1) Commitment for Treason, in aiding the Escape of H. committed for Treason, ought to specify the Treason for which H. was committed.

## Bethell's *Case.* Trin. 7 Will. III. B. R.

(2) If Commitment in Execution by Court of Oyer and Terminer be Wrong in Form only, the Defendant not discharged on Habeas Corpus, but put to his Writ of Error. Commitment ought to be to the Sheriff.

THE Defendant being indicted for buying and selling of old Money was convicted at the Old Baily, and fined 100 l. And now on a Habeas Corpus directed to the Keeper of Newgate, was returned, that he was committed by Order of the Court of Sessions at the Old Baily to his Custody, tenor cujus Ordinis sequitur in hæc verba, viz. Willielmus Bethel convictus, &c. ideo consideratum est, That he be fined 1000 l. & quod ibidem, viz. in Custodia of the Keeper of Newgate in Gaola remaneat sub salva Custodia quousque finem persolvet.

It was held per Cur', That this Commitment was naught, 1st, Because it was not to the Sheriff, who is the Legal and immediate Officer to every Court of Oyer and Terminer. 2dly, Because the Word Committitur is necessary to the Form of a legal Commitment.

Then the Question was, Whether he could be discharged? Et per Cur. Before Bushel's Case no Man was ever by Habeas Corpus, without Writ of Error, delivered from a Commitment of a Court of Oyer and Terminer; but this Commitment was not causeless: Where a Commitment is without Cause, a Prisoner may be delivered by Habeas Corpus; but where there appears to be good Cause, and a Defect only in the Form of Commitment, as in this Case, he ought not to be discharged.

And as to the other Matter, they said, that tho' the Commitment ought in Strictness to be to the Sheriff, yet a Gaoler is a known Officer in Law, and his Custody is the Custody of the Sheriff to many Purposes; therefore let him bring his Writ of Error, for we will not discharge him on the Habeas Corpus.

## Bracy's *Case.* Mich. 8 Will. III. B. R.

(3) Commitment by Commissioners of Bankrupt till the Defendant conform to their Authority, ill.

BRACY being committed by Commissioners of Bankrupt, brought a Habeas Corpus, whereon the Commitment was return'd, and this Exception taken, that it was, That he be committed to Prison, there to remain till he conform himself to our Authority: The Case was, That he refus'd to answer to such Questions and Interrogatories, as they put to him relating to the Bankrupt's Estate. And the Statute impowers the Commissioners to commit in that Case till he submit himself to be by them examined. And the Court held the Word conform instead of the Word submit to be well enough; because it was of the same Sense; but because the Commissioners had other Authorities besides that of examining, and it did not appear but it might re-

quire a Submission to them in other Respects, and for that all Powers given in restraint of Liberty must be strictly pursued, and in this Case they had but a special Authority, and must not exceed it, they held the Return naught.

## Anonymus. Hill. 8 Will. III. B. R.

(4) Commitment by Chief Justice of B. R.

If the Chief Justice of the King's Bench commit one to the Marshal by his Warrant, he ought not to be brought to the Bar by Rule, but by Habeas Corpus, per Holt C. J.

## King *versus* Clerk. Hill. 8 Will. III. B. R.

(5) Where there is a Commitment by Warrant, the Officer must return the Warrant; otherwise of Commitments by Court to a proper Officer in Execution.

UPON a Habeas Corpus directed to the Keeper of Newgate, to bring up the Body of Clerk, it was returned, That in London there are Companies, some Freemen of those Companies are Liverymen, and that there is a Court of Aldermen, and that any one duly chosen, and not taking upon him the Office of a Liveryman, may by Custom be committed by the Court of Aldermen to any Officer of the City, and that he being before the Court of Aldermen and refusing, the Court committed him by Warrant in Writing to the Keeper of Newgate, until he should declare he would consent to take upon him the Office of Liveryman; and it was resolved,

1st, That the Court of King's Bench takes Notice of a Liveryman, and the Nature of his Office, and that he, who comes into a Company, agrees to incident Charges and Duties; and it was admitted, a Corporation might have a Power to commit by Custom, tho' not by a Charter or By-Law.

2dly, They held that they could not take Notice, that the Keeper of Newgate was an Officer of the City of London, and therefore it does not appear they pursued their Authority: The Sheriff is their proper Officer, and they should commit to him.

3dly, Where a Commitment is in Court to a proper Officer there present, there is no Warrant of Commitment, and therefore he cannot return a Warrant in hæc verba, but must return the Truth of the whole Matter under Peril of an Action; but if he be committed to one, that is not an Officer, as in this Case, there must be a Warrant in Writing, and where there is one, it must be returned, for otherwise it would be in the Power of the Gaoler to alter the Case of the Prisoner, and make it either better or worse than it is upon the Warrant; and if he may take upon him to return what he will, he makes himself Judge, whereas the Court ought to judge, and that upon the Warrant it self.

Ano-

## Anonymus. Mich. 11 Will. III. B. R.

(6) H. brought in to B. R. shall not be brought into any other Court till he has answered.

If one in Prison in the Counter be removed into the King's Bench by Habeas Corpus ad respond. and intending to go over to the Fleet, procures some Friend to bring a Habeas Corpus to remove him thither; he shall not be removed thither till he has answered to the Cause here, and he shall not compel the Plaintiff to follow after a rolling Defendant, and so vice versa of the Common Pleas; each Court shall retain the Defendant, in which he is first attached, and after he has answered there, you may carry him where you will. This is fit to be the settled Course, if there be any Difference between the two Courts.

## Dominus Rex *versus* Fowler. Trin. 12 Will. III. B. R.

(7) Habeas Corpus quash'd because directed to the Sheriff or Gaoler in the Disjunctive.

FOWLER was brought up upon a Habeas Corpus directed to the Sheriff or Gaoler, whereupon was return'd the Warrant from the Sheriff for taking him, and that was upon a Writ of Excommunicato capiendo, for subtraction of Tithes and other Ecclesiastical Duties: And Holt C. J. and the Court held,

1st, That the Habeas Corpus being directed in the Disjunctive to the Sheriff or Gaoler was wrong, and that all the Precedents were otherwise. That where a Man is taken on a Warrant of the Sheriff, in pursuance of a Writ to the Sheriff, the Habeas Corpus ought to be directed to the Sheriff, for the Party is in his Custody, and the Writ it self must be return'd. Otherwise it is where one is committed to the Gaoler immediately, as in Cases criminal.

2dly, The Writ of Excommunicato capiendo it self ought to be returned, and it is not sufficient to return the Warrant, because the Warrant may be wrong when the Writ is right; and tho' the Warrant may be wrong, yet if the Writ is right, the Party is rightfully in custody of the Sheriff. And for these Reasons the Writ was quash'd.

## Anonymus. Trin. 12 Will. III. B. R.

(8) Alias Habeas Corpus granted upon insufficient Return.

A Habeas Corpus went to the Stannary Court, to which an insufficient Return was made, and therefore disallowed: Et per Cur. The Warden of the Stannaries must be amerced, and you may go to the Coroners and get it affeered, and estreat it, (you know my Lord Bath's Amerciament is 5 l.) and an Alias Habeas Corpus must go for the Insufficiency of the Return of the

 first,

first, and upon that the Body and the Cause must be removed up: If another Excuse be returned, we will grant an Attachment.

## Yoxley's *Case*. Pas. 1 Ann. B. R.

ONE Yoxley was committed by the Earl of Nottingham, till he should be delivered by due Course of Law, for refusing to be examined, and answer whether Jesuit or not, according to the 35th of Eliz. c. 2. which impowers the Justices to examine and commit him if he refuse to answer such Questions; and the Court held the Commitment naught, because the Statute was not pursued; and that this was a kind of Conviction or Judgment to be founded upon the Statute. The Court held further that they had a Power to examine, and he being examined, made answer, No Jesuit, and was discharged.

(9) Commitment on 35 El. c. 2. till delivered by due Course of Law, ill.

## Keach's *Case*. Trin. 1 Ann. B. R.

A Habeas Corpus issued to remove H. from the Prison of the Admiralty where he lay in Execution upon a Sentence, to answer an Action to be brought against him here. Upon the Return 'twas moved that the Defendant might be committed here, for that there was no other Way to sue him; for he was not chargeable in the Prison of the Admiralty, and there ought not to be a Failure of Justice. Holt C. J. said, This was new: That tho' the Proceeding of the Admiralty was by the Civil Law, yet it was supported by the Custom of the Realm, and this Court must not elude their Process. He enquired as to the Action, and thinking it only a Pretence, said, there being no Action pending here, consequently they ought not to commit him, and the Plaintiff could not declare against him till in Custody; otherwise if an Action had been depending. The Defendant was remanded. Ex Motione Salkeld.

(10) H. committed by the Admiralty in Execution, not removeable into B. R. to answer an Action to be brought there.

## Hollingshead's *Case*. Hill. 1 Ann. B. R.

HOLLINGSHEAD was brought up on a Habeas Corpus, on which was return'd a Warrant of Commitment by Commissioners of Bankrupt, for refusing to be examin'd by them, and the Conclusion of the Warrant of Commitment was, —Or otherwise discharged by due Course of Law: And this was held naught; for the Words of the Statute are, He shall be committed till he submit himself to be examined by the Commissioners.

(11) Commitment by Commissioners of Bankrupt till he shall be discharged by due Course of Law, ill.

Ano-

## Anonymus. Hill. 1 Ann. B. R.

( 12 ) Habeas Corpus after interlocutory Judgment, and then Defendant died. Procedendo awarded.

AFTER an interlocutory, and before final Judgment in an inferiour Court, a Habeas Corpus cum causa was brought: Before the Return of the Writ, the Defendant died, and a Procedendo was awarded; because by the 8 & 9 W. 3. c. 11. the Plaintiff may have a Scire Facias against the Executors, and proceed to Judgment, which he cannot have in another Court, and by this means he would be deprived of the Effect of his Judgment, which would be unreasonable.

## Fazacharly *versus* Baldo. Trin. 3 Ann. B. R.

Procedendo may be awarded after filing the Return of Habeas Corpus.

ON a Habeas Corpus to the Sheriffs of London, they returned an Action on a By-Law with Penalty for not weighing at the City-Beam: Parker and Eyre moved the Return might be filed, for otherwise the Party could have no Remedy if the Return was false, and that there was no Inconvenience on the other Side; for the Record might be taken off the File at any Time the same Term. 1 Roll. Rep. 85. At least a Procedendo might be awarded. 1 Lev. 93. 1 Keb 133, 170. Et per Holt C. J.

1st, If a Record be filed here, it can never be sent down or remanded, either in the Term it is filed, or any other, and that is plain by the Act of 6 H. 8. c. 6. which enables this Court to do it in cases of Felony, which otherwise they could not have done.

Record not removed by Habeas Corpus.

2dly, The Record it self is never removed by a Habeas Corpus, as it is on a Certiorari, but remains below, and the Return is only an Account or History of their Proceedings stated and sent up to the superiour Court to judge and determine the Matter there; therefore if a Cause be removed hither by Habeas Corpus, the Plaintiff here must begin de novo, and declare against the Defendant as in Custod. Marr.

3dly, The Habeas Corpus suspends the Power of the Court below, so that if they proceed, the Proceeding would be void & coram non judice.

4thly, That the Return in this Case may be filed, because the very Record below is not returned, and therefore will not be thereby filed; of consequence a Procedendo may be granted, because it will not send out any Record filed in this Court, but takes off the Suspension they were under by the Habeas Corpus. Accordingly the Writ was filed, and afterwards a Procedendo awarded.

## French's *Case*. Mich. 3 Ann. B. R.

THE Defendant was out on Bail in an Action in B. R. and was taken on an Extent at the Queen's Suit; the Bail brought him up on a Habeas Corpus, and prayed he might be committed to the Marshal in discharge of his Bail; and notwithstanding great Opposition was made by the Attorney-General, he was turned over, because the Action here was precedent to the Queen's Extent.

(14) Habeas Corpus for H. in Custody at the Suit of the Crown.

## Domina Regina *versus* Layton. Pas. 4 Ann. B. R.

UPON the Return of a Habeas Corpus it appeared, That Layton was convicted by Sir Owen Buckingham, Lord Mayor of London, upon view by vertue of the 15th R. 2. c. 2. for a forcible Detainer of the Prison of the Fleet, and that he was committed until delivered by due Course of Law, Et quousque he paid the Fine of 100 l. set upon him: Sir James Mountague took Exceptions, and objected, 1st, That it did not appear that the Mayor was a Justice, sed non allocatur; For the 8 H. 6. gives the same Power to Mayors, &c. Secondly, That the Complaint was of a forcible Entry and Detainer, and here is no forcible Entry at all, and a Man's House is his Castle, which it is lawful for him to defend with Force. Curia advisare vult. At another Day it was farther objected, That the Fine was set at another Time; but the Court held that might be set after the Conviction, as in Lambard's Eirenarcha. Farther it was objected, That it should appear by the Conviction, that the Defendant had not been three Years in Possession upon the 8 H. 6. 9. But per Cur. That comes in by a Proviso, and he that would have the Benefit of it, must plead his Possession. Vide 2 Cro. 199. and Stat. 31 El. c. 11. Also the three Years Possession is intended where the Estate is continuing, not else. Vide Moore 848. The Court also held, That tho' the Conviction was only of forcible Detainer upon view, yet it was traversable upon the 8 H. 6. 9. by him that had been three Years in quiet Possession, as well as upon a finding by Inquisition, and that because the Party is to be imprisoned.

(15) Commitment for Fine upon Conviction of forcible Detainer.

## Crackall *versus* Thompson. Mich. 4 Ann. B. R.

THE Defendant pending an Action against him in B. R. was taken upon a Warrant in a criminal Matter, and committed to the Compter, and afterwards was there charged with an Extent

(16)

Extent for the Queen. And he was brought up by Habeas Corpus at the Suit of the Plaintiff in the Action, in order to be declar'd against in Custody of the Marshal, and Mr. Attorney-General opposed it, because the Custody of the Marshal was precarious, and he would let him escape as he did French; and this Case differed from that, because by the late Act of Parliament, the Plaintiff might declare against him in Custodia Vicecomitis, whereas the Bail had been without Remedy, if French had not been committed; and as to the Defendant's being arrested on criminal Process, that was nothing, for tho' one so arrested cannot be charged at the Suit of a Subject in any Action, without Leave of the Court; yet the Queen may charge him, and the Defendant was remanded.

## Anonymus. Mich. 4 Ann. B. R.

(17) Habeas Corpus lies not to County Palatine.

HABEAS CORPUS ad respond. was granted to the County Palatine of Chester, and afterwards superseded upon the Motion of Mr. Cheshire, who cited two Precedents.

# HEIR.

## Smith & Ux. *versus* Angel. Trin. 1 Ann. B. R. Intr. Pas. 13 Will. III. Rot. 325.

(1) Heir cannot plead a Term for Years raised by his Anceftor in Delay of Execution, but should confess Assets.

DEBT against an Heir upon the Obligation of his Ancestor; the Defendant not denying the Action or Obligation pleads, That his Ancestor was seised in Fee of three Fourth Parts of such and such Tenements, and that in 1697 he demised the same for Five hundred Years to A. who entered, and that the said Reversion descended & riens ultra. And that at the Time of the Action brought he had no Tenements in Fee-simple by Discent præterquam the said Reversion, and that afterwards there was a Bill in Chancery exhibited against him by the Ancestor's Wife for Dower, and a Decree obtained

tained against him for the third Part of those three Fourths for the Wife's Life. Et hoc, &c. unde petit judicium si ipse de debito prædict. præterquam in the Reversion after the Lease, and the Estate in Dower when they respectively happen, virtute scripti obligatorii prædict' onerari debeat, &c. To this there was an idle Replication, a Rejoinder and a Demurrer.

It was not questioned but Judgment ought to be given for the Plaintiff; the Doubt was, whether General or Special.

Et per Cur', A general Judgment ought to be given: And, 1st, Holt C. J. said, It had been a Doubt whether the Heir could plead a Term for Years in Delay of present Execution; and tho' there were some Precedents to that purpose, yet he was of Opinion the Heir could not plead a Term in Delay, but ought to confess Assets; for the Reversion is Assets, and the Common Law had no Regard to a Term for Years. 2 Inst. 321. 43 E. 3. 9. Br. Assets 9. And there is no Mischief in this; for tho' in consequence a Levari Facias may go; yet the Lessee may maintain himself against an Ejectment by Vertue of his Lease. Vide Dy. 346. Hern's Pl. 307.

2dly, As to the Decree in Chancery, he held it plain, That there was no Estate or Interest vested in the Wife by that, so that the Plea in this respect is naught, and most apparently false: Upon which Reason a general Judgment was given for the Plaintiff.

General Judgment for his false Plea.

## Denham *versus* Stephenson. Mich. 3 Ann. B. R.

(2) Where Defendant is sued as Heir, the Declaration need not shew coment Heir.

PLAINTIFF brought Debt on a Bond as Administrator, against the Defendant, as Heir of his Ancestor; and upon Demurrer, one Objection was, That he did not shew coment hæres, &c. and Hob. 333. was cited. Et per Cur', Where H. sues as Heir, he must shew his Pedigree, & coment hæres, for it lies in his proper Knowledge; but where one is sued as Heir, he need not; for the Plaintiff is a Stranger, and it would be hard to compel him to set forth another's Pedigree. For the principal Point in this Case, vide Title Administrator, pag. 40. pl. 10.

# HERIOT.

Austin *versus* Bennet. Pas. 5 W. & M. B. R.

Where it may be seized; and where distrained for.

TRESPASS for a Cow; the Defendant shewed that J. S. was possessed of, &c. and died, and that he seized the Cow as Heriot-Service, and does not shew that he seized it within the Manor. Et per Cur', H. may seise either Heriot, Custom or Service, any where; but one cannot distrain for them out of the Manor.

# Highways, Rivers, Bridges.

Dominus Rex *versus the Inhabitants of the Parish of* Newington. Trin. 8 Will. III. B. R.

(1) Construction of 2 W. & M. Stat. 2. c. 6. sect. 2.

BY the 2d of W. & M. Stat. 2. ca. 6. sect. 8. The Pavements of Streets are to be repaired by the Inhabitants of the said Streets, and by Sect. 9. the Scavengers are to be paid by the Parishioners; and the Question was, Whether Housholders, who are bound to repair the Pavements before their own Doors at their own Costs by the 8th Clause, are bound to contribute to the Payment of the Scavenger's Rates? And the Court held they were, for that an indefinite Proposition is universal, and they are Parishioners: And as for paving before their own Doors, they have the principal Benefit of it; so that is no Reason to excuse them from other Parochial Duties.

## Domina Regina *versus* Kime. Paſ. 2 Ann. B. R.

INDICTMENT for not working toward the Repair of Highways according to the Statute, ſhewing that ſix Days inter ſuch a Time and ſuch a Time were appointed by the Juſtices, and Defendant did not come upon any of the ſix Days; this Indictment was held naught, for the particular Days ought to be ſet forth. The Juſtices muſt not appoint ſix Days generally between ſuch a Time and ſuch a Time, but muſt be particular; and ſince the Appointment was naught in this Caſe, the Party was not bound to come at all.

(2) If Juſtices appoint H. to work on the Highways ſix Days between ſuch a Day and ſuch a Day, 'tis void.

## Domina Regina *versus* Watts. Trin. 2 Ann. B. R.

INDICTMENT for not repairing a Houſe ſtanding upon the Highway ruinous and like to fall down, which the Defendant occupied and ought to repair ratione tenuræ ſuæ. The Defendant pleaded Not guilty, and the Jury found a Special Verdict, viz. That the Defendant occupied, but was only Tenant at Will; and whether he was liable, was the Queſtion. Et per Cur', The Ratione tenuræ is only an idle Allegation; for it is not only charged, but found, that the Defendant was Occupier, and in that reſpect he is anſwerable to the Publick; for the Houſe was a Nuſance as it ſtood, and the continuing the Houſe in that Condition is continuing the Nuſance. And as the Danger is the Matter that concerns the Publick, the Publick are to look to the Occupier, and not to the Eſtate, which is not material in ſuch Caſe as to the Publick: And Powell J. held, That there might be ſuch a Tenure, and that Tenures being chargeable upon the Land by the Statute of Avowries, it is not material, even in an Avowry, what Eſtate the Occupier has in the Premiſſes liable.

(3) Indictment for ſuffering a Houſe on the Highway to be likely to fall down, lies againſt Tenant at Will.

## Warren *versus* Matthews. Hill. 2 Ann. B. R.

ONE claim'd ſolam Piſcariam in the River Ex, by a Grant from the Crown. Et per Holt C. J. The Subject has a Right to fiſh in all navigable Rivers, as he has to fiſh in the Sea; and a Quo Warranto ought to be brought to try the Title of this Grantee, and the Validity of his Grant.

(4) Subject has a Right to fiſh in all navigable Rivers.

Domina

## Domina Regina *versus the Dutchess of* Bucklugh, & al'. Pas. 3 Ann. B. R.

(5) Manor held by Service of Repairing a certain Bridge. Tenant of any Part is liable to the whole Charge.

At a Trial at Bar upon an Information for suffering a common Bridge to be ruinous, which the Defendants by Tenure were obliged to repair, it was resolved, 1st, That if a Manor be held by the Service or Tenure of repairing a common Bridge or Highway, and that Manor afterwards comes to be divided into several Hands; every one of these Alienees being Tenants of any Parcel, either of the Demesnes or Services, shall be liable to the whole Charge, and are contributory among themselves. And tho' the Lord of the Manor might, upon the several Alienations, agree to discharge those that purchased of him, of such Repairs; yet that shall not alter the Remedy for the Publick, but only bind the Lord and those that claim under him. As the whole Manor, and every part of it in the Possession of one Tenant, was once chargeable with the Reparation, so it shall remain, notwithstanding any Act of the Proprietor: It shall not be in his Power to apportion the Charge whereby the Remedy for publick Benefit should be made more difficult, or by Alienations to Persons unable, to render it, in respect of the Parts which should come into such Hands, quite frustrate. 2dly, That tho' a Manor subject to such Charge, comes into the Hands of the Crown, yet the Duty upon it continues, and any Person claiming afterwards, under the Crown, the whole Manor, or any part of it, shall be liable to an Indictment or Information for want of due Repairs.

And the Charge continues, tho' it comes to the Crown.

## Domina Regina *versus Inhabitants of* Cluworth. Pas. 3 Ann. B. R.

(6) Where Inhabitants submit to a Fine, they must also repair the Way.

The Defendants were indicted for not repairing a common Footway and confessed it, and submitted to a Fine. Et per Cur', The Matter is not at an End by the Defendants being fined, but Writs of Distringas shall be awarded in infinitum, till we are certified that the Way is repaired; but the Defendants are not bound to put it in better Condition than has been Time out of Mind, but as it has been usually at the best.

## Domina Regina *versus Inhabitants* Com. Wilts. Mich. 3 Ann. B. R.

INFORMATION against the County for not repairing Laycock Bridge; they pleaded, That the Village of Laycock ought to repair it; and it was proved in Evidence, that the Justices at the Sessions had made an Order upon the Village to repair it; but the Court held that was no Evidence, for the Justices might indict for the Neglect, but could not make an Order; and the County is liable, unless they can find a particular Person to charge. Northey Attorney-General cited a Case, wherein it was adjudg'd, That if a private Person build a Bridge, which afterwards becomes a publick Convenience, the County is bound to repair it.

(7) County liable to repair a Bridge, unless they can charge a particular Person.

## Domina Regina *versus* Sainthill. Trin. 4 Ann. B. R.

INDICTMENT found before Justices of Peace at the Sessions, for not repairing occidentalem partem communis pontis pedalis continent. dimid pontis in communi semita; Judgment for the Queen, and Error brought: It was objected, That the 22 H. 8. by which Justices of Peace have their Jurisdiction of Nusances in Bridges, extends only to Bridges in the common Highway. 2 Inst. 701. Vide West's Pref. 119, 156. 2dly, It ought to shew the Quantity, viz. So many Foot in length, and so many in breadth. It was answered, That there may be communis strata, which is not the King's Highway, and yet the Justices have Power over Nusances in that Case, not by vertue of the 22 H. 8. but by the 1 E. 3. which gives Power of all Nusances. The Court doubted as to the first Exception, over-ruled the second, it being said dimidium, but held that Pons pedalis did not signify a Foot-bridge, but a Bridge a Foot long; and so reversed the Judgment, being Pedalis for Pedestris.

*Pons pedalis*, quid.

2 Roll. 81.

House

# Houſe and Building.

## Tenant *verſus* Goldwin. Mich. 3 Ann. B. R.

Defendant's Privy ſeparated by Partition Walls from the Plaintiff's Cellar. Defendant ought to repair the Wall of common Right.

IN an Action on the Caſe the Plaintiff declared, That he was poſſeſſed of a Meſſuage, and in a Cellar, part thereof, was wont to lay Coals, Beer, &c. That the Cellar joined to the Defendant's Meſſuage; and by a Wall which the Defendant debuit reparare was ſeparated and defended from the Defendant's Privy, and that for want of repairing this Wall, feditates & ſordida furicæ prædict. in Cellarium ipſius quer. floebant, &c. There was Judgment by Default and Damages upon the Writ of Enquiry: And upon a Motion in Arreſt of Judgment, Holt C. J. was at firſt of Opinion, That, the Defendant being a Tertenant, the Plaintiff could not put a Charge upon him without ſhewing a Special Title: Upon this it was afterwards argued, That there have been Caſes where the Plaintiff has by a de Jure debuit & conſuevit, charged the Defendant even where a Tertenant. Sands and Trefuſes, 1 Cro. 575. In the Caſe of a Watercourſe, 3 Lev. 266. In the Caſe of a Way, 1 Lut. 119. And that it is not neceſſary in any Caſe for the Plaintiff to ſhew a Title where the Defendant is liable of common Right: Thus it is not requiſite in an Aſſize for a Rent-Service, or for common Appurtenant to make Title even againſt the Tertenant; aliter of an Aſſize for a Rent-Charge or Common in groſs, unleſs the Aſſize be againſt the Pernor of the Profits. 32 H. 6. 15. a. 35 H. 6. 7. b. So of all Charges by Act in Law, as againſt a Pariſh for not repairing a Highway; otherwiſe if againſt a private Perſon: That the Flowing of this Filth was an actual Treſpaſs, like the Caſe 6 E. 4. 7. Fitz. Treſ. 110. And that every Man ought to uſe and keep his own, ſo as not to damnify his Neighbour. That one Man might compel another to repair his Houſe, in ſeveral Caſes.

In what caſes one Man may compel another to repair his own Houſe.

Two Jointenants of a Houſe, one may have a Writ de reparatione facienda againſt the other; and the Writ ſuppoſes quod ad reparation. & ſuſtentationem domus tenetur. Aliter of a Wood and Fence. Mo. 374. 11 Co. 82. b. 2 Inſt. 403. Reg. 153. b. F. N. B. 127. So if H. has a Houſe near anothers, which he will not repair, a Writ de domo reparanda lies, and ſuppoſes quod reparare debet. Note, The Writ is good without ſolet. Reg. 153. b.

 F. N.

F. N. Br. 127. c. d. Reg. 153. b. 1 Inst. 56. b. One Man has the upper Part of a House, another the lower. Kelw. 98. b. Towards the end of the Term, the Chief Justice called for the Postea, and gave Judgment for the Plaintiff: He did not approve of the Case in Kelw. 98. b. and thought the Writ in F. N. Br. 127. b. must be founded upon the particular Custom of Places. The Reason he gave for his Judgment in the principal Case was, because it was the Defendant's Wall and the Defendant's Filth, and he was bound of common Right to keep his Wall so as his Filth might not damnify his Neighbour; and that it was a Trespass on his Neighbour, as if his Beasts should Escape, or one should make a great Heap on the Border of his Ground, and it should tumble and roul down upon his Neighbours. That the Case might indeed possibly be such, That the Defendant might not be bound to repair; as if the Plaintiff made a new Cellar under the Defendant's old Privy, or in a vacant Piece of Ground which lay next the old Privy before, in such Case the Plaintiff must defend himself: But that cannot be the Case here, for then he could not be bound to repair, and upon the Words debet reparare, he must be acquitted upon the Trial. But on the other Side, if A. has two Houses, and the House of Office of the one is contiguous to the Cellar of the other, but defended by a Wall, and he sells this House with the House of Office, the Vendee must repair the Wall; so if he keeps this and sells the other, he himself must repair the Wall of the House of Office; for he whose Dirt it is, must keep it that it may not trespass. Salkeld pro Quer', Southouse pro Def.

# House of Correction.

*The Case of the Hundred of* Blackheath. Paf. 1 Ann. B. R.

Justices of Peace may by 39 Eliz. c. 4. increase the Number of Work-houses, if necessary, but it must be at the Charge of the whole County.

THERE being a mighty Increase of People in the Hundred of Blackheath, by reason thereof it was thought necessary to erect a new House of Correction within that Hundred, to restrain and imploy idle People and Vagabonds: For this End a Petition was presented to the Justices in their Quarter-Sessions for such a Work-house; and it was ordered by the Court, That the Justices of the Precinct, or any two of them, should cause such a House to be built, and should assess a Tax on the Hundred for carrying on and compleating the said Work. Upon this a Question arose, Whether Justices could cause a House of Correction to be erected in a County which had one already? It was objected, That this Power of the Justices was by the 39. Eliz. c. 4. which Statute is expired. But per Holt C. J. The 39 Eliz. is continued by 3 Car. 1. and all Acts continued by 3 Car. 1. are likewise continued till it be otherwise ordained, and this stands upon the same Foot with the 43 Eliz. which is no otherwise continued, and the Justices therefore may increase the Number of Work-houses for the County, if there be occasion. A second Question arose, Whether the Justices could raise the Tax out of the particular Hundred only where the House of Correction was to be built? Broderick argued they might, because it was for their particular Convenience, and would save them a greater Charge in removing Vagrants to remoter Places, and that the Hundred in this respect might charge themselves at Common Law: Sed per Holt C. J. The Tax cannot be raised upon any particular Precinct or Hundred, but must be a general Tax upon the whole County, because the House of Correction must be for the whole County, and cannot be erected for a particular Precinct, unless in Boroughs and Corporations; and he held that this could not be done by any Authority at Common Law, because it was no charge at Common Law: Where the Common Law creates a Charge upon any Precinct, as to repair Bridges, Ways, Churches, &c. The Common Law gives them the Method of answering that Charge; otherwise where no Charge is by Law laid upon them, as in this Case; therefore a Majority cannot bind the rest, but all must agree, which Powell and

39 El. c. 4. continued by 3 Car. 1.

Gould, Justices, agreed. 3dly, The whole Court agreed, That Sessions could not delegate their Authority to particular Justices of Peace, nor invest them with a judicial Power in the Matter, but may refer a Matter to them to enquire after, and report back.

Justices cannot delegate Authority.

# JEOFAILS.

## Brook *versus* Ellis. Pas. 5 W. & M. B. R.

(1) Insufficient Return of Devastavit aided by Verdict.

UPON a Devastavit suggested against both Executors, viz. A. and B. the Writ was to the Sheriff to enquire of a Wasting by both; the Sheriff returned a Devastavit as to A. but said nothing as to B. This being assigned for Error, after Judgment upon a Verdict was held to be aided by the Verdict, being but an insufficient Return, or a Misreturn by reason of the Omission; otherwise if no Return at all. Vide 3 Cro. 587. 3 Co. 81. Noy 72. Cro. Car. 295, 312.

## Dorne *versus* Cashford. Pas. 9 Will. III. B. R.

(2) Termor for Years cannot declare on a Que Estate.

THE Plaintiff declared, That he was possessed of the Greyhound-Inn, &c. by Lease thereof for a Term of Years, and that he and all those whose Estate he had, habuerunt & habere debuerunt & consueverunt viam ad Ecclesiam, &c. and the Defendant obstructed it. After a Verdict for the Plaintiff, the Judgment was arrested for this Reason, That Lessee for Years has no Body's Estate but his own, and therefore he cannot lay a Que Estate, and the Title is impossible; but habere debuit without a Que Estate had been well enough: Adjudg'd 3 Keb. 528. 1 Ven. 13. 1 Sid. 297.

Clerk *versus* Martin. Paf. 1 Ann. B. R. Vide *this Case, Title* Bills of Exchange, pag. 129. Pla. 12.

(3) ET Nota, the Diversity there taken, That after Verdict it may be intended that no Damages were given for Matter insensible; but it cannot be so intended for Matter sensible, but insufficient in Law.

Courtney *versus* Strong. Mich. 4 Ann. B. R.

(4) Assumpsit. After Verdict, Judgment arrested, because Nudum pactum.

IN Assumpsit, the Plaintiff James Courtney declared, That in Consideration that he had agreed with the Defendant at his Request, that the Defendant quiete occuparet quoddam Mesuag. & vigint. Acras Terre onerat' cum redditu 20l. nuper concessum cuidam Johanni Courtney Libera & immun. ab omni molestatione præfat. Jacobi Courtney r'one reddit. prædict. the Defendant promised. Non Assumpsit was pleaded, and a Verdict for the Plaintiff. But Judgment was arrested on the Motion of Mr. Eyre, for that the Rent-charge was granted to John Courtney, and not to the Plaintiff; and there was no Room to imagine an Assignment, or that the Rent did not continue in John. So then the Defendant was to pay the Plaintiff for not doing that which he had no Right to do, which is nudum pactum, and no Consideration: It was urged by Mr. Squibb for the Plaintiff, that being after Verdict the Court must intend a Consideration, and that there was an Assignment. Curia Contra. Here was a Promise, tho' not a legal Promise, and such as could bind; and if that Promise which is laid was fully proved, the Jury might well find the Verdict. Et per Powell, They could not but find it.

Crouther *versus* Oldfeild. Hill. 4 Ann. B. R.

(5) Copyhold Estate laid without saying, ad voluntatem domini, and held well after Verdict, because the Lands alledg'd to be Parcel of the Manor.

THE Plaintiff declared quod cum seisitus fuisset de uno Messuagio & decem acris terræ in N. parcell. Manerii de W. ac tent. per copiam rotulor. Cur. Manerii illius ut tenens custumarius in feodo simplici secund. consuetudinem Manerii; cumque ipse præfat. quer. habeat & habere debeat, ipseque & omnes tenentes customarii Manerii prædict. per consuetud. infra Manerii ill. a tempore cujus,&c. Habuer. & habere debuerunt & consueverunt communiam Pasturæ in quodam loco vocat. Waimles Moor parcell. dicti Manerii pro omnibus averiis communicalibus super tenementa sua custumaria levan. & cuban. tanquam ad tenementa sua prædict. spectan. & pertinen. prædict. tamen defendens to deprive him of his said

2 Com-

Common, had inclosed, per quod, &c. Upon Not guilty pleaded, the Plaintiff had a Verdict; but upon Motion in the Common Pleas, Judgment was arrested. Upon this the Plaintiff brought a Writ of Error in B. R. and that Judgment was reversed: 1st, It was agreed in this Case, that a Man cannot be a Copyholder, nor an Estate be a Copyhold Estate, tho' it be held per Copiam Rotulorum & secundum consuetudinem Manerii, unless it be also ad voluntatem Domini; and the Chief Justice said, the great Difference between Copyholds and customary Freeholds which pass by Surrender is, That the Copyholder is in by Demise from the Lord; but in the Case of customary Freeholds the Lord is only an Instrument; and that in pleading a Title to a Copyhold Estate, it is sufficient to shew a Grant from the Lord; but in the other Case it is not enough to shew, that the Lord granted it, or that A. surrendered to the Lord, and he granted; but it must be shewn that the Surrenderor was seized in Fee and surrendered to the Lord, and he granted, &c. 2dly, It was agreed, That if this Estate must be taken to be Freehold, the Judgment of the Common Pleas was rightly given: For then the Plaintiff being seized of a Freehold Estate, to make a Title to the Common, should have prescribed, that he and all those whose Estate he had, have Time out of Mind had, &c. and cannot make a Title by Custom, according to 1 Cro 418. And here the Court admitted the Case of Dorne and Cashford supra, pla. 2. and said, That tho' the Plaintiff in possessory Actions may declare upon his Possession without setting out a Title; yet if he undertakes to set out a Title, and shews a bad one, the Verdict cannot cure that. Vide 1 Cro. 418. 2 Cro. 315. 2 Saund. 136, 186. 1 Mod. 294. But the Court held, That now after Verdict this Estate of the Plaintiff must be taken to be a Copyhold-Estate, and not a Freehold Estate, because it is both laid and found, that the Tenements were Parcel of the Manor, and that by Custom, the Plaintiff ut tenens custumar. has Common; all which is utterly impossible, unless the Tenement was Copyhold, and therefore must be supposed such, tho' the Words ad voluntatem Domini were omitted, comparing it to the Case of Debt for Rent by an Assignee of a Reversion, who shews no Attornment and has a Verdict, and the Case in 1 Sid. 218. Upon this Foot the whole Court held, That tho' a Title, which could not be good, could never be aided by a Verdict; yet a Title in a Declaration which was only imperfectly set forth, and where the Want of somewhat omitted might be supplied by Intendment, was cured by Verdict: And hereupon, supposing this to be a Copyhold Estate, there arose these Objections: 1st, That the Custom was not alledged expresly, quod infra manerium prædict. talis habetur & a tempore, &c. but quod cum ipse per consuetudinem habere debeat, which does not affirm a Custom, but suppose it. Vide 4 Co. 31. b. Vaugh.

In pleading Copyhold it is sufficient to shew the Grant of the Lord; in customary Freeholds the Estate of the Surrenderer must be shewn.

Verdict will not aid a bad Title when shewn, tho' it need not have been shewn.

Verdict aids a Title defectively set forth, not a bad one.

Vaugh. 251, 253. 2 Cro. 185. Co. Ent. 123. b. Raft. 627. 2dly, That they ought not to claim Common tanquam ad tenementa sua spectan. & pertinent. for it is annexed to the Estate and not to the Land; the Reason is, because the Estate grew by Custom, and so did the Common as part thereof, or rather a Privilege annexed thereto. Vide 2 Cro. 253. 2 Brownl. Entr. 96. If a Copyholder purchase the Freehold of his Copyhold, his Common is gone. As to the first Objection the Court held, that it was but a defective Title, and there was Room enough to induce a Proof of the Custom; and it was only an Informality of laying the Custom, which is cured by the Verdict. As to the second Objection the Chief Justice took this difference, viz. Where a Copyholder claims Common in the Wastes of a Manor, it properly and strictly belongs to his Estate, and if he enfranchise his Copyhold, in that case his Common is lost; but where he claims it out of the Manor, it belongs to the Land and not to the Estate; and if he enfranchise the Estate, the Common continues: But all the Precedents of Common are, tanquam ad tenementa sua spectan. 9 Co. 113. Co. Ent. 9. Dy. 363. b. 1 Saund. 349. 2 Saund. 321. Co. Ent. 574. Winch. Ent. 931, 1026, 1027, 1111. Hern. 811. Brownl. Red. 428, 430. And the Chief Justice thought, that since the Pleadings were so, the Common might be said to belong to the Copyhold Tenement, since it belonged to the Copyhold Estate; for that which belongs to the Estate belongs to the Tenement, and the Judgment was reversed after great Deliberation. Vide 1 Lut. 126. The Report of the Judgment of the Common Pleas.

Diversity between Common belonging to the Estate, and to the Land.

IM-

# IMPARLANCE.

## Anonymus. Mich. 10 Will. III. B. R.

IN an Action brought against H. he pleaded to the Jurisdiction of the Court, and the Declaration being not delivered four Days before the End of the Term, pleaded it as he might by the Course of the Court within the first four Days in the subsequent Term; and the Clerk, to avoid the Trouble of making up a Post-Roll, entered it with a Special Imparlance as of the subsequent Term, which spoiled the Plea, and the Clerks were ordered to make up Post-Rolls, and not to use these Special Imparlances, which, as Holt C. J. said, were crept in of late, and were not known formerly.

(1) Special Imparlances.

## Anonymus. Hill. 11 Will. III. B. R.

PER Holt C. J. In an Information, if the Defendant comes in upon the first Process, he has an Imparlance of Course; but if upon the Attachment, he must plead instanter.

(2) Imparlance upon an Information, when granted, and for how long.

## Domina Regina versus Rawlins. Mich. 3 Ann. B. R.

RAWLINS being bound by Recognizance to appear and answer an Information, appeared at the Day and prayed an Imparlance. Et per Northey Attorney-General, An Imparlance is not to be denied; but for how long shall he be allowed to imparle? Et per Cur', An Imparlance is a reasonable Time to advise, and there have been Imparlances from one Retorn Day to another; but now they are always from one Term to another in the Crown-Office: Yet per Holt C. J. It seems reasonable that the Defendant should have the same Time on such an Appearance, as if he had stood out and come in upon an Attachment or Capias, i. e. the same Time that the length of the Process would take up, and no more; for when he had come in upon that, he must have pleaded instanter.

(3)

IN-

# Incident, Appendant and Appurtenant.

## Poole's *Case*. Mich. 2 Ann. Coram Holt *C. J.* *At* Nisi Prius *in* Middlesex.

Things set up by Lessee for Years, for the Convenience of Trade are removeable during the Term, and seisable on a Fieri Fac.

TENANT for Years made an Under-lease of a House in Holborn to J. S. who was by Trade a Soap-boiler: J. S. for the Convenience of his Trade, put up Fats, Coppers, Tables, Partitions, also paved the Backside, &c. And now upon a Fieri Facias against J. S. which issued on a Judgment in Debt, the Sheriff took up all these Things, and left the House stript and in a ruinous Condition; so that the first Lessee was liable to make it good; and thereupon brought a special Action on the Case against the Sheriff and those that bought the Goods, for the Damage done to the House. Et per Holt C. J. it was held,

1st, That during the Term the Soap-boiler might well remove the Fats he set up in relation to Trade, and that he might do it by the Common Law (and not by vertue of any Special Custom) in favour of Trade, and to encourage Industry: But after the Term they become a Gift in Law to him in Reversion, and are not removeable.

2dly, That there was a Difference between what the Soap-boiler did to carry on his Trade, and what he did to compleat the House, as Hearths and Chimney-pieces, which he held not removeable.

3dly, That the Sheriff might take them in Execution, as well as the Under-Lessee might remove them, and so this was not like Tenant for Years without Impeachment of Waste; in that Case he allowed the Sheriff could not cut down and sell, tho' the Tenant might: And the Reason is, because in that Case the Tenant hath only a bare Power without an Interest; but here the Under-Lessee hath an Interest as well as a Power, as Tenant for Years hath in standing Corn, in which case the Sheriff can cut down and sell.

# Indictments, Informations, Inquisitions, Convictions, &c.

## Rex & Regina *versus* Pullen & al'. Pas. 3 W. & M. B. R.

(1) Oath made de veritate Præmissorum sufficient in Convictions.

SIR William Williams took exceptions to a Conviction on 13 Car. 2. c. 10. Wherein the Memorandum was, Quod super 23 Septembris, Hall venit coram A. B. C. tribus Justiciariis Pacis & informavit, That the Defendant with Greyhounds, chased in, &c. and that tunc Hall and Marshall made Oath de veritate præmiss. & super prædict. Sacrament. Pullen was convicted, ideo consideratum est quod forisfaciet 20 l. one Moiety to the Informer, the other to my Lord Thanet, the Proprietor of the Park, secundum formam Statut'. It was agreed, That the whole need not be recited in the Conviction, but if it be and appear ill, it may viciate the Conviction. 2dly, They held that saying, they made Oath de veritate præmiss. generally, without setting it forth specially, was well enough. 3dly, That the Judgment for Distribution was good enough, tho' the Statute gives it after Execution. 4thly, The 13 Car. 2. c. 10. is to be intended of clandestine Hunting, &c. not where the Party does it only to assert a Right; but the Court could not take Information of that by Affidavits or otherwise, because it appeared not on the Conviction. 5thly, That the Time of the Conviction and also of the Offence must appear, the Reason of which seems to be, because it must be on a Prosecution within six Months after the Offence committed. Afterwards, viz. Hill. 3 W. & M. Shower prayed an Attachment upon the Affirmance, but was denied it: Yet the Court was of Opinion, that they ought to execute their Judgment of Affirmance, as well in this Case as of Orders of Sessions affirmed; but they thought the proper Execution would be a Levari or Fieri Facias specially made out on the Statute of 13 Car. 2. c. 10. Nota, Pas. 4 W. & M. B. R. Rex & Reg. versus Rogers, the Court held they might award a Fieri Facias of the Goods, and in Default thereof a Capias ad satisfaciendum against the Person of the Dear-stealer, as well as the Justices, and a Fieri Facias was awarded in this later Case.

Execution may go on Affirmance of Convictions by Levari, Fieri Fac. or Capias ad satisfaciendum.

## Rex & Regina *versus* Franklin. Mich. 3 W. & M. B. R.

(2) Quashed because præsentant. existit for præsentat.

Indictment upon 5 Eliz. may be found at a Borough-Sessions.

MR. Eyre moved to quash an Indictment for exercising the Trade of a Goldsmith, not having served seven Years Apprenticeship for this Exception, viz. That it was found at a Quarter-Sessions for a Borough, whereas by the Statute 31 El. c. 5. it ought to be at the Quarter-Sessions of the County. But the Court held, the Indictment might be at the Sessions of a Borough, (tho' it had been otherwise ruled heretofore in several other Cases.) Note, The Words of the Statute are, —shall be enquired of, heard and determined in the Assizes or General Quarter-Sessions of the Peace of the same County where such Offence shall be committed, or in the Leet within which it shall happen, and not in any wise out of the same County where such Offence shall happen to be committed. But for a third Fault, viz. Præsentant. existit for Præsentatum, it was quashed.

## Rex & Regina *versus* Clerk. Pas. 5 W. & M. B. R.

(3) Indictment for Preaching, not being licensed, quashed, because not said contra formam Statuti.

INDICTMENT that twenty Persons being assembled, the Defendant, not being licensed, preached to them, not concluding contra formam Statuti, was quashed, for they might be the Defendant's own Family, to which the Statute does not extend, and it is not an Offence at Common Law. But Dolben differed in this.

## Rex & Regina *versus* Ball. Trin. 5 W. & M. B. R.

(4) Recognizance for trying, when forfeited.

UPON Removal of an Indictment, the Defendant enters into a Recognizance to try it; yet this is not forfeited unless the Prosecutor gives Rules, and so if one gives a Recognizance to prosecute a Writ of Error with Effect, the Defendant must give Rules and nonsuit the Plaintiff, or there is no Forfeiture.

## Rex & Regina *versus* Harwood. Trin. 5 W. & M. B. R.

(5) Indictment for Words spoke to prejudice a publick Market, quashed.

INDICTMENT for Words spoke, to the Intent to prejudice the Market of Barnstable, and hinder the Town of Toll, viz. I have got a Judgment against the Town, that we shall not pay for standing, and they are Fools that pay; the Court quashed it, and said, the Recorder of the Town ought to be fined for it.



Rex

## Rex & Regina *versus* Whitehead. Trin. 5 W. & M. B.R.

Mr. Northey moved to quash two Indictments, which were quod cum an Order was made, that the Parishioners should receive a Bastard-Child; they in Contempt did refuse to receive it. And because it was not positively said, that it was ordered that they should receive it, but only by Recital with a Quod cum, they were quashed.

(6) Quashed, because the Charge laid by Recital.

## Rex & Regina *versus* Trobridge. Mich. 6 W. & M. B.R.

INDICTMENT was per Jurator. præsentat. existit, That the Defendant erected a Cottage; & ulterius præsentant quod continuavit contra formam Statuti, and there was Judgment for the King, but reversed on a Writ of Error; for there is nothing to agree with præsentant, and it is a new Indictment distinct from the first, the Matter whereof is no Offence at Common Law, and the contra formam necessarily refers to the ulterius præsentant, and no more.

(7) Præsentat. exist. &c. Et ulterius præsentant. reversed for that.

## Dominus Rex *versus* Stocker. Mich. 7 Will. III. B. R.

INDICTMENT for making, or causing to be made, a false Bill of Loading, in the Disjunctive: And though forging, or causing to be forged, is Forgery; yet the Court thought the Indictment not good in the Disjunctive.

(8) Charge in the Disjunctive, ill.

## Dominus Rex *versus* Walcot. Mich. 7 Will. III. B. R.

If a Man is indicted and tried in B. R. the Indictment is entered upon the Plea-Roll; but if he be tried at the Sessions of the Old Baily, the Indictment when brought here, is put into a Bag and laid by. Per Holt C. J.

(9) Indictment, when entered on the Plea-Roll.

## Dominus Rex *versus* Hill. Mich. 7 Will. III. B. R.

If a Man be outlawed by Process in an Information, and comes in and reverses the Outlawry, he must plead Instanter to the Information.

(10) Outlawry on Information.

## Dominus Rex *versus the Inhabitants of* Belton. Hill. 8 Will. III. B. R.

(11) Indictment for any heinous Offence not quash'd on Motion.

INDICTMENT on Stat. Westm. 2. c. 4. for pulling down Hedges; the Defendant moved to quash it, which Holt C. J. refused, saying, he might as well move to quash a Declaration without pleading to it. Afterwards Trin. 11. on a like Motion the Chief Justice said, We never quash Indictments for Forgery, Perjury, Subornation, or any Crime concerning the Highways. In Trin. 10 W. 3. B. R. On a like Motion the Court said, they would not quash an Indictment for inticing away another's Servant upon Motion, but must plead, demur, or move in Arrest of Judgment. So of all Crimes that are heinous. So it was held, Pas. 4 Ann. Dom. Regina versus Wigg, in an Indictment for a Nusance.

## Dominus Rex *versus* Gregory. Hill. 8 Will. III. B. R.

(12) Information filed by Attorney-General not quashed.

A Motion was made to quash an Information filed by the Attorney-General, and the Court would not upon Motion.

## Dominus Rex *versus* Gaul. Hill. 10 Will. III. B. R.

(13) Information or popular Action on Penal Stat. made before 21 Jac. 1. c. 4. cannot be brought in B. R. unless for Facts done in the County where the Court sits.

AN Information on the 5 & 6 E. 6. c. 14. for buying and selling live Cattle, not having kept them the Time the Statute appoints, was exhibited in this Court. The buying and selling was alledg'd to be in Norfolk; And it was insisted, That the Information ought to have been brought in Norfolk where the Fact was done, and not in Middlesex, and that the Statute of 21 Jac. 1. was made for the Ease of the Subject: On the other Side it was objected, That the King's Bench is not restrained, and that the Attorney-General may exhibit Informations in this Court, for the King, notwithstanding the Statute; and they cited Latch 192. 1 Sid. 360. 2 Keb. 340. 1 Vent. 8. Jones 193. 3 Keb. 247. 2 Cro. 178. 3 Inst. 176, 191. 1 Cro. 112.

And now Holt C. J. said, Ten Judges had agreed in the following Resolution:

1st, That the 21 Jac. 1. c. 4. does not extend to any Offence created since that Statute; so that Prosecutions on subsequent Penal Statutes are not restrained thereby; but that Statute is as to them, as it were, repealed pro tanto.

2dly, That all Informations and popular Actions on Penal Statutes made before that Act, must by Force of 21 Jac. 1. c. 4. be laid, brought and prosecuted in the proper County where the Fact was done.

## Hicks's *Case*. Hill. 10 Will. III. B. R.

HOLT C. J. reported the Opinion of all the Judges in this Case. An Action of Debt was brought in the King's Bench on 5 Eliz. c. 4. by a common Informer, for exercising a Trade, not having served as an Apprentice; and the Question was, If the Jurisdiction of the King's Bench was taken away by 21 Jac. 1. for it was thought fit to settle it, because of the Case of Barns and Hughes. 1 Vent. 8. (14)

And it was resolved by the Opinion of eleven of the Judges, 1st, That 21 Jac. 1. restrains the Jurisdiction of the King's Bench, in Actions of Debt by common Informers, and that they cannot bring Debt upon the Statute in the King's Bench, unless the Cause of Action arise in the County where the King's Bench sits, but must in other Cases prosecute by Information, &c. before Justices of Assize, &c. as the Statute directs.

Debt lies not on any Penal Statute made before 21 Jac. 1. in B. R.

2dly, It was resolved, That where a Remedy is given by Action of Debt, &c. in any Court of Record, &c. by any later Statute, subsequent to 21 Jac. 1. such Action is not restrained; for the said Statute of 21 Jac. 1. does not extend to such Actions, but stands repealed as to them.

Secus of Penal Acts made since.

But the Chief Justice declared, that his own private Opinion was, That where any subsequent Act gives any popular Action, it must be laid in the proper County within the Equity of 21 Jac. 1.

Hale C. J. was always against the Opinion of Barns and Hughes; and the principal Objection in that Case was, That the Party offending might get out of the County, and so escape the Punishment of the Law, as being out of their Jurisdiction: But by Holt C. J. This Objection does not hold, for there may be process of Outlawry sued out against him: The Statute of 21 Jac. 1. giving the same Process that lay in Actions of Trespass Vi & Armis at Common Law; and therefore neither Debt nor Information, tho' exhibited by the Attorney-General, lieth here, but in Yorkshire, which is the proper County in this Case.

Do-

## Dominus Rex *versus the Mayor and Aldermen of* Hertford. Hill. 10 Will. III. B. R.

(15) Information Quo Warranto, they admit Persons to be Freemen not Inhabitants.

A Motion was made to file an Information in Nature of a Quo Warranto against the Mayor and Aldermen of Hertford, to shew by what Authority they admitted Persons to be Freemen of the Corporation, who did not inhabit in the Borough; the Motion was pretended to be on Behalf of the Freemen, who by this means were incroached upon; and an Information was granted, because it was a Question of Right, and there was no other way to try it, nor to redress the Parties concerned.

Different Judgments on Writ of Quo Warranto, and Information.

In a Quo Warranto the Judgment is to seize the Franchise in manus Regis, in an Information, as here, to oust the Defendant of the particular Franchise, and herein the first Process is a Subpoena, and then a Distringas, wherein there must be fifteen Days between the Teste and Return, if it issue into a foreign County.

## *The Case of the Surgeon's Company.* Trin. 11 Will. III. B. R.

(16) Information for false Return of Mandamus.

A Mandamus was granted to the Company of Surgeons to chuse Officers; they made a Return under their common Seal, and now a Rule was moved for, and granted to file an Information against some particular Persons of the Company for that Return: And the Chief Justice said, the Court must proceed by Way of Information; for being a Matter concerning publick Government, no particular Person is so concerned in Interest as to maintain an Action, and the Information must be granted against particular Persons, tho' the Return be under their common Seal, for there is no other Way to try the Right; and if it be found for the King, there must be a peremptory Mandamus, perhaps we shall set but a small Fine.

## Dominus Rex *versus* Dummer. Mich. 11 Will. III. B. R.

(17) Information for Perjury denied.

A Motion was made for an Information against Dummer for Perjury committed, in a Trial between the King and Fitch, in answering to this Question, Whether he had received 800 l. for passing his Accompts. Et per Holt C. J. If the Question had been fair, we would have granted an Information; But this Question was in Effect, Whether he was guilty of Bribery, which it could not be expected he would own: You may indict him, but we will not grant an Information.

## Dominus Rex *versus* Knight. Hill. 11 Will. III. B. R.

INFORMATION setting forth quod cum 5 Junii, Anno 9 W. 3. tres aut plures Commissionar. of the Exchequer caused Exchequer Bills to be issued ad recept. Scacc. secundum formam Statuti in eo casu edit. & provis. prædict. Knight existens nuper receptor generalis, &c. to the Intent to get great Gains to himself, did fraudulently and falsly indorse twenty Bills at the Custom-House, quasi receptæ essent pro Custumis & eod. die, &c. paid them into the Exchequer, ac si essent truly indorsed, in deceptionem & defraudationem dicti Domini Regis. Upon Not guilty pleaded, the Defendant was convicted, and now a Motion was made in Arrest of Judgment: This Case depended on the Statute 8 & 9 W. 3. cap. 19. sect. 63. and was twice spoke to and determined upon good Consideration. At last Judgment was arrested, and the Chief Justice in delivering the Opinion of the Court, held these Points:

(18) Indictment for indorsing Exchequer-Bills, as if they were received for Customs. Judgment arrested.

1st, That nuper receptor does not import, that he was the King's Officer at the Time of indorsing and paying these Bills; but rather the contrary, and he must be taken to be a private Person, and as such to make this Indorsement; which in a private Person could be no Crime, because the Falsity might hurt himself, but could not prejudice the King. And it is like the Case in Noy 99. where the Obligee lessened the Sum in the Obligation; it would have been Forgery in a Stranger or in the Obligee to make it more; but in regard the Obligee had hurt no Body but himself, it was no Forgery: So it is of this false Indorsement, it is not criminal, because it hurts no Body but himself. But it is objected, It may be a Damage to Contractors: I answer, We are to take Notice there might be Contractors, but not that there are any, because it is not set out.

No Forgery, where no Person can be prejudic'd but the Person doing it.

2dly, The Word Indorse is not sufficient; the Words of the Act are, That the Person who pays the same into, &c. shall put his Name to the said Bill, and write the Day of the Month, &c. And the Information should have been, That the Defendant set such a Person's Name on the back of the Bill, ubi revera, there was no such Person, or ubi revera, no such Person ordered him to put his Name to the Bill; for Indorsavit imports a Writing on the back of a Thing, but not putting his Name upon it, as petit Auditum Indorsamenti. But it was urged by the King's Council that this might be plainly understood by the Words quasi receptæ essent pro Custumis: I answer, This is by Argument only; and argumentative Informations are naught for that very Cause; for all Charges ought certainly to be set out in Pleading: But farther it was urged, That it is said falso indorsavit,

Charge must be express, not argumentative.

dorsavit in deceptionem Domini Regis, and so found by the Jury; and tho' a Fact that appears innocent cannot be made a Crime by Adverbs of Aggravation, as falso, fraudulenter, &c. Yet where a Fact stands indifferent, as writing, which may be true or false, and is charged to be falso, and the Jury find it so, all are then estopped to say the contrary. That on the other Side it was said, in deceptionem, is only Matter of Conclusion. But here is no Charge, It is not enough to say the King is cheated, he must appear to be so, as well as said to be so.

3dly, The saying indorsavit, quasi receptæ essent pro Custumis, &c. is not well. In an Indictment of Forgery it is not well to say, the Defendant forged a false Deed, purporting quasi a Conveyance, &c. but it must be continen', &c. So here it should have been, That the Defendant made a false Indorsement continens, &c. Here is a Falsity, but nothing is charged that's criminal, for that Falsity could not hurt, nor tend to hurt any Body but himself, and the Judgment was arrested.

## Dominus Rex *versus the Mayor and Aldermen of* Hertford. Pas. 12 Will. III. B. R.

(19) No Process can issue on Informations before Recognizance given by Informer.

IN the Information supra, against the Mayor and Aldermen of Hertford, a Motion was made to set aside the Process, because no Recognizance was given according to the late Act; and this being to try a Right, the Question was, Whether it was within the said Statute, viz. Trespasses, Batteries, and other Misdemeanors, which are frivolous wrangling Matters of an inferiour Nature. But the Court said, That this Usurpation here pretended was a Misdemeanor, and the Information might be as vexatious in this Case, as in Trespass or Battery: That this last is a remedial Law to prevent Vexation, and must be construed accordingly; therefore the Process was ordered to be set aside, but the Information stood.

## Dominus Rex *versus* Brown. Trin. 12 Will. III. B. R.

(20) Billa before finding; indictamentum afterwards.

THE Caption of an Indictment was præsentat. existit quod separalia Indictamenta huic Schedule annexa sunt bille vere. To this Exception was taken by Shower; 1st, That if there be twenty Indictments, one half true, the other false, 'tis within this finding; sed Curia contra, separalia Indictamenta, imports all the several Indictments. Second Objection, That they were not Indictments till they were found; till then they were only Bills; and they were quashed for this Cause.

## Domina Regina *versus* Clerk. Pas. 1 Ann. B. R.

A Coroner's Inquisition finding that one Clerk cum cultro jugulum suum voluntarie & felonice & ut felo de se secuit & seipsum murdravit, being removed into this Court, was quashed; for that, 1st, The Wound ought to be set forth, and it ought to be alledg'd that it was mortal, and that the Party died of it; for it is for that very End and Reason that the Jury have the View: He might cut his Throat, and yet not die of it: And as to the Answer, that it shall be intended, because it is said felonice & ut felo de se, it was held, That Inquisitions must not be taken by Intendment any more than Indictments, because the Party is to forfeit his Goods and Chattels by this finding, and tho' the Cut was but a Maihem, it might be said to be done felonice. Vide Dy. 68. 2dly, The Court held, That such an Inquisition would be good without the Word murdravit, and so is Dame Hale's Case; and that if an Indictment wants the Word murdravit, it ought not to be quashed for that Omission, for it is still a good Indictment for Manslaughter, tho' not for Murder: It crept in at first to exclude the Offender from having Clergy, and it continues accordingly.

(21) Coroner's Inquisition quash'd, because the Wound not set forth, nor that the Persons died of it.

This Inquisition being thus quashed, tho' the Body had lain buried seven Months, the Coroner took it up again and had another Inquisition found, which was complained of as irregular, and moved to be set aside. Broderick contra. The first being insufficient, is as none at all: It was done so in Barkley's Case, 2 Sid. 101. And in Bonning's Case, 1 W. & M. And the not taking it, would be an Injury to the King or the Lord of the Manor.

Holt C. J. The Coroner need not go ex Officio to take the Inquest, but ought to be sent for, and that when the Body is fresh; and to bury the Body before or without sending for the Coroner, is a Misdemeanor. The Body may be dug up again, but it ought to be upon fresh Pursuit, not at such a Distance of Time; for it is a Nusance, and may infect People. In Barkley's Case, there was the Leave of the Court for that purpose. At last it was agreed to traverse this Inquisition, and to try it at the Assizes.

Coroner may cause the Body to be dug up soon after the Burial, but not at a great Distance of Time.

## Domina Regina *versus* Smith. Mich. 1 Ann. B. R.

Mr. Broderick took Exceptions to a Conviction of Deer-stealing, where the Fact was laid to be done in Foresta usitatâ for keeping Deer, and that the Defendant killed a Deer without consent of the Keeper; and insisted, That usitat. might be meant of a long Time before, and there might be the Consent of

(22) Conviction of Deer-stealing.

of the Ranger; sed non allocatur, for the Leave of the Ranger is the Leave of the Keeper, and used speaks the present Time as well as Time past.

## King *versus* Chandler. Mich. 1 Ann. B. R.

(23) Summary Convictions must be construed strictly.

A Conviction of Deer-stealing on 3 & 4 W. & M. c. 10. was returned on a Certiorari, and Exceptions taken to it. And it was said by Holt C. J. That in these summary Proceedings, the Right of an Englishman of being tried per pares suos, was taken away; therefore the Court was to construe them strictly, so far as to see that the Fact was an Offence within the Act, and that the Justices proceeded accordingly: And these Points were agreed; 1st, That the Fact in the Conviction need not be laid contra Pacem, for mere Form or Formality is not required in these nor any other summary Proceedings. Et per Northey Attorney-General, This is not the King's Prosecution; he can have no Fine; but the Prosecution of the Party, and this is the Memorandum of what the Justice has done in that Matter.

Not laid contra Pacem.

That between such a Day and such a Day he killed three Deer, is well.

2dly, That inter such a Day and such a Day he killed three Deer, is good; for if a Day certain were alledged, the Informer is not tied up to that: Now in these Cases he is confined to give Evidence of a Killing within these Days, so that it is more certain and better for the Defendant; and Northey cited Rast. 410. Hern. 549. Winch 54, 547. Tho. 91, 92. Vid. 186. Co. Entr. 158, &c. Otherwise it is in Informations at Common Law, because every distinct Offence creates a new Penalty, but in Trespass a Fact may be laid to be done diversis diebus & vicibus inter such a Day and such a Day; because it is not a new Action, but an increase of Damages, per Gould, quod Holt C. J. concessit.

3dly, That an unlawful Killing is sufficient, and it need not set forth a Hunting, nor how the Deer was killed.

Considerat. est quod convictus est, is sufficient without forisfaciet.

4thly, That ideo consideratum est quod convictus est, without Et quod forisfaciet, is sufficient; for the Statute gives that in consequence, and the judicial Part ends at the Conviction; the rest is only Consequence and Execution.

Executor of the Owner may sue Execution.

5thly, That if the Owner of the Park die before Execution, and the Conviction is affirmed here; his Executors shall have a Levari Facias [sed videtur, it must be upon Affidavit, and then the Matter suggested on the Roll.] So may the Church-wardens without Suggestion or Scire Facias, and so may the King.

## King *versus* Speed. Mich. 1 Ann. B. R.

(24) On Conviction affirmed in B. R. Execution shall be by Levari Facias to the Sheriff.

ON a Conviction affirmed in B. R. a Levari Fac. was awarded to the Sheriff, to levy the Penalty: The Sheriff seized the Goods and sold them. And this coming before the Court, they held,

1st, That this Court must award Execution; for the Record here cannot be removed nor sent back to the Justices; and as the Court have a Power to affirm the Conviction, the Court in necessary Consequence have Power to award Execution.

2dly, This Execution cannot be awarded to the Constable, as it would, if the Record had been before the Justices; but it must be awarded to the Sheriff, for he is the Officer of the Court, and the Court can take Notice of no other.

Where the Law gives a Distress for the publick Benefit, the Officer may sell.

3dly, It may be by Levari Facias, impowering the Sheriff to sell the Goods: The Words of the Act are, That the Offender shall forfeit 40l. to be levied by Way of Distress; and in such Case the Distress shall not be deemed to be a Distress taken as a Pledge, but a Distress to sell, for the Publick being concerned, it shall be construed the most effectual Levy by Distress. Thus upon a Distringas in a Court-Leet for a Fine, as in case of Nusance, where the Publick is concerned, the Officer may sell of common Right: But upon a Distringas in a Court-Leet pro certo Letæ, the Officer cannot sell the Distress of common Right, without a Custom: So for a Distress in a Court-Baron, he cannot sell without Custom; but in case of the Sewers, the Officer has a Power to sell the Goods. Vide All. 92. 1 Keb. 733. 2 Jones 25. 2 Inst. 738.

## Domina Regina *versus* Jones. Trin. 2 Ann. B. R.

(25) Cheat where indictable.

MR. Parker moved to quash an Indictment, which was, That the Defendant came to A. pretending B. sent him to receive 20l. and received it, whereas B. did not send him. Et per Cur', It is not indictable unless he came with false Tokens; we are not to indict one Man for making a Fool of another: Let him bring his Action.

In Bainham's Case, there was an Indictment, for that A. borrowed 5l. of the Defendant, and pawned Gold Rings to secure the Payment; and that at the Day A. tendered the Money, but the Defendant refused to deliver up the Rings; and it was quashed.

Anonymus. Mich. 2 Ann. B. R.

(26) No Motion to quash an Indictment remov'd by Certiorari after the Recognizance for trying forfeited.

INDICTMENT was removed by Certiorari, and upon the awarding the Certiorari, a Recognizance taken; and now Salkeld moved to quash the Indictment, but it appearing that the Recognizance was forfeited, the Court would not hear the Motion. Holt C. J. said, The Practice was, or ought to be now altered by the late Act; before that the Defendant came soon enough at any Time to move to quash, but should not be allowed to do it now, after his Recognizance forfeited by not carrying the Record down to the next Assizes to be tried; and for the same Reason the Court refused to let him take any Exceptions, either to the Certiorari or Return.

Domina Regina *versus* Daniel. Hill. 2 Ann. B. R.

(27) Indictment lies not for inticing away an Apprentice from his Master.

INDICTMENT, for that at such a Day and Place the Defendant quendam Carolum Scot, servum sive Apprenticium cujusdam Josephi Bishop, extra Domum Shopam & servitium prædict. Josephi Magistri sui discedere & seipsum absentare illicite allexit procuravit & causavit; & quod adtunc & diversis diebus antea illicite seduxit eundem Carolum ad 200 Carolina Hats, valoris, &c. de bonis & catallis præfat. Josephi extra Domum & Shopam ipsius Josephi illicite capiend. & asportand. & ill. adtunc & ibidem injuste cepit. recepit & habuit sciens bona, &c. & præd. Carolum esse servum præfat. Jos. The Defendant being found guilty, it was moved in Arrest of Judgment, That this was but a private Injury, for which Case lies, and not in its Nature publick to maintain an Indictment. Trespass will lie for taking away his Servant out of his actual Service; but for inticing, Case lies only, and not Trespass. 21 H. 6. 31. Also no Fact is laid to be done in pursuance of this inticing; and as to the later Part about the inticing to carry away the Goods, there is no Venue laid where the Goods were taken away: And Judgment was arrested. And in the Case of the Queen and Collingwood. Mich. 3 Ann. in this Court, which was an Indictment of the same Nature, the Judgment was also arrested for the same Reasons.

Domina Regina *versus* Wyat. 2 Ann. B. R.

(28) Constable indictable for neglecting Duty requir'd by CommonLaw or Statute.

INDICTMENT setting forth, That one Nash was convicted of Deer-stealing upon 3 & 4 W. & M. c. 10. before a Justice of Peace, and that the Defendant being a Constable, the Justice

2 Di-

directed his Warrant to him to levy the Penalty, and that he had levied the Penalty and had not returned his Warrant, nor made any Return or Certificate at all. The Defendant was found guilty, and the Indictment removed hither by Certiorari. Et per Cur. resolved,

1st, Tho' the Constable is not named in the Statute, nor appointed to be the Officer to execute these Warrants; yet the Justices may command him to execute them; for as at Common Law the Constables were subordinate Officers to the Conservators of the Peace, so are they now the proper Officers of the Justices: The Constable of the Hundred may Arrest for Breach of the Peace as well as a Petit Constable, 3 Cro. 378. and was an Officer at Common Law, notwithstanding the Opinions to the contrary, and the Statute of Winton only enlarges his Authority. Vide Hale's Pleas of the Crown, 3 Keb. 231.

Constable is the proper Officer to the Justices of Peace.

2dly, Where an Officer neglects a Duty incumbent on him, either by Common Law or Statute, he is for his Default indictable. Et nota, In this Case, the Indictment was not laid contra formam Statuti, nor need it have been, tho' the Constable had been named in the Statute; because the Constable is an Officer at Common Law, and when a Statute requires him to do what without requiring had been his Duty and he must have done it, it is not imposing a new Duty, and he is indictable at Common Law for it.

3dly, They held, he need not return the Warrant it self, for that is not required, and it may be necessary to keep it for his own Defence; but he must either return that, or certify what he has done upon it; for without this the Prosecutor cannot attain the End of his Prosecution, and the Defendant cannot be discharged; and in a Writ of Execution, where something more is to be done upon it, an Attachment lies against the Sheriff if he does not return the Writ. Lastly, They held, That contra pacem was surplusage, and could neither do good nor harm; because it was a Nonfeasance.

## Domina Regina *versus* Gould. Pas. 3 Ann. B. R.

INDICTMENT, for that a poor Boy being put out Apprentice to the Defendant pursuant to the Statute, he Vi & Armis refused to provide for him. Et per Cur', Since we allow the Justices Power to put out Apprentices, we must allow an Indictment for Disobedience, either in case of not receiving, turning off, or not providing for such Apprentice, as the Law requires; and the Vi & Armis is surplusage.

(29) Indictment for refusing to provide for an Apprentice.

## Domina Regina *versus* Culliford. Mich. 3 Ann. B. R.

(30) Where two Indictments are for the same Fact, proper to try on both at once.

PER Cur', If there be two Indictments against H. for the same Thing, as if one be found by a Coroner's Inquest, and another by the Grand Jury, and H. is acquitted upon one; yet he must still be tried upon the other, to which he may plead the former Acquittal; but the Usage of the Old Baily is, and indeed so is the fairest Course, to try him on both Indictments at once.

## Domina Regina *versus* Peirson. Trin. 4 Ann. B. R.

(31) Indictment lies for keeping a Bawdy-House, but not for being Communis Lena, &c.

INDICTMENT found at Hicks's Hall, for that the Defendant fuit communis lena ac male dispositas personas in Domibus lupanaribus convenire & Scortationes & Fornicationes committere pro suo lucro proprio illicite procuravit: Upon Not guilty pleaded, the Defendant was convicted, and Judgment against her; and now a Writ of Error was brought, and the Judgment reversed. The Court agreed, 1st, That if a Lodger, who has only a single Room, will therewith accommodate lewd People to perpetrate Acts of Uncleanness, she may be indicted for keeping a Bawdy-House, as well as if she had the whole House. 2dly, That one may be indicted for keeping a Bawdy-House; but a bare Solicitation of Chastity is not indictable; just as it is actionable to say, a Woman keeps a Bawdy-House; but not to say, she is a Whore.

## Domina Regina *versus* Atkinson & al'. Pas. 5 Ann. B. R.

(32) Two may be jointly indicted for Extortion; otherwise for exercising a Trade not being Apprentice.

INDICTMENT was against A. and others, for that being Receivers of the Queen's Tax, they did colore Officii sui extort Money from several Persons. Upon a Motion in Arrest of Judgment it was held, That two Men may be indicted jointly for a Battery or Extortion; because 'tis a Crime at Common Law, of which they might be jointly or severally guilty. But as to the Case in 2 Ro. 51. 1 Ven. 302. they admitted that, viz. That two Men could not be indicted jointly for exercising a Trade, not having been Apprentices; for not being Apprentices, is that which occasions the Crime and Forfeiture, and that must of necessity be several. Judgment for the Queen.

## Domina Regina *versus* Jennings. Trin. 7 Ann. B. R.

SIR James Mountague moved to quash a Conviction of Deer-stealing on 3 & 4 W. & M. taken by a Justice who entered into a Glover's House, and finding a Deer-Skin, asked him how he came by it; the Glover said he bought it of J. S. who not giving a good Account of himself, was convicted. And the Court held, That the Justice might enter and convict the Person that sold it, for the Statute might be easily evaded, if the Deer-stealer could discharge himself by a Sale.

( 33 ) On 3 & 4 W. & M. c. 5. Seller of Deer's Skin may be convicted.

## Domina Regina *versus* Barrett. Mich. 9 Ann. B. R.

A Conviction of Deer-stealing being return'd on a Certiorari, the Objection was, 1st, That the Conviction appeared to be a Year after the Day of the Information; but it was held sufficient that the Information be prosecuted within a Year after the Fact; for that is a good Commencement of the Suit, and it is from that the Computation is made in all such Cases. 2d Obj. It is laid to be in quodam loco in ambulacro Chaseæ, and this Walk may be in a Chase and not of it; sed non allocatur, for it must be intended that the Walk was part of the Chase, and the Place part of the Walk. 3d Obj. No due Summons; non allocatur, the Defendant having appear'd: In a Mandamus it must appear that the Party was summoned; because he is to lose his Freehold, and it is a Course of proceeding by Common Law, wherein no Appeal lies; otherwise in Convictions, which are a Proceeding by the Statute, in which the Defendant appeared, and that Appearance will aid the Want of Summons: So it was held in Peache's Case, and all the Precedents are so.

( 34 ) If Information be in due Time, Conviction may be at any Time afterwards.

Appearance aids want of Summons in summary Convictions.

4th Obj. Quod convictus est & forisfaciet summam 30 l. juxta formam Statuti, without making a Distribution, which ought to be 10 l. to the Party grieved, 10 l. to the Poor, &c. But the Court held it was well enough. It is enough to say, Quod convict. est & forisfaciet juxta formam Statut', for by the Statute he is only to forfeit in case he has Goods, which is conditional, and not absolute, and by Parker C. J. the Words juxta, &c. qualify it. Et per Cur', The Judgment in such Cases seldom makes a Distribution; and it has been a Question, Whether convict. est be not enough of it self. Vide Rex versus Chandler, Ante, pl. 23.

Forisfaciet juxta formam Statut. sufficient.

5th Obj. This Conviction is pardoned by the late Act of general Pardon, being not a final Judgment. Vide Dy. 322. To which it was answered by Serjeant Pengelly, 1st, That this is more than an interlocutory Judgment, and that it is a compleat and

Whether Conviction of Deer-stealing pardon'd by Act of general Pardon?

and a final Judgment, because a Writ of Error lies on it. 2dly, He argued that it could not be pardoned: 1st, Because it is a Forfeiture to the Party grieved, and he hath an Interest in the Penalty, and it is a Part of the Judgment. 2dly, Because the Punishment of the Party in this Case is by Way of Satisfaction, not for Example, like the three Years Imprisonment by the Statute de Malefactoribus in Parcis. 2 Inst. 200. 3 Inst. 171. 5 Co. 51. not like 1 Cro. 46, 47, 198. 11 Co. 65, 66. 3 Cro. 338. 1 Mod. 34. 3 Cro. 82, 83. Adjournatur.

## Domina Regina *versus* Williams. Mich. 10 Ann. B. R.

(35) Indictment against Baron and Feme for keeping a Bawdy-House.

INDICTMENT against Husband and Wife for keeping Commun' Domum lenocinii, Anglice a common Bawdy-House. Upon a Motion to quash it, the Objection was, That the Keeping a House could not be the Keeping of the Wife, any more than it is the Keeping of the Servant: But to this 'twas answered and resolved by the Court, That the Wife may be guilty and commit a Crime with her Husband, and that that Crime is joint and several. Husband and Wife may commit a Trespass, Murder, Treason. In Dr. Hussey's Case, Baron and Feme were indicted of a Ravishment of Ward, and the Wife was found guilty. Hob. 95. Keeping a Bawdy-House is a common Nusance; and the Indictment for Keeping, is a Charge against them for this Nusance. The Keeping is not to be understood of having or renting in Point of Property; for in that Sense the Wife cannot keep it, but the Keeping here is the governing and managing a House in such a disorderly Manner as to be a Nusance, and the Wife may have a Share in the Management or Government of a disorderly House as well as the Husband. 2 Ro. 345. 3 Keb. 34. 1 Keb. 575. cited.

## Domina Regina *versus* Ingram & Ux'. Hill. 10 Ann. B. R.

(36) Battery implies an Assault.

INDICTMENT against the Husband and Wife for an Assault and Battery; setting forth, That they Vi & Armis insultum fecit verberaverunt, vulneraverunt, &c. Upon Not guilty pleaded, the Jury found both guilty; and now an Exception was taken, that insultum fecit being the singular Number, could refer only to one of the Defendants, ergò it was uncertain which was charged, and both could not be found guilty. Parker C. J. This Indictment would have been very good, tho' the insultum fecit had been left out, and it had alledged only Vi & Armis verberaver. vulneraver', &c. for there cannot be a Battery and Wounding without an Assault; tho' there may be the later without the former.

former. In a civil Action, where one Part of the Declaration is ill, and the Jury find entire Damages, the Judgment must be arrested, because the Court cannot apportion them; but in Indictments the Court assess the Fine, and they will set it only according to those Facts which are well laid. If an Offence sufficient to maintain the Indictment be well laid, 'tis enough. Afterwards, in Trinity-Term following, Judgment was given against the Defendants.

If an Offence sufficient to maintain the Indictment be well laid, 'tis enough, tho' other Facts ill laid.

Domina Regina *versus* Cranage. Mich. 11 Ann. Coram Parker *C. J. at* Nisi Prius *in* Middlesex.

(37)

Indictment for breaking the Chamber of S. in the House of James, and taking Goods. Evidence, that it was the House of Jamson, does not maintain the Indictment.

INDICTMENT, that the Defendant with others at the Parish of St. Giles in the Fields, riotously assembled, & quoddam cubiculum cujusdam Saræ S. in domo mansionali cujusdam David James fregit & intravit, and thirty Yards of Stuff took and carried away. Upon Evidence, it appeared to be the Mansion-House of David Jamson, and not James; and the Chief Justice held, That this did not maintain the Indictment like 2 Ro. 677. Trespass for breaking his Close in Calvering, in quodam loco vocat. Calverfield abutting South on a Mill in the Tenure of J. S. the Plaintiff must prove the whole Abutment, even its being in the Tenure of J. S. He cited the Case of the Queen against Sudbury, Indictment for an Assault and Battery laid as a Riot; two were acquitted, and two found guilty; and all were acquitted, for the Crime was the Riot, and the whole Charge alledged under that Specification and Description. So of the Play-House; Indictment for acting a Play and speaking obscene Words, in such a Parish, in a Play-House in Lincolns-Inn-Fields; if there be no Play-House in Lincolns-Inn-Fields, the Defendant must be acquitted; for tho' Words are not local, yet these are made so. One may make a Trespass local, that is not so. If the Speaking had been alledged in Lincolns-Inn-Fields, then it had been laid as a Venue; but here 'tis otherwise, for here it is alledged as a Description where the Play-House stood. In the principal Case, part is local, part not local; the Cubiculum is local, the taking and carrying away is not local; but then all is put together as one intire Fact under one Description, and you cannot divide them.

# INFANT.

## King *versus* Dilliston. Hill. 1 W. & M. B. R. Intr. Hill. 2 & 3 Jac. II. Rot. 494.

(1) Custom of a Manor, that if Surrenderee appears not to be admitted on three Proclamations, the Tenement is forfeited. Infant not bound.

IN Ejectment it was found by a Special Verdict, that the Custom of a Manor was, That if on a Surrender presented and three Proclamations, the Surrenderee comes not to be admitted, the Lord shall seize as forfeited: Surrenderee died; three Proclamations were made; his Heir, an Infant, did not come in; the Lord seized. Holt C. J. held, The Infant was bound; because otherwise the Lord would lose his Fine; and it is not the Forfeiture of the Infant, but of the Surrenderor in whom the Estate continues till Admittance, and that, if it be a Forfeiture, 'tis so only quousque. But Dolben, Eyre and Gregory, contra. Custom shall not be intended to reach Infants; and by Eyre, If it had been found expresly, that all Persons, Infants as well as others &c. he had been bound, for as Custom makes his Inheritance, it may abridge it. And the Lord cannot be said to lose a Fine, for he has a Tenement and no Fine due, nor occasion of Admittance: And here is no Room to suppose a temporary Forfeiture; for the Jury have found the Custom to be of an absolute Forfeiture: Nor is the Infant within the Custom, for as found it is, That if the Person to whom the Surrender is made comes not, the Bailiff of the Manor may, by Command of the Lord, seize such Tenements as forfeited. Vide 1 Leon. 100. 3 Leon. 221. 8 Co. 99. 2 Cro. 226. 8 Co. 44. is of such a Custom; but the Forfeiture is quousque only, as appears by the Pleadings. In Error on a Judgment of C. B. which was affirm'd.

## Earle *versus* Peale. Hill. 10 Ann. B. R.

(2) Infant may buy Necessaries.

IN Debt upon a single Bill, the Defendant pleaded that he was within Age; the Plaintiff replied, That it was for Necessaries, viz. 10 l. for Cloaths, and 15 l. Money lent pro & erga his necessary Support at the University. The Defendant rejoined, That the Money was lent him to spend at Pleasure, absque hoc, that it was lent him for Necessaries, and Issue hereupon

upon was found for the Plaintiff, who had Judgment in C. B. And now a Writ of Error was brought. Et per Parker C. J. That which is put in Issue, is only, whether this Money was lent the Infant for Necessaries, not whether it was laid out in Necessaries. It may be borrowed for Necessaries, but laid out and spent at a Tavern: A Feme Covert may buy Necessaries, and her Act shall make the Husband chargeable; but she cannot borrow Money to lay out for Necessaries. So it is of an Infant, he may buy Necessaries, but he cannot borrow Money to buy; for he may misapply the Money, and therefore the Law will not trust him, but at the Peril of the Lender, who must lay it out for him, or see it laid out, and then 'tis his providing, and his laying out so much Money for Necessaries for him. Judgment reversed Nisi Causa.

But cannot borrow Money to buy Necessaries.

# Inns and Inn-keepers.

## Parkhurst *versus* Foster. Trin. 11 Will. III. B. R.

TRESPASS for quartering a Dragoon upon the Plaintiff to find him Meat and Drink, and Hay and Straw for his Horse, &c. Upon Not guilty pleaded, a Special Verdict was found, That the Plaintiff kept a House at Epsom, & dimisit Conclavia, Anglice Lodgings, talibus quales ibid. accedebant propter salubritatem aëris & potionem Aquarum, &c. and that he dressed Meat for his Lodgers at 4 d. per Joint, and sold them small Beer at 2 d. per Mug, and also found them Stable-room, Hay, &c. for Horses, at such and such Rates, and that the Defendant being a Constable, quartered a Dragoon upon the Plaintiff.

(1) One taking Lodgers to lodge and diet in his House, and letting Stables for their Horses, not an Inn-keeper within Stat. 4 & 5 W. & M. c. 13. for quartering Soldiers.

Serjeant Wright and Mr. Cowper insisted on the 4 & 5 W. & M. c. 13. By which Soldiers may be billetted upon Inns, Livery-Stables, Ale-houses, Victualling-houses, and all Houses selling Brandy, Strong-water, Cyder and Metheglin by Retail, to be drunk in the Houses, and no others, and in no private Houses whatsoever. And that this House of the Plaintiff's does partake of

of the Nature of all of them; and it is a common and a publick House kept for Gain.

Shower and Broderick contra. It is against common Right to quarter Soldiers on any Man against his Will, and so is the Petition of Right 3 Car. 1. and 31 Car. 2. c. 1. and therefore the Court will not extend the Statute of the 4 & 5 W. & M. by any equitable Construction, and this is not a House within the Words of that Act. 1st, This is not an Inn; for there Men come and are entertained on access, and the Inn-keeper is indictable if he refuse. 2 Ro. 84. Kel. 50. Pal. 367, 374. Here People lodge on a private Contract; here he is as a Lodger, there is a Guest. By Common Law, if a Guest stole Goods from his Lodgings, 'twas Felony; otherwise of a Lodger. If an Attorney comes to Town and takes a Chamber in an Inn for the Term, he is not a Guest. Mo. 877. Hetl. 49. Fitz. Hostler 49. 2dly, It is not a Livery-stable; for there is Accommodation for Horses only; here for Horse and Owner. 3dly, It is not an Ale-house nor Victualling-house, for they sell to all publickly, and indeed are described, quod custodivit Tabernam communem & communit. & publice vendidit, &c. West. Symb. 71.

Lodger is on Contract, Guest not.

Guest steals, 'tis Felony; secus of Lodger.

Holt C. J, when this Case was set down for the Resolution of the Court, gave Judgment for the Plaintiff, and said, the Case was so plain, that there was no Occasion for giving Reasons.

## York *versus* Grindstone. Mich. 3 Ann. B. R.

(2) H. by leaving his Horse in an Inn becomes a Guest; otherwise of a dead Thing.

REPLEVIN for a Horse; the Defendant avowed the Taking and Detaining, for that he kept an Inn, and the Plaintiff being a Traveller came and left his Horse there, where he had been kept so long, that the Keeping came to such a Sum, till Payment whereof he detained him: Upon Demurrer the whole Court held, That Inn-keepers were bound to receive and entertain Guests, and therefore might detain the Goods of Guests till Payment; but the Chief Justice doubted whether the Plaintiff was a Guest in this Case, because he never went into the Inn himself, but only left his Horse there, which the Inn-keeper was not obliged to receive, and without an Owner did not receive as an Inn-keeper. Powell, Powys and Gould contra, That the Plaintiff is a Guest by leaving his Horse, as much as if he had stayed himself, because the Horse must be fed, by which the Inn-keeper has Gain; otherwise if he had left a Trunk or a dead Thing. Vide Cro. Ja. 188, 189. Noy 46. Latch 126. Pop. 178. Mo. 471.

# INROLMENT.

## Taylor *versus* Jones. Mich. 8 Will. III. B. R.

A Deed may be enrolled, without the Examination of the Party, upon Proof by Witness that the Party delivered it. Godb. 270. Party died before Acknowledgment, yet the Deed was inrolled. 3 Leon. 84. And if two are Parties to a Deed, and one acknowledges it before a Judge, it binds the other; and at Common Law there was an Inrolment pro salva custodia; and 'tis the Practice, That if a Man lives in New-England, and would pass Lands here in England, they join a mere nominal Party with him in the Deed, who acknowledges it, and it binds.

(1) Deed inrolled upon Oath of the Execution. Where two are Parties, Acknowledgment of one binds the other.

## *Lady* Anderson's *Case*. Mich. 11 Will. III. B. R.

The Court made a general Rule, That all Deeds should be acknowledged on the Plea-Side in this Court, and not on the Crown-Side, and that the Acknowledgment should be in open Court.

(2)

# Jointenants and Tenants in Common.

## Stedman *versus* Bates. Mich. 7 Will. III. B. R.

(1) Parceners must join in Avowry.

IN Replevin the Defendant made Conusance, as Bailiff to the Countess of Salisbury, for Rent arrear, for that J. S. was seised and made a Lease, &c. and died, and the Reversion descended to the said Countess of Salisbury and her Sister as Heir: On Demurrer the Court held this Conusance naught, for by Littleton himself, both Sisters must join; both take as Heir by Descent, and make but one Heir, to whom the Rent descends as one intire Inheritance.

## Ward *versus* Everard. Hill. 10 Will. III. B. R. Intr. Hill. 7. Rot. 718.

(2) Grant of 100 l. Rent to five, equally to be divided; to hold to them, viz. 20 l. to each, &c. Grantees are Jointenants.

REPLEVIN; the Defendant made Cognizance as Bailiff to A. and B. and shewed that Sir Robert Carr was seized in Fee of the Locus in quo, and granted one Annuity or yearly Rent of 100 l. to A. B. C. D. and E. to be equally divided between them, to have and receive to them and their respective Assigns, 20 l. to each during their Lives, and the Life of the longest Liver of them; and that if any one died, his Share should be equally divided among the Survivors, and that A. and B. are the Survivors. The Plaintiff pleaded in Bar an Act of Parliament to make void all Conveyances made by Sir Robert Carr before such a Time, and Issue being joined, whether this Grant was made before such a Time, viz. April 1630. was tried at Bar, and found for the Avowant; and Pemberton moved in Arrest of Judgment, That Tenants in Common could not join in an Avowry, but must avow severally. Litt. Sect. 317. And that the Grantees were Tenants in Common, and not Jointenants. The Cases cited on both Sides were, 2 Ro. Abr. 90. Sty. 211. 2 Cro. 656. 1 Inst. 180. Dy. 351. 3 Cro. 25. 1 Saund. 282. 5 Co. 55. Et per Holt C. J. The Words, equally to be divided, cannot make a Tenancy in Common in a Deed, tho' they may in a Will; and the

Tenants in common cannot avow jointly.

Dy. 308, 309.

the Words, to have and receive 20l. a-piece, are an Explanation how the Money on Receipt is to be distributed, viz. So much to one, and so much to another; but do not sever the Grant nor the Rent; for it is not several Rents nor several Grants, but one Rent and one Grant undivided. If they were Tenants in Common, then each of them must avow de quinta parte of 100l. and not for 100l. If one Coparcener grants a Rent of 20l. for equality of Partition to the other two, viz. 10l. to one, and 10l. to the other, they have but one Rent, and the viz. is but explanatory. 1 Inst. 169. b. which Case is not to be distinguished. And the Chief Justice said, If a Man grants two Acres to A. and B. habend. one Acre to one, and the other Acre to the other, the Habendum is void and repugnant. Hob. 172. And so here, Where the Grantor has granted one Rent, it is repugnant to the very Words of the Grant to make it several Grants of several Rents. Judgment for the Avowant.

Grant to A. and B. hab. one Acre to A. and the other to B. they are Jointenants.

## Fisher *versus* Wigg. Hill. 12 Will. III. B. R.

COPYHOLD LANDS were surrendered to the use of A. B. and C. and their Heirs, equally to be divided between them and their Heirs respectively. Gould J. and Turton J. held this a Tenancy in Common, by reason of the apparent Intent of the Parties. But Holt C. J. contra, held it a Jointenancy, for that the Words equally, &c. import no more than was implied in the foregoing Words, i. e. to have alike, which they cannot but have as Jointenants.

(3) Where the Words, equally to be divided, make a Tenancy in Common.

If a Feoffment be to A. and B. equally to be divided, they are Jointenants; for they have the Land by one Title and Estate, and equally to be divided, imports nothing but what was implied before: But if it be to A. and B. habendum one Moiety to A. and the other to B. they are Tenants in Common, for they have several Titles, and there must be several Liveries, and the Habendum is consistent. But if it were habendum ten Acres to one, and ten to the other, the Habendum would be void for repugnancy.

As for the Word divided, he held that did not import a Tenancy in Common, for their Possession must be intire & pro indiviso; to divide would be to destroy it; and it is strange to create an Estate from a Word which implies only what would destroy it.

Tenants in Common hold by several Titles or several Rights; but their Possession is intire. At Common Law they were not compellable to make Partition. And therefore in suing a Writ of Partition, the Party never shews whether he is Tenant in Common or Jointenant; the Possession of the one is the Possession of other, and he cannot be a Disseisor without an actual Ouster. Hob. 120. Mo. 868.

Co. Ent. 413, 414.

A

A Devise to two and their Heirs, equally to be divided, was formerly look'd on as a joint Estate. Vide Dy. 25, 158. Bendl. 19. 3 Cro. 330. Now indeed 'tis an Estate in Common, not by Force of the Words, but that it appears to be the Intention of the Party, that there should be no Survivorship. A Devise to two equally to be divided, habendum to them and the Heirs of the Body of the Survivor, is a Jointenancy. Styles 211, 434.

Lastly, He said, Jointenancies were favoured, for the Law loves not to divide and multiply Tenures. But Judgment was given according to the Opinion of the other two Justices.

### Reading's *Case*. Hill. 1 Ann. B. R.

(4) Tenant in Common may disseise his Companion.

ONE Tenant in Common may disseise the other; but it must be by actual Disseisin, as turning him out, hindering him to enter, &c. But a bare Perception of Profits is not enough. Per Cur'.

# Joint and Several.

### Heydon *versus* Heydon. Mich. 5 W. & M. B. R.

(1) Two Partners. Execution against one. Sheriff must seize all the Goods, and sell an undivided Moiety.

COLEMAN and Heydon were Copartners, and a Judgment was against Coleman, and all the Goods both of Coleman and Heydon were taken in Execution: And it was held by Holt C. J. and the Court, That the Sheriff must seize all, because the Moieties are undivided, for if he seize but a Moiety and sell that, the other will have a Right to a Moiety of that Moiety; but he must seize the whole, and sell a Moiety thereof undivided, and the Vendee will be Tenant in Common with the other Partner.

Robinson *versus* Walker. Hill. 1 Ann. B. R.

In Covenant the Plaintiff declared, That the Defendant and J. S. convenerunt pro se & quolibet eorum, that they or either of them would lade such a Ship, and pay for the Freight, &c. The Defendant pleaded in Abatement, that other Covenantors were in full Life not named, and prayed Judgment of the Writ; and it was agreed by all, That Obligamus nos & utrumque nostrum in a Bond is joint and several. Sed per Holt C. J. There is Diversity between A. & B. conveniunt & quilibet eorum convenit & A. & B. conveniunt pro se & quolibet eorum, for in this first, quilibet eorum convenit, expressly severs the Lien, but pro quolibet eorum seems to go to the Thing to be done, that is, That they both or either of them would do it: Sed reliqui Justic. contra, and Judgment was, That the Defendant should answer over.

(2) What Words make a Covenant joint and several.

# Journeys Accounts.

Elstobb *versus* Thoroughgood. Mich. 9 Will. III. C. B.

The Testator made A. his Executor till his Son came to twenty-one. A. brings Debt, pending which the Son came of Age. Et per Cur', They make but one Executor, and 'tis but one Executorship, and therefore the Son may bring a Writ by Journeys Accounts, for he is privy; otherwise had A. been Administrator durante minori ætate of the Son, for then he coming in by the Ordinary, and the Son by the Testator, there had been no Privity. So if the Testator make A. his Executor, with Condition that if he do such an Act, B. shall be his Executor; in this Case A. is an absolute Executor, unless he determine his Office by his own Act, and then B. is not privy to have Journeys Accounts. 2dly, A Writ brought within thirty Days after the Abatement of the first is a recent Prosecution.

Where one not Party to the first Writ, may have a Writ by Journeys Accounts.

# Issue General.

## Holler *versus* Bush. Pas. 9 Will. III. B. R.

(1) Trespass. Plea that it was the Horse of J. S. and the Plaintiff took and impounded it, and the Defendant took him by a Replevin, &c. amounts to the general Issue.

IN Trespass, the Defendant pleaded and shewed a Right in the Bishop of Salisbury by Prescription, to grant Replevins in such a Manor, and that the Horse in Question was the Horse of J. S. a Stranger, and that the Plaintiff cepit & imparcavit Equum prædict. and that by vertue of a Replevin the Defendant took the said Horse, &c. And the Court held this Plea no more than the general Issue, for it does not so much as admit a Possession in the Plaintiff, for the Taking and Impounding gained no Possession to the Plaintiff; but the Horse was thereby only in Custody of the Law, and so no Colour of Action in the Plaintiff; otherwise perhaps if it had been cepit & detinuit.

## Hatton *versus* Morse. 1 Ann. B. R.

(2) Payment pleaded specially in Assumpsit, or given in Evidence on the general Issue.

PER Holt C. J. In Debt, the Defendant may plead a Release, because it admits the Contract, which is a Colour of Action, and yet he might give it in Evidence upon Nil Debet.

So in Assumpsit, the Defendant may plead Payment, because it admits the Assumpsit, and yet he may give it in Evidence on Non Assumpsit; so was the principal Case, and so ruled.

## Sea *versus* Taylor. Mich. 2 Ann. B. R.

(3) Performance in Assumpsit amounts to the general Issue.

IN Assumpsit, the Defendant pleaded, Quod ipse performavit omnia ex parte sua performand'; and it was ruled, That this amounts only to the general Issue. Quære, For the Assumpsit is admitted, so that this is but a Discharge; and Quære of the Case of Hatton and Morse ante, if it be not contra.

# Issues and Profits.

## Britton *versus* Cole. Hill. 9 Will. III. B. R. Intr. Trin. 7 Will. III. Rot. 187.

ON a Levari Facias to levy the yearly Value of 55 l. found by Inquisition upon an Outlawry, on a Judgment in Debt; The Sheriff took the Beasts of a Stranger, Levant and Couchant on the Land of the Defendant; and in an Action of Trespass against the Plaintiff in the Action for taking these Beasts, wherein he justified under the Levari Facias; the Court held, 1st, That by bare Outlawry, the Party immediately forfeits his personal Goods, and they are vested in the King, but he does not forfeit the Profits of his Lands, nor Chattels real, till Inquisition taken: And therefore that an Alienation after Outlawry, and before Inquisition, is good to bar the King of the Pernancy; but if he makes a Feoffment after Inquisition, the Feoffee has the Estate, and the King shall have the Profits. Vide 21 H. 7. 19. Hard. 101. Ray 17. Dr. and Student, p. 1. c. 22. 2 Ro. 159. Lane 79. 3 Cro. 431. 2dly, That the Sheriff may well take the Cattle of a Stranger Levant and Couchant; for they are the Issues of the Land. Stat. Westm. 2. c. 32. 2 Inst. 433. and the Land is Debtor; and if the Law were otherwise, he might defeat the King of all by agisting the Land; and there is better Reason for their being liable in this Case, than for a Rent-Charge; which is against common Right, and by the Grant of the Tenant. 3dly, That if there be a Commoner, or another Tenant in Common with the Defendant, his Beasts may be taken upon the Land, unless the Title of the Commoner, or the Tenant in Common be found by the Inquisition; and so it is of a Lease for Years, prior to the Outlawry; for they are bound by the Inquisition, and so is their Title till they avoid it by Monstrans de droit brought in the Exchequer. 4thly, That if Issues be forfeited by a Juror and returned upon him; his Feoffee is liable, nay, he in Reversion is liable, if the Juror was only Tenant for Life; for this being a Service for the Publick, the Inheritance it self is made Debtor, and charged to answer it; otherwise of the Issues forfeited and returned upon an Outlawry. The Defendant or his Heirs, Feoffee or Assigns, are liable as claiming under the same Estate, which is charged with this

Issues of Land not forfeited by Outlawry till Inquisition taken; and Alienation before Inquisition is a Bar.

Beasts of Stranger, Levant and Couchant, seisable on a Levari Facias; so of Jointenant and Commoner, unless the Title found by the Inquisition.

Issues of Jointenant for Life, leviable on Reversioner.

this Debt, but it shall not charge him in Reversion or Remainder, for the Forfeiture arises from a particular Default of the Tenant, and not from a Charge on the Inheritance. See more of this Case, Title Justification.

# JUDGE.

## Anonymus. Mich. 10 Will. III. B. R.

(1) Judge and Party.

PER Holt C. J. The Mayor of Hereford was laid by the Heels, for sitting in Judgment in a Cause where he himself was Lessor of the Plaintiff in Ejectment, tho' he by the Charter was sole Judge of the Court.

## Groenvelt *versus* Burwell, & al'. Trin. 12 Will. III. B. R.

(2)

THE Censors of the College of Physicians in London are impowered to inspect, govern, and censure all Practisers of Physick in Civitate London, and seven Miles round, so as to punish by Fine, Amerciament, and Imprisonment; they convicted Dr. Groenvelt of administring Insalubres Pillulas & noxia Medicamenta, and fined him 20 l. and twelve Months Imprisonment; accordingly the Doctor was taken in Execution upon this Sentence, and brought Trespass against the Officers and the Censors; and it was held by Holt C. J.

Where H. acts as a Judge, his Act is not traversable.

1st, That the Censors have a judicial Power; for a Power to examine, convict and punish, is judicial, and they are Judges of Record, because they can fine and imprison. 2dly, That being Judges of the Matter, what they have adjudged is not traversable, and the Plaintiff cannot be admitted to gainsay what the Censors have said by their Judgment, viz. That they were insalubres Pillulas & noxia Medicamenta. 43 E. 3. 17. 9 E. 4. 3. 12 Co. 24, 25. But if a Constable commit a Man for a Breach of the Peace in his Presence, when there was no Breach of the

Otherwise of an Officer, as Constable committing for the Peace.

3 Peace,

Peace, that may be traversed, for he is not a Judge, nor does he act by judicial Authority, tho' he has a Power to commit, for he does not commit for Punishment, but for safe Custody. But here is a Fine set, & finis finem litibus imponit; by which it appears, that the Cause for which a Fine is set, is never traversable. The Matter of a Verdict is not traversable, and there is no Reason why the Matter affirmed by the Sentence of a Judge should not also be untraversable, where the Law intrusts him to try and determine it without a Jury.

Cause for which Fine is set is never traversable.

2dly, Tho' the Pills and Medicines were really Salubres Pillule & bona Medicamenta; yet no Action lies against the Censors; because it is a wrong Judgment in a Matter within the Limits of their Jurisdiction; and a Judge is not answerable, either to the King or the Party, for the Mistakes or Errors of his Judgment, in a Matter of which he has Jurisdiction: It would expose the Justice of the Nation, and no Man would execute the Office, upon Peril of being arraigned by Action or Indictment for every Judgment he pronounces. If a Justice of Peace record that upon his View, as a Force, which is no Force, he cannot be drawn in Question, either by Action or Indictment, 12 Co. 23. And in the 27 Aff. 18. a Judge of Oyer and Terminer, where the Jury found and presented a Fact to be a Trespass, caused their finding to be entered as a Felony, and yet could not be punished by Indictment, or otherwise, because he was a Judge of Record, and the Indictment against him was to defeat his Record, by avering against what he did as a Judge of Record. Vide 1 H. 6. 4. 47 E. 3. 50. See Vaugh. Bushel's Case, 1 Mod. 184. 2 Mod. 218.

Judge not answerable for Error of Judgment, either by Action or Indictment.

Wood *versus The Mayor and Commonalty of* London. March 2. 1701. In Error.

AT Guild-Hall, Debt was brought in the Court of the Mayor and Aldermen of London, for the Penalty of a By-Law made by the Common-Council of the City; the Penalty was 400 l. of which 300 l. was by the By-Law to be forfeited to the Use of the Mayor and Commonalty of the said City: Judgment was given against the Defendant, and he brought Error before Commissioners appointed to examine those Errors, viz. Holt C. J. Ward C. Baron, &c. and it was held by Holt C. J. to which the rest agreed, 1st, That the Mayor and Commonalty might make a By-Law, and limit the Penalty to be forfeited to themselves; because there is no Way to inforce Obedience, but by Punishment, which must necessarily be either pecuniary or corporal, as Imprisonment, which is not legal, unless there be a Custom to warrant it; and the direct End the By-Law seeks, is no more than Obedience.

(3) Mayor and Commonalty of London may limit Penalties of By-Laws to themselves, but they cannot be sued for in the Mayor's Court; otherwise if the Mayor could be severed.

2dly,

2dly, That it might be sued for in the Court of the Mayor and Aldermen; if the Mayor could be severed, and the Court held before the Aldermen: Thus the Chief Justice of the Common Pleas may bring an Action in C. B. but then there must be a special Entry, viz. Placita coram Johanne Blencow milite, &c. omitting the Chief Justice, otherwise it would be erroneous. 8 H. 6. 81. But so it is good, for the other Judges are a Court without him: So a Judge of the Common Pleas cannot take the Conuzance of a Fine in his own Case.

3dly, That if the Mayor was an integral Part, so as there could not be a Court without him, but it must be the Court of the Mayor and Aldermen, it could not be sued for there; for then, the same Person was Judge and Plaintiff, Agent and Patient, which could not be: The Master and Confreres of an Hospital are seized of an Advowson: If the Church is void they may present a Confrere, for he may be severed, and yet the Corporation remains; but they cannot present the Master, for he is an integral Part; and the same Person cannot be Donor and Donee: So if a Bishop hath Lands in both Capacities, he cannot give or take to or from himself. So of a Mayor, for he is the Head of the Corporation: And if an Action be brought by the Mayor and Commonalty, and the Mayor dies, the Writ abates, for he is the Head of the Corporation, and by his Death the Corporation is suspended.

Action by Mayor and Commonalty abates by the Death of the Mayor.

4thly, Tho' the Mayor absent himself, and the Recorder sits for him, and that by the Custom of the City, yet it alters not the Case; for tho' the Recorder sits personally, and it is personally his Judgment, yet it is legally and virtually the Act of the Mayor: The Recorder is his Deputy, and his Act is the Act of his Superiour: The Style of the Court is Coram Majore, &c. And a Man cannot sue either before himself or his Deputy.

5thly, That the Case in 2 Ro. 93. Title Judge, pl. 14. was Law, but not for the Reason there given: It was an Action brought by the Mayor before the Mayor; but it did not appear on the Face of Record that the Plaintiff was Mayor; for it was brought by him as J. S. and he was not Mayor at the Commencement, but pending the Action became Mayor; and it could not be assigned for Error, because it was not pleaded below; and it was only Error in Fact, and could not be averred, nor appear to the Court above without Averment.

JUDG-

# JUDGMENTS.

## Clerk *versus* Rowland. Trin. 5 W. & M. B. R.

UPON a Writ of Enquiry, either on Demurrer or Judgment by Default executed the last Day of a Term, the Plaintiff may enter Judgment the 5th Day after, and not before: So where there is a Verdict, there must be four Days between the Verdict and the Judgment; not that in all Cases there can be a Motion in Arrest, as in the principal Case, where the Verdict or Inquest is the last Day of the Term; but still there may be a Writ of Error, and this Time is allowed for these Purposes; and therefore, after Verdict or Writ of Enquiry, the Course is for the Plaintiff to give a Rule to enable him to enter his Judgment Nisi causa ostensa sit in contrarium infra quatuor dies; and in the principal Case, Execution was set aside, because it was sued out the 4th Day after the Term, the Writ of Enquiry being executed and returned the last Day.

(1) There must be four Days exclusive between the Day in Bank and the Signing of Judgment.

## Anonymus. Pas. 9 Will. III. B. R.

IF a Feme Sole give a Warrant to confess a Judgment, and marry before it be entered, the Warrant is countermanded, and Judgment shall not be entered against Husband and Wife, for that would charge the Husband.

(2) Warrant per Feme, who marries afterwards, is revoked.

## Cooke *versus* Cooke. Trin. 9 Will. III. B. R.

IN a Quare Impedit the Defendant pleaded Misnomer in Abatement, and the Plaintiff demurred and gave the common Rule to join, &c. It was held, That in all real Actions one cannot enter Judgment upon a peremptory Rule without Motion; and so in mix'd Actions; otherwise in personal; but this extends not to Pleas in Abatement, because final Judgment is not given on them.

(3) Where Judgment may be entered on the peremptory Rule without Motion.

Duke's

## Duke's *Case*. Mich. 9 Will. III. B. R.

( 4 ) Judgment for a corporal Punishment cannot be given against H. in his Absence.

DUKE was upon a Trial at Bar convicted of Perjury, and upon the Capias he was outlawed; and upon the Exigent 'twas moved, That Judgment of the Pillory might be given against him in his Absence: Et per Holt C. J. Judgment cannot be given against any Man in his Absence for a corporal Punishment; there is no such Precedent. If a Man be outlawed of Felony, Execution was never awarded against the Felon till brought to the Bar. A Capias ad satisfaciendum Domino Regi pro fine is common, but there never was a Writ to take a Man and put him in the Pillory; and so says Sir Samuel Astry upon Search of Precedents.

## Anonymus. Mich. 10 Will. III. B. R.

( 5 ) Judgment confessed by Feme Covert refused to be set aside upon Motion.

A Feme Covert, who lived by her self and acted as a Feme Sole, gave a Warrant of Attorney to confess a Judgment, &c. and afterwards moved to set aside the Judgment, because she was Covert, but the Court would not relieve her, but put her to her Writ of Error.

## Anonymus. Mich. 10 Will. III. B. R.

( 6 ) Where Judgment is confessed upon Terms, Court will take Notice of them; otherwise if the Agreement is subsequent.

A Motion was made to set aside an Execution on a Judgment, upon Suggestion of an Agreement between the Parties made after the Judgment given, viz. That the Judgment should be upon such and such Terms. Et per Holt C. J. Where a Judgment is confessed upon Terms, it being in Effect but a conditional Judgment, the Court will lay their Hands upon it, and see the Terms performed: But where a Judgment is acknowledged absolutely, and a subsequent Agreement made, this does no way affect the Judgment, and the Court will take no Notice of it, but put the Party to his Action on the Agreement; and in this Case the Agreement being only under their Hands, 'tis no Ground for an Audita querela; and the Court cannot hold Plea of an Agreement upon a Motion.

## Domina Regina *versus* Fitzgerald. Paf. 1 Ann. B. R.

THE Defendant being convicted of a fcandalous Libel, Judgment was given againft him to pay 100 Marks Fine, and go to all the Courts in Weftminfter with a Paper in his Hat. In Chancery he behaved himfelf impudently, and juftified his Offence; for which reafon the Court increafed his Punifhment by Imprifonment.

(7) Judgment altered the fame Term, and the Punifhment increafed.

## Anonymus. Paf. 1 Ann. B. R.

IF a Judgment be below for the Plaintiff, and Error is brought, and that Judgment reverfed; yet if the Record will warrant it, the Court ought to give a new Judgment for the Plaintiff: But if the Judgment be erroneous, and againft the Plaintiff on the Merits of the Caufe, that ought to be reverfed, and a new Judgment given for the Plaintiff. If an erroneous Judgment be given for the Defendant, and 'tis reverfed, and the Merits appear for the Plaintiff, he fhall have Judgment: If the Merits be againft the Plaintiff, the Defendant fhall have a new Judgment; fo it is in the Exchequer-Chamber, for they are to reform as well as to affirm or redrefs. 1 Roll's Ab. 774. pl. 1. Cro. Car. 443. Hob. 194.

(8) What Judgment fhall be given on a Writ of Error.

## *Duke of* Norfolk's *Cafe*. Trin. 1 Ann. B. R.

A Verdict was given in Eafter-Term, and before Judgment figned the Plaintiff died. Et per Holt C. J. That fhall not hinder the Judgment being entered, provided it be within two Terms after; and the Statute of Frauds and Perjuries only requires the Time of Signing fhould be entered on the Roll; and that is only for the Benefit of Purchafors; for if Judgment be figned in the Vacation, yet 'tis entered as of the Term before; and none but a Purchafor fhall be admitted to fay, it was figned as of any other Time; and 'tis the Courfe of the Court to let all Things be done in the Vacation, as of the Term before.

(9) Judgment may be after Plaintiff's Death, provided it be within two Terms after Verdict.

## Attwood *versus* Burr. Mich. 1 Ann. B. R.

( 10 ) Judgment on a Demurrer to a Plea must be entered with, Et quia videtur Curiæ quod placit. præd', &c.

IN an inferiour Court the Plaintiff demurred on the Defendant's Plea, and the Entry of the Judgment for the Plaintiff on the Demurrer was, Ideo considerat. est, &c. and not said as usual, Et quia videtur Cur. hic quod placitum prædict. præfat. Defendentis minus sufficiens in lege, &c. and now this Judgment was reversed for that Cause; for when a Demurrer is joined, the Court ought first to determine the Matter of Law, whether sufficiens or minus sufficiens, before they pronounce Judgment; and by this Judgment it does not appear that they determined the Matter of Law before them.

( 11 ) Cutting versus Williams. Hill. 1 Ann. B. R. Vide this Case, Title Action sur le Case sur Assumpsit, pag. 24. pla. 8.

## Anonymus. Mich. 2 Ann. B. R.

( 12 ) Warrant to confess Judgment given in Custody.

IF a Man be arrested upon Process ex Communi Banco, or any inferiour Court, and gives a Warrant to confess a Judgment in this Court while in Custody, no Attorney being there present, we can examine and set aside this Judgment; otherwise where it is to confess a Judgment in another Court.

## Sifted *versus* Lee. Mich. 3 Ann. B. R.

( 13 ) Setting aside Judgment.

UPON Payment of Costs, the Court will set aside a Judgment, tho' it be regularly entered, if the Plaintiff hath not lost a Trial, and so is the common Course in C. B.

## Anonymus. Pas. 4 Ann. B. R.

( 14 ) No Reference for Irregularity after Error brought.

THE Defendant, against whom Judgment was recovered, brought a Writ of Error, and afterwards got a Reference to the Master to examine the Regularity of the Judgment; and the Court upon the Master's Report were of Opinion, That by bringing the Writ of Error the Judgment was admitted to be regular, and that he should not examine that now; and the Rule was discharged.

## Phillips *versus* Berry. Trin. 6 Ann. B. R.

In Ejectment, Judgment was given in B. R. for the Defendant; a Writ of Error was brought in the House of Lords, who reversed the said Judgment, whereupon the Plaintiff applied to the Court of King's Bench to enter up the Judgment given by the House of Lords; and 'twas urged, That a Judgment must be given either by the Lords, or by this Court: That the Lords could not, because they have only the Transcript of the Record before them; therefore this Court must, lest there should be Defect of Justice, like the Case of Shaldoe and Ridge, Yelv. 74. In Trespass, Judgment in B. R was given for the Defendant; Error was brought in the Exchequer-Chamber, and the first Judgment was reversed, and the Record returned in B. R. The Court of B. R. gave Judgment quod querens recuperet, and a Precedent was shewn in Winchcomb's Case, where the same Course was taken. Holt C. J. The House of Lords have, in Judgment of Law, the very Record before them; for the Writ of Error says, recordum & processum, and not transcriptum; and he took this Difference, If Ejectment is brought in B. R. and upon a Special Verdict Judgment is given for the Defendant, and this Judgment is reversed in the Exchequer-Chamber, that Court shall give Judgment and enter it; but had it been upon Demurrer, this Court should have entered the new Judgment, because the Exchequer-Chamber could not have awarded a Writ of Enquiry of Damages: Further he said, If Judgment be first given for the Plaintiff, and that be reversed in Error, the Defendant is in Statu quo thereby, and no new Judgment need be given. But if the first Judgment was given for the Defendant, and that is reversed, a new Judgment must be given to put the Plaintiff in Possession of what he demands: And the Court agreed they could not enter 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 this Court ever entered a new Judgment, where the Judgment given here was reversed in Parliament: And afterwards Application was made to the Lords, and they entered the new Judgment.

(15) If a Judgment of B. R. be reversed in Parliament, the new Judgment must be entered there.

If Judgment for the Defendant on a Special Verdict be reversed in the Exchequer-Chamber, that Court shall give the new Judgment; otherwise on Demurrer.

# JURISDICTION.

## Stannian *versus* Davis. Mich. 3 Ann. B. R.

(1) In inferiour Courts every Thing that makes the Gist of the Action, must be laid within the Jurisdiction; otherwise of Matter of Aggravation.

ERROR of a Judgment in the Palace-Court, in an Action on the Case, wherein the Plaintiff declared, That such a Day, in such a Parish, in the County of Middlesex, he delivered to the Defendant (being an Inn-keeper) a Gelding, safely to be kept in his Inn, and that he suffered him to be taken out of his Stable and rid so immoderately that the Gelding was spoiled; and it was objected as Error, That the Riding did not appear to be within the Jurisdiction of the Marshal's Court. Et per Cur'. In Actions in inferiour Courts, it is necessary that every Part of that which is the Gist of the Action, should appear to be within their Jurisdiction; otherwise of such Matters as are inserted only for Aggravation of Damages, and might be omitted, and yet the Action remain.

In Case for calling the Plaintiff Whore, per quod Maritag. amisit, the Loss of Marriage must be laid to be infra Jurisdictionem, for that is the Gist of the Action; otherwise for calling her Thief, &c. So in the principal Case, the Neglect in keeping is the Gist of the Action: The Taking and Riding is a subsequent Wrong, and a Measure only of Damages. Judgment affirmed. 1 Saund. 72. 1 Cro. 570. 1 Ro. 546. 1 Jones 448.

## Anonymus. Paf. 4 Ann. In Canc.

(2) Bill may be brought in Chancery to foreclose Mortgage on Lands out of the Jurisdiction of the Court, if the Person be within it.

Chancery agit in Personam.

A Bill was brought in Chancery to foreclose a Mortgage of the Island of Sark; the Defendant pleaded to the Jurisdiction of the Court, viz. That the Islands of Sarke, Guernsey, Jersey, &c. were four Islands governed by the Laws of the Dutchy of Normandy. And it was objected, That Bills to redeem were ancient, but Bills to foreclose were of later Date: That Serjeant Hutchins had said, he remembred the first of them; That the Party ought to sue in the Courts of the Island, and appeal.

On the other Side it was said, That Chancery agit in Personam; That if the Person be here, he may be sued in Chancery, tho' the Lands lie in a County-Palatine, or in another Kingdom,

as Ireland or Barbadoes. And Wright, Lord Keeper, over-ruled the Plea, saying, The Court acted against the Person of the Party and his Conscience; and there might be a Failure of Justice if the Chancery would not hold Plea in such Case, the Party being here, and the whole Island in Mortgage.

# Jury and Juror.

## Anonymus. Trin. 8 Will. III. B. R.

(1) Jury struck by the Master, and the Practice thereon.

A Rule was made, That when the Master is to strike a Jury, viz. Forty-eight out of the Freeholders Book, he shall give Notice to the Attorneys of both Sides to be present, and if the one comes and the other does not, he that appears shall according to the ancient Course strike out Twelve, and the Master shall strike out other Twelve for him that is absent.

## Anonymus, Mich. 8 Will. III. B. R.

(2)

If by Rule of Court the Master is ordered to strike a Jury, in Case it be not expressed in such Rule, That the Master shall strike Twenty-eight, and each of the Parties shall strike out Twelve; the Master is to strike Twenty-four, and the Parties have no Liberty to strike out any.

## Anonymus. Pas. 1 Ann. B. R.

(3) Ought to acquaint the Court that they can give Evidence, before they are sworn.

If a Jury give a Verdict on their own Knowledge, they ought to tell the Court so; but they may be sworn as Witnesses, and the fair Way is to tell the Court before they are sworn, that they have Evidence to give.

Justices

# Justices of Peace.

## Anonymus. Hill. 4 Ann. B. R.

(1) Proper proceeding upon Statute 14 Car. 2. in Removals of Poor.

PER Holt C. J. The most regular Way for Justices to proceed upon the 14 Car. 2. in removing a poor Person, is to make a Record of the Complaint and Adjudication, and upon that to make a Warrant under their Hands and Seals to the Church-wardens, to convey the Persons to the Parish to which they ought to be sent, and deliver in the Record per proprias manus into Court next Sessions, to be kept there amongst the Records, to charge the Parish; and that Record may be well removed by a general Certiorari to the Justices of Peace: Mr. Broderick said he had advised the Justices in Surrey to do so.

## Domina Regina *versus* Yarrington. Mich. 9 Ann. B. R.

(2) Indictment for Forgery lies not before Justices of Peace.

INDICTMENT was found at the Sessions of the Peace for forging a Letter in the Name of J. S. &c. and was brought into B. R. by Certiorari, and upon Motion in Arrest of Judgment the Court held, That no Indictment lay before the Justices of Peace for Forgery; for their Power is created by Act of Parliament within Time of Memory, and they have no other Authority than what is thereby given them; and the general Words of their Commission, De omnibus aliis transgressionibus & malefactis quibuscunque, must be understood of such Crimes as they have Power over by the several Statutes which created or inlarged their Power: So it is for Perjury at Common Law; but Perjury upon 5 Eliz. is indictable before the Justices at Sessions, because it is so appointed by the particular Provision of that Statute.

Vide plus, Title Poor, Orders, Sessions.

# JUSTIFICATION.

## Atkinson *versus* Crouch. Mich. 2 W. & M. B. R.

In Trespass for taking Salmon. The Defendant justified the Taking the Salmon, being caught at an undue Season, under the Stat. 1 Eliz. c. 17. and that he was a Constable. And upon Demurrer the Court held the Plea ill for Want of shewing a Warrant, for that the Constable could not intermeddle without Warrant, nor the Leet without a Presentment. Plaintiff had Judgment.

(1) Justification by 1 Eliz. c. 17. ill for want of shewing a Warrant.

## Leeward & Ux. *versus* Basilee. Mich. 7 Will. III. B. R.

In Trespass by Husband and Wife for Assault and Battery on the Wife, the Defendant pleaded Son Assault demesne of the Wife. The Plaintiff replied, That the Defendant was going to wound her Husband, and that she Insultum fecit to defend him. To this the Defendant demurr'd; and Carthew for the Defendant insisted, that Insultum fecit was naught, and to prove it, cited a Case, Trin. 21 Car. 2. Rot. 1821. where the Defendant pleaded Insultum fecit in defence of his Possession, which was held ill, and that he should have pleaded Molliter manus imposuit. Quod fuit concessum per Curiam. But the Court said this differed, for that a Wife might justify an Assault in defence of her Husband; so might a Servant of his Master; but not a Master in defence of his Servant, because he might have an Action per quod servitium amisit. If the Defendant was holding up his Hand to strike the Husband, the Wife might make an Assault to prevent the Blow. But a Man cannot justify an Assault in defence of his House or Close, but must plead Molliter manus imposuit. Judgment for the Plaintiff.

(2) Wife may justify Assault in defence of her Husband.

Servant of his Master; but not vice versa.

Nor of his Freehold, but must plead Molliter, &c.

Swin-

## Swinstead *versus* Lyddal. Mich. 8 Will. III. B. R. Intr. Trin. 8 Will. III. Rot. 229.

(3) In Imprisonment, Justification under order of the Court of Conscience to carry Plaintiff to the Counter, ill; because Imprisonment confessed, and not shewn to be in the Counter.

IN an Action of Trespass and False Imprisonment for such a Time, & quousque he paid 11 s. The Defendant pleaded the Stat. 3 Jac. 1. c. 15. for erecting a Court of Conscience in London, and that tali die the Plaintiff was summoned to appear, and the Process continued until such a Day, and then the Court made an Order that he should be carried to the Counter and imprisoned, quousq; he paid 7 s. Debt, and 2 s. 6 d. for Costs; virtute cujus ordinis, he being an Officer took him and detained him, &c. Plaintiff demurred. Et per Cur'.

1st, The Court of Conscience erected by 3 Jac. 1. c. 15. have by the very Erection, incidentally and consequentially, a Power to continue their Process. 2dly, Tho' he does not answer the Detaining, quousque he paid 11 s. yet the Plea is well enough, for the quousque is not the Cause of Action, but the Imprisonment; the quousque is but Matter of Aggravation. If the Defendant had said nothing to the Money, it had been a good Justification; as if one bring an Action of Trespass for taking his Horse and riding him immoderately, 'tis sufficient to justify the Taking, for that is the Trespass; and if the Case was, That the Plaintiff paid the Officer 9 s. 6 d. and nevertheless the Officer detained him for more, the Plaintiff should reply it. Vide Moor 704, 705. 3dly, The Court held the Plea naught, because the Order was to carry him to the Counter, and tho' he confesses he detained him six Hours, he does not shew it was in the Counter, or in carrying him thither, and this differs from the Case of a common Arrest; the Officer in that Case may make any Place his Prison; because the Writ is, Ita quod Habeas Corpus ejus coram, &c. apud Westm. which is a general Authority, but here 'tis a special Authority to take and carry him to the Counter.

## Britton *versus* Cole. Hill. 9 Will. III. B. R.

(4) IN Trespass against J. Cole, for taking forty-three Sheep, the Defendant pleaded, That a Levari issued ex Cam. Scacc. which recited a Judgment in Debt, obtained by J. Cole in C. B. and an Outlawry and Seizure, and an Inquisition returned, which found the Land and the Value to be 55 l. per Annum; and by this Levari the Sheriff was commanded to levy the said 55 l. de exitibus & proficuis terræ, and that on a Warrant of the Sheriff

to A. and B. Bailiffs, the now Defendant requested them to take these Cattel. On Demurrer it was held, That the Court could not take Notice, that John Cole the Defendant, was the J. Cole mentioned and recited to be the Plaintiff in C. B. but that ought to have been averred: Yet that however his Requesting the Bailiffs not to execute their Writ, but to take these particular Cattel, was a sufficient Confession of a Trespass: But then they held, That whether the Defendant was concerned as the original Plaintiff, or concerned himself of his own Head as a Stranger, he had not justified; and these Diversities were taken and agreed.

If H requests another to take Goods, he is a Trespasser.

That in Trespass against the Sheriff, 'tis enough for his Justification to shew a Writ: So it is in the Case of his Bailiff or Officer; with this Difference, That the Sheriff must shew the Writ was returned, if returnable; the Bailiff need not, because it is not in his Power: But in Trespass against the Plaintiff himself or a mere Stranger, they cannot justify themselves unless they shew there was a Judgment as well as an Execution; for the Judgment may be reversed, and it ought to be at their Peril, if they take out Execution afterwards; but they seemed to hold, That if one comes in aid of the Officer, at his Request, he may justify as the Officer may do; but such Request or Command of the Officer is traversable: As in Trespass, if the Defendant justifies Damage-feasant, or by Distress for Rent, he must make himself Bailiff to the Person having Right, or that he did it by his Command, but the Command is traversable; otherwise in Replevin where H. makes Conuzance on the Right. 1 Leon. 150. 2 Leon. 115. 1 Ro. Rep. 46.

In Trespass for taking Goods, the Officer need only shew a Writ of Execution; otherwise of a common Person, unless in aid of the Officer by his Command.

The Command is traversable.

Freeman *versus* Blewitt. Hill. 12 Will. III. B. R.

TRESPASS for taking the Plaintiff's Goods; the Defendant pleaded, That a Plaint in Replevin was entered in the Sheriffs Court in London; that the Defendant was Serjeant at Mace, and a Precept came to him to replevy these Goods, which he did accordingly. Upon Demurrer it was objected, That the Defendant was principal Officer, and his Precept was returnable, and yet he does not shew it was returned: But Broderick contra urged, That Replevin differs, for it is not returnable, and never is so pleaded. Dy. 189. and several other Cases. After two Arguments 'twas ruled by Holt C. J. to which the rest agreed, That where-ever a principal Officer is to justify under a returnable Process, he must shew that the Writ was returned; for he is commanded to return the Writ, and shall not be protected by it, unless he shews that he paid a due and full Obedience in acting under it: So it is of a Fieri Facias or Capias; the Sheriff cannot justify under them without shewing a Return; for these

(5) Serjeant at Mace justifies under Precept, on a Plaint in Replevin out of the Sheriff's Court; ill for want of shewing it was return'd.

Where a principal Officer justifies under a returnable Writ, he must shew it was returned.

Secus of subordinate Officers.

these Writs are, Ita quod Habeas Corpus or denarios illos apud Westm. but any subordinate Officer, as a Bailiff, may. Vide 20 H. 7. 13. 21 H. 7. 22. 3 Lev. 204. 5 Co. 90. a. Br. Trespass, 48, 76, 104, 154. Fitz. Trespass, 198. Now a Replevin or an alias Replevin, are not returnable Process; they are only in Nature of a Justicies to impower the Sheriff to hold Plea in his County-Court, where a Day is given them; but there is no Return to be made to the first or second Writ, and therefore whoever justifies under the first Writ of Replevin, or the Alias, need shew no Return; but the pluries Replevin is always with this Clause, vel causam nobis significes, and therefore it is a returnable Process; and if any principal Officer that has the Return of it, pretends to justify under it, he must shew it was returned; otherwise of a subordinate Officer. In the Case at Bar the Defendant is a principal Officer: If the Prisoner escape, the Action must be brought against him; and this Process under which he justifies, was a returnable Process: And Judgment was entered for the Plaintiff.

The End of the First VOLUME.

## *BOOKS printed for* J. Walthoe *in the* Temple-Cloysters, *and* J. Walthoe *Jun*. *against the* Royal Exchange *in* Cornhill.

### FOLIO.

SIR *Edward Lutwyche's Entries:* Containing also a *Report* of the Resolutions of the Court of divers Exceptions taken to Pleadings, and upon other Matters in Law, arising (for the most part) in the Court of *Common Pleas*. In two Vol. Approved of by the Lord Keeper and all the Judges. Price 3 *l.*

The *Reports* of Sir *Bartholomew Shower*, Kt. of Cases adjudged in the Court of *King's Bench*, in the Reign of K. *Will.* III. Price 18 *s.*

The *Reports* of Sir *Peyton Ventris*. The *Third Edition*, with several thousand References by Mr. Serjeant *Richardson*. 1716. Price 1 *l.* 12 *s.*

A Treatise of the *Pleas* of the *Crown*: Or, A System of the principal Matters relating to that Subject, digested under their proper Heads. By *William Hawkins*, of the *Inner-Temple* Esq; 1716. Price 12 *s.*

*Reports* of divers Cases in Pleas of the Crown; adjudged and determined in the Reign of the late King *Charles* II. with Directions for Justices of the Peace, and others. Collected by Sir *John Kelynge*, late Lord Chief Justice of the Court of *King's Bench*. To which are added, the Reports of three Modern Cases. By the late Lord Chief Justice *Holt*. With the Allowance of the Judges. Price 8 *s.*

The *Country Justice:* Containing the Practice of the Justices of Peace, as well in, as out of the Sessions. By *Michael Dalton*, of *Lincoln's-Inn* Esq; one of the Masters in *Chancery*. To which is now added, An Abridgment (under proper Titles) of all the Statutes relating thereunto, to 1715. Price 14 *s.*

Sir *Orlando Bridgman's Conveyances*. The *Fourth Edition*, with large Additions. Price 12 *s.*

A General *Abridgment* of the *Common Law*, Alphabetically digested under proper Titles, with Notes and References to the whole. By *Knightley D'Anvers*, of the *Inner-Temple* Esq; With the Allowance of the Judges. In 2 Vol. Price 2 *l.* 10 *s.*

*Cases* argued and decreed in the High Court of *Chancery*. In Three Parts. The *Second Edition*, carefully corrected; with References to the ancient and modern Books of the Law. Price 1 *l.* 5 *s.*
*N. B.* The two last may be had alone.

*Modern Cases* argued and adjudged in the Court of *King's Bench*, in the Reign of Her late Majesty Queen *Anne*. By *Thomas Farresley*, late of the *Middle-Temple* Esq; 1716. Price 8 *s.*

I Mo-

*Modern Cases*, argued and adjudged in the Court of *Queen's Bench*, in the 2d and 3d Years of Q. *Anne*. Price 12 *s*.

A Collection of Select and Modern *Entries*. Written by Sir *Creswell Levinz*, and referring to his Reports. Price 7 *s*.

## OCTAVO & DUODECIMO.

*Cursus Cancellariæ*: Or, The Course of *Proceedings* in the High Court of *Chancery*. Wherein the Authority, Jurisdiction and Modern Practice of that Court are methodically and distinctly treated of, from the Bill filed and Process thereupon, to the final Sentence end Decree. As also of reversing Decrees by Bills of Review, and Appeals to the House of Lords. And the Method of Proceeding in the *Petty-Bag-Office*, &c. With variety of useful Precedents. Published by *W. Bohun*, of the *Middle-Temple* Esq; 1715. Price 6 *s*.

*De Jure Maritimo & Navali*; or, A Treatise of *Affairs Maritime*, and of Commerce. In three Books. The *Sixth Edition*, with large Additions of Modern Cases, &c. By *Charles Molloy*, late Barrester at Law. 1716. Price 6 *s*.

The *Law* against *Bankrupts*: Or, A Treatise wherein the Statutes against Bankrupts are explain'd; by several Cases, Resolutions, Judgments and Decrees, both at Common Law and in *Chancery*. To which are added, Forms and Directions for Commissioners, with Precedents, &c. The *Third Edition*, with several large Additions of New Cases, and all the Acts relating to Bankrupts. By *Tho. Goodinge*, Serjeant at Law. Price 4 *s*. 6 *d*.

The Common and Statute *Law* of *England*, concerning *Trials* in High Treason, Misprision of Treason, and in all other Crimes and Offences relating to the Crown: Wherein the Learning of *Appeals* is at large set forth under the same Head. By *W. J.* Barrester at Law. Price 4 *s*. 6 *d*.

*Officium Clerici Pacis*: A *Book* of *Indictments*, Informations, Appeals, and Inquisitions: Also the Manner of holding the Sessions of the Peace, &c. The *Second Edition*, with Additions. Pr. 4 *s*. 6 *d*.

*Legal Provisions* for the *Poor*; or, A Treatise of the Common and Statute Laws concerning the Poor, either as to Relief, Settlement or Punishment. Wherein are explain'd all the Statutes relating to that Subject; with the ancient and modern Law-Cases and Resolutions of the Judges; and also many Precedents proper for such a Treatise. By *S. C.* of the *Inner-Temple* Esq; The *Third Edition*. To which is added, the late Act concerning *Vagrants*, with Notes and Observations thereupon. 1715. Price 3 *s*. 6 *d*.

A *Compendium* of the *Laws* and Government Ecclesiastical, Civil, and Military, of *Great Britain* and *Ireland*, and Dominions, Plantations and Territories thereunto belonging; with the Maritime Power thereof, and Jurisdiction of Courts therein. By *H. Curson*, of the *Inner-Temple* Esq; The *Second Edition*. 1716. Price 4 *s*.